UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v. -

DEAN SKELOS and ADAM SKELOS,

Defendants.

S1 15 Cr. 317 (KMW)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR A RULE 6(e) HEARING

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INTRODUCTION

There is no longer any doubt that the government repeatedly disclosed grand jury secrets in violation of Federal Rule of Criminal Procedure 6(e). These violations appear in a litany of newspaper articles disclosing virtually every aspect of the grand jury proceedings, including the identity of grand jury witnesses, *e.g.*, Newsday (Apr. 16, 2015), 2015 WLNR 11041897 ("Nassau County Executive Edward Mangano testified last week before a federal grand jury looking into allegations against state Sen. Dean Skelos . . . ."); their testimony to the grand jury, *e.g.*, *id.* (grand jury witness "was questioned mostly about procedures and facts, such as what contracts had been let and who had bid on them"); who the grand jury subpoenaed, *e.g.* N.Y. Post (Apr. 17, 2015), 2015 WLNR 11263204 ("[N]early all of Long Island's state senators have been subpoenaed as part of a federal grand-jury probe . . . ."); the precise targets of the grand jury's investigation, *e.g.*, *id*. (the "grand jury" was "targeting state Senate Majority Leader Dean Skelos and his son"); the focus and direction of the investigation, *e.g.*, (Dkt. 25 Ex. J. at 2-3, 6)[1] (grand jury was "focused on . . . Adam Skelos's business dealings" with both "AbTech Industries" and "American Land Services"); and whether the grand jury would indict and the nature of the anticipated charges, *e.g.*, N.Y. Post (May 2, 2015), 2015 WLNR 12959917 ("[A] federal grand jury is planning to indict [Dean Skelos] on corruption charges, law-enforcement sources told The *Post*"; "Skelos' son, Adam" would "[a]lso . . . be indicted.").

Nor is there any doubt that the government was responsible for these violations of grand jury secrecy. Some of the articles confirm that they were based upon "law-enforcement" or "government sources." *See, e.g.*, N.Y. Post (Apr. 16, 2015), 2015 WLNR 11163680. And the

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[1] Where documents filed on the docket do not have their own pagination, we refer to the page numbers generated by the ECF system.

other articles could only have resulted from government leaks. For example, a *New York Times* reporter revealed in an email to Defendants that he was privy to upcoming grand jury testimony *before* that testimony was given. Then he published an article closely tracking [redacted]. The only plausible explanation is that the reporter had a source inside the government who was disclosing matters before the grand jury in violation of Rule 6(e).

Consequently, defendants are entitled to an evidentiary hearing to establish the full extent of the prosecutorial misconduct and to fashion an appropriate remedy. We recognize that the Court previously denied this relief because the motion defendants filed before the first trial failed to show that government sources had disclosed any matters occurring before the grand jury. *United States v. Skelos*, No. 15 CR 317 KMW, 2015 WL 6159326, at *8-12 (S.D.N.Y. Oct. 20, 2015). However, subsequent developments—including the FBI's admission to systematic leaking in white collar prosecutions in another case, and the additional evidence that is now before this Court and summarized herein—conclusively establish a pattern of clear and blatant Rule 6(e) violations.

BACKGROUND

A. The Grand Jury Began Investigating Dean And Adam Skelos

Beginning no later than November 2014, "the [g]overnment . . . extensively employed grand jury subpoenas to obtain financial records and other documents relevant to the investigation" of Dean and Adam Skelos. (Declaration of Alexandra A.E. Shapiro, dated March 1, 2018 ("Shapiro Decl.") Ex. 1: Wiretap App. dated Dec. 5, 2014, at USAO_000120 ¶ 177).[2]

[2] This wiretap application was filed under seal. A redacted version was filed on the public docket at Dkt. 71.

By December 2014, based on information produced in response to these subpoenas, the government believed that there was "probable cause to believe that [redacted] made payments to Adam Skelos so that Adam Skelos, through the influence and acts of his father . . . could assist [redacted]." (*Id*. at USAO_000037 ¶ 25). The grand jury subpoenas also yielded documents allegedly showing that "[redacted] rel[ied] on Adam Skelos and the influence and acts of his father to increase payments to [redacted] under the Nasasau [*sic*] County contract." (*Id*. at USAO_000038 ¶ 25). [redacted] (*Id*. at USAO_000037 ¶ 24). Finally, the government also subpoenaed "Adam Skelos's bank records" which "reflect[ed] [a] $20,000 deposit . . . from [redacted], which is a title company involved in real estate transactions." (*Id*. at USAO_000067 ¶ 92). [redacted]

B. The U.S. Attorney Divulged Aspects Of The Investigation

Soon thereafter, then-U.S. Attorney Preet Bharara publicly revealed his intent to indict Dean Skelos. For example, on January 22, 2015, Bharara held a press conference in connection with the arrest of Assembly Speaker Sheldon Silver. He broadly attacked the "show-me-the-money culture of Albany" and singled out the so-called "three men in the room"—Silver, Senator Skelos and Governor Cuomo—stating that "our unfinished fight against political corruption continues. You should stay tuned." (Dkt. 25 Ex. D at 1, 4, 6). The next day, Bharara warned that the "State Senator" in this "triumvirate" was "more likely to be arrested by the authorities than defeated in election." (*Id.* Ex. E at 4-5).

Less than a week later, additional details about the Skelos investigation were leaked to the press. On January 29, 2015, News 4 reported that, according to "[s]ources familiar with the investigation," Skelos "has been under criminal investigation by the feds." (*Id.* Ex. F at 2). The report revealed that both the USAO "and the FBI are taking a hard look at how Skelos made some of his money with part of the investigation looking into his apparent ties to the real estate industry." (*Id*.). The report concluded that the decision "whether or not to charge Skelos[] . . . could come in a matter of weeks, up to the next month or two." (*Id*. at 4). This report was followed by a wave of press concerning "Bharara['s] investigat[ion] [of] Skelos' . . . ties to the real estate industry." Kenneth Lovett, *You're Next, Pal—Preet Eyes Senate Boss: NBC—Skelos' income probe similar to Shel's*, N.Y. Daily News (Jan. 30, 2015), 2015 WLNR 2999864; *see also, e.g.*, Joe Tacopino, *Better Pray, Dean! Now Skelos is in Preet's cross hairs*, N.Y. Post (Jan. 30, 2015), 2015 WLNR 2992078 ("Skelos' connections to real-estate deals were being looked into by US Attorney Preet Bharara, who last week jolted Albany with the arrest of Assembly Speaker Sheldon Silver").

C. The *New York Times* Received Advance Notice Of Upcoming Grand Jury Testimony [redacted]

On April 2, 2015, *New York Times* reporter William Rashbaum advised Skelos that "a federal grand jury" was investigating "you and your son['s] . . . business dealings." (Dkt. 25 Ex. C at 1). Rashbaum also provided Dean and Adam Skelos with a list of written questions that closely tracked the grand jury investigation, [redacted] what would ultimately be alleged in the indictment. Rashbaum's questions referenced "federal grand jury subpoena[s]" and covered topics including both AbTech and the payment Adam received from ALS. (*Id.* at 1-3). Specifically, Rashbaum asked about Adam's "work[] as a consultant for AbTech"; "how [he] [was] compensated" for that work; whether "anyone

affiliated with [Glenwood]" had "helped" Adam get the job; whether they knew about the "significant stake in Abtech" "held" by "Glenwood . . . executive[] Charles Dorego"; "a Nassau County contract that was awarded to AbTech"; whether Adam's "father [had] taken any official action that benefits AbTech"; and whether Adam's "relationship with AbTech . . . represents a conflict of interest . . . for [his] father." (*Id.* Ex. B at 3-4; *accord* Ex. C at 2-3). Rashbaum also stated that "Thomas K. Dwyer of American Land Services has paid [Adam] $20,000 with the expectation that [Adam] would go to work for that company," and asked why Adam "did not end up working there." (*Id.* Ex. B at 3).

[redacted]

[redacted]

D. The Government Leaked The Grand Jury Testimony And The Identity Of Witnesses Subpoenaed By The Grand Jury

Beginning the day after Runes testified, a series of four newspaper articles—two of which expressly relied upon government sources—revealed the substance of the grand jury testimony, the identity of at least one witness, a list of other individuals who had been subpoenaed by the grand jury, and the focus of the grand jury's investigation.

Rashbaum, who apparently had a head start based on the tips he received in early April, authored the first of these articles, which appeared in the *New York Times* on April 15, 2015. The article revealed that "[f]ederal prosecutors have begun presenting evidence to a grand jury considering a case against the leader of the New York State Senate, Dean G. Skelos of Long Island, and his son." (Dkt. 25 Ex. J. at 2). Rashbaum identified his sources as "several people with knowledge of the matter" who told him that the grand jury was "focused on . . . two areas": "Adam Skelos's business dealings" with both "AbTech Industries" and "American Land Services." (*Id.* at 2-3, 6). As to the first, "investigators are seeking to determine whether Senator

Skelos exerted any influence in matters involving AbTech" and "whether his son's hiring as a consultant was part of a scheme in which the senator, in exchange, would take official action that would benefit AbTech." (*Id*. at 3). The article notes that AbTech also "has had ties" to "Glenwood Management, a politically influential real estate developer," and in particular "Charles Dorego, a top Glenwood executive." (*Id*. at 3, 5). Regarding ALS, Rashbaum wrote that "federal investigators have also focused on a one-time $20,000 signing bonus paid to Adam Skelos by American Land Services," even though "Mr. Skelos never went to work at the company and did not return the money." (*Id*. at 6).

On April 16, 2015, both the *New York Post* and *Newsday* followed the *Times* piece by divulging additional details about the grand jury proceedings. The *Post* article expressly relies upon "[l]aw-enforcement sources," who confirmed that "Dean Skelos and his son are being probed by the US Attorney's Office, which has convened a grand jury and presented evidence about possible corruption in the latest claim of financial misconduct to rock Albany." Rich Calder et al., *Skelos grand jury—Eyed in contract for firm that hired son*, N.Y. Post (Apr. 16, 2015), 2015 WLNR 11163680. The "[l]aw-enforcement sources" also told the *Post* that the investigation was focused upon "Adam Skelos [being] paid $20,000 by a title-insurance company for which he never worked," and that "state senators from Long Island have been subpoenaed." (*Id*.). The April 16, 2015 *Newsday* article reveals that "Nassau County Executive Edward Mangano testified last week before a federal grand jury looking into allegations against state Sen. Dean Skelos . . . and his son," and that "[h]e was questioned mostly about procedures and facts, such as what contracts had been let and who had bid on them." Robert E. Kessler & Yancey Roy, *Sources: Skelos probe Mangano testifies before grand jury, sources say Fed investigation reportedly focuses on LI pol, son*, Newsday (Apr. 16, 2015), 2015 WLNR

11041897. Like the *Post*, *Newsday* also reported that "Mangano was among several Nassau politicians subpoenaed to testify." (*Id.*).

The next day, the *Post* published a follow up piece that, like the original, was based upon information provided by "government" sources, and reported that "Nassau County's highest-ranking official [*i.e.*, Mangano] and nearly all of Long Island's state senators have been subpoenaed as part of a federal grand-jury probe targeting state Senate Majority Leader Dean Skelos and his son." Rich Calder et al., *Lining up pols vs. Skelos—Feds subpoena LI bigs*, N.Y. Post (Apr. 17, 2015), 2015 WLNR 11263204. Specifically, the *Post* revealed that the subpoenas were issued to "Eight of Long Island's nine state senators" and "direct[ed] them to cough up documents." (*Id.*). The Post was also told by "a government source briefed on the case" that "County Executive Ed Mangano . . . appeared before the secret panel last week and was asked about various contracts signed by the county." (*Id.*).

The reporting by the *Times*, *Post* and *Newsday* generated a wave of local and national press devoted to the "grand jury['s] examin[ation] [of] evidence . . . against Skelos . . . and his son." John A. Oswald, *New York's top Republican, Dean Skelos, under fed microscope: Report*, Metro - New York (Apr. 16, 2015), 2015 WLNR 11244256; *accord, e.g.*, Reid Wilson, *READ IN: Commuting by Gyrocopter Edition*, The Washington Post (Apr. 16, 2015), 2015 WLNR 11080070 ("Federal prosecutors have started presenting evidence to a grand jury . . . . focused on Adam Skelos's business dealings, including a government contract in Nassau County he secured for [AbTech]. Federal authorities were asking witnesses whether Sen. Skelos exerted any influence in the contract."); Denis Slattery et al., *Grand jury eyes Skelos*, N.Y. Daily News (Apr. 16, 2015), 2015 WLNR 11119989 (evidence was presented "to a grand jury" concerning "a connection between a stormwater treatment contract in Skelos' district being awarded to

AbTech"; "[a] $20,000 payment made to Adam Skelos from a title insurance company he never worked for is another focus of the grand jury probe"); Oswald, *New York's top Republican, Dean Skelos, under fed microscope: Report*, 2015 WLNR 11244256 ("A grand jury is examining evidence in a possible case against Skelos . . . and his son . . . . Specifically, the feds are looking at the younger Skelos' business dealings and his hiring by [AbTech]. A $20,000 signing bonus from a title insurance company that never employed him, is also part of the probe"); Casey Seiler & Chris Bragg, *Skelos under a cloud*, Times Union (Albany) (Apr. 17, 2015), 2015 WLNR 11255656 ("One of the subjects of the probe, which is reportedly being presented to a grand jury, involves Adam Skelos' hiring by an Arizona-based company called AbTech that sought a stormwater treatment contract with Nassau County."); Kenneth Lovett, *Pols' 'family' court—Bharara puts squeeze on kids to press parents in probes*, N.Y. Daily News (Apr. 20, 2015), 2015 WLNR 11492710 ("Bharara is reportedly presenting evidence to a grand jury against state Senate Major Leader Dean Skelos . . . and his son, Adam.").

E. The Government Leaked The Grand Jury's Impending Indictment

Two weeks after these violations of grand jury secrecy, the government leaked to the *Post* that a grand jury indictment was forthcoming, that both Dean and Adam Skelos would be charged, and some of the facts underlying those charges. Specifically, on May 2, 2015, the *Post* published an article titled *Skelos going 'bust'—Feds set to indict*, which, like the two prior articles published by the *Post*, explicitly relied upon "law-enforcement sources." 2015 WLNR 12959917. The article revealed that "Dean Skelos, the Republican leader of the state Senate, will soon have something in common with Sheldon Silver, his former Democratic counterpart in the Assembly—a federal grand jury is planning to indict him on corruption charges, law-enforcement sources told The Post." The article went on to reveal that "Skelos' son, Adam"

would "[a]lso . . . be indicted," "according to the sources." And one basis for the indictment would be that Adam "once worked for an Arizona engineering company [AbTech] that won a big-bucks contract for a job in Nassau County." *Id.*; *see also* (Dkt. 25 Ex. L ("prosecutors are expected to announce criminal charges" following an "inquiry[] which include[d] information presented to a grand jury")).

F. The Government Parlayed The Illicit Leaks Into Additional Evidence That It Used Against Defendants

The government leaked grand jury secrets in order to stimulate conversations on the wiretap and to generate ill-gotten evidence that it believed would support an indictment and conviction. [redacted] GX 1601-T, Trial Tr. 2721 [redacted] Trial Tr. 1508, GX 1606); [redacted]

Given the extensiveness of the leaking and the government's focus on the evidence resulting from the leaks, it is apparent that the government did not believe that the evidence developed before the leaks was sufficient to secure an indictment and conviction. That explains why the government resorted to illicit means in an attempt to generate additional evidence.

G. The Government's Systematic And Pervasive Violations Of Grand Jury Secrecy

The prosecutorial misconduct here is not an isolated incident—far from it. In *United States v. Walters*, 16 Cr. 338 (S.D.N.Y.), the government admitted that, over the past decade, the FBI's New York Office systematically and pervasively violated Rule 6(e). In *Walters*, the FBI agent in charge of white collar crime ultimately admitted to strategically leaking grand jury secrets to the *New York Times* and the *Wall Street Journal* on numerous occasions. *See Walters*, ECF No. 65-1. Yet the government there, like here, initially tried to stonewall the defendant's inquiry. In response to the defendant's request for an evidentiary hearing to address suspected leaks, the USAO falsely claimed that he "cannot show that the source of the information contained in the articles was an agent or attorney for the government," and denigrated the defendant's suspicions as "false," "baseless accusations [] undermined by the facts," and "a fishing expedition." *Id.* ECF No. 43 at 32. The government submitted a declaration from Telemachus Kasulis, "the principal AUSA responsible for the investigation," stating that neither he nor an FBI investigator assigned to the case had spoken to the press. *Id.* ECF No. 44 ¶¶ 2, 17. Conspicuously absent were sworn statements from any of the other prosecutors or from any FBI agent concerning their involvement in the leaks. Nor did Kasulis ask Bharara himself whether he was responsible for any leaks.

Judge Castel granted the defendant's request for an evidentiary hearing over the government's objections. *See id.* ECF No. 46. Then, all of a sudden, the government recanted

its denials and took responsibility for what it now admits was an "outrageous" and "reprehensible" pattern of prosecutorial misconduct. *Id.* ECF Nos. 65-5, 65-6. Specifically, the government conceded that "[i]t is . . . an incontrovertible fact that FBI leaks occurred," "that such leaks resulted in confidential law enforcement information about the [i]nvestigation being given to reporters," and that the resulting news articles "contained a significant amount of confidential information about the [i]nvestigation." *Id.* ECF No. 65-1 at 1, 10. It was also undisputed that the leaks occurred in numerous other white collar investigations in which the FBI's New York office was involved, such that it now "has become part of the government's investigative playbook." *Id.* ECF No. 68 at 36-41; ECF No. 82. And the government produced emails showing that the USAO was notified of the leaks early on, and the issue was immediately elevated to the highest ranks of the FBI and the USAO. The U.S. Attorney himself characterized the "leaks" as "outrageous" in one internal email. *Id.* ECF No. 65-6.

Yet the government did *nothing* to bring the leakers to justice, and instead turned a blind eye as the leaks continued, because they were integral to reviving an otherwise "dormant" investigation. *See id.* ECF No. 65-1. And, as described above, the USAO initially misled the *Walters* district court in an attempt to prevent the truth from coming to light. After Judge Castel uncovered the government's systematic and pervasive campaign to leak grand jury secrets, he charitably described the government's initial response as an "artful opposition" that "never disclosed" the USAO's "high level concerns over FBI leaks." *Id.* ECF No. 104 at 20.[3]

[3] Judge Castel ultimately denied Walters' motion to dismiss the indictment on the grounds that (1) Walters was required to show prejudice arising from the grand jury leaks and (2) Walters had not made this showing. *See id.* ECF No. 104 at 12-20. These rulings are currently on appeal. *See United States v. Walters*, 17-2373-cr (2d Cir.).

The government's revelations in *Walters* post-dated this Court's decision denying Skelos' original motion, and they are significant for two reasons. First, we now know that the FBI's New York Office, with the tacit approval of the USAO, is responsible for leaking grand jury secrets in numerous white collar prosecutions. In addition to this case and the other investigations implicated by the government's admissions in *Walters*, credible allegations of leaking have surfaced in other prosecutions in this district and the Eastern District of New York. *See, e.g.*, *United States v. Nordlicht*, 16 Cr. 640 (DLI) (E.D.N.Y. Apr. 7, 2017), ECF No. 107 (describing FBI leaks in white collar case); *Ganek v. Liebowitz*, No. 15 Civ. 1446 (WHP) (S.D.N.Y. Feb. 26, 2015), ECF No. 1 (same).

Second, as in *Walters*, the government responded to the Skeloses' first motion with a declaration from a single prosecutor purporting to deny responsibility on behalf of the investigative team. (*See* Dkt. 33-1). Yet no one else, including any FBI agent, submitted their own sworn statement. And, as in *Walters*, the declaration is silent as to whether Bharara played a role in the leaks. Tellingly, the government in *Walters* relied upon this Court's acceptance of the declaration in urging Judge Castel to accept the similar declaration submitted by Kasulis, the lead AUSA there. The government argued that "[t]he Kasulis Declaration was modeled on a similar, recently submitted declaration cited with approval in *United States v. Skelos* . . . . Judge Wood, in denying the defendants' motion without a hearing, relied upon a declaration from an AUSA responsible for the investigation that included representations from line AUSAs, one supervising AUSA who attended a grand jury presentation, and line investigators and case agents handling the investigation, that none of them had disclosed any information about the investigation to the press." *Walters*, ECF No. 82 at 14 n.10. Yet Judge Castel ordered a hearing anyway, which exposed the Kasulis declaration as a misleading attempt to cover up the

systematic and pervasive leaking campaign about which both the FBI and the USAO were well aware.

ARGUMENT

"The Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of its proceedings." *United States v. Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980) (citing *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979)). Federal Rule of Criminal Procedure 6(e) "implements this policy of secrecy." *United States v. Ulbricht*, 858 F.3d 71, 106 (2d Cir. 2017) (quoting *In re Grand Jury Subpoena*, 103 F.3d 234, 237 (2d Cir. 1996)). Specifically, Rule 6(e) precludes government attorneys and agents from disclosing any "matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B); *accord United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983) (government is "forbidden to disclose matters occurring before the grand jury").

If the defendant "offer[s] sufficient evidence to establish a *prima facie* case of a violation of Rule 6(e), . . . he is entitled to a show cause hearing at which the Government must attempt to explain its actions." *Barry v. United States*, 865 F.2d 1317, 1325 (D.C. Cir. 1989). In determining whether a *prima facie* case is presented, a court should examine "(1) whether the media reports disclose matters occurring before the grand jury; (2) whether the media report discloses the source as one prohibited under Rule 6(e); and (3) evidence presented by the government to rebut allegations of a violation of Rule 6(e)." *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996); *accord In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 216-19 (5th Cir. 1980).

The "burden in a Rule 6(e)(2) proceeding is relatively light." *United States v. Flemmi*, 233 F. Supp. 2d 113, 117 (D. Mass. 2000) (quoting *In re Sealed Case No. 98-3077*, 151 F.3d

1059, 1068 (D.C. Cir. 1998)). The Defendants here easily meet that burden, because there is no serious dispute that the government leaked a host of matters that occurred before the grand jury.

I. The Government Disclosed Matters Occurring Before the Grand Jury

Courts take a "broad view" of what constitutes a "matter occurring before [the] grand jury." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1177 (10th Cir. 2006). "Rule [6(e)(2)] covers not only the evidence actually presented to [the grand jury] but also anything that may tend to reveal what transpired before it," *United States v. E. Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991); *accord Lance*, 610 F.2d at 216-17, or the future "direction of the grand jury proceedings." *Grand Jury Subpoena*, 103 F.3d at 238; *accord In re Grand Jury Proceedings*, No. 13 Misc. 153, 2013 WL 2237531, at *1 (S.D.N.Y. May 21, 2013).

Examples of "matters occurring before [the] grand jury" include "whom the grand jury is investigating," "the identities of witnesses," the "substance of [their] testimony," and "how likely is an indictment," *Special Grand Jury 89-2*, 450 F.3d at 1176-77 (internal quotation marks omitted); *Grand Jury Subpoena*, 103 F.3d at 238, as well as "the identity of . . . expected witnesses," "expected testimony" and "the strategy or direction of a grand jury investigation." *Skelos*, 2015 WL 6159326, at *10. "[M]aterial . . . covered by Rule 6(e)" also includes "individuals who were . . . recipients of a Federal Grand Jury Subpoena," *Hodge v. F.B.I.*, 703 F.3d 575, 580 (D.C. Cir. 2013), and "records subpoenaed by the grand jury." *Gatson v. Fed. Bureau of Investigation*, No. CV 15-5068, 2017 WL 3783696, at *9 (D.N.J. Aug. 31, 2017).

Here, the government leaked nearly every category of information that the courts have deemed to be "matters occurring before the grand jury," including the focus and direction of the grand jury investigation, which individuals were targeted, who testified and what they said, who was subpoenaed, whether and when to expect an indictment, who would be indicted, and the

nature of the charges. *See supra* at 6-10. Specifically, the articles resulting from the leaks revealed that, *inter alia*:

- The "grand jury considering [the] case" was "focused on . . . Adam Skelos' business dealings" with "Abtech Industries" and "American Land Services," (Dkt. 25 Ex. J. at 2-3, 6); *see also In re Grand Jury Investigation*, No. 87-cv-0163, 1987 WL 8073, at *5-6 (E.D.N.Y. Feb. 23, 1987) ("matters occurring before the grand jury . . . has been interpreted to encompass" the "strategy or direction of the investigation" and "the scope of the grand jury's investigation") (internal quotation marks omitted);

- The targets of the "grand jury" inquiry were "Dean Skelos and his son," Calder et al., *Skelos grand jury*, 2015 WLNR 11163680; *see also In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986) ("Disclosure of . . . the direction of the grand jury's investigation and the names of persons involved . . . falls within Rule 6(e)(2).");

- "Nassau County Executive Edward Mangano testified . . . before [the] grand jury," Kessler & Roy, *Sources: Skelos probe Mangano testifies before grand jury*, 2015 WLNR 11041897; *see also Grand Jury Subpoena*, 103 F.3d at 239 ("the names of . . . witnesses" are "matters occurring before the grand jury"); *Gatson*, 2017 WL 3783696, at *9 (same);

- Mangano testified about "various contracts signed by [Nassau] [C]ounty," including "what contracts had been let and who had bid on them," and the grand jury also heard testimony concerning, *inter alia*, Adam Skelos being paid $20,000 by ALS, Calder et al., *Lining up pols*, 2015 WLNR 11263204; Kessler & Roy, *Sources: Skelos probe Mangano testifies before grand jury*, 2015 WLNR 11041897; *see also Skelos*, 2015 WL 6159326, at *9 ("Rule 6(e)(2) protects from disclosure evidence that is actually presented to the grand jury" or "summaries of grand jury testimony") (internal quotation marks omitted); *Grand Jury Investigation*, 1987 WL 8073, at *5 ("matters occurring before the grand jury . . . has been interpreted to encompass . . . [the] substance of testimony") (internal quotation marks omitted);

- "Eight of Long Island's nine state senators" were "subpoenaed as part of [the] federal grand-jury probe," Calder et al., *Lining up pols*, 2015 WLNR 11263204; *see also Hodge*, 703 F.3d at 580 ("material . . . covered by Rule 6(e)" includes "individuals who were . . . recipients of a Federal Grand Jury Subpoena");

- The "grand jury is planning to indict [Dean Skelos] on corruption charges" "soon," Jamie Schram, *Skelos going 'bust'—Feds set to indict*, N.Y. Post (May 2, 2015), 2015 WLNR 12959917; *see also Blalock v. United States*,

844 F.2d 1546, 1552 (11th Cir. 1988) ("[T]he decision whether to indict appellant is a 'matter . . . before the grand jury' and thus falls within the proscription of Rule 6(e)(2)."); *Lance*, 610 F.2d at 218 (same for "[d]isclosures which expressly identify when an indictment would be presented to the grand jury" or "the nature of the crimes which would be charged"); and

- "Skelos' son, Adam" would "[a]lso . . . be indicted," Schram, *Skelos going 'bust'*, 2015 WLNR 12959917; *see also Lance*, 610 F.2d at 218 (matters occurring before the grand jury include "the number of persons who would be charged").

There can be no dispute that the articles in question revealed numerous "matters occurring before the grand jury."

II. An Attorney Or Agent Of The Government Was Responsible For The Leaks

Defendants have also made a "*prima facie* showing that the disclosure[s] w[ere] made by an attorney or agent for the government." *Skelos*, 2015 WL 6159326, at *11. All three *New York Post* articles expressly rely upon "law-enforcement" or "government" sources. Calder et al., *Skelos grand jury*, 2015 WLNR 11163680; Calder et al., *Lining up pols*, 2015 WLNR 11263204; Schram, *Skelos going 'bust'*, 2015 WLNR 12959917. Those articles revealed the identity of a grand jury witness, summarized his testimony and the testimony of other grand jury witnesses, identified recipients of grand jury subpoenas, named Dean and Adam Skelos as the grand jury investigation's targets, revealed that the grand jury was planning to indict them, and said when that would likely happen. Because these same articles state on their face "that a government attorney or agent was the source of the information," they unequivocally establish that the government revealed grand jury secrets in violation of Rule 6(e). *Skelos*, 2015 WL 6159326, at *11. Certainly they support a *prima facie* showing of such violations.

Defendants have also made the requisite showing for the three other stories identified above—the January 29, 2015 News 4 report (Dkt. 25 Ex. F), the April 15, 2015 *New York Times* article (Dkt. 25 Ex. J), and the April 16, 2015 *Newsday* article (Kessler & Roy, *Sources: Skelos*

probe Mangano testifies before grand jury, 2015 WLNR 11041897). These articles do not expressly rely upon government sources, but that is unnecessary to make a *prima facie* showing. "The articles submitted need only be *susceptible to an interpretation* that the information reported was furnished by an attorney or agent of the government[.] . . . '[I]t is not necessary for [an] article to expressly implicate [the government] as the source of the disclosures if the nature of the information disclosed furnishes the connection.'" *Sealed Case No. 98-3077*, 151 F.3d at 1068 n.7 (emphasis supplied) (quoting *Barry*, 865 F.2d at 1325); *accord Flemmi*, 233 F. Supp. 2d at 117; *United States v. Flemmi*, 233 F. Supp. 2d 75, 81 (D. Mass. 2000).

Although this Court previously held that there was no such connection for the News 4 and *Times* pieces, we respectfully submit that the evidence now before this Court compels a different result. For example, the timing of the January 2015 News 4 report coincides with [redacted]. Similarly, Rashbaum sent his list of questions to the Skeloses on April 2, 2015, [redacted] and he published the *New York Times* article—which reports that "prosecutors have begun presenting evidence to a grand jury"—the day after the relevant testimony was finished. (Dkt. 25 Ex. J. at 2; *see also id.* Exs. B, C). [redacted] two other stories appeared in the *New York Post* revealing similar details based on leaks that we know came from "law-enforcement" officials. Under these circumstances, the article is plainly "susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government." *Sealed Case No. 98-3077*, 151 F.3d at 1068 n.7; *accord Barry,* 865 F.2d at 1326 (where "[t]he record contains a whole spectrum of news articles, . . . the precise attribution of a source in one . . . may give definition to a vague source reference in others

because of their context in time or content") (internal quotation marks omitted); *accord Flemmi*, 233 F. Supp. 2d at 83 (ordering evidentiary hearing even though "none of the articles describing the activities of the grand jury investigation expressly states that any or all of the sources were government attorneys or law enforcement agents").

The *Newsday* piece revealed that "Mangano testified . . . before a federal grand jury," that "[h]e was questioned mostly about procedures and facts, such as what contracts had been let and who had bid on them," and that "Mangano was among several Nassau politicians subpoenaed to testify." Kessler & Roy, *Sources: Skelos probe Mangano testifies before grand jury*, 2015 WLNR 11041897. Only a government source would be privy to both the testimony of one grand jury witness and the identity of various other witnesses who had yet to testify. Because "[t]he nature of the disclosure is such that it discloses the likely source"—the government—defendants have made a *prima facie* showing with respect to the *Newsday* article as well. *Lance*, 610 F.2d at 218; *accord United States v. Broussard*, No. CRIM. 11-299, 2012 WL 3138033, at *2 (E.D. La. Aug. 1, 2012) ("[T]he nature of the information contained in the[] reports, viewed as a whole, suffices in a prima facie case to establish a connection to those obligated to maintain grand jury secrecy under Rule 6.").

III. The Court Must Hold An Evidentiary Hearing

Where defendants have "offered sufficient evidence to establish a *prima facie* case of a violation of Rule 6(e)," they are "*entitled* to a show cause hearing at which the Government must attempt to explain its actions." *Barry*, 865 F.2d at 1325 (emphasis supplied); *accord Flemmi*, 233 F. Supp. 2d at 115. Here, because Defendants have offered such evidence, they are "entitled" to an evidentiary hearing. *Barry*, 865 F.2d at 1325.

Once the Court has ascertained the full extent of the misconduct, it has wide latitude to fashion an appropriate remedy. *Id.* at 1321 ("Rule [6(e)] indicates no limits on the relief available to address violations"). For example, if "Rule 6(e) . . . has been violated," the "sanctions . . . that may be imposed," include "imprisonment for criminal contempt" and "dismissal of the case." *Flemmi*, 233 F. Supp. 2d at 83, 86; *accord* Fed. R. Crim. P. 6(e)(7). "Other possible remedies" include "suppression of grand-jury material." Charles Alan Wright et al., 1 Fed. Prac. & Proc. Crim. § 106 (4th ed.). Defendants reserve the right to seek one or more of these remedies following the evidentiary hearing.

Whichever remedy is chosen, it is "[c]lear" that "mere admonishments or . . . the mere gnashing of judicial teeth is insufficient to deter what seems to be growing practice among prosecutors" and investigators who continue to leak grand jury secrets without any meaningful repercussion. *Grand Jury Investigation*, 1987 WL 8073, at *6 (internal quotation marks omitted); *accord, e.g.*, *Walters*, 16 Cr. 338 (S.D.N.Y.), ECF No. 65-1, ECF No. 68 at 36-41, ECF No. 82; *Nordlicht*, 16 Cr. 640 (DLI) (E.D.N.Y. Apr. 7, 2017), ECF No. 107; *Ganek*, No. 15 Civ. 1446 (WHP) (S.D.N.Y. Feb. 26, 2015), ECF No. 1.

CONCLUSION

For the foregoing reasons, this Court should hold an evidentiary hearing to determine the full extent of the government's misconduct and to fashion an appropriate remedy. If the hearing is granted, the Court should allow the Defendants to take appropriate discovery concerning the misconduct described above.

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