UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL NO. 3:08CR014-MPM-SAA
	)	
ROBERT L. MOULTRIE,	)	
NIXON E. CAWOOD,	)	
CHARLES K. MOREHEAD,	)	
FACILITY HOLDINGS CORP., d/b/a	)	
THE FACE FACILITY GROUP,	)	
FACILITY MANAGEMENT GROUP, INC.,	)	
FACILITY CONSTRUCTION	)	
MANAGEMENT, INC., and	)	
FACILITY DESIGN GROUP, INC.,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO "DEFENDANTS' EMERGENCY MOTION TO STRIKE PLEADINGS CONTAINING GRAND JURY TESTIMONY BASED UPON VIOLATION OF RULE 6(E)"

Comes now the United States of America, by and through the United States Attorney for the Northern District of Mississippi, and in response to the defendants' "emergency" motion to strike pleadings would respectfully show unto the Court as follows, to wit:

1. Defendants FACILITY HOLDING CORPORATION d/b/a THE FACILITY GROUP, FACILITY MANAGEMENT GROUP, INC., FACILITY CONSTRUCTION MANAGEMENT, INC., and FACILITY DESIGN GROUP, INC. have collectively petitioned the Court to strike pleadings containing references to grand jury testimony. In doing so, they declare an emergency, asking that the government's pleadings be stricken, and suggesting that other sanctions might be appropriate. In response, the government would respectfully show unto the Court that disclosure of matters occurring before the grand jury ". . . may be made to an attorney for the government for use in performing that attorney's duty . . . ." and may be

authorized by the court when the disclosure is made ". . . in connection with a judicial proceeding. . . ." Rules 6(e)(3)(A)(I) and 6(e)(3)(E), Fed. R. Crim. P.

2. In discovery the defense invoked the provisions of Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, requiring the government to produce the prior grand jury testimony of any directors, officers, employees or agents of the corporation who would have been in a position to bind the corporation regarding the subject of their statements. Pursuant to their request the government disclosed to the defendants the grand jury testimony of both George Sewell and Robin Williams. The defendants now complain that in their view government counsel has improperly disclosed excerpts from the same testimony of those two witnesses. In response to the defendants' request to exclude the expert testimony of Sean Carothers, government counsel provided an excerpt from the grand jury testimony of general counsel George Sewell which testimony was directly relevant to an issue that is before the Court, i.e., whether or not the Project Management Agreement envisioned a 2X multiplier. In response to another defense motion, one to dismiss Counts One through Sixteen of the Superseding Indictment based upon, *inter alia*, what the defense perceives to be the fatal absence of a *quid pro quo*, government counsel provided an excerpt from the grand jury testimony of Robin Williams that clearly establishes that *quid pro quo*.

3. Rule 6(e)(3)(A) specifically envisions disclosure of matters occurring before the grand jury to attorneys for the government for that attorney's use in performing his official duties. Certainly, answering motions to exclude testimony and to dismiss would fall within the duties of a government attorney. Additionally, the disclosure of matters occurring before the grand jury in connection with a judicial proceeding is specifically authorized by Rule

6(e)(3)(E)(I) provided that disclosure is authorized by the court. The defendants may wish to argue that such authorization must be formal and must precede the disclosure, but the actual practice in this district is to the contrary. The best example might be the disclosure of grand jury transcripts as *Jencks* material (Rule 26.2, Fed. R. Crim. P., and 18 U.S.C. § 3500) prior to trial or, in this case, the disclosure of that same grand jury material to the defense, pursuant to the defendants' discovery requests, months in advance of trial. Clearly, the district court has the inherent authority to reject or approve that disclosure, but it has never been the practice in this district to seek formal written authority in advance of disclosing *Jencks* material. It therefore appears that it is not so much the disclosure of grand jury material that offends the defense, but rather its impact on the legal sufficiency of their motions. That does not make its use improper. The disclosure of matters occurring before the grand jury in the course of an AUSA's official duties in connection with a judicial proceeding before the court and under the court's supervision is a legitimate and proper use of grand jury materials.

United States v. Eisenberg, 711 F.2d 959, 961 (11th Cir. 1983), and the other cases cited by the defense highlight the fact that the secrecy requirements of Rule 6(e) pertain with greatest force pre-indictment, and in fact every case cited by the defense involves pre-indictment disclosures of information. Prior to an indictment being made public, there is an enhanced concern that the release of grand jury information might prejudice an innocent individual or place officers at risk when they attempt to execute a warrant. In the case *sub judice*, the indictment has already been made public, and the initial disclosures of grand jury material were made at the specific request of the defendants; only now that it is being used against them do they complain of its disclosure.

Government counsel have performed their duties properly, and the defendants' motion should be denied and overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert H. Norman, AUSA, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

This 8th day of August, 2008.

/s/ *Robert H. Norman*
ROBERT H. NORMAN
Assistant United States Attorney