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.	)	

ROBERT L. MOULTRIE'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT UNDER RULE 12(b)(3)(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE; TOGETHER WITH SUPPORTING MEMORANDUM OF LAW

1. Motion.

Pursuant to Fed. R. Crim. P. 12(b) (3) (B) and 7(c), defendant, Robert L. Moultrie ("Mr. Moultrie") moves this Court to dismiss Counts 2 through 16 of the Superseding Indictment. The Superseding Indictment contains fatal defects in each Count, since, as a matter of law, it misstates and mischaracterizes the "Project Management Agreement" (the "Agreement") in allegations in paragraphs 15 and 36 of Count 1, paragraphs 4(b) [on page 49] and 12 [on page 51] of Count 2 (all of which are incorporated by reference into Counts 3 – 16).

2. Statement of Facts.

Under the Agreement in this case, The Facility Group was to be paid in two components: A fee of $3,347,974.00, plus an additional amount for "services compensation" that was guaranteed to be $2,500,000, but not to exceed $3,021,418, with the services compensation component to include "compensation for **all** labor, salaries, indirect labor costs and social burdens, materials, equipment,

temporary facilities, insurance, and general conditions costs directly incurred in or attributable to performance of the Services." This motion is concerned with misleading allegations in the indictment about the services compensation component of the contract. The Superseding Indictment is misleading in part in that it pretends away the language, explicitly contained in the contract, listing the elements that the "services compensation component [is] to include…" By doing this, the Superseding Indictment pretends away issues about the meaning of the Agreement.

One defect in the Superseding Indictment is contained in ¶ 15 of Count 1 in the Superseding Indictment, which alleges:

> … on or about July 11, 2003, THE FACILITY GROUP d/b/a FACILITY CONSTRUCTION MANAGEMENT, INC. ("FCMI"), entered into a Project Management Agreement with the State of Mississippi and the [Community] Bank to manage the completion and design of the Mississippi Beef Processors plant whereby THE FACILITY GROUP would be paid not only a $3,547,974.00 fee, but also an additional reimbursement of up to $3,021,418.00 for costs associated with the project "at cost."

Substantially similar allegations are contained in paragraphs 36 of Count 1, 4(b) and 12 of Count 2, and incorporated into Counts 3 – 16.

The flaw is that the Superseding Indictment's paraphrasing of the Agreement – "reimbursement of up to $3,021,418.00 for costs associated with the project 'at cost'" – misstates and erroneously characterizes the actual wording of the Agreement, primarily by omission of important language about costs actually contained in the agreement.[1]

The principle provision of the Agreement that defines The Facility Group's "compensation for its Services"[2] – ¶ 3.1.2 – actually states:

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[1] A complete copy of the Agreement is attached at Tab 1.

[2] The term "Services" is defined in the Agreement (¶ 2.1) as "FCMI shall supervise, manage and perform pursuant to this Agreement, certain ancillary and related services required for completion of the design and construction of the Project." The term "Project" is defined in the

> 3.1.2. FCMI's compensation for Services shall be at cost not to exceed $3,021,418.00 (the "Services Compensation"), provided that the minimum Services Compensation shall be $2,500,000.00, and further provided that if the Services Compensation equals an amount less than $3,021,418.00, FCMI shall receive an additional amount equal 50% of the difference between $3,021,418.00 and the total costs constituting the actual Services Compensation. The Services Compensation shall include compensation for all labor, salaries, indirect labor costs and social burdens, materials, equipment, temporary facilities, insurance, and general conditions costs directly incurred in or attributable to performance of the Services (but not including general overhead or profit). …[3]

As is readily apparent, the Agreement does not simply say – as inaccurately alleged in the Superseding Indictment – that there was to be "reimbursement of up to $3,021,418.00 for costs associated with the project 'at cost'." The Agreement adds important language about costs. The Agreement actually states:

1. "the **minimum** Services Compensation **shall be** $2,500,000.00,"

2. The Facility Group's compensation shall be "not to exceed $3,021,418.00,[4]" and

3. "Services Compensation **shall include** compensation for **all** labor, salaries, indirect labor costs and social burdens, materials, equipment, temporary facilities, insurance, and general conditions costs **directly incurred in or attributable to performance of the Services** (but not including general overhead or profit)." (Emphasis added)

Contrary to the Superseding Indictment, the Agreement does not say that The Facility Group's costs will be compensated "at cost". First, Paragraph 3.1.2 explicitly contemplates a minimum payment of $2.5 million, with a maximum of $3,021,418.00. The Superseding Indictment

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Agreement (page 1, first "Whereas" clause) as "the design and construction of a beef processing plant in Oakland, Mississippi."

[3] The Agreement also contains other provisions regarding payment, including a provision concerning disputed amounts (¶ 6.1.2) and payment for "changes" (¶ 7).

[4] The sentence in ¶ 3.1.2 of the Agreement reads, "FCMI's compensation for Services shall be at cost not to exceed $3,021,418.00 (the "Services Compensation"), provided that the minimum Services Compensation shall be $2,500,000.00, …."

completely omits the minimum payment. Second, the Agreement provides that Services Compensation "***shall*** include … ***all***" of the following nine categories of expenses:

(1) "labor,"

(2) "salaries,"

(3) "indirect labor costs,"

(4) "social burdens,"

(5) "materials,"

(6) "equipment,"

(7) "temporary facilities,"

(8) "insurance," and

(9) "general conditions costs."

There is an ambiguity in this language relating to the highlighted words: Costs "shall include compensation for all labor, salaries, indirect labor costs and social burdens, materials, equipment, temporary facilities, insurance, and general conditions costs **directly incurred in or attributable to performance of the Services** (but not including general overhead or profit)." This ambiguity is that the highlighted phrase "directly incurred in or attributable to performance of Services" could modify all nine categories of reimbursable expenses; or it could modify only the ***ninth*** category, "general conditions costs." Furthermore, because the disjunctive word "or" appears between the phrase "directly incurred in" and the phrase "attributable to," the words "attributable to"[5] obviously

[5] There are a number of other critical issues involving this and other contract language that will become important should this case proceed to trial. For instance, the words "attributable to" were intended to authorize attribution of costs in accordance with The Facility Group's customary and standard accounting practices. "Words generally bear their usual and common signification; but technical words, words of art, or ***words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning***." (Emphasis added). *See, e.g.*, Infinity Ins. Co. v. Patel, 737 So. 2d 366, 369 (Miss. App.1998); 4 Samuel Williston, A treatise on the Law of Contracts § 609, at 402 (3d ed.1961); *See also* Hicks v. Bridges, 580 So. 2d 743, 746 (Miss.1991); and

mean costs ***not*** "directly incurred,"--otherwise the phrase would be redundant. Thus the language of Paragraph 3.1.2. literally says that both a cost that was "directly incurred" and a cost that was "attributable" to performance is compensable.

It is also mystifying how an Agreement that provides for payment of "indirect labor costs and social burdens" can support a Superseding Indictment charging fraud for billing above what is "at cost." The indictment here is inexact in order to avoid the exact language of the Agreement.

The literal interpretation of the language is borne out by principles of contract interpretation. It is a fundamental principle that a contract should be construed so as to give effect to all of its provisions and not render any provision meaningless. *See, e.g.*, Gulfside Casino Partnership v. Mississippi State Port Authority at Gulfport, 757 So. 2d 250, 257 (Miss. 2000); Facilities, Inc. v. Rogers-Usry Chevrolet, Inc., 908 So. 2d 107, 111 (Miss. 2005); *see also* O.C.G.A. § 13-2-2(4).[6] Thus, the Project Management Agreement means that in addition to costs directly incurred, "***indirect labor costs and social burdens***, materials, equipment, …, insurance, and general conditions costs … ***attributable to performance of the Services***" "shall" be included within the compensation for "Services Compensation." (Emphasis added). This is true even if those indirect labor costs and social burdens, materials, equipment, …, insurance, and general conditions costs" were ***not*** "directly incurred in … performance of the Services." Otherwise, both the disjunctive word "or" and the inclusion of the phrase "attributable to" would be meaningless.

Paragraph 3.1.2 also contains the parenthetical "(but not including general overhead or profit)." Neither term – "general overhead" or "profit" – is defined anywhere in the Agreement. It

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O.C.G.A. § 13-2-2(2). This may require expert testimony under Federal Rule of Evidence 702 should the Court determine the Agreement is ambiguous, requiring parol evidence. *E.g.*, Gatlin v. Sanderson Farms, Inc., 953 So. 2d 220 (Miss. 2007).

[6] "The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part."

is not clear what the parenthetical modifies, that is, whether it modifies all of the nine categories of reimbursable expenses under ¶ 3.1.2,[7] or whether it only modifies the phrase "general conditions costs directly incurred in or attributable to performance of Services."

In any event, there is nothing in the Agreement that limits The Facility Group reimbursement "at cost," as alleged in the Superseding Indictment. Most importantly, the costs permitted to be included in Services Compensation are set forth in the Agreement, albeit ambiguously. Further, paragraph¶ 3.1.2 says that "compensation for Services shall be at cost not to exceed $3,021,418.00 (the 'Services Compensation'), provided that the minimum Services Compensation shall be $2,500,000.00…."[8] In other words, the contract explicitly provides that there will be at least $2,500,000.00 in services compensation. Yet, as will be seen, the indictment pretends otherwise.

The inaccurate paraphrasing of ¶ 3.1.2 is a major and fatal flaw in the Superseding Indictment. The actual wording of the Agreement is known (even if its meaning is ambiguous); and the Superseding Indictment cannot be premised on an inaccurate paraphrasing of the Agreement.

The inaccurate paraphrasing goes directly to the heart of the Superseding Indictment's allegation in ¶ 21 of Count 2 that The Facility Group was paid "approximately $2,000,000 for 'Services Compensation' in excess of THE FACILITY GROUP'S actual costs, contrary to the terms of the Project Management Agreement." That is impossible in light of the clear provision in the contract that "compensation for Services shall be at cost ***not to exceed*** $3,021,418.00 (the 'Services

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[7] Under one reasonable reading, the parenthetical could modify only the ninth category – "general conditions costs" as modified by "directly incurred in or attributable to performance of the Services" – because one permissible category is "indirect labor costs" which could be included in "general overhead."

[8] The Indictment's selective quotation of the words "at cost" without reference to the complete wording of ¶ 3.1.2 is subject to the criticism at the core of the rule of completeness embodied in Federal Rule of Evidence 106. That rule is based on "the misleading impression created by taking matters out of context." [Advisory Committee Notes, Rule 106]

Compensation'), provided that the ***minimum*** Services Compensation shall be $2,500,000.00…." (Emphasis added). With a minimum of $2.5 million and a maximum of $3.021 million, it is impossible for The Facility Group to have been paid $2.0 million in excess of actual costs, as alleged in the Superseding Indictment. There was only $521,000 of "play" between the minimum and maximum services compensation in the contract; a $2.0 million excess was impossible. In fact, elsewhere the Superseding Indictment alleges that The Facility Group was paid the $3,021,418 "cap" amount, in ¶ 9 of Count 2. A reader of the Superseding Indictment is left at an utter loss how there can be $2,00,000.00 in fraudulent billings for costs when, regardless of the costs, there was to be at least $2,500,000.00 paid and $3,021,000.00 was what was actually paid.

These internal inconsistencies appear throughout the Superseding Indictment. Although the Superseding Indictment alleges (in ¶21 of Count 2) that The Facility Group was supposedly paid $2.0 million in excess of its actual costs, it also alleges that "[a]ccording to the 'Services Compensation' provision, THE FACILITY GROUP would receive a minimum of $2,500,000.00 and up to $3,021,418.00 for 'cost' reimbursement." [Superseding Indictment ¶36, Count 1] The $2.5 million minimum guarantee is also alleged in ¶¶ 4(b) and 12 in Count 2 of the Superseding Indictment. The $3,021,418 maximum – "not exceed" – is also alleged in ¶ 12 of Count 2.

With a minimum of $2.5 million and a maximum of $3.021 million, it is impossible to have been overpaid by approximately $2.0 million, as alleged. The difference between the minimum and the maximum is $521,418.00, making the allegation that The Facility Group was supposedly overpaid by approximately $2.0 million impossible. This impossibility vividly illustrates this facial defect in the Superseding Indictment.

3. Argument and Citation of Supporting Authority.

The inaccurate paraphrasing of the Agreement throughout the Superseding Indictment is a fatal deficiency. The determination of the meaning of a contract and whether it contract is

ambiguous, in the first instance, a matter of law for the trial court, not the jury. *E.g.*, Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 429 (5th Cir. 2007); Windsor Village of Clinton, LLC v. Solon Automated Serv's, Inc., 392 F. Supp. 2d 769 (S.D. Miss. 2005); Gatlin v. Sanderson Farms, Inc., 953 So. 2d 220, 222 (Miss. 2007). It is for this reason that this Court should decide as a matter of law whether (a) the Superseding Indictment is deficient on its face, and (b) whether the Agreement is ambiguous.

A. The Superseding Indictment fails to unambiguously provide a written statement of the essential facts.

A defendant must be "fairly informed of what charge he must be prepared to meet." United States v. Conley, 349 F.3d 837, 840 (5th Cir. 2003); Russell v. United States, 369 U.S. 749, 763 (1962). An indictment should "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Russell, 369 U.S. at 768. Since the fraud crimes charged arise out of the alleged acts of the Defendants in administering the Project Management Agreement, inaccurate paraphrasing of that very contract cannot fairly inform a Defendant of the charge he must be prepared to meet nor does it accurately inform the trial court of the facts.

Anyone who reads the contract and the indictment together would be mystified as to how there can be $2,000,000 of overcharged services in a contract that required payments of at least be $2,500,000.00 for services and no more than $3,021,00.00. Furthermore, anyone who reads the indictment with its allegation of fraudulent billing for costs and then turns to the contract to learn what costs can be billed is left with an even greater question, because the contract is ambiguous as to what costs could be billed.

The importance of this issues is highlighted by another motion before this Court: The Daubert motion as to Sean Carothers's testimony. Carothers's testimony is premised on the same misreading of the contract as that in the Superseding Indictment, disregarding the actual language in

the agreement and using the phrase "at cost" in place of the actual contract language. *See* Defendants Motion To Exclude Testimony from Putatitve Expert Sean Carothers at 10-12 (Document Number 90) (discussion Carothers's purported opinion on this issue and why it is both an improper reading of the Agreement and an improper subject for expert testimony).[9]

These ambiguities go to the heart of the charges of fraudulent billing in the Superseding Indictment. With clarity lacking as to what is an appropriately billed cost, the line between a properly billed cost and an improper one is unclear. It is exactly this sort of ambiguity that the Rule of Lenity is designed to address: For there to be a crime, it must be clear what you can and cannot do. Criminal charges cannot be premised upon ambiguities.

Moreover, "[i]f the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense." Van Liew v. United States., 321 F.2d 664, 669 (5th Cir. 1963). Here, the offense is based on an inaccurate interpretation – paraphrasings – of the contract, not on the actual wording of the contract. The flaws in the Superseding Indictment embody the Van Liew court's fears: the Superseding Indictment resulted in the Grand Jury charging an offense on an impossible set of facts – alleging false "Services Compensation" billings of over $2,000,000 on the contract [Superseding Indictment, Count 2, ¶ 21] despite the fact that the contract only allowed for $521,000 worth of "play" as to the Services Compensation [Project Management Agreement, Paragraph 3.1.2]. Such a defectively drafted indictment is subject to dismissal. *See* United States v. Karkisian, 231 F. Supp. 489, 491-492 (D.C. Colo. 1964)(Indictment's language was an unjustified and unwarranted variation on statute's language, and because of that variation, defendant was deprived of his right to be

[9] Other defendants have raised essentially identical objections as to other putative experts. *See* Motion to Exclude Testimony from Putatitve Expert Dennis Dickinson at 3 (Document Number 92); Motion to Exclude Testimony of Putative Experts William Purdy & Ralph Germany at 3-4 (Document Number 94).

informed of the nature and cause of the accusation against him, and to have this done in plain, concise, and definite language).

Similarly, Federal Rule of Criminal Procedure 7(c) requires an indictment to contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged."[10] Mischaracterization of a contractual provision on which the offense is premised fails, as a matter of law, to comport with Rule 7(c), giving rise to a defect in the Superseding Indictment under Rule 12(b)(3)(B).

"It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, ***without any uncertainty or ambiguity***, set forth all the elements necessary to constitute the offense intended to be punished.'" Hamling v. United States, 418 U.S. 87, 117 (1974) (Emphasis added). An indictment which inaccurately paraphrases a contractual provision is uncertain and ambiguous.

B. A Contractual Rule of Lenity applies because the contract is ambiguous.

At worst, the Defendants' submission of reimbursable costs resulted from an ambiguous contract. The fact that the Agreement is ambiguous is why the Superseding Indictment paraphrases the Agreement. If this Court finds the Agreement to be ambiguous, the Rule of Lenity principle applies and the Superseding Indictment should be dismissed. United States v. Apex Oil Co., Inc., 132 F.3d 1287, 1291 (9th Cir. 1997) (ambiguous regulation – "In the face of uncertainty as to the meaning of what is forbidden, the rule of lenity requires dismissal of count one of the indictment"). As this is a criminal prosecution, not a civil dispute, it is not for the Court to interpret the Agreement other than determine that ambiguity exists. A criminal charge cannot be based on ambiguity; this Court's process of construction in a criminal case is to simply establish whether an ambiguity exists. If so, the Rule of Lenity applies and the prosecution cannot go forward.

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[10] Mr. Moultrie is also filing a Motion for a Bill of Particulars.

The United States Supreme Court recently explained that the Rule of Lenity embodies a "venerable rule" that requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them" and "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain." United States v. Santos, 128 S.Ct. 2020 (June 2, 2008).

None of the contractual terms in ¶ 3.1.2, *e.g.*, "social burdens," "indirect labor costs," "general conditions costs," "directly incurred in or attributable to performance of Services," "general overhead," etc., are defined anywhere in the Agreement. As noted above, it is not clear whether the parenthetical "(but not including general overhead or profit)" modifies only "general conditions costs directly incurred in or attributable to performance of the Services" or whether it modifies all of the nine categories of reimbursable expenses under ¶ 3.1.2. It is not clear whether the phrase "directly incurred in or attributable to performance of Services," modifies only the ninth category of reimbursable expenses, or all nine categories. Those are all ambiguities.

The Rule of Lenity has been applied to contracts, and applied to mandate that a prosecution for false payment requests cannot be premised on an ambiguous contract. Under the Rule of Lenity, a prosecution for making false statements cannot be founded on an ambiguous contract. United States v. Race, 632 F.2d 1114 (4th Cir. 1980). If a contract is ambiguous, that is, it is "susceptible of at least two reasonable constructions," the defendants cannot, as a matter of law, be found guilty of making a false request for payment. Race, 632 F.2d at 1120.

Ambiguity in the Agreement is important because the central issue in this criminal prosecution is whether the Defendants with criminal intent billed for costs that were not within those permitted or contemplated by ¶ 3.1.2 of the Agreement, as actually written, not as inaccurately paraphrased in the Superseding Indictment. From a facial reading of ¶ 3.1.2 it readily appears the

eleven undefined contractual terms in ¶ 3.1.2 and the language that follows them are subject to alternative interpretations.

The words actually used in a contract – not an indictment's paraphrasing of those words – are the primary consideration when determining whether a contract is ambiguous. *E.g.*, Gatlin v. Sanderson Farms, Inc., 953 So. 2d 220 (Miss. 2007) (the court looks to the "four corners" of the agreement).

The principle underpinning of the Rule of Lenity is one of fundamental fairness – citizens must have fair warning of those acts which are proscribed. United States v. Garrett, 984 F.2d 1402, 1411 (5th Cir. 1993) (Rule of Lenity means "ambiguous criminal statutes should be construed in favor of the defendant"); McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.) ("it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). The Rule of Lenity is based on long-standing requirements of due process—that it must be reasonably clear criminal conduct occurred. *See* United States v. Lanier, 520 U.S. 259, 266-67 (1997) (describing this aspect of the fair notice required for conduct described by a criminal statute to be criminal).

The Rule of Lenity operates not only in the space where legislative guidance is completely absent or lacking; it is also used to bolster a court's decision where a court is asked to interpret a particular word or phrase. United States v. Thompson, 484 F.3d 877,881 (7th Cir. 2007). In Thompson, the question was what conduct was required for a conviction of bribery under 18 U.S.C. §666. The court noted that it had a particular undefined term in the statute, the word "misapplies." The court looked to the caption of the statute (with the phrase "Theft or Bribery") and reasoned:

> [A] statute's caption does not override its text, but the word 'misapplies' is not a defined term. We could read that word broadly, so that it means any disbursement that would not have occurred had all state laws been enforced without any political considerations. Or we could read it narrowly, so that it means a disbursement in

> exchange for services not rendered…or to suppliers that would not have received any contract but for bribes, or for services that were overpriced, or for shoddy goods at the price prevailing for high-quality goods.

A broad interpretation would have included the defendant's conduct, while a narrow interpretation, which clearly encompasses obviously illegal activity, did not. The court looked to the statute's caption for guidance "plus the rule of lenity" and adopted the narrower construction, reversing the defendant's conviction under § 666. Thompson, 484 F.3d at 881.

The Third Circuit has also applied the Rule of Lenity to reverse a conviction under § 666. United States v. Cicco, 938 F.2d 441 (C.A.3, 1991) In *Cicco*, there was an implied promise by the defendant (a mayor) that city employees could keep their jobs if they aided in the defendant's reelection. The court reasoned

> … that a solicitation of specific election day services with municipal employment as the *quid pro quo*, might come within the literal language of § 666. It must also be recognized, however, that the language the drafters…chose is also consistent with an intention of focusing solely on offenses involving theft or bribery, the crimes identified in the title of this section."

Id. at 444. Further, if the statute is read as broadly as the Government in this case argued it should be, "its boundaries are difficult to limn." *Id.*[11]

The principle of "fair warning" embodied in the Rule of Lenity was applied in the context of an ambiguous contract by the Fourth Circuit in Race where the court held that "one cannot be guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract." Race, 632 F.2d at 1121.

In Race, the defendants were accused of making false statements by billing in excess of the amounts authorized under the contract and by billing for things not included in the contract at all. *Id.* at 1117. The Court reviewed the contract in question and found that the defendants were in fact

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[11] It is important to note for other issues in this case that the court in Cicco found there to be a quid pro quo (the exchange was keep-your-job for help-in-the-election but nevertheless found the "quo"—help in the election—insufficient to convict under §666.

authorized by the contract to bill the government as they had done, dismissing the defendants convictions for the submission of false of fraudulent invoices. *Id.* at 1120. Notwithstanding this conclusion, the court noted that:

> even if [the court] were to accept the Government's argument that the [contract clause in question] is ambiguous, the result [reversal of the conviction] would not be different. To be ambiguous a contract must be susceptible of at least two reasonable constructions…. Such a conclusion[, that the contract clause was ambiguous,] requires a ruling that the defendants cannot be convicted under [18 U.S.C. § 1001] for a statement or billing which may be said to be accurate within a reasonable construction of the contract. This is so because one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract.

Id. In applying this rule, the court held that "whenever a defendant's statement or action under a contract accords with a reasonable construction of the enabling language of the contract, the government will not have carried its burden of negativing [sic] any reasonable interpretation that would make the defendant's statement factually correct and thus a conviction under [18 U.S.C. §] 1001 cannot stand under those circumstances." *Id.* (internal quotes removed).

This holding – that persons cannot be convicted for making false statements where their statements are not false under a reasonable interpretation of an ambiguous contract – is widely accepted in many other Circuits that have explicitly cited Race for this proposition. *See* United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002); United States v. Migliaccio, 34 F.3d 1517, 1525 (10th Cir. 1994); United States v. Dale, 991 F.2d 819, 832-33 (D.C. Cir. 1993); United States v. Johnson, 937 F.2d 392, 399 (8th Cir. 1991); *see also*, General Dynamics, 644 F.Supp. at 1500-01 (C.D. Cal. 1986) (holding a prosecution cannot be based on an ambiguity as to whether a contract was fixed-price or best-efforts); United States v. D'Alessio, 822 F.Supp. 1134, 1144 (D.N.J. 1993) (following General Dynamics in holding that lenity barred a prosecution based on an ambiguous rule). In United States v. Bryant, ___ F.Supp.2d ____, 2008 WL 2315720 (D.N.J. 2008), the court explained how the application of this rule to contracts necessarily proceeds from the Rule of Lenity's logic:

> If a defendant cannot be subject to prosecution for an alleged breach of duties arising from an ambiguous court rule, a defendant cannot be subject to liability for an alleged breach of duties arising from an ambiguous contract.

Similarly, in United States v. Moses, 94 F.3d 182 (5th Cir. 1996), the defendants appealed convictions for making false statements on an Immigration and Naturalization Service ("INS") form concerning their marital status. The Court reversed the conviction of one defendant because his response to a question on the INS form was "not false on its face [and therefore], the evidence was insufficient to support the conviction" for false statements. Id. at 189. In reaching this holding, the Court declared that "a prosecution for a false statement under [18 U.S.C.] § 1001 or under the perjury statutes cannot be based on an ambiguous question where the response *may* be literally and factually correct. . . . An indictment premised on a statement which on its face is not false cannot survive." Id. at 94 F.3d at 189 (emphasis in original).

The Fifth Circuit has stated that the Rule of Lenity requires that "a court should resolve doubts about an ambiguous criminal statute in favor of the defendant." United States v. Phipps, 319 F.3d 177, 188 (5th Cir. 2003). Thus, even though the interpretation advanced by the government was "reasonable"—the Fifth Circuit's reasoning suggests the government's was the more reasonable interpretation—the government's view while persuasive was not controlling because there was more than one possible interpretation. Lenity required reversal of the conviction. *Id.; see* United States v. Reedy, 304 F.3d 358, 367 (5th Cir. 2002) ("Because 'argumentative skill' 'could persuasively and not unreasonably reach' either interpretation, the Court ruled that the 'ambiguity should be resolved in favor of lenity'…" quoting Bell v. United States, 349 U.S. 81, 83 (1955)).

The logic in Moses and Phillips demonstrates that the rule articulated in Race is applicable in the Fifth Circuit.

The Fifth Circuit has demonstrated a willingness to look outside its own Circuit when dealing with false statement prosecutions. In Moses, the court relied upon cases from the Sixth and

Eighth Circuits, Gahagan and Vesaas, respectively, for its own legal standard in a false statements case, a standard which was later applied in the Fifth Circuit as valid precedent. *See* United States v. Herlihy, 157 F.3d 900, 1998 WL 611195 (5th Cir. 1998) (unreported).

The Fifth Circuit's reliance on decisions in the Eighth Circuit is particularly important because the Eighth Circuit has readily accepted Race and the rules espoused therein concerning ambiguous contracts and false statement prosecutions. *See* United States v. Johnson, 937 F.2d 392, 398 (8th Cir 1991) ("When the government has created an ambiguity upon which the defendant has reasonably relied in making his statement, the government will ordinarily be unable to negative the defendant's interpretation") *citing* Race, 632 F.2d at 1120.

For all of these reasons, Race is persuasive and should control the application of the Rule of Lenity. *See also* United States v. Garrett, 984 F.2d 1402, 1411 (5th Cir. 1993) (Rule of Lenity means "ambiguous criminal statutes should be construed in favor of the defendant")

CONCLUSION

For the foregoing reasons, this Court should dismiss Counts 2 through 16 of the Superseding Indictment because of the fatal defects in the Superseding Indictment involving mischaracterizations of the Agreement in the allegations of ¶¶15 and 36 of Count 1, in ¶¶ 4(b) and 12 of Count 2, and incorporated into Counts 3 – 16.

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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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