

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)
)
 v.) Criminal No. H-97-93
)
 MARK ALBERT MALOOF,)
) FILED 6/11/97
 Defendant.)

**MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION FOR PROTECTIVE ORDER**

Pursuant to Fed. R. Crim. P. 16(d), the United States has filed with the Court a Motion for Protective Order to limit the disclosure of certain grand jury materials that will be turned over to the defendant under Fed. R. Crim. P. 16, Brady, Giglio, Bagley, and the Jencks Act. A Protective Order is needed because this case arises from an active grand jury investigation in this District concerning price fixing in the metal building insulation industry. Furthermore, a parallel civil case has been filed in this District and civil litigants are seeking discovery of individuals and companies who are witnesses, subjects, and targets of the grand jury investigation.¹

I

**GRAND JURY SECRECY IS ESSENTIAL
TO THE CRIMINAL JUSTICE SYSTEM**

It is a matter of fundamental importance in the criminal justice system that grand jury proceedings should be kept secret to the fullest practical extent. United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983 (1958). Grand jury secrecy encourages witnesses to come forward and

¹A related civil action, Caddell Const. Co. Inc. v. Hiplax Int'l Corp., et al., Master File No. H-96-3490 (S.D. Tex. Houston Div.) is pending before this Court.

testify freely and confidentially without fear of reprisal. In addition, it helps prevent unnecessary disclosure that may make persons appear to be guilty of misconduct without their being afforded adequate opportunity to challenge the allegation. It likewise prevents information adduced under compulsion and for the purposes of public justice from being used for insubstantial purposes, to the detriment of the criminal justice system. *Id.* at 681 n.6, cited in Douglas Oil Co. of Cal. v. Petrol Stops, 441 U.S. 211, 219-20, 99 S.Ct 1667, 1673 (1979). See also In Re Grand Jury January, 1969, 315 F. Supp. 662, 672 (D. Md. 1970).

Unrestricted disclosure of grand jury materials may also adversely affect unindicted individuals and entities. For example, the press may gain access to the material and try putative defendants in the newspapers prior to any formal accusation being issued against them by way of formal indictment or the reputations of third parties may be unfairly tarnished merely because their names were mentioned during the grand jury investigation. In addition, the unrestricted disclosure of the business records of competitors in the metal building insulation industry could adversely affect their competitive situations.

II

A PROTECTIVE ORDER IS A NECESSARY AND APPROPRIATE MEANS OF ENSURING GRAND JURY SECRECY AND THE EFFICACY OF THE GRAND JURY INVESTIGATION AND PROTECTING THIRD PARTIES

The Court's power to issue a protective order in criminal discovery matters is recognized in Fed. R. Crim. P. 16(d)(1), which provides that "[u]pon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred . . ." The Supreme Court, in Alderman v. United States, 394 U.S. 165, 185, 89 S.Ct. 961 (1969), explicitly recognized that a trial court "can and should, where appropriate, place a defendant and his counsel under enforceable orders against

unwarranted disclosure of the materials which they may be entitled to inspect." Lower courts have echoed this admonition in recognizing a protective order as the necessary way to protect government files or to protect government witnesses from threats, bribery, and other corrupt influences. See, e.g., United States v. Anderson, 509 F.2d 724, 730 (9th Cir.), cert. denied, 420 U.S. 910, 95 S.Ct. 831 (1975); United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443 (1973); United States v. Salsedo, 477 F. Supp. 1235, 1244 (E.D. Cal. 1979), vacated and remanded on other grounds, 622 F.2d 465 (9th Cir. 1980).

Generally, courts have entered protective orders in antitrust cases where there was the danger that unnecessary disclosure of grand jury materials might harm third parties. See, e.g., United States v. Alcoa, 232 F. Supp. 664 (E.D. Pa. 1964) (disclosure of competitor's subpoenaed documents, except those intended to be used by the government at trial, prohibited where such disclosure might release confidential trade information). Orders limiting antitrust defendants' disclosure of their grand jury transcripts to those persons necessary in assisting counsel in the preparation of their defense have been entered in other cases. See, e.g., United States v. Acme Meat Co., 1978-2 Trade Cas. (CCH) ¶ 62187 (C.D. Cal. 1978) (Stipulated order).

The instant case demonstrates the importance of maintaining grand jury secrecy to the fullest possible extent. The defendant's indictment stems from an ongoing grand jury investigation involving as yet unindicted co-conspirators and other putative defendants. The instant case is the fifth case to result from this investigation. The grand jury, however, has designated another 17 individuals and companies as targets, and expects its continued investigation to lead to later indictments. Concurrently, the Court is presiding over the related civil action, Caddell. A number of the individuals and companies designated by the grand jury as targets are also named defendants in this case. Through

notice of deposition of government witnesses,² defendants in the civil case have attempted to gain unwarranted access to criminal discovery through liberal civil discovery rules.

Premature disclosure of grand jury testimony and materials beyond the limited disclosure authorized by Rules 16 and 26.2, as well as the United States' proposed Protective Order, will have an adverse effect on any future criminal cases and possibly compromise them entirely. Witnesses may feel pressure from those designated as targets and other putative defendants and may decline to cooperate. Evidence may be destroyed or otherwise disappear.

Moreover, the United States believes that the defendant and designated targets, as well as subjects and other potential targets of the grand jury investigation, have entered into a joint defense agreement that obligates its parties to share information. On May 23, 1997, the Court heard oral motions in the Caddell case concerning discovery issues, including a possible stay of civil discovery pending completion of the criminal investigation³. A stay of civil discovery would be undermined and rendered moot without an order restricting further dissemination of grand jury materials beyond the defendant and those assisting his defense. If the defendant is permitted to disseminate these materials to other targets and subjects, each and every defendant in Caddell could gain access to discovery to which they were not entitled under this Court's stay order.

²Civil defendant Bay Industries, defendant Maloof's employer, noticed for deposition Wally Rhodes, Jerry Killingsworth, and Peter Yueh. These individuals pled guilty to felony informations in this Court. See, U.S. v. Huber Wallace Rhodes, CR H-96-119; U.S. v. Jerrold Warren Killingsworth, CR H-96-200; and U.S. v. Yun Lung Yueh a/k/a Peter Yueh, CR H-96-213.

³At this hearing, the United States entered a limited appearance in support of an order to stay civil discovery. Pursuant to the Court's request, the United States will be stating its position in writing on June 16, 1997.

Additionally, the United States must comply with Fed. R. Crim. P. 6(e), which prohibits disclosure of grand jury materials except under specific circumstances, such as a court order. See United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) (applying Douglas Oil standard to government attorneys, requiring a party to show particularized need before allowing disclosure of grand jury materials). Rule 16 provides another specific circumstance where disclosure is warranted, but that disclosure is made by the United States solely to the defendant. The United States believes that defendant is party to a joint defense agreement with targets and subjects of the grand jury investigation, and, without a protective order, will almost certainly disseminate grand jury materials, clearly contrary to the secrecy requirements of 6(e).

Not only would this breach of grand jury secrecy compromise the United States' investigation and prosecution of price-fixing violations, it would irreparably harm civil plaintiffs who would not have access to those grand jury materials.

III

THE UNITED STATES' PROPOSED ORDER IS NARROWLY DRAWN

The protective order sought by the United States in this case would not restrict the defendant's rights to discovery under Rules 16 or Jencks, nor under the doctrines announced by Brady, Giglio or Bagley. Rather, the order is narrowly drawn and merely would restrict any further dissemination of grand jury materials beyond the defendant. It specifically prohibits dissemination to the civil litigants in Caddell, yet allows the defendant to disclose grand jury material to those persons assisting in case preparation, including outside experts. Courts have upheld protective orders to protect third parties that deprived the defendant of evidence relevant to the case. See, e.g., United States v. Garcia, 625 F.2d 162, 165 (7th Cir.), cert. denied, 449 U.S. 923, 101 S.Ct. 325 (1980) (protective order upheld where

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UNITED STATES' MOTION FOR PROTECTIVE ORDER

COMES NOW the United States of America, through its attorneys and respectfully requests this Honorable Court to enter a protective order pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure.

The defendant has filed a discovery request, and will inspect, copy and receive grand jury materials, pursuant to Fed. R. Crim. P. 16(a); Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667 (1985); and the Jencks Act, 18 U.S.C. § 3500. Pursuant to Fed. R. Crim. P. 16(d)(1) the United States hereby moves the Court to limit the disclosure of this material by ordering that:

1. Upon receiving grand jury transcripts, tape recordings and other witness statements, reports of interviews, and all other grand jury documents pursuant to its discovery request, the defendant and his respective counsel are to treat such material, including copies of such material, as confidential and are to make no further disclosure of such material, except as provided herein;

2. Said confidential material, including copies, may be utilized by the defendant and his attorneys only to prepare for this case, impeach witnesses, refresh a witness's recollection as to matters about which he or she formerly testified, or to test a witness's credibility;

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ORDER

The United States' Motion For Protective Order is hereby GRANTED. Accordingly, it is hereby ORDERED that:

1. Upon receiving grand jury transcripts, tape recordings and other witness statements, reports of interviews, and all other grand jury documents pursuant to its discovery request, the defendant and his respective counsel are to treat such material, including copies of such material, as confidential and are to make no further disclosure of such material, except as provided herein;
2. Said confidential material, including copies, may be utilized by the defendant and his attorneys only to prepare for this case, impeach witnesses, refresh a witness's recollection as to matters about which he or she formerly testified, or to test a witness's credibility;
3. Neither the defendant nor his attorneys may disclose, make copies of, or reveal the contents of such materials for purposes other than the defense preparation and efforts specified herein. Nothing in this order, however, is intended to prohibit the attorneys for the defendant from disclosing the materials to the defendant, the attorneys' legal assistants, economic experts or other employees assisting in case preparation, or from characterizing the substance of the testimony or evidence contained in such materials in discussions with prospective witnesses;

4. Neither the defendant nor his attorneys may disclose or reveal the contents of such materials to the parties or their respective attorneys in the related civil action styled Caddell Construction

Co., Inc. vs. Hiplax International Corp., et al., Master File No. H-96-3490 (S.D. Tex. Houston Div.); and

5. All such materials turned over to the defendant and his attorneys, and any copies made therefrom, shall be returned to the attorneys for the United States when the trial of this case is concluded.

IT IS SO ORDERED this ____ day of _____, 1997.

United States District Judge

