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

**UNITED STATES OF AMERICA**

**V.** **CRIMINAL NO. 3:08CR014-M-A**

**ROBERT L. MOULTRIE,**
**NIXON E. CAWOOD,**
**CHARLES K MOREHEAD,**
**FACILITY HOLDING CORP d/b/a FACILITY MANAGEMENT GROUP, INC., FACILITY CONSTRUCTION MANAGEMENT INC., and FACILITY DESIGN GROUP, INC.**

**MOTION FOR REQUIRING A HEIGHTENED STANDARD IN RULING ON ADMISSION OF ANY CONSPIRACY EVIDENCE AND IN EVALUATING CONSPIRACY LIABILITY IN LIGHT OF DEFENDANTS' FIRST AMENDMENT RIGHTS**

Defendants Robert L. Moultrie, Nixon E. Cawood, Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management, Inc. and Facility Design Group, Inc., Defendant Robert L. Moultrie respectfully submits this motion. Among other relief, this motion seeks a ruling from the court on the heightened standard the Government must show in advance of tendering any evidence about coconspirator statements under Fed. R. Evid. 802.

This is a prosecution that goes to the heart of the political process. This is a case that goes to the circumstances under which a citizen or a company can support a political candidate. While the prosecution may respond, "no, it's a bribery and mail fraud

prosecution," the first and central charge in this prosecution relates to campaign contributions to a candidate for public office that on their face were legal under federal law and were reported on state political contribution reports and to the internal revenue service. The Government has charged bribery for those campaign contributions but completely failed to allege in the indictment any element of exchange in the alleged bribery. That issue has been addressed in a Motion to Dismiss Count One filed contemporaneously with this motion (Document 124).

The Motion to Dismiss Count One and this motion raise related but distinct issues. That motion raises that the indictment was insufficient because it failed to allege an exchange, which is required to establish bribery and is particularly critical given that the alleged "bribe" involves constitutionally protected political contributions. It is critical to require allegation of some element of an exchange or a direct allegation of an effort to "corrupt" the public official for the indictment to give notice of a charge of bribery. That is the basis of the motion to dismiss. This motion raises the related issue of what is constitutionally required should this case go to trial on a bribery charge—that campaign contributions and association for political ends are constitutionally protected, and, in basing a charge on *prima facie* constitutionally protected activity, the Government is to be held to the strictest standard of proof in showing intent to participate in an alleged conspiracy—a considerably stricter standard for weighing sufficiency of the evidence than is applied in ordinary conspiracy cases.

The legal principle that forms the basis of this motion is the principle of *strictissimi juris,* which literally means "the most strict right or law." The rule originated in cases with a conspiracy charge, where conduct of the defendant or the alleged conspiracy is "bifarious"—

that is where it can be said to have two interpretations, one legal and one illegal, and where the legal interpretation also implicates First Amendment rights, the court must require strict proof establishing that a defendant specifically intended to participate in the alleged illegal activities of the conspiracy. *See United States v. McKee,* 506 F.3d 225, 239 (3rd Cir. 2007) (following *N.A.A.C.P. v. Claiborne Hardware,* 458 U.S. 886, 918-19 (1982) to hold that where free speech or association rights are involved, evidence of intent and participation in a conspiracy must be judged "according to the strictest law"); *United States v. Dellinger,* 472 F.2d 340, 392 (7th Cir. 1972) (explaining application of this principle to "bifarious" conduct). This principle applies "[w]hen the group activity out of which the alleged offense develops can be described as a bifarious undertaking, involving both legal and illegal purposes and conduct, and is within the shadow of the [F]irst [A]mendment." *Dellinger,* 472 F.2d at 392; *United States v. Markiewicz,* 978 F.2d 786, 813 (2nd Cir. 1992) (quoting language from *Dellinger*).

Assuming that the conduct here can also be interpreted to have an illegal purpose, it is then clearly bifarious in the sense the term is used in *Dellinger* and other cases. In the Motion to Dismiss Count 1 of the Indictment for Failure To State an Offense at 3-6 (Document No. ____), there is a detailed analysis of Count One of the Superseding Indictment. In that Count, the Government alleges that Robert Moultrie held a fund-raiser and raised political contributions for an unnamed public official after the State of Mississippi had entered into a letter of intent with regard to The Facility Group and the beef plant project. As set forth in the Motion to Dismiss, the Superseding Indictment has no allegations of what any defendant did that was an exchange or an effort to "corruptly influence" the unnamed public official. The gaps in the Superseding Indictment that are at the heart of the Motion to Dismiss are just as critical to this motion.

The First Amendment rights raised in the Motion to Dismiss establish that the conduct charged in Count One is "bifarious" conduct and *strictissimi juris* applies. Campaign contributions involve both free speech and free association rights. *Buckley v. Valeo*, 424 U.S. 1, 14, 23 (1976) (Political campaign contributions involve the "area of the most fundamental First Amendment activities, and political contributions involve "protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate."); *see Fed. Election Com'n v. Colorado Republican Federal Election Campaign Comm.*, 533 U.S. 431, 466 (2001) (affirming continued validity of *Buckley*'s holding); *Chamber of Commerce v. Moore*, 288 F.3d 187, 192 (5th Cir. 2002) (citing *Buckley* for the principle that the First Amendment protects campaign contributions and expenditures); *FEC v. Wisconsin Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2676 (2007) (Scalia, J. concurring) ("contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections"). The government's interest in regulating political contributions and the constitutional limits imposed by the First Amendment have been explained in terms of *quid pro quo* exchanges: "The 'corruption' to which the Court repeatedly referred [to in *Buckley*] was of the '*quid pro quo*' variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official." *Wisconsin Right to Life,* ___ U.S. at ___, 127 S.Ct. at 2676 (Scalia, J., concurring). Obviously, a payment to a public official's campaign is not in itself illegal. "Any payment to a public official, whether it be a legitimate campaign contribution or a bribe, is made because of the public office he holds." *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993)(citing *Evans v. United States*, 504 U.S. 255, 268 (1992)).

The First Amendment directly protects efforts to influence the government. For instance, in the area of antitrust law, the Supreme Court "has clearly stated that efforts to influence public officials will not subject individuals to liability, even when the sole purpose of the activity is to drive competitors out of business." *Bayou Fleet, Inc. v. Alexander,* 234 F.3d 852, 861 (5th Cir. 2000). This is called the *Noerr Pennington* doctrine, and the Fifth Circuit has extended it outside the antitrust area, to include claims under section 1983[1] It is based on the First Amendment right to petition the government. *Acoustic Systems, Inc. v. Wenger Corp.,* 207 F.3d 287, 294-95 (5th Cir. 2000). This constitutional protection for contact with the government even encompasses anticompetitive conspiracies. *Bayou-Fleet,* 234 F.3d at 861 ("A conspiracy exception to *Noerr-Pennington* immunity has been explicitly rejected by the Supreme Court unless the conspiracy 'reaches beyond mere anticompetitive motivation.'" Citing *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 380 (1991)). The First Amendment protection here is not dependent on subjective intent—even retaliatory intent is protected. *Bayou Fleet, Inc.,* 234 F.3d at 862.

The Fifth Circuit's understanding of the *Noerr Pennington* doctrine and its extension to section 1983 cases is exactly harmonic with the principle of *strictissimi juris*: Where speech or conduct are protected by the First Amendment, there are limitations on the operation of "ordinary" rules governing conspiracy cases, and the court has special obligations in weighing the evidence. The campaign contributions described in Count One are constitutionally protected.

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[1] *Video Int'l Prod. Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1074, 1084 (5th Cir. 1988). The doctrine is named dafter two cases announcing it, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

The issues raised in the Motion to Dismiss Count One also have an impact here. The Government has failed to allege a *quid pro quo* or exchange. Yet even if there were allegations of a corrupt bargain, the Government should have to prove the facts constituting corruption to show that the defendant's conduct lacked First Amendment protection. In either event, it is clear that this is a context where the defendant's conduct with regard to Count One is bifarious. This Court must therefore accord the defendants the protections of *strictisimmus juris.*

Where this principle applies, a "[s]pecially meticulous inquiry into the sufficiency of proof is justified and required…." *Dellinger,* 472 F.2d at 393. To satisfy this standard, the court must:

> … determine if 'there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the illegal goals of the conspiracy and [the court] may not impute the illegal intent of alleged co-conspirators to the actions of the defendant.

*Markiewicz,* 978 F.2d at 813 (quoting *United States v.* ***Montour,*** 944 F.2d 1019, 1024 (2nd Cir. 1991)). If both the goal of the purported conspiracy and the methods of the purported conspiracy are illegal, *strictissimi juris* does not apply. *Montour,* 944 F.2d at 1024. The doctrine "emphasizes the need for care in analyzing the evidence against a particular defendant… both by the jury in its fact-finding process and by the court in determining whether the evidence is capable of convicting beyond a reasonable doubt." *Delinger,* 472 F.2d at 393.

Where *strictissimi juris* applies, it takes the case out of the ordinary rules governing charges of criminal conspiracy; to apply "the panoply of rules applicable to a conspiracy having purely illegal purposes" is improper. *United States v. Spock,* 416 F.2d 165, 173 (1st Cir. 1969). In such a case, a defendant's specific intent must not be ascertained by reference to the conduct of others, even where the defendant has knowledge of the others' statements.

"The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*." *Id.*

The principle arose out of Smith Act cases, which were prosecutions for being a member of the Communist Party. *Scales v. United States,* 367 U.S. 203, 230 (1961) and *Noto v. United States,* 367 U.S. 290, 291 (1961) identified and defined the principle. *See Dellinger,* 472 F.2d at 392 (setting forth this history). The principle was expanded to encompass free speech rights in addition to free association rights in cases involving draft resistance during the Vietnam era, such as *Dellinger* (which is the Chicago Seven prosecution) and *Spock*. The Supreme Court made clear it recognized the application of this principle to free speech rights in *Claiborne Hardware*.

One component of *strictissimi juris* is that a defendant cannot be convicted solely because of his associations. *United States v. McKee,* 506 F.3d 225, 238 (3rd Cir. 2007). That court explained *strictissimi juris* in the context of free association and free speech rights:

> First Amendment protections require the government produce more than evidence of association to impose liability for conspiracy. The Supreme Court has instructed that, "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Morever, evidence of intent must be judged "according to the strictest law."

*McKee,* 506 F.3d at 239 (quoting *N.A.A.C.P. v. Claiborne Hardware,* 458 U.S. 886, 918-19 (1982)). In *McKee,* a tax-protester case in which the defendants claimed that they were being prosecuted for advocating tax avoidance, the government showed that both defendants had signed checks and filed 941 payroll returns that intentionally omitted employees involved in the tax protest. This joint participation in the tax fraud, the court held, would have

supported a jury verdict that each defendant had made a conscious decision to run their partnership in a way that violated the tax laws. *McKee,* 506 F.3d at 239.

*Claiborne Hardware* illustrates how this principle works. The case involved First Amendment rights of both free association and free speech. The case was a suit alleging a civil conspiracy in which the defendants were organizing a boycott of local business for reasons relating to civil rights activities. As a part of the boycott, the trial court had found that illegal means—violence, threats, and other intimidation—were used to enforce the boycott. The Supreme Court held that for liability for association with a group allegedly using illegal means, "there must be 'clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization].'" that were illegal. *Claiborne Hardware,* 458 U.S. at 919 (quoting *Noto v. United States,* 367 U.S. at 299, additions in original). As the Court held in *Claiborne Hardware,* this principle increases the burden relating to establishing participation in the conspiracy.

The case of *United States v. Cerilli,* 603 F.2d 415 (3rd Cir. 1979), a Hobbs Act-extortion prosecution involving political contributions, shows the limits of this principle. The Government established illegal, and extortionate, conduct by each individual defendant. *Cerilli* involved low-level elected public officials in Pennsylvania who were involved in the letting of snow-removal contracts. They went to contractors and demanded that the contractors pay a set percentage of their contracts in order to keep the work. The defendants told the contractors that they knew how much they were making, and demanded political contributions based on that amount. Because of the direct evidence of the extortionate conduct by each defendant, the court held that *strictissimi juris* did not protect the defendants. *Id.* at 421.

In stark contrast, there are no allegations in this case that any defendant gave political contributions to the unnamed public official because they were extorted or because they were part of a corrupt exchange. There is no allegation of an agreement of any kind between Robert Moultrie, Nixon E. Cawood, or the corporate defendants and the unnamed public official. In fact, as elaborated in the Motion to Dismiss Count One, the Government has made clear that they have not alleged a *quid pro quo*.

The Supreme Court has described this court's role in ordinary operation of the rules governing coconspirator statements:

> Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court." Petitioner and the Government agree that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court.

*Bourjaily v. United States,* 483 U.S. 171, 175 (1987). The clearest statement of how the rule would vary where the actions of an alleged coconspirator is bifarious is in *Spock*¨

> [A]n individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."

*Spock,* 416 F.2d at 173) (quoting *Scales,* 367 U.S. at 234). There are several important aspects of this statement: That the expression of intent to join the allegedly illegal parts of the conspiracy, if that is how the defendant is shown to have joined, must be unambiguous; by showing the commission of the very legal act alleged in the indictment; or by acts clearly

undertaken to join in the illegal activity. Conviction requires that illegal acts be directly attributable to the defendant individually.

An agreement to get together to make political contributions is legal and constitutionally protected. An agreement to get together to use political contributions to corruptly influence a public official is not. Because the former is constitutionally protected, the Government must show not just that the individual defendants knew of an illegal end but that they made unambiguous statements or acts clearly intended to carry out the illegal ends. This Court's obligation under Fed.R.Evid. 104(a) is ordinarily straightforward in a way that can be handled during trial without disruption of an orderly trial process. This Court's heightened obligations from *strictissimi juris* are not straightforward in that way. This Court is required to make specific determinations that each individual has acted unambiguously to join allegedly illegal conduct.

The issues raised by this motion do not solely go to issues that will arise when the court evaluates motions for a directed verdict. The requirement is that there be strict proof that each individual defendant be shown to have participated in the illegal end, directly (and not merely by joining in the effort, aware of the illegal end). This strict demand in evaluating the evidence against each individual defendant also creates compelling considerations in evaluating motions for a severance.

Recall that in order to properly join offenses in a single indictment the offenses must be part of the same act or transaction, or the same series of acts or transactions. Since the facts as alleged in the Superseding Indictment show that the alleged bribery conspiracy had a different object than did the alleged fraud scheme, involved different alleged participants, and involved a different alleged *modus operandi,* the only way that joinder of these offenses

could be proper is if they were part of a single overarching conspiracy. Since the proper joinder of Count 1 and Counts 2-16 is contingent on the existence of a single overarching conspiracy, as opposed to two separate transactions (as advocated in the Motion to Sever contends), the Courts' evaluation of the conspiracy under the rule of *strictissimi juris* is likely to be dispositive of the motion to sever.

This Court should not delay in examining the Government's conspiracy allegations and applying the required heightened standard by waiting to do so at trial. Not only will pre-trail application of the rule of *strictissimi juris* aid the court in making important rulings on central issues of this case. Pretrial determinations, as requested in this motion, will aid the Court in ruling on the motions to sever – by allowing the Court to determine whether all of the acts alleged are truly part of a single conspiracy. Pretrial determinations of the nature of the conspiracy alleged, in accordance with the rule of *strictissimi juris*, will allow the Court to apply the correct standard to assessing the propriety of the defendants' motion to dismiss count 1 under Rule 12. A determination of the scope of the conspiracy under the rule of s*trictissimi juris*, will clarify what should and should not be in the Superseding Indictment – aiding the Court in its rulings on the defendants' motion to strike for surplusage and motion for a bill of particulars.

Finally, waiting until evidence is presented before a jury at trial to make the determination under the rule of *strictissimi juris* is likely to result in prejudicing the jury. The only connection between Count 1 and Counts 2-16 is the very activity which is protected by the First Amendment and the rule of *strictissimi juris* – the constitutionally protected campaign contributions which were the Government seeks to characterize as nefarious by

arguing, but not proving, to have been specifically recovered though billing on the contract.[2] The conspiracy alleged in Count 1 of the Superseding Indictment is not only the glue by which the Government seeks to tie the defendants into a single group of wrongdoers – thereby attributing the independent actions of one defendant to all defendants, but it is also the method by which the Government has sought to join to offenses which do not relate to each other. The Court should therefore make a determination of the scope of the nature and scope of the conspiracy pre-trail, in an effort to not only prevent confusion of the jury in an already complex case, but also to prevent wasting of the Court's time and prejudice of the jury.

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[2] The Government's theory that the defendants recovered the alleged $63,000 in campaign contributions is premised upon the Government's calculation that the time billed by Defendant Morehead to the project over a particular period of time equals $63,000 in charges to the project. The Government's calculation of $63,000 is an arithmetic manipulation which ignores the reality of the situation as evidenced by the fact that the Government's calculation of $63,000 was only reached by totaling all of the time billed by Defendant Morehead over the selected time period, which erroneously assumes that Defendant Morehead spent no time working on the project. If this contrived calculation is all that links Counts 1 and Counts 2-16 into a single conspiracy, then it is imperative that the Court review such evidence and determine whether such a conspiracy exists prior to the impaneling of a jury. Waiting until the time of trial and allowing the jury to hear this evidence—which is little more than a manipulation of numbers that ultimately does not bear on the relatedness of the two offenses—will likely confuse a jury and potentially prejudice them as well.

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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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