UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO PRESERVE GRAND JURY TAPES

The United States of America, through its undersigned attorney, submits this Response to Defendant's Motion to Preserve Grand Jury Tapes. The defendant requests that the government preserve all audio tape recordings of grand jury proceedings relating to Bay Industries, the defendant's employer, and its employees.

On June 6, 1997, the government advised the defendant that audio tape recordings from all grand jury sessions in the metal building insulation investigation will be preserved. Defendant was advised that the undersigned attorney contacted the grand jury court reporter for this District and was advised that, as a matter of routine practice, all audio tape recordings of grand jury sessions are preserved. (See attachment A). The court reporter stated he will preserve all audio tapes from the metal building insulation grand jury session. Therefore, the defendant's motion should be denied as moot.

There is a long, established policy that maintains the secrecy of grand jury proceedings in the federal courts. United States v. Sells Engineering, Inc., 463 U.S. 418, 424, 103 S.Ct. 3133, 3138 (1983). Even though the government has ensured that the

grand jury tape recordings will be preserved, the government will oppose any effort by defendant to gain access to them. Rule 6(e) of the Federal Rules of Criminal Procedure applies not only to information drawn from transcripts of grand jury proceedings, but also to anything which may reveal what occured before the grand jury. In re Grand Jury Matter, 682 F.2d 61, 63 (3d Cir. 1982). There is a presumption of regularity in grand jury proceedings. United States v. R.Enterprises, Inc., 498 U.S. 292, 301, 111 S.Ct. 722, 728 (1991). Before disclosure of grand jury materials can be ordered, defendant must offer evidence of a "substantial likelihood of gross or prejudicial irregularities in the conduct of the grand jury." United States v. Budzanski, 462 F.2d 443, 454 (3d. Cir. 1972), cert. denied, 409 U.S. 949, 93 S.Ct. 271 (1972). Disclosure of such materials will be denied in all but extraordinary circumstances. Costello v. United States, 350 U.S. 359, 364, 76 S.Ct. 406, 409 (1956).

In support of his Motion, in paragraphs 3 through 8, the defendant alleges the undersigned attorney for the government "frightened" a witness before the grand jury with "repeated, loud questioning." Def. Mot. at 2. The government denies the allegations in the defendant's Motion and states for the record that the conduct of its attorneys in this investigation has been at all times ethical and appropriate. Moreover, the allegations in defendant's Motion do not rise to the level of a substantial likelihood of gross irregularities or extraordinary circumstances required by the courts before ordering disclosure of grand jury materials under Rule 6(e)(3)(C)(i).

Accordingly, because the actions of the government attorneys conducting the grand jury investigation have been ethical and appropriate, and because audio tapes for

the grand jury sessions in this investigation will be preserved, defendant's Motion should be denied as moot.

Respectfully submitted,

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