

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

UNITED STATES OF AMERICA	}	
	}	
Plaintiff,)	Case Nos. 5:17cr00007
)	5:17cr00013
v.)	5:17cr00014
)	5:17cr00015
BEAM BROS. TRUCKING, INC., et. al.)	5:17cr00016
)	
Defendants.)	
)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR DISCLOSURE

Defendants Beam Bros. Trucking, Inc., Beam Bros. Holding Corporation LLC (“Beam Brothers”), Gerry W. Beam, Garland C. Beam, Shaun C. Beam, and Nickolas Kozel (collectively “the Defendants”), by and through their attorneys, respectfully submit this Reply in Support of their Motion for Disclosure.

A. The Government’s Purported Compliance with the Court’s Original Sentencing Order Is Irrelevant.

The government argues that having complied with the Court’s May 30, 2017 Sentencing Order, no further disclosures are necessary. That Order, however, contemplated one-hour sentencing hearings for each defendant. Circumstances have now changed dramatically and the government has submitted pre-sentencing disclosures *that it admits* required alteration of that schedule and involve much more evidence than it had expected. Having now vastly expanded the scope of the sentencing proceedings, the government should be required to make more meaningful disclosures.

B. The Requested Disclosures Further the Purposes of the Sentencing Guidelines and Federal Rules of Criminal Procedure.

This Court has substantial discretion to manage its docket. *United States v. W.R. Grace*, 526 F.3d 499, 507-513 (9th Cir. 2008) (en banc) (discussing district court's authority to order disclosure of witness lists). When combined with Rules 2 and 16 of the Federal Rules of Criminal Procedure, this Court's authority to order disclosures by the government is quite broad. *Id.*; *see also* Fed. R. Crim. P. 2, 16. That discretion and authority is particularly important for controlling situations such as this where the government is trying to turn misdemeanor sentencing for the individual defendants into full scale felony trials.

Further, Rule 32(i)(3)(C) of the Federal Rules of Criminal Procedure requires that the Court, "must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P 32(i)(3)(C). This rule is designed to promote judicial efficiency and ensure orderly sentencing hearings. *See United States v. Cole*, 496 F.3d 188, 194 (2d Cir. 2007); *United States v. Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005). As the Sentencing Guidelines state, "lengthy sentencing hearings seldom should be necessary." U.S.S.G. §6A1.3, Commentary.

Here, the reciprocal disclosures requested by Defendants are reasonable and further the interest in an efficient, orderly sentencing procedure. Most importantly, Defendants do not believe that the Grand Jury transcripts cited by the government carry "sufficient indicia of reliability to support [their] probably accuracy." U.S.S.G. §6A1.3, Commentary (*citing United States v. Watts*, 519 U.S. 148, 157 (1997)). Based on the disclosures provided by the government to date, Defendants have no choice but to provide the Court with substantial briefing and

numerous exhibits to demonstrate inaccuracies in the grand jury testimony. As these papers and exhibits concern matters before the Grand Jury, they would be filed under seal, further impairing judicial economy. This obstacle can largely be obviated by the simple disclosures Defendants request. Witnesses the government will call at sentencing can be cross-examined on the reliability of their testimony. And identification of the relevant portions of grand jury transcripts will enable Defendants to determine whether the government will be relying on the problematic portions. In short, the disclosures requested by the Defendants here “provide for the just determination of [this] criminal proceeding, [] secure simplicity in procedure and fairness in administration, and [] eliminate unjustifiable expense and delay.” Fed. R. Crim. P. 2.

With respect to each of the requested areas of disclosure, Defendants request this Court to consider the following additional points:

1. Final Witness List: The government originally identified 9 witnesses, but stated during the October 23 hearing, that it might not call all those witnesses. In addition, the government informed the clerk in an email on October 26 that some witnesses might not be available to testify. Moreover, witnesses called to testify can be cross-examined, therefore obviating the need to submit objections to the court about the reliability of their grand jury testimony. The Court has authority to order the government to produce a final list of witnesses. *W.R. Grace*, 526 F.3d at 499 (holding that district court did not abuse discretion in requiring a final list of government witnesses one year before trial).
2. Summary of Expected Testimony: The government’s initial witness list includes Michael Patron. Defendants have never heard of this person, nor can they find any

reference to such a person in any of the materials produced by the government.

Defendants must be given some indication as to the identity and testimony of this person to adequately prepare for sentencing. Moreover, with regard to other witnesses, these disclosures will help clarify the factual issues to be addressed during sentencing. It is within the discretion of the district court to order such disclosures by the government. *See United States v. Anderson*, 481 F.2d 685, 693-94 (4th Cir. 1973) (denying defendant's pre-trial request for witness list and summary of testimony but finding such a decision within the discretion of the district court); *W.R. Grace*, 526 F.3d at 513 (overruling panel decision preventing district court from ordering witness list and summaries as applied to the government); *United States v. Finley*, No. 12-15J, 2014 WL 3056022 at *4 n. 1 (W.D. Pa. July 3, 2014).

3. Final Exhibit List: The number of exhibits proposed by the government makes it almost certain that not all will be introduced at sentencing. As with witnesses, the district court has discretion to order such disclosures. *W.R. Grace*, 526 F.3d at 499.
4. Summary of Grand Jury Testimony: This is perhaps the single most important request by Defendants. The transcripts provided by the government are littered with testimony that is inconsistent with previous statements by the witnesses, contradicted by documentary evidence, or potentially driven by bias or other improper motivations. If the government plans to cite disputed portions of these transcripts, Defendants must prepare rebuttal evidence. The court may be able to avoid sifting through extraneous issues if the government identifies which portions it plans to

highlight. The court has discretion to order such disclosures. *See generally W.R. Grace*, 526 F.3d at 499.

5. **Jencks Material**: Defendants appreciate the government's representations that it is reviewing its files to ensure all such material has been produced. Defendants cite three categories of materials they believe may exist but remain, as yet, undisclosed: (1) Jencks material produced by agent Amanda Yarborough after the original indictment, (2) material by unknown witness Michael Patron, and (3) communications with witnesses regarding any payments they will receive as a result of the corporate defendants' plea agreements.

CONCLUSION

The Defendants believe the proposed disclosure process will help focus the issues for all parties and ensure that the government and defense abide by the reasonable time limits established by this Court. Accordingly, the Defendants respectfully request this Court to order disclosure in accordance with the recommended procedures, or as otherwise deemed appropriate by this Court.

Respectfully submitted,

BEAM BROS. TRUCKING, INC., AND
BEAM BROS. HOLDING CORPORATION
LLC

Michael Ronald Gill (VSB No. 85185)
Hancock Daniel Johnson & Nagle PC
P. O. Box 72050
Richmond, VA 23255-2050
804-934-1961
Email: mgill@hdjn.com

Counsel for Defendants Beam Bros. Trucking,
Inc. and Beam Bros. Holding Corporation LLC

By: _____ /s/
Of Counsel

GERALD W. BEAM

Mark D. Obenshain
Justin Manning Wolcott
Obenshain Law Group
420 Neff Avenue, Suite 130
Harrisonburg, VA 22801
540-208-0728 / 540-208-0727
mdo@obenshainlaw.com
jmw@obenshainlaw.com

Counsel for Defendant Gerald C. Beam

GARLAND C. BEAM

Howard Crawford Vick , Jr.
Michael A. Baudinet
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
804-775-4340 / 804-775-1139
tvick@mcguirewoods.com
mbaudinet@mcguirewoods.com

By: _____ /s/

Counsel for Defendant Garland C. Beam

SHAUN C. BEAM

Thomas J. Bondurant, Jr. (VSB No. 18894)
Justin M. Lugar (VSB No. 77007)
Gentry Locke
10 Franklin Road SE, Suite 900
Roanoke, VA 24011
(t) 540-983-9300
Bondurant@gentrylocke.com
jlugar@gentrylocke.com

By: _____ /s/

Counsel for Defendant Shaun C. Beam

NICKOLAS GENE KOZEL, JR.

Ralph J. Caccia
Brandon J. Moss
Kevin B. Muhlendorf
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(t) 202-719-7242
rcaccia@wileyrein.com
bmooss@wileyrein.com
kmuhlendorf@wileyrein.com

By: _____ /s/

Counsel for Defendant Nickolas Gene Kozel, Jr.

CERTIFICATE OF SERVICE

I certify that on November 2, 2017, I electronically filed the foregoing Defendants' Motion for Disclosure with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all counsel of record.

By: _____/s/

Michael R. Gill
Counsel for Defendants