

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 3:08CR014
	)	
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.,	)	
	)	
Defendants.	)	
	)	

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**MEMORANDUM IN SUPPORT OF  
MOTION FOR BILL OF PARTICULARS**

NOW BEFORE THE COURT come the Defendants, 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., by and through undersigned counsel, and submit this memorandum in support of their motion for a bill of particulars.

Federal Rule of Criminal Procedure 7(c)(1) provides in pertinent part that “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . .” Rule 7(f) provides that “[t]he court may direct the government to file a bill of particulars.” According to Fifth Circuit precedent

The purpose of a bill of particulars is [1] to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense and [2] to minimize surprise at trial . . . [and] also [3] also, to enable double jeopardy to be pleaded in case of a later prosecution.

*United States v. Cantu*, 557 F.2d 1173, 1178 (5th Cir. 1977) citing *United States v. Sherriff*, 546 F.2d 604, 606 (5th Cir. 1977) and *United States v. Mackey*, 551 F.2d 967, 970 (5th Cir. 1977).

A bill of particulars “supplements an indictment by providing the defendant with information necessary for trial preparation.” *Id.* A bill of particulars is further “designed to define and limit the government’s case.” *United States v. Mariani*, 90 F. Supp.2d 574, 591 n. 18 (M.D.Pa. 2000).

The grant of a bill of particulars “is addressed to the sound discretion of the trial court.” *United States v. Thevis*, 474 F. Supp. 117, 123 (N.D.Ga. 1979) (citing *Wong Tai v. United States*, 273 U.S. 77, 47 S.Ct. 300 (1927)).

A bill of particulars “may not be used to obtain a detailed disclosure of the government’s evidence prior to trial.” *United States v. Perez*, 489 F.2d 51, 71 (5th Cir. 1973) citing *United States v. Bearden*, 423 F.2d 805 (5th Cir. 1970); *Downing v. United States*, 348 F.2d 594, 599 (5th Cir. 1965). However, “if necessary to give the defendant enough information about the charge to prepare his defense, a bill of particulars will be required even if the effect is disclosure of the Government’s evidence or theories” *United States v. Barnes*, 158 F.3d 662, 665 (2d Cir.1998); see also *Thevis*, 474 F. Supp. at 123 (holding that it is not “a legitimate objection to a motion for Bill of Particulars that it calls for an evidentiary response or a legal theory of the government, when the furnishing of this information is necessary to prepare a defense and to avoid prejudicial surprise at trial”) (citing *United States v. Smith*, 16 F.R.D. 372, 375 (W.D.Mo.1954)); *Ganim*, 225 F.Supp.2d at 156 (quoting Wright, *Federal Practice and Procedure: Criminal 3d* § 129 at 659-660).

In this case, on April 4, 2008, The Defendants sent to the Government a letter outlining what areas of the original Indictment were so imprecise and ambiguous as to deprive the Defendants of the ability to prepare a defense and subject the Defendants to surprise at trial.

(Attached hereto as Exhibit A) Many of these problems were not addressed or changed in the Superseding Indictment, and so the ambiguities and other problems that existed in the original Indictment persist. Accordingly, the Defendants show why each request set forth in the DEFENDANTS' MOTION FOR BILL OF PARTICULARS ("Defendants' Motion") should be provided by the Government in accordance with Federal Rule of Criminal Procedure 7.

With respect to the bill of particulars requested in paragraph 1 and 2 of the Defendants' Motion, the use of term "THE FACILITY GROUP" is so imprecise, confusing, and indefinite that it subjects the Defendants to unfair surprise and greatly hinders the ability of the Defendants to prepare its defense. *Cantu*, 557 F.2d at 1178 (5th Cir. 1977). This is because the term THE FACILITY GROUP is given three different definitions in the Superseding Indictment. First, THE FACILITY GROUP is used as a reference to the corporate defendant, FACILITY HOLDING CORP., as shown in Count 1, ¶ 1(d). Second, the term "THE FACILITY GROUP" is used in a collective sense in Count 1 but without reference to C. K. Morehead, as shown in Count 1, ¶ 2. Third, the same term "THE FACILITY GROUP" is also used in a collective sense in Count 2, this time including C.K. Morehead, as shown in Count 2, ¶2.

To add to the confusion, THE FACILITY GROUP is also referred to as FCMI in Count 1, ¶ 12. Paragraphs 2 and 10 of Count 1 suggest that Robert L. Moultrie is the Chairman and Chief Executive Officer of all of the other six (6) Defendants and ¶ 2 suggests the Nixon E. Cawood is the Chief Operating Officer of all of the other six (6) Defendants. This changing and inconsistent use of the same term is extremely confusing and ambiguous.

The Defendants are entitled to precise notice of the acts they are charged with committing, *Vastola* 670 F. Supp. at 1269-1270, which they are deprived of in light of the

imprecise and blanket use of the term THE FACILITY GROUP. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 5 of the Defendants, Motion, Count 1 of the Indictment appears to charge in Count 1, ¶ 2, a conspiracy to bribe a public official, alleging "Defendants, did knowingly and willfully conspire . . . to corruptly give, offer and agree to give things of value . . . with intent to influence and reward . . . in violation of [18 U.S.C. § 666(a)(2)]" However, the inclusion of the factual allegations set forth in Count 1 ¶'s 19, 23, 24, 41 and 42 alleging fraudulent submission of invoices, makes it unclear whether Count 1 also charges a conspiracy to submit false invoices, such that clarification of the allegations set forth in Count 1 is necessary to enable the Defendants to prepare a defense and to prevent surprise at trial. Therefore, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 6 of the Defendants' Motion, Count 1, ¶ 2 (near the bottom of page 2) of the Indictment, alleges that the Defendants (other than Charles K. Morehead) acted "with intent to influence *and* reward the public official..." [Emphasis added] However, 18 U.S.C. § 666(a)(2) says it is a crime to corruptly give, offer, or agree to give anything of value to any person, "with intent to influence *or* reward ..." [Emphasis added] The verbs "to influence" and "to reward" are mutually exclusive because of the disjunctive word "or." Accordingly, Count 1, ¶ 2 is ambiguous such that clarification of the paragraph is necessary to enable the Defendants to prepare a defense and to prevent surprise at trial. Therefore, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraphs 7 and 8 of the Defendants' Motion, the Defendants' are entitled to a "definite written statement of the facts constituting the offense charged," Fed.R.Crim.Pro. 7, such that the defendants can prepare a defense. *Cantu*, 557 F.2d at 1178. The failure of the Superseding Indictment to state neither the identities of the co-conspirators involved in the conspiracy alleged nor the acts which these unnamed persons are alleged to have engaged in have rendered the preparation of a defense as to these allegations impossible and subject the Defendants to unfair surprise at trial. *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir.1979), *cert. denied*, 444 U.S. 990 (1979); *United States v. Thevis*, 474 F. Supp. 117, 126-27 (N.D.Ga. 1979) ("To the extent that the indictment does not disclose the known members of the conspiracy and the aiders and abettors to the conspiracy, it is insufficiently clear. It could hardly be anything but prejudicial surprise . . ."); *see also United States v. Mackey*, 551 F.2d at 970 (5th Cir. 1977). Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particulars set forth in paragraphs 9 and 10 of the Defendants' Motion, in order to verify the truth of the fact alleged in these paragraphs of the indictment, it is critical that the Defendants be given the identity of the individual who is the only witness to the alleged fact that Sean Carothers and the Governor met in private on or about April 11, 2003. The failure to provide a more definite statement regarding the identity of these individuals subjects the Defendants to surprise at trial and prevents them from preparing a defense as to these allegations. Furthermore, failure to disclose the full contents of the conversation alleged in Count 1, paragraph 12, subjects the Defendants to surprise a trial and prevents the Defendants from fully preparing its cross examination of a key Government witness, Sean Carothers. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particulars set forth in paragraphs 11, 12, and 13 of the Defendants' Motion, the Defendants' are entitled to a more "definite written statement of the facts constituting the offense charged," Fed.R.Crim.Pro. 7, such that the defendants can prepare a defense. *Cantu*, 557 F.2d at 1178. The Superseding Indictment alleges that Defendant Moultrie and Defendant Cawood "instructed" employees to engage in acts which the Government alleges were in furtherance of the charged scheme to defraud. The Defendants cannot defend against such accusations without the Government providing the identities of the employees whom the Defendants are alleged to have instructed, nor can the Defendants prepare a defense to such allegations without being informed as to which Defendant is alleged to have instructed each employee. *See Vastola* 670 F. Supp. at 1269-1270 (the Defendants are entitled to precise notice of the acts they are charged with committing). Finally, considering the thousands of pages of invoices involved in this case, the Defendants cannot prepare a defense as to the Superseding Indictment's allegations that the campaign contributions are linked to certain invoice items which are alleged to be false. These ambiguities in the Superseding Indictment subject the Defendants to surprise at trial and prohibit them from preparing a defense to the accusations in the indictment regarding the alleged reimbursement of campaign contributions. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particulars set forth in paragraphs 14, 15, and 16 of the Defendants' Motion, the defendants require a more definitive statement as to the identities to the persons mentioned in these bills of particulars in order to prepare a defense. As to paragraph 9, the identities of the persons who are alleged to be victims of the Defendants' alleged fraud are essential for the Defendants to prepare a defense to the charges brought against them in Count 2 of the Superseding Indictment. As to paragraphs 10 and 11, the Defendants requires the

identities of the employees referred to in these paragraphs because the Superseding Indictment attributes the acts of these unidentified employees to the Defendants and because the Superseding Indictment alleges that these unidentified employees were directed by the Defendants to commit acts which the Government alleges were part of the Defendants alleged scheme to defraud. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 17, 18, 19, and 20 of the Defendants' Motion, the Defendants' are entitled to a "definite written statement of the facts constituting the offense charged," Fed.R.Crim.Pro. 7, such that the defendants can prepare a defense. *Cantu*, 557 F.2d at 1178. The terms which the Defendants seek to clarify in this bill of particulars are terms used by the Government to describe the acts, and aspects thereof, committed by the Defendants in furtherance of the alleged scheme to defraud. The failure to accurately define such terms will force the defendants to guess as to what the meaning of these terms is; depriving the Defendants of the ability to prepare a defense. The Defendants are entitled to precise notice of the acts they are charged with committing. *Vastola* 670 F. Supp. at 1269-1270. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 21 and 22 of the Defendants' Motion, the Defendants require the Government specify which acts are attributed to which defendant. Since the Superseding Indictment groups all of the Defendants together and since the Superseding Indictment also groups all of the alleged victims of the alleged fraud together, the Superseding Indictment fails to provide notice as to what acts each Defendant must defend. Accordingly, the Defendants are unable to prepare a defense and they are subject to surprise at trial, and they pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 23 and 24 of the Defendants' Motion, the Defendants' are entitled to a "definite written statement of the facts constituting the offense charged," Fed.R.Crim.Pro. 7, such that the Defendants can prepare a defense. *Cantu*, 557 F.2d at 1178. The failure of the Superseding Indictment to state neither the identities of the co-conspirators involved in any conspiracy involving Counts 2 through 16, nor the identities of those aiding or abetting the Defendants' in their alleged fraud scheme has rendered the preparation of a defense as to these allegations impossible and subject the defendants to unfair surprise at trial. *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir.1979), *cert. denied*, 444 U.S. 990 (1979); *United States v. Thevis*, 474 F. Supp. 117, 126-27 (N.D.Ga. 1979) ("To the extent that the indictment does not disclose the known members of the conspiracy and the aiders and abettors to the conspiracy, it is insufficiently clear. It could hardly be anything but prejudicial surprise . . ."); *see also United States v. Mackey*, 551 F.2d at 970 (5th Cir. 1977). Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraphs 25 and 26 of the Defendants' Motion, each of the Defendants must be informed of what acts they are alleged to have committed in furtherance of the fraud. The Superseding Indictment, as written, names all Defendants as "knowingly caus[ing] to be delivered . . . envelopes [that] contained a fraudulent request for payment." Furthermore, Count 2 of the Superseding Indictment alleges that certain acts were committed by the Defendants collectively. Such failure to specify which acts were committed by which Defendant in furtherance of the alleged fraud scheme, prevents each Defendant to prepare his own defense and also subjects each Defendant to surprise at trial. The Defendants are entitled to precise notice of the acts they are charged with committing. *Vastola* 670 F. Supp. at 1269-

1270. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

As to the bill of particular set forth in paragraph 26 of the Defendants' Motion, Counts 2-16 explicitly charge a scheme to defraud in violation of 18 U.S.C. §§ 2 and 1341, but each of these Counts also incorporates ¶¶ 1-42 of Count 1, which allege a conspiracy to bribe in violation of 18 U.S.C. § 371. It is unclear why the entirety of Count 1, including its charge of conspiracy to bribe in violation of 18 U.S.C. § 371, is included in Counts 2-16, where the only offense charged is mail fraud. Accordingly, the Defendants pray that this Court direct the Government to provide this bill of particular.

For the above stated reasons, the Defendants pray that this Court direct the Government to provide a bill of particulars as required by law.

Respectfully submitted this 10th day of July, 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of July, 2008, 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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