IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>ROBERT L. MOULTRIE, NIXON E. CAWOOD, CHARLES K. MOREHEAD, FACILITY HOLDING CORP., d/b/a THE FACILITY GROUP, FACILITY MANAGEMENT GROUP, INC., FACILITY CONSTRUCTION MANAGEMENT, INC., and FACILITY DESIGN GROUP, INC.,<br><br>Defendants. | ) | CRIMINAL NO. 3:08CR014 |

**ROBERT L. MOULTRIE'S RESPONSE TO CAROTHERS CONSTRUCTION CO.'S MOTION TO QUASH SUBPOENA DUCES TECUM**

## I. BACKGROUND FACTS

On June 19, 2008, Mr. Moultrie moved the District Court to issue a subpoena *duces tecum* on the keeper of records of Carothers Construction Company ("CCC"). Motion for Issuance of Rule 17(c) Subpoena, ECF Doc. #72 ("Moultrie's Motion for Subpoena"). This motion was served on all parties involved in this case, including the government, and did not meet with any objection from any party. Upon review of the motion and the attached subpoena, the motion to issue said subpoena was granted by the Honorable Magistrate S. Alan Alexander on July 1, 2008, ECF Doc. # 89, and the subpoena was served upon CCC shortly thereafter.

Sean Carothers is a blend of fact witness and expert witness in this case. On the one hand, he is a fact witness because he was the original contractor on the beef plant project. He and Richard Hall worked together before The Facility Group contracted to complete it, and

Carothers and Richard Hall arrived at a kickback arrangement using proceeds from the project, an arrangement that ultimately lead to their convictions in this Court. Further, the Superseding Indictment in Count One contains allegations about contact between Sean Carothers and the "public official" who was the subject of the alleged bribery charges in Count One. Sean Carothers also continued to do the construction work under TFG supervision after TFG contracted with the Mississippi Development Authority to supervise the construction, which means that he is possibly a fact witness concerning TFG's performance of the contract, a subject of the billings that in turn are the subject of the mail fraud charges in the Superseding Indictment. At the same time, the government has "retained" Sean Carothers as its expert, in exchange for its effort to obtain a reduction of his sentence, and apparently intends to offer him to testify about TFG's billings. Sean Carothers is, of course, the former CEO of Carothers Construction and was throughout the period involved here.

The subpoena (attached hereto as Ex. A) contains fourteen (14) requests which were accurately reproduced in CCC's Memorandum of Law at pages 26-28. These requests are directed at both Sean Carothers' knowledge as a fact witness and at his experience with CCC. Carothers' experience with CCC is the sole foundation for his expert testimony on behalf of the Government. According to the Government's "Summary of Testimony of Sean Carothers" (a copy of which is attached as Ex. B), he will opine on the following topics based on his experience with CCC:

1. "Corporate Structure/Intercompany Billings"
2. "Accounting"
3. "Determining FCMI's Actual Cost"
4. "FCMI Labor Overbillings"

5. "Alleged Cost Overbilling"
6. "Design - FDGI Overbillings"
7. "Other Allocated Overbillings"
8. "Insurance Overbilling"

Moultrie's subpoena is specifically directed to the basis of the expert testimony of Sean Carothers to be offered in the Government's case-in-chief. Thus, the requested information is relevant and material to Moultrie's defense. The Government will be required to establish Sean Carothers' experience in order to qualify him to testify as an expert. *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999); Fed. R. Evid. 702 – Committee Notes on Rules – 2000 Amendment ("if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis of the opinion, and how that experience is reliably applied to the facts.")

On July 16, 2008, CCC moved this court to quash the subpoena filed against it on several grounds. ECF Doc. # 115 & 116. On July 22, 2008, the Court issued an order providing that "all interested parties shall file a response by 5 p.m. on Friday July 25th, 2008" and that "[a]ll replies to such responses shall be filed by 5 p.m. on Tuesday July 29th, 2008." ECF Doc. # 120. This is Mr. Moultrie's response to CCC's Motion to Quash and Memorandum of Law.

## II. THE SUBPOENA WAS NOT OBTAINED *EX PARTE*, NOR DOES RULE 17(C) REQUIRE THAT CCC BE GIVEN ANY NOTICE OF MOULTRIE'S APPLICATION FOR THE SUBPOENA.

CCC states that the subpoena issued upon CCC is deficient because, "most importantly, Moultrie applied for and obtained this subpoena *duces tecum* returnable prior to trial *ex parte*; a violation of Rule 17(c) which requires notice to the subpoenaed party except in very limited circumstances." CCC's Motion to Quash, ECF Doc. # 115, para. 7; *see also* CCC's

Memorandum of Law, ECF Doc. #116, p. 10-11 & 30. According to CCC, these circumstances are where the moving party is indigent – something which CCC correctly points out does not apply to Mr. Moultrie. According to CCC, the "subpoena duces tecum was applied for and issued *ex parte* with no notice given to [CCC, and t]he "weight of authority is . . . that it is improper for a [non-indigent] defendant . . . to have a Rule 17(c) subpoena issued *ex parte*." CCC's Memorandum of Law at 10.

CCC appears to argue that because CCC was not given notice of the application for a subpoena, the subpoena was issued *ex parte* and since Mr. Moultrie is not indigent, he cannot avail himself of the ability to issue subpoena's *ex parte*. *Ex parte* does not mean "without notice to the recipient" as implied by CCC's argument. The Fifth Circuit has already defined the term; "*In its more usual sense, ex parte* means that an application is made by one party to a proceeding *in the absence of* the other [Emphasis in original]." *United States v. Meriwether*, 486 F.2d 498 (5th Cir. 1973). As the *Meriwether* court explained, normally non-indigent defendants can obtain – for a fee – blank, signed and sealed subpoenas from the Court to be issued in circumstances such as this case. *Id.* at Part IV, pp. 505-507. Such a use of a subpoena allows the defendant to obtain testimony and documents from persons without the Government's knowledge of what is being sought, allowing them to withhold their theories of defense from the Government. Prior to the 1966 amendment of Rule 17, an indigent defendant could obtain a subpoena upon normal motion to the Court, an act that unfairly allowed the Government to view the indigent defendant's theory of the case as they explained to the Court their reasons for subpoena to be issued was needed. *Id.* Thus, the 1966 amendment allowed the indigent defendant to make such a motion *ex parte* or without the **Government's** participation in the court proceeding, in order to protect the indigent defendant's theory of defense in the same way a

non-indigent defendant can conceal his or her defense. *Id.*; *see also* Fed. R. Crim. Pro. 17, Advisory Committee Notes – 1966 Amendment.

The motion for a subpoena was not such an *ex parte* proceeding. The application for the subpoena was not made *ex parte*, i.e., "in the absence of the other party," but in the presence of the other party in this case – the Government. In all of the cases cited by CCC, the Government is one of the parties who moved to quash the subpoena because the application for the subpoena was made by non-indigent defendants to the court *ex parte*, without service or notice of the motion for the subpoena being served upon the Government. These facts are clearly different from the instant case. Here all parties were given notice of the motion, the polar opposite of an *ex parte* proceeding. Rule 17 does not require that the recipient of the subpoena be given notice – that is what Rule 17(c)(2)'s procedures are for, and those are the very grounds for CCC's motion to challenge the sufficiency of the items requested in the subpoena. Thus, failure to provide notice to CCC, who is not a party to this case, is not cause to quash the subpoena.

## III. THE SUBPOENA SHOULD NOT BE QUASHED BECAUSE THE REQUESTS CONTAINED IN THE SUBPOENA ARE IN ACCORDANCE WITH RULE 17(C) IN THAT THE DOCUMENTS ARE RELEVANT, ADMISSIBLE, AND ARE NOT PART OF A "FISHING EXPEDITION."

Having addressed CCC's "most important" argument for quashing the subpoena, we turn to CCC's argument that the subpoena's requests violate Rule 17(c) and the policies underpinning this rule. The test for granting a Rule 17(c) subpoena *duces tecum*, set forth by the Supreme Court in *United States v. Nixon*, requires the moving party to show:

> (1) [T]hat the documents are evidentiary [fn.] and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

418 U.S. 683, 699-700, 94 S.Ct. 3090 (1974). This precedent has been applied by the Fifth Circuit, *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir.) (requiring only a "sufficient likelihood" of relevancy), *cert. denied*, 113 S.Ct. 597 (1992), and will govern CCC's motion to quash the subpoena.

**A. Rule 17(c) is not a discovery rule, nor is it being used as one by Moultrie**

Before specifically addressing CCC's arguments that the requests at issue do not satisfy *Arditti* and *Nixon*, Moultrie addresses CCC's characterization that "Moultrie would lead the Court to believe that Rule 17 creates some right in the defendant to obtain more liberal discovery than is available under Criminal Rule 16." CCC's Memorandum of Law, at 12. In characterizing Moultrie's argument as espousing Rule 17 to be a more liberal discovery rule, CCC then correctly notes that Rule 17 is "*not even a discovery device*." *Id.* at 13. Moultrie agrees and has never asserted that Rule 17 was a discovery device. Moultrie, and the U.S. Supreme Court both note that Rule 17 "establish[es] a more liberal policy for **production, inspection and use** of materials at the trial." Moultrie Motion for Subpoena, ECF Doc. #72, at para. 13 *quoting Bowman Dairy Co. v. United States*, 341 U.S. 214, 218 (1951). CCC implies that the defendants are seeking to impermissibly use Rule 17 to expand the scope of discovery under Rule 16 – citing Moultrie's assertion that "Rule 16, however, does not set any limits on the materials available under Rule 17."

Prior to 1966, Rules 16 and 17 were both used by defendants to obtain discovery materials from the Government. However, "[t]he 1966 amendment broadened Rule 16 to the point where there is no longer any information obtainable via subpoena which is not covered by Rule 16." *Xydas v. United States*, 445 F.2d 660, 664 (D.C. Cir. 1971). However, "[t]he statement in the case quoted above is true when documents are sought **from the United States**

**by a defendant.** But **Rule 16 does not apply to documents in the hands of third persons** and Rule 17(c) may still be useful to obtain such documents." 2 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 274, n. 33 (3d ed. 2000). "The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, *only apply to documents in the government's hands*..." *United States v. Nachamie*, 91 F.Supp.2d at 563 (emphasis added) (*quoting United States v. Tomison*, 969 F.Supp. 587, 593 n.14 (E.D.Cal. 1997)). Like its argument concerning notice and the erroneous labeling of the motion filed as *ex parte*, CCC's arguments rely on the rights of a party to the case at bar. CCC is not a party to this case. As correctly observed by Wright & Miller in the above cited foot note, Rule 16 is a discovery device whereby one party obtains information and materials in a case that is in the custody or control of **another party.** *See* Fed. R. Crim. Pro. 16. The only avenue available to any party in a criminal proceeding to obtain materials from a **third party** is Rule 17.

A deeper reading of the cases cited by CCC reveal the deficiency of its argument. The cases cited by CCC involve defendants seeking to obtain materials **from the Government**, and not third parties. *See e.g. Arditti*, 955 F.2d 331, 345 (sought to subpoena the IRS); *United States v. Ail*, 2007 WL 1229415 (D.Or. 2007) (subpoenaed Government informants). Where a subpoena seeks materials from third parties the materials sought are not discovery materials and so the Rule 16 versus Rule 17 debate is not applicable. *United States v. Williams*, 2007 WL 2287819 (Government's argument that the materials sought from The City of New Orleans were discovery materials (*Brady*, *Giglio*, etc.) and thus improper for Rule 17 subpoena was "incorrect[;] . . . [t]he "Government," as the prosecutor of this case, does not include the City of New Orleans, which is the custodian of the police officers' personnel files.)

Thus, application of the very cases cited by CCC leads to the conclusion that not only is Rule 17 not a discovery tool, but that Moultrie is not attempting to use the Rule as such by subpoenaing CCC.

**B. The materials sought by Moultrie satisfy the requirements for Rule 17(c) subpoenas set forth in *Nixon* and *Arditti***

In its Memorandum of Law, CCC distills the categories of documents sought into five distinct categories, describing them as:

(1) Records reflecting how Carothers Construction billed the beef plant project under Carothers' contract to build the beef plant
(2) Records reflecting how Carothers Construction would have billed the beef plant project under its rejected bid to be Project Manager
(3) All documents showing money paid by Carothers Construction or Sean Carothers to Richard Hall or any entity Hall had an interest in;
(4) All correspondence between Carothers Construction and any other entity involved in any aspect of the beef plant project; and,
(5) All communications passing between Carothers Construction and attorneys William Purdy and Ralph Germany.

CCC's Memorandum of Law at 14. While Moultrie takes some issue with the broad language used in the above created categories of requests,[1] these labels are sufficient to engage in a discussion of the subpoena's satisfaction of Rule 17(c)'s requirements of relevance and admissibility. Accordingly, Moultrie will adopt these labels for the purposes of addressing the first two prongs of the *Nixon* text.

[1] The actual requests contained in the subpoena are more specific and precise. E.g. the subpoena asks for, in item 9, "the correspondence from or to Carothers Construction Company, Richard Hall, Community Bank, the Mississippi Land, Water and Timber Board, Hendon & Redmond of Ohio, the Mississippi Development Authority, and any other agency or department of the State of Mississippi concerning the Mississippi Beef Project" which is far more specific than how CCC describes this provision; "All correspondence between Carothers Construction and any other entity involved in any aspect of the beef plant project." For a further discussion of these particular discrepancies, see the third part of the *Nixon* analysis contained in this brief pertaining to specificity of the requests, Part III.B.iii, *infra*..

The materials requested in the subpoena at numbered request 14, and described by CCC above as category number 5, are records of communications between CCC and Purdy and Germany. In light of CCC's statement that Messrs. Purdy and Germany are CCC's attorneys, and not Sean Carothers' attorney, Moultrie respectfully withdraws its request for these materials. Moultrie reasonably believed that Messrs. Purdy and Germany represented Sean Carothers, not his company, and accordingly such requested documents would not be protected by such an attorney client privilege because no attorney client relationship existed.

Accordingly, Moultrie will only address the *Nixon* factors with respect to the four other categories of requests contained in the subpoena.

**i. The materials requested in categories 1 through 4 are relevant.**

CCC moves to quash the subpoena by claiming that the documents demanded have no relevance to the issues in this case. In its memorandum of law, CCC states:

> Subpoenaed items are "'material to preparing the defense' if they are material to the defendant's 'response to the Government's case-in-chief.'" United States v. Ail, 2007 1229415 (D. Ore. 2007). The defendant's burden is to prove that the documents sought are material to some issue in the case and admissible as part of the defendant's case-in-chief. *Id.* To prove relevance Moultrie would have to show the court that even if Sean Carothers did not testify, the subpoenaed documents could be relevant to some issue in the defendant's case-in-chief.

CCC's Memorandum of Law, at 16-17. Quite frankly, CCC's characterization could not be more inaccurate. The passage quoted by CCC from the *Ail* case clearly pertains to what the defendant must prove in seeking discovery materials **under rule 16(a)(1)(E).** The quotation, in full, reads:

> Federal Rule of Criminal Procedure 16(a)(1)(E) requires the prosecution to permit a defendant to inspect documents and objects "within the government's possession, custody, or control" that are "material to preparing the defense." Documents are "material to preparing the defense" if they are material to the defendant's "response to the Government's case-in-chief." *United States v. Armstrong*, 517 U.S. 456, 462-63, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

*Ail*, 2007 WL 1229415, at the second paragraph under the subject heading "A. Legal Standard for Criminal Discovery." CCC is incorrect in asserting that materiality has anything to do with whether to quash a subpoena, as stated above and elsewhere in CCC's Memorandum of Law. The appropriate standard is *Nixon*, which requires, relevance – not materiality.

One ground upon which CCC challenges the requests in the subpoena is that its purpose is solely for impeachment of Sean Carothers – who will be testifying as an expert witness on behalf of the Government at the trial of Mr. Moultrie. CCC cites the general rule correctly, that seeking material solely for purposes of impeachment is generally insufficient grounds to require its production in advance of trial. However, "[i]f… the defendant demonstrates that a government's witness's statements are relevant aside from impeachment purposes, the statements may be subpoenaed from a third party pursuant to Rule 17(c)") *United States v. Holihan*, 248 F.Supp.2d 179, 183 *citing United States v. Cuthbertson*, 630 F.2d 139, 144-45 (3d Cir. 1980).

The materials requested in the subpoena and summarized in categories 1 through 4 above are relevant not only for purposes of impeachment of Sean Carothers, but also because Sean Carothers will be a fact and an expert witness for the Government. As a fact witness, Sean Carothers' was the president of CCC and was the primary person involved with the Mississippi beef plant project, as admitted by CCC in their Motion to Quash at para. 8. (Sean Carothers is "the one person most familiar with the records of Carothers Construction Company as they relate to the construction of the beef processing plant.") Thus, as general contractor on the job, the method by which work was billed, how subcontractors were paid, Richard Hall's involvement, the Governors potential involvement, and the likelihood of success or failure of the project are facts upon which Mr. Carothers has personal knowledge and can testify to as a fact witness. The materials requested by Moultrie, particularly those in Category 1, are relevant in that they are

evidence of the way that the project proceeded for the duration of the project. No person, other than Richard Hall, was around for the duration of the entire project, and so no persons' records are better at proving what occurred over the course of the project than the records request of CCC in the subpoena. To name just a few examples, the documents will show that it was more or less probable that the several facts exist; (1) that failure of the plant was known to everyone involved, (2) that the project's success or failure was in no way impacted by The Facility Group's joining of the project, (3) that neither the Governor, nor his office had anything to do with the running of the project, and (4) that the billing procedures employed by The Facility Group were not different than the ones already in use on the project and therefore didn't constitute fraud. Since the records sought will bear on the probability that these facts of consequence exist, they are relevant and therefore satisfy the requirements set forth by *Nixon.*

The Government has also identified Sean Carothers as an expert based upon his personal experience and not upon his professional studies.[2] *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167 (1999). CCC has fairly noted that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Memorandum of Law, at 17 *quoting United States v. Skilling*, 2006 WL 1006622 (S.D. Tex 2006). Mr. Carothers' experience is a "fact that is of consequence to the determination of the action" because it is by his experience that he is being qualified as an expert.

[2] This conclusion, that Carothers' expert qualification is based upon his experience, as opposed to education, is based upon the fact that the references produced by the Government concerning Mr. Carothers detail his work history, his responsibilities at CCC, and "[o]ther industry experience." Mr. Carothers' educational training in accounting is merely described as "Bachelor of Business Administration with an emphasis on Accounting." Moultrie's Motion for Subpoena, Ex. C.

The requested materials in categories 1 through 4 pertain to Sean Carothers' experience with the latest design-build contract that Mr. Carothers dealt with, thus reflecting the most recent, and up-to-date, evidence of Mr. Carothers experience. Mr. Carothers will testify as part of the Government's case in chief as to (1) the FCMI contract, (2) The Facility Group's accounting records, (3) The Facility Group's calculation, allocation and billing of costs, including labor and insurance costs, and (4) accounting in the construction industry in general. Government's Summary of Testimony of Sean Carothers, Ex. B. The conclusions reached by Mr. Carothers are based on his review of the contracts involved and the accounting records of The Facility Group, as well as his knowledge of how things work in the construction industry. *See* Summary of Testimony of Sean Carothers, Ex. B at 8.

Mr. Carothers can only testify as an expert if he is qualified as an expert to do so under Rule 702, an inquiry which is based upon Mr. Carothers' "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. According to the Commentary to Rule 702:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeper function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995). . . . *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on completely subjective methodology held properly excluded).

Fed. R. Evid. 702 – Committee Notes on Rules – 2000 Amendment (13th paragraph).

The materials sought are materials reflecting prior experience of Mr. Carothers in his work on the design-build contract that most recently preceded his review of The Facility Group materials and the creation of his expert opinion. Mr. Carothers' ability and qualifications to make such an evaluation are based upon his experience – those prior instances where Mr. Carothers dealt with similar documents and records in similar situations. The documents

requested in Category 1 (reflecting how Carothers administered contracts in his prior experience) constitute evidence of his experience, and their contents are evidence that will make it more or less probable that he is, or is not, qualified to give an expert opinion in the Government's case in chief.

Carothers is essentially testifying that, based upon his experience, the defendants managed the project incorrectly. However, if evidence shows that Mr. Carothers' experience shows that he would have managed the project in the same way as the defendants, then his expert opinion is not "as careful as he would be in his regular professional work." Fed. R. Evid. 702 – 2000 Amendments – para. (4). This is a specific *Daubert* factor and so it is relevant to Mr. Carothers' expert testimony.

The proposal created by Mr. Carothers was created by CCC – with significant input from him – and can be reasonably assumed to have been created based upon his experience in how such a contract should be managed.[3] Accordingly, the documents requested in Category 2 – pertaining to the proposal and the background documentation associated with the proposal – are relevant to an assessment of whether Mr. Carothers is qualified to be an expert and whether Carothers' testimony is based upon his qualification as an expert, i.e. his experience.

The documents sought in category 3 are relevant in that its contents bare on Mr. Carothers' experience, much like category 1. CCC admitted that "at best" the material requested, including category 3, "would tend to show what Carothers believed its contract allowed it to charge the project." CCC's Memorandum of Law, at 20. Precisely. The

[3] While the proposal was submitted by CCC, CCC has admitted that Sean Carothers is the one person most familiar with the records of CCC, particularly with respect to the beef plant. CCC's Motion to Quash, para. 8. Thus, it is a reasonable inference that Sean Carothers – president of CCC – would have helped create the document and infused his experience into the planning and drafting of the proposal.

documents requested bear on Mr. Carothers' belief as to how contracts of the type involved – design build – should be administered. How to administer a design build contract is the very subject matter of his expert testimony and the fact that Mr. Carothers made illicit payments to Mr. Hall and others associated with Mr. Hall, would tend to show that Mr. Carothers' experience is NOT in accordance with industry practice – making it less probable that he is qualified to be an expert on how such contracts should be billed and how they would normally be billed in the industry.

The documents requested in category 4 have relevance, not in terms of impeachment, but bear directly on the allegations of the Government in the indictment. The Superseding Indictment in Count One now alleges that there was an internal memo at TFG that suggested serious problems with the beef plant project, and that TFG was somehow at fault for failing to disclose this to the State of Mississippi. Superseding Indictment at ¶ 4-7. Sean Carothers and Carothers Construction were of course deeply involved in the beef plant project at that point, and would have documents that directly relate to this allegation . There can therefore be no question of the relevance to these allegations in Count One of documents evidencing the history of the beef plant project prior to the hiring of TFG. After the hiring of TFG, the documents would relate to the question whether TFG's management was reasonable and its billings fraudulent or not.

Category 4 seeks documents that record conversations and communications about the project between Carothers and the entities involved in the project. The Government alleges that the defendants took advantage of a failing situation, keeping secret the fact that the project was likely to fail. Superseding Indictment Count II, para. 4-5. However, the communications between all of the parties involved in the project – before and during the time The Facility Group

joined the project – will reflect the true nature of the situation. That being that everyone involved with the project had misgivings similar to The Facility Group, and the fact that the project's margin for error was slim was known to all persons involved. These documents have been sought and received via subpoena and others means, where possible, from all of the other entities noted in subpoena request no. 9.[4] Thus, these documents will make it more or less probable that a fact of consequence exists, that fact being that knowledge of the high likelihood of failure was not a secret guarded by The Facility Group, but was well known to all involved. Thus, this category of materials is relevant.

**ii. <u>The admissibility of the subpoenaed documents is sufficiently established</u>**

In its Memorandum of Law, CCC asserts the alleged proposition that, "[e]ven if the records sought contain exculpatory material, if they are not admissible in evidence, they may not be subpoenaed," CCC's Memorandum of Law at 20 (citing *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981)). While admissibility is indeed one of the "hurdles" which the Supreme Court in *United States v. Nixon* held must be cleared in order to require pretrial production of documents pursuant to Federal Rule of Criminal Procedure 17, 418 U.S. 683, 700, 94 S.Ct. 3090 (1974), it must be noted that the Court did not elucidate what this requirement entails except in concluding that the prosecution had made "*a sufficient preliminary showing* that each of the subpoenaed tapes *contains* evidence admissible with respect to the offenses charged in the indictment," *id*. at 701 (emphasis added). The Court further recognized that "there are other valid *potential* evidentiary uses for the same material, and the analysis and possible

[4] These include Community Bank, Mississippi Land, Water and Timber Resources Board, Hendon & Redmond of Ohio, the Mississippi Development and Richard Hall (in the form of documents from the Mississippi Beef Processors Inc, currently in possession of the United States Attorney's Office).

transcription of the tapes may take a significant period of time." *Id*. at 702 (emphasis added). Similarly, the late Judge Goldberg, in his special concurring opinion in *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992), which contains perhaps the best description by the Court of Appeals of the requirements and procedures to be adhered to under Rule 17, stated that:

> "Under the Rule 17(c) standard… the district court must determine whether the subpoena constitutes a "good-faith effort ... to obtain evidence." [Cit.]. *A party does not have to use all materials subpoenaed under 17(c) in evidence to satisfy this test*. Rule 17(c) merely requires that the moving party make a good faith effort to obtain evidence-instead of embarking on "a fishing expedition to see what might turn up."

*Id*. (Goldberg, J., concurring) (internal citation omitted; emphasis added) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 71 S.Ct. 675, 678 (1951); *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D.Fla. 1991); citing *In re Martin Marietta Corp.*, 856 F.2d 619, 622 (4th Cir.1988)). Finally, there is the Supreme Court's express holding in *Bowman Dairy Co. v. United States*, which CCC omits entirely from its arguments, that subpoenaed materials need *not "actually be used in evidence*." *Bowman Dairy Co.*, at 219 (emphasis added).

*Nixon*, *Bowman Dairy Co.*, and the special concurrence to *Arditti* accordingly make plain that, in order to satisfy *Nixon*'s admissibility requirement, Mr. Moultrie need only make a "preliminary showing" that the documents sought pursuant to the subpoena contain "some" evidence which would be admissible with respect to the charges in the government's Superseding Indictment, pursuant to any "potential" evidentiary use, even though the documents need not be used. CCC further cannot show that some of the documents responsive to each of the categories of information sought by the subpoena would not be admissible at trial. Its baseless efforts to elevate the admissibility "hurdle" in order to avoid compliance with the subpoena must be rejected as a matter of law.

Each of the subpoena's requests indisputably includes within its scope some evidence which could be admissible at trial under *Nixon* under some potential rule, whether as records of regularly conducted activity pursuant to Federal Rule of Evidence 803(6); **or** under the residual exception to the hearsay rule pursuant to Federal Rule of Evidence 807 to show material facts relevant to this matter; **or** as evidence of material facts introduced in the interest of justice; **or** as evidence of bias; **or** as relevant to impeachment; **or** to support any defenses of the defendants at trial. *See United States v. Caruso*, 948 F.Supp. 382, 387 (D.N.J. 1996) (denying motion by accounting firm, in prosecution of the defendant, a managing partner at the firm, for mail fraud for allegedly devising a scheme to defraud the firm, to quash subpoena to produce documents, pursuant to a Rule 17 (c), concerning the firm's policies and practices, and actual reimbursements and subsidies paid, relating to partner relocation, and partners' decision-making authority, holding that "the documents are clearly evidentiary, relevant, and admissible… The documents are relevant to establishing the defendant's state of mind at the time of the offense, and as such would be admissible at trial. Moreover, as the defendant claims, such material regarding [the firm's] practices and customs would be admissible at trial pursuant to Federal Rule of Evidence 406").

Evidence relating to CCC's contract for the Mississippi beef project, its bid to become project manager, its communications with other entities involved in the project or its communications with the law firm of Purdy & Germany and any payments to Richard Hall are plainly both relevant and admissible to some extent to the charges against the defendants for conspiracy, mail fraud and bribery . Accordingly, Mr. Moultrie has made a preliminary showing that. *United States v. McCollom*, 651 F. Supp. 1217, 1224 (N.D.Ill. 1987) (denying the defendant's motion to quash trial subpoena *duces tecum* issued by the government in prosecution

for mail fraud, racketeering and tax evasion, seeking original checks, check registers, withdrawal slips or other information reflecting withdrawals of funds from accounts owned by the defendant, holding that "[the defendant] contends that the subpoena seeks documents that are irrelevant or inadmissible as evidence. This contention may ultimately prove to be correct, but it does not justify quashing the government's subpoena. Under Rule 17(c) the materials subpoenaed need not actually be used in evidence. 'It is only required that a good-faith effort be made to obtain evidence'") (quoting *Bowman Dairy Co.*, 341 U.S. at 219-20).

CCC's contention that documents responsive to the subpoena are not admissible pursuant to Rule 803(6) as records of regularly conducted activity for the reason that Mr. Moultrie purportedly is not prepared to admit that its records are "trustworthy," relying on the unpublished decision of *United States v. Skilling*, No. Crim. H-04-025, 2006 WL 1006622 (S.D.Tex 2006) (unpublished) (Memorandum Opinion and Order), cannot be viewed as anything other than disingenuous in the extreme. *See* CCC's Memorandum of Law at 20-21 (discussing *Skilling*, 2006 WL 1006622). First, the Court of Appeals has rejected similar arguments in *United States v. Tafoya*, 757 F.2d 1522, 1529 (5th Cir. 1980) (where the Fifth Circuit upheld the trial court's admission, in the prosecution of the defendant for tax fraud, of billing memoranda despite the fact that evidence indicated that the preparer sometimes falsified billing memoranda) and in *United States v. Hutson*, 821 F.2d 1015, 1020 (5th Cir. 1987) (where the Fifth Circuit affirmed the trial court's admission of computer printouts generated by the defendant, a bank employee, in her prosecution for embezzlement, over the defendant's objection that her own fraud and manipulation rendered the documents untrustworthy pursuant to Rule 803(6)). "The district court is given great latitude on the issue of trustworthiness." *Id.* (citing *Miss. Grain Elevator, Inc. v. Bartlett & Co.*, Grain, 659 F.2d 1314, 1319 (5th Cir. 1981)).

Second, CCC certainly is not prepared to admit in its Motion or Memorandum that any particular evidence responsive to the subpoena is "untrustworthy." To the contrary, CCC asserts that "[a]ll of the work contracted to be done by Carother's Construction Company was timely done in a good and workmanlike manner in accordance with all contract requirements." CCC's Memorandum of Law at 8. It further characterizes the conduct of Sean Carothers—an admitted felon who pled guilty to aiding and abetting mail fraud in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1341—as "bad judgment rather than greed." CCC's Memorandum of Law at 8. Such representations naturally detracted from any assertions on the part of Carothers and its president as to the untrustworthiness of the evidence sought. Furthermore, in *Skilling*, the trial court held that the defendants did not carry their burden of showing that the records which they sought to subpoena from Arthur Andersen were relevant and admissible "because *evidence adduced at… trial demonstrate[d]* that those documents are untrustworthy because Enron concealed material information from its auditors." *Skilling*, at *5 (emphasis added). In contrast, CCC has proffered no evidence to show that the materials sought by the subpoena are demonstrably untrustworthy. Its argument on this point must be rejected out of hand.

CCC's assertion that records generated by other entities would not be admissible pursuant to Rule 803(6) is likewise meritless and further defies logic. *See* CCC's Memorandum of Law at 21. As the Court of Appeals has expressly held, "*[t]here is no requirement… that the witness laying the foundation be the one who [created the document] or be able to attest personally to its accuracy, [cit.], or that the records be prepared by the business having custody of them*." *Hutson*, 821 F.2d at 1022 (internal citation omitted; emphasis added) (citing *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 532 (5th Cir. 1986); *Miss. Grain Elevator, Inc. v. Bartlett & Co.*, Grain, 659 F.2d 1314, 1319 (5th Cir. 1981)). Irrespective of the actual "author" of any of the

documents which might be produced pursuant to the subpoena, the documents should be admissible under Rule 803(6) provided a qualified witness with knowledge testifies that the documents were kept or made in the course of a regularly conducted business activity. *Compare Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) (holding that plaintiff in products liability action failed to meet its burden in showing that memorandum prepared by third party was prepared in the regular course of third party's business) (citing *Tafoya*, at 1528-29; *United States v. Rosenstein*, 474 F.2d 705, 709-10 (2d Cir. 1973); *Hussein v. Isthmian Lines, Inc.*, 405 F.2d 946, 948-49 (5th Cir. 1968)) (cited at CCC's Memorandum of Law at 21).

Finally, even *arguendo* if all documents responsive to the subpoena were relevant *only* for impeachment, the documents would nonetheless be subject to production.

> [A]n absolute prohibition against use of Rule 17(c) to secure impeachment material before trial… which ignores the plain language of Rule 17(c), is at odds with the well-reasoned decisions which have made the issue a discretionary one depending upon the facts of particular cases *and upon the certainty with which the court could say that the person giving the statement would testify at trial*. That construction also is at odds with the "chief innovation [of Rule 17(c) which] was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." [Cit.]. Furthermore, a broad brush prohibition against requiring pretrial production of impeachment materials runs counter to the fundamental notion reflected in the third facet of the test enunciated in *Iozia* which is that the material is essential for a proper preparation of trial.

*United States v. King*, 194 F.R.D. 569, 574 n.5 (E.D.Va. 2000) (Memorandum Opinion) (internal citation omitted; emphasis added) (denying television network's and reporter's motion to quash subpoena *duces tecum* sought by the defendants in prosecution for conspiracy to distribute cocaine and ordering movants to produce videotape evidence and statements by witness for government prior to trial where "it [was] rather clear that [the witness'] statements in the interview [would] be useful for impeachment. And… there [was] no uncertainty whether [the witness] [would] testify") (quoting *Nixon*, 418 U.S. at 698-99; citing *United States v. Iozia*, 13

F.R.D. 335, 338 (S.D.N.Y.1952)); *see also LaRouche Campaign*, 841 F.2d at 1180 (affirming district court's order enforcing subpoena *duces tecum* by defendants in conspiracy, mail and wire fraud prosecution to television network seeking videotape evidence relating to a witness for the prosecution, holding that the evidence sought could be admissible for purposes of impeachment and showing bias); *compare* CCC's Memorandum of Law at 22. In this case, it is beyond dispute that Sean Carothers will be a key witness for the government at trial, as evidenced by the government's letter of April 9, 2008, identifying Carothers as an expert. *See* Defendants' Motion to Exclude Testimony of Putative Expert Sean Carothers, Docket No. 98, Exhibit D. Accordingly, pretrial production of the material sought by the subpoena is well within this Court's discretion.

CCC further avoids this Circuit's definition of a "collateral matter" for the purposes of Federal Rule of Evidence 608(b). *See* CCC's Memorandum of Law at 22-23. "[A] matter should *not* be deemed collateral if it is a 'contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.'" *United States v. Carter*, 953 F.2d 1449, 1458 n.3 (5th Cir. 1992) (emphasis added) (quoting *McCormick on Evidence* § 47, at 110 (E. Cleary 3d ed. 1984)). Moreover, "[t]he bias of a witness ... is not a collateral matter…" *United States v. Abadie*, 879 F.2d 1260, 1267 (5th Cir. 1989) (citing *United States v. Diecidue*, 603 F.2d 535, 550 (5th Cir.1979)). The subpoena's requests are all relevant to the transactions which form the underlying basis of the Superseding Indictment.

The evidence sought by the subpoena easily satisfies *Nixon*'s relevance and admissibility requirements. CCC's Motion to Quash should accordingly be denied and its compliance should be required.

**iii. The materials sought are requested with the required amount of specificity and are not part of a "fishing expedition."**

CCC also seeks to quash the subpoena on the grounds that the requests contained therein are not specific enough and thus, are part of a fishing expedition. Such fishing expeditions are clearly prohibited by Rule 17(c) jurisprudence. *See Arditti*, 955 F.2d at 346 (5th Cir.).

CCC characterizes the request in the subpoena as a fishing expedition in a couple ways. First, CCC, in arguing that the subpoena's requests are not specific enough, notes that the subpoena contains a 29 line definition of Moultrie's understanding of the word document for purposes of the subpoena, characterizing the definition as a "legal masterpiece" that includes "everything known to man since the art of human communication came into being." CCC's Memorandum of Law, at 26 & n.15. Indeed, this 29-line definition of documents ensures that CCC understands what is requested in the subpoena by **specifically** identifying all forms of communication included within the definition. Contrary to CCC's argument that the subpoena is non-specific, Moultrie cannot make its definition of the term "document" any more specific than it already has.

CCC next attacks the specificity of the subpoena by noting that Moultrie requests the production of "all documents" that satisfy the 14 enumerated subpoena requests, comparing the requests contained in Moultrie's subpoena to those in the subpoena quashed by the District Court for the Southern District of Texas in *United States v. Bermingham*, 2007 WL 1052600 (S.D. Tex. 2007). Moultrie's request is sufficiently more exacting than the requests in the *Bermingham* case for several reasons.

First, CCC's reliance on the use of the term "all documents" to scuttle the subpoena is misplaced. Moultrie's subpoena requests "all documents from January 1, 2002, through December 31, 2004" going on to list 14 categories of documents. The use of the word "all" is

necessary in this context because all of the documents in these categories are relevant and admissible for the purposes stated above. Were Moultrie to ask for "some of the documents from January 1, 2002, through December 31, 2004" or just "documents from January 1, 2002, through December 31, 2004," the request would not be specific enough. Under those circumstances, when is CCC to know that it has fully complied with the subpoena? At what point would they have produced enough documents to satisfy the subpoena? Thus, there is a necessity to use the word "all."

Second, Moultrie's requests are significantly more specific than the requests in *Bermingham*.[5] In *Bermingham*, the court characterizes the defendant's subpoena *duces tecum* as "ask[ing] for 'all' of whatever it is that follows, and what follows are listings of documents and other things **on broad, sweeping subjects, sometimes over periods of month and sometimes over periods of years.**" (Emphasis added) *Bermingham*, 2007 WL 1052600, *7 (S.D. Tex 2007). CCC would characterize the subjects sought by Moultrie as broad, sweeping subjects as well, and yet CCC distilled the subjects into five distinct categories of types of documents. *See* CCC's Memorandum of Law at 14.

The *Bermingham* court notes several requests seeking "all documents for the past 8 years relating to any valuation, audit or review of three different entities." In comparison, all of Moultrie's requests are confined to the same 3 year period and do not pertain to a broad spectrum of documents and materials, but instead pertain solely to various aspects of the Mississippi Beef

[5] It should be noted that the list of requests made by the defendant in *Bermingham* set forth in CCC's Memorandum of Law is not a quotation of what was requested in the proposed subpoena. Instead, CCC's Memorandum of Law sets forth a paraphrasing of the court's paraphrasing of the requests made by the defendant in *Bermingham.* The actual request – contained in Doc. #122 in the *Bermingham* document history on PACER – is under seal, thus the only way to compare the two sets of requests is through comparison of Moultrie's subpoena to the court's paraphrasing of *Bermingham*'s subpoena.

Project (Categories 1, 3, and 4), or work that went into attempting to manage the Mississippi Beef Project (Category 2).

It is important to remember that the issue of specificity bears not on the amount of material requested, but on how well it is described. CCC criticizes the subpoena's requests by pointing to the long definition of "documents" and the use of the word "all." These two aspects of the subpoena only related to the amount of materials requested, and do not bear on whether the requests are specific enough. Indeed, the use of these devices makes the requests more specific than by not using these words. *See* page 18, *supra.*

Aside from the *Bermingham* case, CCC cites little else that would show that Moultrie's subpoena is not specific enough to satisfy *Nixon.* However, Rule 17(c) does not require Moultrie to be clairvoyant. Moultrie's requests must be limited to a "reasonable period of time and specify with reasonably particularity the subjects to which the writings relate." *Application of Linen Supply Cos.*, 15 F.R.D. 115, 118 (D.C.N.Y. 1953); *see also 1980 U.S. Grand Jury Subpoena Duces Tecums*, 502 F. Supp. 576 (D.C. La. 1980) (specification of things to be produced must be made with reasonable particularity). Indeed, "It is sufficient if kinds of documents are designated with reasonable particularity." 2 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 275, n.7 and accompanying text.

In looking at cases where subpoenas survived motions to quash, it is apparent that Moultrie's motion is similar to these motions in that the requests pertain to a particular subject area over a specific period of time. This is the key in determining specificity. Use of the word "all" or other things that might require the production of many materials is irrelevant so long as the subject and time period are specific. *See e.g. In re Grand Jury Subpoena Duces Tecum to John Doe Corp.,* 570 F. Supp. 1476 (D.C.N.Y. 1983) (Court did not quash subpoena

"[even]though the subpoena issued [t]herein call[ed] for the production of a substantial quantity of Doe Corp.'s records."); *also compare In re Grand Jury Subponea*, 920 F.2d 235 (4th Cir. 1990) (request for production of records of "all subsidiaries" was not overbroad) *and In re Berry*, 521 F.2d 179 (10th Cir.) *stay denied* 96 S. Ct. 30, 423 U.S. 810, *cert. denied* 96 S.Ct. 276, 423 U.S. 928 (1975) (subpoena seeking all of law firm's financial transactions over a five and one half year period was not held to be overbroad) *with Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *(*held that the demand for production of all of the attorney's records in the possession of a third party custodian without limitation as to time, including clients' files, was excessive.)

CCC relies on *United States v. Ball*, 1999 WL 974028 (D. Kan. 1999) (unreported), in arguing that the subpoena is not specific enough. *Ball* states the relevant standards for specificity of a Rule 17(c) subpoena, saying:

> in order for the court to authorize a Rule 17(c) subpoena, the moving party must be able to describe specific documents or, at least, specific kinds of documents. *[cit.]* Moreover, the moving party must specify why the materials are wanted, what information is contained in the documents, and why those documents would be relevant and admissible at trial (citations omitted). Without detailed information on the requested documents, a court is only left "to speculate as to the specific nature of their contents and its relevance." *Id.* (citing *United States v. Arditti*, 955 F.2d 331, 346 (5th Cir.1992).

At *3. Moultrie's subpoena requests satisfy this standard. The requests do seek "specific kinds of documents." Furthermore, Moultrie has addressed the questions of relevance, admissibility, and reason for needing the documents. *See* Parts III.B.i & III.B.ii, *supra*. The content of the requested documents is also apparent in the discussions of relevance and admissibility, but Moultrie will specifically address this final prong here as well.

The documents Mr. Moultrie seeks in Category 1 contain evidence of Mr. Carothers' experience and the documents contained in Category 4 contain evidence of the beliefs and

understandings of persons involved with the project as to whether the beef plant would fail. The billing and accounting records, also requested under Category 1, contain evidence of Mr. Carothers' prior billing and accounting experience – which are the basis of his qualifications as an expert to opine on these issues in this case.

Furthermore, the documents pertaining to the payments that were made to Mr. Hall and the documents pertaining to CCC's proposal to manage the beef plant project contain information bearing on Carothers' personal experience in administering a design-build contract. It is known that these documents will contain information that will be relevant as to how Mr. Carothers "he would be in his regular professional work." Fed. R. Evid. 702 – 2000 Amendments, para. (4). Therefore, they are appropriately requested in Moultrie's subpoena.

Accordingly, the subpoena requests at issue in this case are not part of a "fishing expedition," having been made with sufficient specificity to satisfy the standards set forth in *Nixon* and *Arditti*. Thus, CCC's Motion to Quash should be denied with respect to the first four categories of requests addressed in this section of Moultrie's brief.

## IV. CONCLUSION AND PRAYER FOR RELIEF

CCC's arguments as to why Moultrie was required to give them prior notice before filing its motion for issuance of subpoena is premised upon serious misreading of the law and upon the flawed belief that CCC is a party to this case. Furthermore, CCC's belief that the subpoena is a discovery device is without merit, as Moultrie's requests satisfy all of the factors set forth in *Nixon*. The subpoena was directed at CCC in an effort to obtain documents, known to exist, which are evidence of Mr. Carother's experience in the construction industry, evidence which is relevant and has been put into issue by the fact that Mr. Carothers plans to testify against the

defendant at trial in the Government's case-in-chief. Accordingly, the requests are relevant, admissible, and are specific enough such that they cannot be fairly considered part of a fishing expedition.

Therefore, Mr. Moultrie prays that this Court DENY CCC's Motion to Quash the Rule 17(c) subpoena. Moultrie requests that this court order a timely production of the requested documents so that both the defendants and the Government have ample time to inspect the produced documents before the trial begins, which is scheduled for August 25, 2008. Moultrie feels this is a reasonable request in light of the fact that Sean Carothers, "the one person most familiar with the records of Carothers Construction Company as they relate to the construction of the beef processing plant," CCC's Motion to Quash at para. 8, has recently been released from incarceration in Florida and is now under house arrest in Mississippi where he should be able to aid CCC in production of the documents. *See* Order of Judge Neal B. Biggers, Cr. No. 3:07CR001, ECF Doc. # 37.

Respectfully submitted this 25th Day of July, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I have caused a copy of the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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