

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

Criminal No. 3:08cr014-MPM

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.

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS COUNTS ONE THROUGH SIXTEEN OF THE
SUPERSEDING INDICTMENT**

Comes now the United States and files its response to defendants' motion to dismiss Count One of the Superseding Indictment and defendants' motion to dismiss Counts Two through Sixteen of the Superseding Indictment. In support of its response, the government would state as follows:

Defendant's Arguments

With the present motion, defendants ask the Court to dismiss Count One, making essentially three arguments: First, they claim it does not contain the necessary elements of 18 U.S.C. § 666(a)(2); second they contend the superseding indictment does not provide essential notice of the offense charged; the third argument is a constitutional argument about the vehicle of the bribe - campaign contributions; fourth the defendants argue in a separate motion which will be addressed herein that Counts Two through Sixteen of the Superseding Indictment should be dismissed. The United States will respond to each argument in turn:

I. The Indictment Contains all Essential Elements of 18 U.S.C. §§ 666(a)(2) and 371.

Conspiracy

In the present case, Robert L. Moultrie, Nixon E. Cawood, the entities that make up The Facility Group and others are charged with conspiring to bribe a public official in violation of Title 18, United States Code, Sections 666(a)(2) and 371. The elements of conspiracy under 371 are (1) an agreement between two or more people, (2) to commit a crime, and (3) an overt act performed by one of the members in furtherance of that agreement. United States v. Jobe, 101 F.3d 1046, 1063 (5th Cir. 1996), United States v. Cihak, 137 F.3d 252, 259 (5th Cir. 1998).

In this case the conspiracy charge is clearly laid out. The agreement concerns a plan devised by Moultrie, Cawood and The Facility Group to corruptly influence and reward the public official, in violation of Title 18, United States Code, Section 666(a)(2). In addition, numerous overt acts in furtherance of the defendants' conspiracy are listed in Count One.

18 U.S.C. § 666(a)(2)

As to the underlying offense, 18 U.S.C. § 666(a)(2) provides in pertinent part:

(a) Whoever, if the circumstances described in subsection (b) of this section exists -

(2) corruptly gives, offers or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a)(2).

There are no Fifth Circuit pattern jury instructions for 18 U.S.C. § 666(a)(2); however in the context of a 371 conspiracy, a review of the statutory language enumerated in 666(a)(2) suggests the government must allege in its indictment:

(1) that “the public official” was an agent of the government of the State of Mississippi,

(2) during any one year period specified in the superseding indictment, the government of the State of Mississippi received benefits in excess of \$10,000 in federal funds,

(3) that during any one year period, that the defendants conspired with one another and with others known and unknown to corruptly offer, give or agree to offer or give a thing of value of more than \$5,000 to “the public official”,

(4) that by such plan to offer, give or agree to give something of value, the defendants intended to influence or reward “the public official” in connection with a business or transaction or series of transactions of the state government of Mississippi.

1. All of These Elements are Present in Count One.

All of these elements are alleged in Count One. The defendants do not claim the “the public official” was not an agent of the government of the State of Mississippi. Nor can they deny the fact that the Mississippi Development Authority and State of Mississippi received far in excess of \$10,000 in federal money during 2003. Likewise, the defendants cannot contest that the third element is explicitly depicted in the indictment. The indictment charges that Moultrie and his co-conspirators directly gave more than \$5,000 in campaign contributions to the public official. The defendants’ may not like the Grand Jury’s assessment of their actions, but that does not change the fact that the language depicted in fourth element is also clearly alleged in Count One.

Accordingly, all statutory elements are properly alleged in Count One.

2. The charge under 666(a)(2) turns on the payors' intent (Moultrie, Cawood and the companies' intent), not the public official's intent.

In addressing the defendants' motion, it is important to note the distinctions between the three possible offenses enumerated in 18 U.S.C. § 666. The first paragraph of the statute 666(a)(1)(A) concerns embezzlement or theft of federal money. That is not what is charged here. The second offense is found in 666(a)(1)(B) and concerns bribery from the intent perspective of the recipient of the bribe or the public official's viewpoint. This is also not charged in Count One.

The offense that is alleged in Count One falls under the third choice – 666(a)(2), which covers the intent of the person who is **offering or giving the bribe, not the public official's intent in receiving it.**

Moultrie and his co-conspirators have wholly ignored this point. Instead, in support of their motion, they cite numerous irrelevant cases in which their specific argument attacking 666(a)(2) was never raised. The cases relied upon and cited by the defendants for the most part involve extortion cases under the Hobbs Act under 18 U.S.C. § 1951, federal gratuity cases under 18 U.S.C. § 201, mail and wire fraud cases under 18 U.S.C. §§ 1341 and 1343, and numerous other cases under 666(a)(1)(A) concerning theft and embezzlement and 666(a)(1)(B) which address bribery from the intent of the recipient or public official.¹

¹ In support of their motion defendants cite a litany of cases that do not concern the specific requirements of 666(a)(2): United States v. Abu-Shawish, 505 F.3d 550 (7th Cir. 2007) (**theft of funds under 666(a)(1)(A)**); United States v. Panarella, 277 F.3d 678 (3rd Cir. 2002) (**wire fraud under 18 U.S.C. 1343**); United States v. Vitillo, 490 F.3d 314 (3rd Cir. 2007)(**theft of funds under 666(a)(1)(A)**); United States v. Medley, 913 F.2d 1248 (7th Cir. 1990) (**receiving bribe under 666(a)(1)(B)**); United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996) (**receiving bribe under 666(a)(1)(B)**); United States v. Washington, 688 F.2d 953, 958 (**mail**

These types of violations do not concern 666(a)(2) and are not charged in Count One of the superseding indictment. Simply put, Moultrie and his co-defendants' argument for the most part addresses the wrong paragraph of 666 and is couched from the wrong perspective.

Count One and 666(a)(2)

The conspiracy, as charged in the superseding indictment, clearly focuses on the Georgia executives' plan to corruptly influence and reward the public official by *giving* and *offering* bribes. The charge strictly adheres to the statutory requirements of 666(a)(2), which addresses the giving/paying of the bribe rather than the receipt of it. The Fourth Circuit has made clear that under 666(a)(2) that to determine whether a crime has occurred, the jury must look to the **intent of the payors, not the intent of the payee/recipient**. United States v. Jennings, 160 F.3d 1006, 1017 (4th Cir. 1998) (emphasis added).² Thus, the only intent the jury is to consider under 666(a)(2) is the corrupt intent of the payors (Moultrie, Cawood and the corporate entities).

In other words, consideration of the intent of the recipient (public official) is only truly mandated in prosecutions under 666(a)(1)(B), which is not charged in the present case.

The Fifth Circuit has not directly addressed the defendants' specific attack on 666(a)(2).

fraud under 18 U.S.C. 1341)); United States v. Ford, 435 F.3d 204 (2nd Cir. 2006) (receiving bribe under 666(a)(1)(B)); McCormick v. United States, 500 U.S. 257 (1991) (Hobbs Act Extortion under 18 U.S.C. 1951); United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) (gratuity under 18 U.S.C. 201); U.S. v. Allen, 10 F.3d 405 (7th Cir. 1993)(aiding in illegal gambling business); United States v. Griffin, 154 F.3d 762 (receiving bribe under 666(a)(1)(B)). United States v. Ganim, 510 F.3d 134 (receiving bribe under 666(a)(1)(B) and Hobbs Act extortion under 18 U.S.C. 1951).

² See also United States v. Campbell, 684 F.2d at 148 n.11 (a gratuity case under 201 cited by the Jennings Court for the proposition that under 666(a)(2) "the donor may be convicted of giving a bribe even despite the fact that the recipient had no intention of altering his official activities." (internal quotations omitted)).

However, in United States v. Reyes, the Fifth Circuit in responding to a sufficiency of evidence claim offered by a co-defendant who was convicted under 666(a)(2), stated “[t]o convict under § 666(a)(2), the jury must find that the defendant acted with ‘intent to influence or reward’ a government agent.” United States v. Reyes, 239 F.3d 722, 737 (5th Cir. 2001). That is specifically what is charged here. In Reyes, there was no mention of the necessity of an explicit *quid pro quo*. In fact in discussing the requisite intent of a briber or payee, the Fifth Circuit cited directly to the statute - 18 U.S.C. § 666(a)(2). Id. at 737.

3. 666(a)(2) Does not Require an Explicit *quid pro quo* and one Should Not be Imported Into This Case.

As this Court is well aware 666(a)(2) does not contain or require an explicit *quid pro quo* element. Nevertheless, Moultrie and his charged co-conspirators argue that the Court should import this additional element into their case.

Other Courts have shot down the defendants’ argument. In United States v. Agostino, the defendant, Agostino, managed the Toll Road Division of the Indiana Department of Transportation. One of his subordinates (Goetz) supervised the process of randomly selecting survey stations and calculating fuel prices on the Toll Road. United States v. Agostino, 132 F.3d 1183, 1187-89 (7th Cir. 1997). Agostino told Goetz that the process of setting fuel prices was too cumbersome and that Goetz was no longer in charge of randomly selecting the survey stations. Agostino informed Goetz that Gas City would take over the selection of the survey stations. Around a month later, Agostino handed the employee \$4,000 in cash in an envelope. Agostino told Goetz he was doing a good job and did not make enough money. Agostino claimed the \$4,000 was “PAC” money, provided by a person Goetz believed to be the manager of Gas City. The subordinate ultimately returned the money to Agostino. Id.

Thereafter, Agostino was indicted under 18 U.S.C. § 666(a)(2) and convicted after a jury trial. Agostino appealed. He argued to the Seventh Circuit that because a *quid pro quo* is an “essential element” of § 666, the indictment was facially insufficient for failing to identify the specific act or acts he was trying to influence by giving Goetz \$4,000.

The Seventh Circuit disagreed. In rejecting the same argument now offered by Moultrie and his co-conspirators, the Seventh Circuit correctly noted that, like in the present case, the charge against Agostino involved “666(a)(2), and focuses on the *offer* of a bribe.” In affirming Agostino’s conviction, the Seventh Circuit explained:

We decline to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2). Section 666(a)(2), by its statutory language, requires that the defendant act “*corruptly ... with intent to influence or reward.*” **This intent, and not any specific *quid pro quo* is what must be alleged in the indictment.** Thus, Agostino’s indictment is not facially insufficient for failing to include an essential element of the offense.

Agostino, at 1190 (7th Cir. 1997) (emphasis added).

In reaching this decision, the Seventh Circuit referenced the district court’s citation to United States v. Castro, 89 F.3d 1443 (11th Cir. 1996). In Castro, the Eleventh Circuit similarly addressed whether, under Section 666(a)(2) the government must show a direct *quid pro quo* relationship between the defendant and the agent of the agency receiving federal funds. Id. at 1454.

The Eleventh Circuit like the Seventh, declined to import a “directness” requirement into Section 666(a)(2), stating that “the appellants narrow reading of the bribery statute would belie the statute’s purpose ‘to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery.’” Castro at 1454 (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 369-70 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3510-11).

In United States v. Gee, 432 F.3d 713, 714 (7th Cir. 2005), the Seventh Circuit declined to

impose an additional *quid pro quo* element in a bribery charge, this time under 666(a)(1)(B). The defendant appealed his conviction under Section 666 complaining that the absence of a *quid pro quo* prevents his conviction. The Seventh Circuit reaffirmed that Section 666 did not require such a link. **“A *quid pro quo* of money for a specific legislative act is sufficient to violate the statute, but it is not necessary.”** *Id.* at 714. (emphasis added). The holding in Gee was based on the Seventh Circuit’s reasoning in Agostino. See also United States v. Jennings, 160 F.3d 1006, 1017 (4th Cir. 1998) (“Under 666(a)(2) the intent of the payor, not the intent of the payee, is determinative of whether a crime occurred.”).

The United States requests that the Court not import and impose additional elements into 666(a)(2).

4. \$100,000 and the Contract

The United States is not required to allege or prove a *quid pro quo* to convict Moultrie, Cawood or The Facility Group. But even if it was, Moultrie’s former employee Robin Williams’ Grand Jury testimony eviscerates Moultrie’s entire argument about the lack of any *quid pro quo*.

Robin Williams was a member of the Georgia Legislature while employed as a “consultant” for Robert Moultrie and The Facility Group. Williams attended an April 2, 2003 dinner with the public official, one of the public official’s campaign employees and Robert Moultrie. The dinner took place in Jackson, Mississippi just days before The Facility Group was announced as Project Manager of Mississippi Beef Processors, LLC. After dining with the public official, Moultrie and The Facility Group billed the costs of the dinner with the public official as well as Moultrie’s travel to the dinner back to the State of Mississippi as a business expense.

Concerning the Project Management Agreement and the related fundraiser, Williams offered

the Grand Jury the following testimony about a conversation he had with Robert Moultrie:

Grand Juror: You said it (the fundraiser) was already planned. So the (public official) knew there was going to be a (sic) fundraiser before the contract was signed?

Robin Williams: I - - this - - here is what I was told that day. On the phone this is what was told. We got the contract. I've (Moultrie) got to do a fundraiser for the (public official). I've got to raise \$100,000 dollars. Now, in that - - the contract to me took that they had done their deal and this is the date. And the date was pretty quickly after phone call. He said we're going to be in Smyrna at my home. I need you to bring some money.

Documentary evidence proves invitations for the fundraiser for the public official were sent out on July 7, 2003, just days before the contract was signed on July 11, 2003. Less than two weeks later, on July 23, 2003, a fundraiser for the public official was held at Moultrie's Smyrna, Georgia residence. Moultrie, Cawood and employees of The Facility Group and others raised \$25,000 for the public official³ and Williams provided a check for \$25,000 to the Democratic Governors Association.

Then, less than seven days after the fundraiser, The Facility Group created a Political Action Committee, from which it gave two more contributions to the public official in the amounts of \$20,000 and \$25,000 respectively for a total of \$95,000 raised by Moultrie, Cawood and The Facility Group.

³ Individual employees of The Facility Group contributed \$1,000 each to the public official, with knowledge their contributions would be reimbursed by the company. The Facility Group, then reimbursed each employee under the guise of a "bonus."

5. Why so much interest in a race two states away from their home state of Georgia?

Neither Moultrie, Cawood nor The Facility Group gave a single dime to the public official when he ran for office in 1999. But it should be noted they were not in the hunt for a multi-million dollar contract to manage the construction of a beef processing plant in Mississippi that year like they were in 2003.

Similarly, there is no evidence of any contributions by The Facility Group PAC to any other Mississippi public official – ever. Furthermore, a quick study of The Facility Group’s PAC reveals that their PAC contributions alone to the Mississippi public official are almost 5 X more than The Facility Group gave to any officials in its home state of Georgia during the entire existence of the PAC.

To further evidence their corrupt intent, in addition to reimbursing company employees for their campaign contributions under the disguise of a “bonus”, after receiving the contract, The Facility Group began “padding” its billings to the State of Mississippi, Richard Hall and Mississippi Beef Processors, to recoup the amount of money it spent on bribe payments.

Accordingly, Count One is sufficiently alleged and will be overwhelmingly proved.

II. The Indictment Sufficiently Advises the Defendants of the Charges.

Rule 7(c)(1) states that the indictment “shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed R. Crim. P. 7(c)(1). “In applying this rule, [the Fifth Circuit] has noted that practical, not technical considerations govern the validity of an indictment, and the test of the validity of an indictment is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards.” United States v. Caldwell, 302 F.3d 399, 410 (5th Cir. 2002)

(internal quotations omitted). An indictment is constitutionally sufficient if it alleges each essential element of the offense charged, fairly informs the defendant of the charges against which he must defend, and enables the defendant to invoke the double jeopardy clause in any subsequent prosecution. United States v. McAfee, 8 F.3d 1010, 1013 (5th Cir. 1993).

The courts “are not concerned with whether the indictment could have been better framed, or whether it invokes a particular ‘ritual of words,’ but whether it conforms to the minimal standards required by the Constitution.” United States v. Harms, 442 F.3d 367, 372 (5th Cir. 2006) (citing United States v. Wilson, 884 F.2d 174, 179 (5th Cir. 1989)).

Count One is Clear

Count one of the indictment could not be more clear. It charges a conspiracy during which:

...ROBERT L. MOULTRIE, Chairman and Chief Executive Officer of THE FACILITY GROUP and NIXON E. CAWOOD, Chief Operating Officer of THE FACILITY GROUP, defendants, devised and executed a scheme to give more than \$5,000 in campaign contributions to the reelection campaign of an agent of the government of the State of Mississippi, hereinafter referred to as ‘the public official’, who is not charged in this indictment, with intent to influence and reward the public official in connection with the State of Mississippi’s selection of THE FACILITY GROUP to manage the completion of the design and construction of Mississippi Beef Processors, LLC...

It is puzzling to the United States how Moultrie can argue that he does not know what he is charged with. The indictment is extremely specific— **campaign contributions given to influence and reward a public official in connection with the State of Mississippi’s selection of Moultrie’s company to manage construction of a beef processing plant for which they would be paid millions of dollars.**

Every element is covered. An indictment that tracks a statute’s words is generally sufficient “as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth

all the elements necessary to constitute the offense intended to be punished. United States v. London, 550 F.2d 206, 210 (5th Cir. 1977). “In other words, the language of the statute may guarantee sufficiency if all required elements are included in the statutory language.” United States v. Arlen, 947 F.2d 139 (5th Cir. 1991) (quoting United States v. Gordon, 780 F.2d 1165, 1171 (5th Cir. 1986)). See United States v. Gaytan, 74 F.3d at 551-552 (5th Cir. 1999) (finding indictment sufficient in spite of defendants’ argument that it was ‘factually barren’ and did not contain “time, dates, places and persons involved and specific criminal acts necessary to know the nature of the charges and prepare a defense.”); United States v. Flores, 63 F.3d 1342, 1361 (5th Cir. 1995)(money laundering indictment held sufficient that merely specified date on which event occurred, the exact dollar amount involved and described that general type of transaction at issue was the movement of money.)

Although the statutory language and one overt act is all the United States is required to allege and prove at trial to obtain a bribery conviction against Moultrie and his co-conspirators, the subject indictment provides far greater detail. In addition to the description of the corrupt intent to influence and reward the public official, the indictment lists a plethora of overt acts in furtherance of the conspiracy, including the following among others:

- (1) That Moultrie and Robin Williams met with the public official and his campaign employee days before The Facility Group was announced to manage the project,
- (2) The mailing of invitations to the fundraiser at Moultrie’s Georgia residence for the public official days before the subject Project Management Agreement was signed,
- (3) Using The Facility Group’s employees as straw contributors to get around corporate donation limits,
- (4) Reimbursing employees for their campaign contributions under the guise of a “bonus” to the employees salaries,
- (5) Creating a Political Action committee to deliver additional campaign contributions to the public official,
- (6) Making two additional contributions from their newly created PAC in the amounts of \$20,000 and \$25,000 respectively and
- (7) Submitting bogus bills to the State of Mississippi to recover the money The Facility Group, Moultrie and Cawood spent on campaign contributions.

In short, the indictment is constitutionally sufficient. It provides overwhelming notice,

alleges all elements required by Title 18, United States Code, Section 666(a)(2) and provides a laundry list of overt acts in furtherance of the conspiracy. There is no doubt that defendants know what they are charged with.

III. Bribes are not Protected Under the First Amendment

The United States wholeheartedly agrees that a campaign contribution to a public official is not itself illegal. However, when people conspire to corruptly influence and reward government officials through the means of a contribution it becomes the vehicle of a bribe. Furthermore, Moultrie and his co-conspirators have failed to offer a single case that provides blanket protection under the First Amendment to those who conspire to corruptly influence and reward public officials through the means of campaign contributions. Perhaps late Judge Warren Ferguson of the Ninth Circuit put it best when he said “[t]he constitution does not protect the right to bribe.” Harwin v. Goleta Water District, 953 F.2d 488, 496 dissenting (9th Cir. 1991) (citing Austin v. Michigan Chamber of Commerce, 494 U.S. at 1397, Buckley v. Valeo, 424 U.S. at 26-27).

The United States asserts that the act of bribery is not protected by the First Amendment and falls clearly within the prohibition enumerated in 18 U.S.C. § 666(a)(2).

IV. Counts 2 through 16 of the Indictment are Constitutionally Sufficient.

Counts Two of the superseding indictment charges Moultrie, Cawood, Charles K. Morehead and The Facility Group with aiding and abetting each other in a scheme to fraudulently overstate and inflate costs associated with their work on the Mississippi Beef Processors, LLC in order to obtain money by false and fraudulent pretenses. The scheme was executed through fifteen different deliveries by interstate carrier Federal Express. The offenses in Counts Two through Sixteen are charged under the mail fraud statute, Title 18, United States Code, Section 1341.

1. All Elements are Met and the Indictment is Sufficient

“An indictment should be found sufficient unless no reasonable construction of the indictment would charge the offense for which the defendant has been convicted.” McKay v. Collins, 12 F.3d 66, 69 (5th Cir. 1994). As the Seventh Circuit explained, “[a] court reviewing the sufficiency of an indictment ‘should consider the challenged count as a whole and should refrain from reading it in a hypertechnical manner.’ An indictment must be read to include facts that the allegations it contains necessarily imply.” Ginsburg v. United States, 909 F.2d 982, 984 (7th Cir. 1990) (citations omitted).

As was discussed previously in this motion, an indictment is constitutionally sufficient if it (1) enumerates each prima facie element of the charged offense, (2) notifies the defendant of the charges filed against him, and (3) provides the defendant with a double jeopardy defense against future prosecutions.” *E.g., United States v. Flores*, 63 F.3d 1342, 1360 (5th Cir. 1995) (citations omitted). Specifically in the context of mail fraud offenses, the Fifth Circuit has found that the indictment must allege that “(1) the defendant devised or intended to devise a scheme to defraud, (2) the mails were used for the purpose of executing, or attempting to execute, the scheme, and (3) the falsehood employed in the scheme were material.” *United States v. Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002).

While specific intent is an essential element of mail fraud, it need not be specifically charged in the indictment. *Id.* at 409 n.8. “If the facts alleged in the indictment warrant an inference [of] material[ity], the indictment is not fatally insufficient for its failure to allege materiality *in haec verba*.” *Id.* at 409 (quoting *United States v. McGough*, 510 F.2d 598, 602 (5th Cir.1975)).

2. The Scheme, Mailings and Materiality are Adequately Alleged.

As to the first element of mail fraud, the superseding indictment contains a scheme to defraud, which includes descriptions of various different fraudulent activities carried out by The Facility Group and the executives including overbilling of employee hours and “cooking the books” by creating false time sheets which depicted that employees worked hours on the Mississippi Beef Project that they did not really work. The scheme outlines The Facility Group’s plan to inflate and pad invoices to recover the money Moultrie, Cawood, The Facility Group employees and PAC spent in contributions to the public official.

Also clearly illustrated in the scheme are the directions of The Facility Group’s President Nixon Cawood to an employee to “get it all” referring to accounting hours, as well as defendant Charles Morehead’s assistance in preparing a false schedule of accounting hours which was billed to the State of Mississippi, Richard Hall and Community Bank. In addition, Count Two also alleges Morehead’s and The Facility Group’s involvement in directing employees to bill time to the Mississippi Beef Processors project that they did not really work on the project and causing to be submitted invoices containing inflated employee hours, among other fraudulent acts.

In the motion to dismiss Counts Two through Sixteen, the defendants disregard all of these badges of fraud. Instead, they focus on only one aspect of Count Two, that is The Facility Group’s plan to double bill labor. The defendants contend that The Facility Group’s definition of cost permits them to double bill and on at least one occasion bill 10 X more than actual cost of insurance. Moultrie and his co-defendants hope to squeeze The Facility Group’s frauds into what he claims is permitted by the contract. This will be discussed briefly below, and is discussed at length in the government’s response in opposition to defendant’s motion to exclude expert testimony of Sean Carothers. Regardless, a scheme is alleged and the first element of the mail

fraud statute is clearly contained in Counts Two through Sixteen.

As to the second element, use of the mails, the Fifth Circuit has recognized that Congress expanded the mail fraud statute to reach private interstate commercial carriers such as Federal Express. See United States v. Marek, 238 F.3d 310, 318 (5th Cir. 2001). Therefore, the defendants cannot seriously contest the second element of Section 1341.

The third and final element requires the falsehoods employed by The Facility Group and its executives to be material. While specific intent is an essential element of mail fraud, it need not be specifically alleged in the indictment. Caldwell at 409. “If the facts alleged in the indictment warrant an inference [of] material[ity], the indictment is not fatally insufficient for its failure to allege materiality *in haec verba*.” *Id.* At 409 (quoting United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975)). Again, the indictment alleges the submission of bogus accounting hours, false time sheets and various fictitious claims for reimbursement. These representations as well many others were described in the indictment and are clearly material to the scheme.

3. There Are No Reasonable Explanations for the Defendants Fraud

The defendants selective attack on the overbilling scheme is limited to the frauds discovered by Sean Carothers. The complicated scheme exposed by Carothers and carried out by The Facility Group and its executives is thoroughly explained in the government’s response in opposition to defendant’s request to exclude expert testimony of Sean Carothers and will not be fully rehashed in this motion. Furthermore, it is only a portion of the scheme alleged in Counts Two through Sixteen. Although, Moultrie does not address the numerous other frauds alleged in Counts Two through Sixteen, it goes without saying that there is no reasonable interpretation of the Project Management Agreement that would permit the defendants to bill Mississippi Beef Processors, the State of Mississippi and the bank hidden costs disguised to seek reimbursement for the money

Moultrie, Cawood and The Facility Group spent on campaign contributions to the public official.

Likewise, there is no reasonable interpretation of the contract that would enable the defendants to bill an employees time to the contract when that employee is not working on the contract. Similarly, it is not reasonable for The Facility Group or its executives to create a fictitious accounting schedule.

In addition, although they touted open book accounting, The Facility Group adamant refused to provide back up documentation concerning insurance and engineering costs. Perhaps the fact that they were billing the State of Mississippi, the project and the bank approximately 10 x the amount of their cost for insurance figure heavily in their decision to close their books. As to insurance, The Facility Group billed \$433,000, when insurance really cost approximately \$40,000. There is simply no reasonable explanation under the contract for such gross overbilling absent fraud.

When asked to show accounting costs, instead of providing accurate time sheets depicting the work performed by accountants, The Facility Group created a fictitious accounting schedule, which listed accounting hours each employee would work from September of 2003 to April of 2004. Then, they began billing according to the schedule, not the accounting time that was actually worked. It defies credibility to suggest that The Facility Group could predict in September, 2003 the exact number of hours its accountants would work in January or February of 2004. Nevertheless, that is what they did, and that is how they began billing. They also increased employee hours without the employees knowledge, then billed these hours to the project. These fraudulent activities and the resulting cover up highlight The Facility Group's knowledge that these acts were illegal.

4. Although They Fail to Address These Frauds, They Still ask the Court to Dismiss Counts 2-16.

A District Court was reversed for dismissing a similar mail fraud scheme which alleged that a construction company billed entities for work not performed and services not rendered. United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir. 1998) (District court's dismissal of mail fraud counts of indictment reversed by Court of Appeals, where the mail fraud was based upon the defendants' scheme to defraud various entities by fraudulently billing them for work not performed and materials not used in the construction and repair projects.)

There is nothing novel about schemes to pad costs, overbill employee hours or to bill an employee to a project, when the employee is not working on the project. Similarly, cases involving false back up documentation, false time sheets and bogus submissions are routinely prosecuted. See United States v. Baker, 626 F.2d 512 (5th Cir. 1980)(False time sheets claiming pay for hours not actually worked, which were submitted to housing authority were material.); United States v. Goodwin, 566 F.2d 975 (5th Cir. 1978); United States v. Anderson, 579 F.2d 455 (8th Cir. 1078)(Conviction affirmed where defendant inflated claim to conceal payment of false labor costs.); United States v. LaBar, 506 F.Supp. 1267 (M.D.PA 1981) (Denying motion to dismiss mail fraud indictment against three individuals and three corporations who inflated fuel costs on contracts.); United States v. Huber, 603 F.2d 387 (2nd Cir. 1979) (Conviction upheld in case where defendant inflated costs under cost plus contract and submitted costs for reimbursement.); United States v. Grissom, 44 F.3d 1507 (10th Cir. 1995) (Conviction affirmed for making false statements to bank, where defendant concealed from bank detailed breakdown of labor and material costs in order to obtain more funds than required to complete project.)

In addition, the notice to the defendants is sufficient. A similar scheme charged under the embezzlement and theft portion of 666(a)(1), was found to be sufficient to enable defendants to

prepare for trial, to prevent surprise and to interpose a plea of double jeopardy, where the Government referenced ‘fictitious time sheets’ and payments issued were based on false and fictitious information.” United States v. Hunter, 2006 WL 3334607 (D.Conn. 2006).

The defendants are on notice, and there is no reasonable interpretation of the contract that permits The Facility Group to claim an employee worked certain hours when he or she did not. There is no reasonable explanation for creating bogus time sheets, false accounting schedules and for hiding campaign contribution reimbursements in employee labor hours.

5. The Defendants Misconstrue the Rule of Lenity.

Finally, the defendants seek relief under the “rule of lenity.” The rule of lenity is wholly inapplicable in this case, and their analysis of the rule is erroneous. The Fifth Circuit has held that the “rule of lenity” is a rule of statutory interpretation, not contract interpretation. It dictates that statutory ambiguities be resolved in favor of leniency and prohibits a Court from interpreting ambiguous statutes in a manner that maximizes the penalty. United States v. Brito, 136 F.3d 397, 408 (5th Cir. 1998); Bifulco v. United States, 447 U.S. 381, 385 (1980); United States v. Sayklay, 542 F.2d 942, 944 (5th Cir. 1976). There is certainly nothing ambiguous about the mail fraud statute, 18 U.S.C. § 1341, so the “rule of lenity is inapplicable.

Accordingly, the United States submits that Counts Two through Sixteen are constitutionally sound and adequately alleged. Therefore, the United States submits that the defendants’ motion to dismiss these counts should be denied.

V. Conclusion

For all reasons cited herein, the United States respectfully submits that the defendants' Motion to Dismiss Count One and Motion to Dismiss Counts Two through Sixteen should be denied.

Respectfully submitted this the 6th day of August, 2008.

JIM M. GREENLEE
United States Attorney

By: /s/ James D. Maxwell, II
JAMES D. MAXWELL, II
Assistant United States Attorney
MSB#100268

By: /s/ William C. Lamar
WILLIAM C. LAMAR
Assistant United States Attorney
MSB#8479

CERTIFICATE OF SERVICE

I, James D. Maxwell, II, Assistant United States Attorney for the Northern District of Mississippi, hereby certify that on August 6, 2008, I electronically filed the foregoing GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS COUNTS ONE THROUGH SIXTEEN OF THE SUPERSEDING INDICTMENT with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Thomas H. Freeland IV
FREELAND & FREELAND
1013 Jackson Avenue
Post Office Box 269
Oxford, MS 38655

Richard H. Deane, Jr.
JONES DAY - Atlanta
1420 Peachtree Street
Suite 800
Atlanta, GA 30309-3053

Jerome J. Froelich, Jr.
McKENNEY & FROELICH
1349 W. Peachtree Street
Suite 1250
Atlanta, GA 30309

Craig A. Gillen
GILLEN WITHERS & LAKE LLC
3490 Piedmont Road
Suite 1050
Atlanta, GA 30305

Thomas D. Bever
CHILIVIS, COCHRAN, LARKINS & BEVER
3127 Maple Drive, N.E.
Atlanta, GA 30305

