UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v. CRIMINAL NO. 3:08CR014

ROBERT L. MOULTRIE, ET AL.

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTIONS TO STRIKE SURPLUSAGE

Comes now, the United States of America, by and through the United States Attorney for the Northern District of Mississippi, and files this response in opposition to the defendants' motion to strike surplus language from the Superseding Indictment. In response thereto, the United States would show unto the Court the following.

Defendants have requested that the Court strike paragraphs seven, eight, eleven, twelve, sixteen, twenty-two, reference to the "Mississippi Code" in paragraph twenty-three, twenty-six, twenty-seven, and forty-four of Count One. Defendants have also requested that the Court strike reference to "citizens and taxpayers" in paragraph 2, paragraphs four, five, eight (2nd), reference to "$2,000,000" in paragraph nine, ten, reference to "$34,000,000 loss" in paragraph eleven, paragraphs thirteen, twenty, twenty-one, twenty-two, twenty-three and twenty-five of Count two of the Superseding Indictment. Defendants' also request that the Court strike the language incorporating the paragraphs from Count One into Counts Two-Sixteen.

While we do not believe that the Superseding Indictment contains surplus language, in an effort to reduce the length of the indictment, enhance clarity and perhaps reduce the length of the trial, the United States is not opposed to striking paragraphs seven, eight, eleven, twelve, thirteen, sixteen, twenty-two, reference to "Miss. Code Ann. 97-13-15 (1972)" in paragraph

twenty-three, paragraphs twenty-six and twenty-seven from Count One of the Superseding Indictment. We also agree to strike the last sentence of paragraph thirty-six of Count One. For the same reasons, we are not opposed to striking reference to "citizens and taxpayers" in paragraph two, paragraphs eight (2nd), nine, ten, eleven, twenty-one, twenty-two, twenty-three, twenty-four and twenty-five of Count Two of the Superseding Indictment. We also agree to strike the first sentence after "Services Compensation" in paragraph four (2nd) of Count Two. We also agree to strike the word "actual" from paragraph thirteen of Count Two. We also agree to strike the language incorporating the paragraphs from Count One into Counts Two through Sixteen.

Federal Rule of Criminal Procedure 7(d), which provides that "[u]pon the defendant's motion, the court may strike surplusage from the indictment," makes striking surplusage permissive, but not mandatory. United States v. Bullock, 451 F.2d 884 (5th Cir. 1971). The standard for striking surplusage is exacting: such motions should be granted only where it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial. United States v. Johnson, 1999 WL 551332, at *1 (E.D. La. June 10, 1999) (citing United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971)); United States v. Graves, 5 F.3d 1546, 1550 (5th Cir. 1993) ("For language to be struck from an indictment, it must be irrelevant, inflammatory and prejudicial."). Thus, motions to strike surplusage are rarely granted. Johnson, 1999 WL 551332 at *1 (citing Bullock); United States v. Davis, 2003 WL 1904039 at *9 (E.D. La. April 16, 2003); see also United States v. Poindexter, 725 F. Supp. 13, 35 (D.D.C. 1989) ("[T]he Rule has been construed as not favoring the striking of surplusage.").

"If evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." United States v. Carollo, 1995 WL

381712 at *2 (E.D. La. June 27, 1999) (denying motion to strike allegations of mafia and organized crime because they were probative of conspiracy and structure and purposes of alleged enterprise), (citing United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990)). Similarly, cumulative allegations that do not meet the strict standard should not be stricken. United States v. Oakar, 111 F.3d 146, 157 (D.C. Cir. 1997). Even if an allegation is "somewhat sensational," it will not be stricken so long as it is relevant. Graves, 5 F.3d at 1550 (denying motion to strike allegations that public official was selling his influence even though not element of offenses because allegation probative of accomplices' motive to aid commission of offense and of defendant's knowledge he did not report income).

"The government is not precluded from including information in the indictment used 'to place the defendant's actions in context and to establish the defendant's state of mind, intent and motives.'" United States v. Trie, 21 F. Supp. 2d 7, 19, (D.D.C. 1998), (citing United States v. Weinberger, 1992 WL 294877, at *7 (D.D.C. Sept. 29, 1992)); see also Graves, 5 F.3d at 1550. Allegations about the establishment of a conspiracy, identity of the participants, and execution of the scheme are properly part of an indictment where they relate to evidence that is part of the government's proof of the conspiracy. See United States v. Reeves, 892 F.2d 1223, 1228 (5th Cir. 1990) (upholding refusal to strike because allegations relevant to establishing charged conspiracy).

Only paragraph forty-four remains subject to their objections to Count One. Defendants contend that paragraph forty-four should be stricken from the indictment because it does not "contain essential facts constituting the offense charged." Defendants are mistaken. Defendants are charged with conspiring to corruptly influence or reward a public official in the performance of his official duties, in violation of 18 U.S.C. 371 and 666(a)(2). 18 U.S.C. 371 states that, "If

two or more persons conspire to commit any offense against the United States....in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy....” shall be a violation of federal law.

It was a part of the conspiracy that the defendants attempted to make their unlawful corporate donation appear as if individuals had given their money. While individual employees wrote checks to the campaign, they did so with the understanding that they would be reimbursed. The defendants caused corporate salary bonus checks to be issued to the individuals to make it appear like a legitimate expense, when in fact, it was an illegal corporate donation. Paragraph fourty-four of Count One merely describes one final overt act of their conspiracy to influence a public official. Hardly satisfied with bribing a public official to be a project worth over $6,500,000 to them, disguising part of the contribution as if individuals made them, attempting to make it appear as a legitimate bonus to their salaries and in the process taking illegitimate business expense deduction, they recouped the monies that they had expended by charging it off as “services compensation” under their contract. All of the above are overt acts which are required by law to be alleged, proven and found by a jury. This paragraph is relevant, properly alleged and should not be stricken.

Only paragraphs four, five, thirteen and twenty remain subject to their objections to Count Two.

Defendants contend that paragraphs four and five of Count Two should be stricken because they are “irrelevant” and “serve no purpose other than to inflame the jury.” Paragraph four discusses a memo received by defendant CAWOOD on or about March 6, 2003, from one

of their design engineers. The memo warned CAWOOD that "Beef producers on national level are concerned that this operation is a 'money pit' and may not be economically viable for the long run. Same producers are concerned that there is not enough livestock available to support the kill facility for more than about 24 months." ... "Beef producers 'feel' the operation won't last two years if it ever gets started." The memo also informed CAWOOD, among other observations in the memo, that "...State leaders could face serious problems with 'unsecured loan' into 'money pit.'" The FACILITY GROUP engineer further warned "If we go in without control and an effective plan we could be blamed for the failure." The engineer requested that CAWOOD "Please guard the confidential information." Paragraph five simply states that CAWOOD and THE FACILITY GROUP concealed the engineer's warning from the State of Mississippi and Community Bank.

Paragraphs four and five are relevant and should not be stricken. Those paragraphs state that the defendants were in possession of information indicating that the project would fail in the near future. The information also includes warnings of the political ramifications to those elected officials who supported the project if it failed. At the time the Facility Group learned of the potential failure, they were tasked with conducting a feasability study for the State of Mississippi and the Community Bank. Yet, they withheld this information from the very groups that employed them. This in conjunction with other evidence will establish that the defendants were more interested in the getting the money and avoiding any blame. Thus, the information in the two paragraphs is relevant in that it establishes knowledge of facts of the alleged conspiracy and intent to deceive.

Defendants next contend that paragraph 13 of Count Two should be stricken. Paragraph 13 states:

> Although NIXON E. CAWOOD and THE FACILITY GROUP caused to be presented a proposed budget for projected labor and other expenses as "Services Compensation" and also proposed to Richard N. Hall, Jr. to split savings "50/50" with Hall, CAWOOD and THE FACILITY GROUP never intended to submit actual costs for reimbursement, nor did they intend to split savings with Hall. Instead, starting with the first invoice submitted and continuing until THE FACILITY GROUP had depleted all of the "Services Compensation" portion of the contract, THE FACILITY GROUP grossly overstated and inflated its costs.

The evidence will establish that the defendants devised a proposed budget which laid out their projections for expenses and cost related to the "services compensation" portion of the contract for a total of $3,021,000. Ironically, that figure is the maximum allowed under their contract for "services compensation." Therefore, it is evidence that from the beginning the defendants set out to get all of the money available. It is evidence that they had no intent to bill the actual costs, but rather a budget to get all the money available. This paragraph demonstrates a part of their scheme to defraud Richard Hall, the Bank and the State of Mississippi. Defendants are free to put on proof of the definition of "actual" cost, just as the government will. This paragraph is relevant and should not be stricken.

Defendants next contend that paragraph 20 of Count Two should be stricken as it is "unrelated to the offense charged", that is devising and executing a scheme to defraud, in violation of 18 U.S.C. 1341. Paragraph 20 states:

> Although THE FACILITY GROUP represented it would use "open book accounting" on the Mississippi Beef project, when questioned by Richard N. Hall, Jr. about certain billings, THE FACILITY GROUP refused to provide backup documentation to show how they came up with certain costs that THE FACILITY GROUP billed to the project.

This paragraph refers to a part of the scheme devised by the defendants. The overall goal of the scheme was to obtain all of the monies available under the "services compensation" provision in their contract, that is, $3.021 million. Richard Hall, the owner of the project, was a victim their of their scheme as well. This paragraph demonstrates how they concealed and disguised their

overbillings to Hall, the Bank and the State of Mississippi. It is a part of their scheme and relevant to their intent to deceive. This paragraph should not be stricken.

Defendants next complain that certain paragraphs contained in Counts One and Two are duplications and should be stricken. With the above concessions to strike, the contends that any duplications of paragraphs is sets forth relevant facts related to the conspiracy to influence and reward and the scheme to defraud and should not be stricken.

With the above concessions, paragraph twenty-nine of Count One and paragraph three of Count Two remain subject to their objections. While identical language regarding the date upon which the Facility Group submitted its proposal to evaluate and manage the project, they are relevant to each charge. They are not prejudicial or inflammatory. In fact, they are quite benign. Thus, they should not be stricken.

Next they contend that paragraphs ten, thirty and thirty-one of Count One are duplicative. The above concessions have remedied any duplication. Thus, remaining paragraphs thirty and thirty-one are not duplications and should not be stricken.

Next they contend that paragraphs thirteen and thirty-two of Count One and paragraph seven (1st) are duplications. We have agreed to strike paragraph thirteen of Count One leaving the remaining two. Those paragraphs are similar, but not identical, in that they recite the date upon which THE FACILITY GROUP was selected to manage the project and CAWOOD executed the letter of intent. They are relevant to each charge. They are not prejudicial or inflammatory. In fact, they are quite benign. Thus, they should not be stricken.

Defendants next complain that paragraphs thirty-four and thirty-six of Count One and paragraph four (2nd) of Count Two are duplicative. The above concessions should cure any

alleged duplication.

Next, defendants contend that paragraphs twenty-three, twenty-four and forty of Count One are duplications. Paragraphs twenty-three and twenty-four are not duplicative in that they describe one describes that the employees who attended the fund raiser were to be reimbursed and they other describes how that was accomplished. Neither should be stricken. Paragraph forty, while similar, is in the section of the conspiracy charge alleging overt acts on behalf of MOULTRIE, CAWOOD and the corporations. As state above, overt acts are required by law and statute to be alleged, proven and found by a jury. Thus, paragraph forty should not be stricken either.

Defendants further contend that paragraphs twenty-five and forty-one of Count One are duplications. While both deal with the creation of the political action committee, they are in separate sections of the conspiracy charge. One describes the intent of the defendants in creating the PAC and the other alleges the creation as an overt act. Thus, neither should be stricken.

Finally, in light of the above concessions, defendants contend that paragraph forty-four of Count One and paragraphs six (2nd)) and seventeen of Count Two are duplications. Paragraph forty-four is an alleged overt act by the defendants to finally recoup the money spent to influence the public official. It is relevant to the conspiracy charge. Paragraphs six (2nd) and seventeen of Count Two, while similar, are not identical. Paragraph six (2nd) describes the general overbilling by the defendants, that is, for labor and expenses. Paragraph seventeen describes defendants' MOREHEAD and the corporations specific methodology for recouping the illegal campaign contributions. Thus, both are relevant to the specific charge and should not be stricken.

Finally, the defendants contend that the "Background" sections of Count One and Two be stricken in their entireties. The United States submits that this request be denied. As stated

above, the United States is entitled to set the defendants' action in context and to describe their states of mind With the above concessions having been made, the United States submits that the background sections of each charge should remain, as modified, in order to set the defendants' actions in context in time and place, as well as describe their actions which alleges their intent and state of mind.

To reduce the length of the indictment, enhance clarity and perhaps reduce the length of the trial, the United States has agreed to excise the above describes paragraphs of the Indictment. In all other respects, the United States submits that the defendants' motion to strike be denied.

Respectfully submitted,

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By: */s/ William C. Lamar*
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CERTIFICATE OF SERVICE

I, William C. Lamar , certify that I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTIONS TO STRIKE SURPLUSAGE with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: None.

This the 5th day of August, 2008.

/s/ William C. Lamar
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