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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 03-40142-01-JAR
	)	
	)	
DAVID C. WITTIG,	)	
Defendant.	)	
_____	)	

**ORDER DENYING MOTION TO SUPPRESS GRAND JURY TESTIMONY**

On August 10, 2004, the Court heard Defendant Wittig's motion (Doc. 92) to suppress his testimony to the grand jury and the fruits of that testimony. After hearing argument, the Court directed Richard Hathaway, Assistant United States Attorney, to submit a transcript of defendant Wittig's grand jury testimony, under seal, for the Court's *in camera* review. Defendant Wittig argues that suppression of his testimony is a reasonable sanction, for what he characterizes as two violations by Mr. Hathaway: 1) failure to advise him of his status as a target; and 2) misrepresenting to him that he would be examined only about the Capital City Bank loan. Based on the Court's review of the transcript, and on the submissions and oral arguments of the parties, the Court does not find that Mr. Hathaway misled Mr. Wittig about the scope of the examination; and the Court finds no evidence suggesting that Mr. Wittig was a target of the grand jury investigation at the time he testified. The Court denies the motion.

***Discussion***

Defendant Wittig contends that the government procured his testimony under false pretenses.

During a voluntary interview of Mr. Wittig before his appearance before the grand jury, Mr. Hathaway represented to Mr. Wittig and his attorney that Mr. Hathaway would examine him about matters pertaining to a Capital City Bank loan. But Mr. Hathaway also examined Mr. Wittig about Westar airplanes, executive compensation, shareholder voting records, and other issues that were unrelated to the Capital City Bank loan but are now covered by the allegations in the instant indictment.<sup>1</sup> Defendant Wittig further complains that Mr. Hathaway never advised him or his attorney that he was a target of any grand jury investigation.

Defendant Wittig points out that it is the policy of the Department of Justice to give notice to someone that they are a target, citing to Section 9-11.151 of the United States Attorney's Manual, which states: "it is the policy of the Department that an 'Advice of Rights' form be appended to all grand jury subpoenas to be served on any 'target' or 'subject' of an investigation." No such "Advice of Rights" form was attached to the subpoenas that Mr. Hathaway served on Mr. Wittig.

The government responds that Mr. Wittig was not a target of a grand jury investigation into such matters at Westar at the time he testified before the grand jury. Indeed, on July 16, 2002, July 31, 2002 and August 13, 2002, the grand jury issued subpoenas to Mr. Wittig in the Capital City Bank loan matter. Mr. Wittig testified before the grand jury on September 12, 2002, approximately two months before the grand jury returned an indictment on the bank fraud, and about 14 months

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<sup>1</sup>In fact, the grand jury subsequently returned an indictment, charging Defendant Wittig and Odell Weidner, president of Capital City Bank, with bank fraud and related charges in *United States v. Clinton O'Dell Weidner II and David C. Wittig*, Docket No. 5:02 CR40140-01-JAR. Both defendants were convicted after a jury trial.

before the grand jury returned an indictment in this case on December 3, 2003. Given this timing, there is no suggestion that in July, August and September of 2002, Mr. Wittig was a target of a grand jury investigation into the matters that are the subject of the charges in the present case.

Moreover, although Mr. Wittig was indicted two months later for bank fraud and related charges concerning the Capital City Bank loan, nothing in the examination evidences that he was the target at that time. The Court takes judicial notice that the charges in the bank fraud case concerned a nominee loan from Capital City Bank to Odell Weidner, the president of that bank, through the nominee, Mr. Wittig, who was a customer of the bank.

Defendant Wittig further argues that the tone and tenor of Mr. Hathaway's examination of him evidences that Mr. Hathaway considered him a target back in September 2002. However, the grand jury transcript reads more like a discovery deposition than an examination designed to memorialize a target's testimony for purposes of indictment. The transcript includes a series of questions about Mr. Wittig's bank relationship with Capital City, the purpose of his line of credit loan, and his use of the line of credit for renovations on the Landon mansion. From the Court's review of the transcript, it is not apparent that Mr. Wittig was considered a target.

Even if Mr. Wittig was a target of such an investigation, the announced policy of the Department of Justice does not confer any right to a target letter or notice.<sup>2</sup> In fact, courts have consistently held that this internal policy does not create legal rights. As long as a defendant was

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<sup>2</sup> Even if Mr. Hathaway considered Mr. Wittig a target, Mr. Wittig had no legal right to be advised of his status as a target. For this reason, Defendant Wittig has failed to show a "particularized need" justifying his request for discovery of grand jury minutes of Mr. Hathaway's statements to the grand jury about Mr. Wittig before calling him into the examination. *See In re Special Grand Jury 89-2*, 143 F.3d 565, 569-70 (10th Cir. 1988) (district court may release grand jury materials after a party demonstrates necessity).

advised of his Fifth Amendment rights, he need not be advised that he is a target of the grand jury's investigation.<sup>3</sup> Thus, a defendant's grand jury testimony is not subject to suppression despite a failure to warn him of his target status.<sup>4</sup> Mr. Wittig's constitutional rights were duly protected, no matter his status, by the Fifth Amendment warning he was given on the record, prior to his testimony before the grand jury. The transcript evidences that Mr. Hathaway advised Mr. Wittig, who in turn acknowledged that he understood: that he had a right not to be compelled to be a witness against himself; that he did not have to appear and provide any information that might tend to incriminate him later in any proceedings; that if he chooses to answer questions, he does so voluntarily; and that any statements could be used against him in future proceedings or in any trial. Mr. Hathaway duly advised Mr. Wittig of his Fifth Amendment rights.

Defendant Wittig also complains that Mr. Hathaway misled him and his attorney about the scope of the examination before the grand jury and, contrary to Mr. Hathaway's representations, he examined him about subjects other than the Capital City Bank loan. The grand jury transcript reveals, however, that before the examination commenced, Mr. Hathaway advised Mr. Wittig that the grand jury was "primarily looking into a \$1.5 million dollar increase in your line of credit that took place on or about April 30<sup>th</sup> of 2001." Moreover, before the examination commenced, Mr. Hathaway advised Mr. Wittig that "before you answer any question, you're entitled to step out and speak with your

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<sup>3</sup>*United States v. Washington*, 431 U.S. 181, 185-89 (1977).

<sup>4</sup> See, e.g., *United States v. Pacheco-Ortiz*, 889 F.2d 301, 306-310 (1<sup>st</sup> Cir. 1989); *United States v. Valentine*, 820 F.2d 565, 572 (2<sup>d</sup> Cir. 1987); *United States v. Crocker*, 568 F.2d 1049, 1053-56 (3<sup>rd</sup> Cir. 1977); *United States v. Bollin*, 264 F.3d 391, 415 (4<sup>th</sup> Cir. 2001); *United States v. Myers*, 123 F.3d 350, 355-58 (6<sup>th</sup> Cir.), cert. denied, 522 U.S. 1020 (1997); *United States v. Gillespie*, 974 F.2d 796, 800-05 (7<sup>th</sup> Cir. 1992); *United States v. Long*, 977 F.2d 1264, 1276 (8<sup>th</sup> Cir. 1992); *United States v. Estacio*, 64 F.3d 477, 481-82 (9<sup>th</sup> Cir. 1995), cert. denied, 517 U.S. 1121 (1996).

counsel before you respond to any question we put to you.” During the testimony, Mr. Wittig’s counsel waited for him outside of the grand jury room. The transcript reveals that Mr. Wittig asked for and was granted a recess to confer with his counsel in the middle of testimony about his use of corporate aircraft--testimony which he now claims Mr. Hathaway procured by ambush. Yet, after taking the recess, Mr. Wittig resumed testifying about the corporate aircraft, with no indication that he was concerned about the scope of the examination.

During the first part of Mr. Wittig’s testimony, he related his employment history, including a lengthy discussion of his initial contacts with Western Resources, now Westar Energy, how he came to work for that company, and his “evolution up through the ranks” to his position as CEO. Much of this testimony was a narrative description of his work at Western Resources, including his work in acquisitions and diversification of Western Resources’ business. Notably, much of this testimony was related not in response to any specific or probing question posited by Mr. Hathaway, but as part of Mr. Wittig’s apparently voluntary narrative of his experiences at Western Resources and of the relationship of Western Resources, Westar Energy and related companies.

Clearly, as Mr. Wittig volunteered certain information, Mr. Hathaway took the opportunity to explore with further questions. One such example is at pages 23- 26 of the transcript. After Mr. Wittig described buying the Landon mansion and seeking financing for renovation, Mr. Hathaway asked Mr. Wittig whether his employment contract addressed reimbursement for renovations on the house. Mr. Wittig then described the “change of control agreement” that he and other officers entered into with the company. Mr. Hathaway acknowledged having seen the agreement, but shortly returned the questioning to the renovations to the house, which was material to the line of credit involved in the

Capital City bank matter. Mr. Hathaway asked Mr. Wittig about a previous statement that he was cash poor at the time he was seeking financing for renovations. Mr. Wittig responded by lengthy narrative-type testimony about the nature and state of executive compensation packages at Western Resources at that time. Mr. Hathaway took the opportunity to then inquire about Western Resources' governance and oversight of executive compensation.

One of the areas of examination that defendant Wittig now complains about is the use of corporate aircraft. The transcript reveals that Mr. Hathaway initiated this examination with a question about Odell Weidner being flown on a corporate jet to a college football game. This question was posited in the context of questions about the nature and length of the relationship between Odell Weidner and Mr. Wittig. Mr. Hathaway then went on to examine Mr. Wittig for approximately 30 pages of the transcript, regarding the use of corporate aircraft by Mr. Wittig and others associated with Western Resources. In the midst of this questioning, Mr. Wittig asked for a five minute recess, which was granted. Immediately after the recess, questioning about the corporate aircraft resumed. Shortly thereafter, the questioning turned back to questions related to the Capital City Bank loan, and the bulk of the transcript concerns examination related to the loan.

The tone and tenor of this grand jury transcript is not of ambush, but of voluntary, narrative testimony into areas that defendant Wittig now claims were outside the scope of the anticipated examination. Sometimes this testimony was responsive to questions initiated by Mr. Hathaway; but often this testimony was initiated by Mr. Wittig and followed with questions by Mr. Hathaway. The transcript does not evidence that Mr. Hathaway intended and used the grand jury examination as a means of ambushing Mr. Wittig with questions designed to incriminate him on matters included in the

current charges. For these reasons, neither of the so-called violations complained about are supported by the evidence. Thus, there is no legal basis to suppress defendant Wittig's testimony. Further, the Court has no reason to exercise its supervisory powers to accord such relief, for there is no evidence of prosecutorial misconduct.

**IT IS THEREFORE ORDERED BY THE COURT** that defendant Wittig's Motion to Suppress Grand Jury Testimony (Doc. 92) is **DENIED**.

**IT IS SO ORDERED.**

Dated this 13<sup>th</sup> day of August 2004.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge

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