IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES,	:	CRIMINAL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
GENE BORTNICK,	:	NO. 03-CR-0414
Defendant.	:	

MEMORANDUM AND ORDER

AND NOW, on this 30th day of November, 2004, presently before the Court is the Motion to Strike Surplusage filed by Defendant Gene Bortnick on October 29, 2004 (Doc. No. 94). For the reasons that follow, Defendant's Motion is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2004, the Grand Jury returned a Second Superceding Indictment ("Indictment") against Defendant Gene Bortnick. The allegations contained therein mainly involve Defendant's activities with respect to three corporations under his control: MGL Corporation ("MGL"), MGL Apparel, Inc. ("MGL Apparel"), and Lorianna Stores, Inc. ("Lorianna"). The Indictment charges Defendant with bank fraud in violation of 18 U.S.C. § 1344 (Count One), wire fraud in violation of 18 U.S.C. § 1343 (Counts Two through Eighteen), transferring or concealing property in contemplation of bankruptcy in violation of 18 U.S.C. § 152(7) (Counts Nineteen and Twenty), making a false claim in bankruptcy in violation of 18 U.S.C. § 152(3) (Counts Twenty-One though Twenty-Four), concealing property of a debtor in violation of 18 U.S.C. § 152(1) (Count Twenty-Five), laundering money in violation of 18 U.S.C. § 1957 (Count Twenty-Six and Twenty-Seven). At its very end, the Indictment contains a

"Notice of Additional Factors, " which charges factors that would enhance Defendant's sentence under the Federal Sentencing Guidelines ("Guidelines").

Defendant moves to eliminate language from two separate sections of the Indictment as irrelevant and prejudicial surplusage. First, Defendant challenges certain paragraphs in Count One of the Indictment, which alleges that Defendant committed bank fraud in violation of 18 U.S.C. § 1344:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice:
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. Specifically, Defendant challenges paragraphs 8-9 and 14-23 of Count One of the Indictment are surplusage. These paragraphs allege that:

1. After obtaining financing from Congress, Defendant increased the salaries paid by MGL to himself and his family and bought a luxury home in Florida. Second Superceding Indictment Count 1, ¶ ¶ 8, 15.
2. Defendant filed petitions for bankruptcy on behalf of MGL, MGL Apparel, and Lorianna on January 20, 2000 and Congress was the only secured creditor at the time. Id. at ¶ 9.
3. Defendant planned to saddle MGL, MGL Apparel, and Lorianna with debt and diverted those funds to himself, his family, and his other corporations in anticipation of bankruptcy. Id. at ¶ 14.
4. Defendant created new fabric and garment companies, the purpose of which was to receive diverted monies and other business from the bankrupt companies. Id. at ¶¶ 16, 17, 21.
5. Defendant filed fraudulent schedules and statements of financial affairs in the course of the bankruptcy proceedings. Id. at ¶ 18.
6. Defendant fraudulently transferred assets of MGL to the Bank of Cyprus. Id. at ¶ 19.
7. Defendant created false, confusing, and incomplete document trials at MGL, MGL Apparel, and Lorianna to inflate the amount of inventory reflected on the books of those companies and to falsely reflect transfers of fabric between MGL and another company controlled by Defendant. Id. at ¶ 20.
8. Defendant made it difficult for third parties to review the true financial situation of

himself and his companies. Id. at ¶ 21.

9. Defendant secretly monitored and attempted to monitor the conversations of employees and third parties working at the MGL office, in order to ascertain what those persons knew about the true finances of his corporation. Id. at ¶ 23.

Though this Court dismissed Count One of the Indictment in an Order dated November 29, 2004, it will address Defendant's surplusage motion with respect to that Count, though the issues are arguably mooted. The Court expects that United States will attempt to re-indict Defendant on that Count, and offers its ruling on that Count as guidance and to preclude a second surplusage motion on this issue.

Second, Defendant challenges the inclusion of the "Notice of Additional Factors." These factors allege that, with respect to the various activities detailed in Counts One through Twenty-Seven, Defendant committed offenses:

1. Where the loss exceeded certain statutory amounts;
2. Which required more than minimal planning;
3. Where a substantial part of a fraudulent scheme was committed from outside the United States;
4. Which involved sophisticated means;
5. Which affected a financial institution and where Defendant derived more than $1,000,000 in gross receipts from the offense;
6. In which Defendant was an organizer or leader of criminal activity involving five or more participants;
7. Where Defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; and
8. Where Defendant knew the funds were the proceeds of unlawful activity.

Id. at ¶¶ 35-42.

II. STANDARD OF LAW

Federal Rule of Criminal Procedure 7(d) allows a court to strike surplusage from an indictment upon motion by defendant. Fed. R. Crim. P. 7(d); 1 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 127 (2d ed. 1982). The Third Circuit has recognized

the "power of the district court to redact from an indictment . . . superfluous language which unfairly prejudices the accused." United States v. Vastola, 899 F.2d 211, 231 n.25 (3d. Cir. 1990), vacated on other grounds, 497 U.S. 1001 (1990). Within the Third Circuit, some courts have held that superfluous language is defined by a disjunctive "irrelevant or prejudicial" standard, while others have adhered to a conjunctive "irrelevant and prejudicial" standard. See United States v. Jardin, 2004 WL 2314511 *2 (E.D. Pa. 2004). The Third Circuit has only spoken on the appropriate standard in a dissent by Judge Cowen in United States v. Pharis, 298 F.2d 228 (3d Cir. 2002). In his dissent, Judge Cowen cites United States v. Oakar, 111 F.3d 146 (D.C. Cir. 1997) for the proposition that "[m]aterial that can fairly be described as 'surplus' may only be stricken if it is irrelevant and prejudicial" Pharis, 298 F.2d at 248 (Cowen J., dissenting). This Court will apply the conjunctive irrelevant and prejudicial standard in this motion, as it prefers to err on the side of caution.

Though the District Court has broad discretion in ruling on a motion to strike surplusage, even courts within the Third Circuit that apply the less-stringent irrelevant or prejudicial standard have repeatedly emphasized the difficulty in prevailing on such a motion. "Under the exacting standard by which they are evaluated, motions to strike surplusage are rarely granted." United States v. Alsugair, 256 F. Supp. 2d. 306, 317 (D.N.J. 2003). See also United States v. Eisenberg, 773 F. Supp. 662, 700 (D.N.J. 1996) ("It is an exacting standard which is met only in rare circumstances."); 1 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 127 (2d ed. 1982) ("[A] motion to strike surplusage should be granted only if it is clear that the allegations are not relevant to the charge and inflammatory and prejudicial. This is a rather exacting standard, and only rarely has surplusage been ordered stricken."). In United States v.

Yeaman, 987 F. Supp. 373 (E.D. Pa. 1997), the Eastern District of Pennsylvania cited language from other district courts that indicated the heavy burden a defendant bears in making a showing of irrelevance or prejudice: "Language is properly included in an indictment if it pertains to matters which the government will prove at trial. These matters need not be essential elements of the offense if they are 'in a general sense relevant to the overall scheme charged.'" Id. at 376-377 (citing United States v. Wecker, 620 F. Supp. 1002, 1006 (D. Del. 1985)). The court went on to add that language was proper if it contained "background information" and went so far as to state that any information the "government hopes properly to prove at trial . . . cannot be considered surplusage no matter how prejudicial it may be." Id at 377 (citing United States v. Hill, 799 F. Supp. 86, 88-89 (D. Kan. 1992).

III. DISCUSSION

1. Count One

The bank fraud statute requires that the Grand Jury charge Defendant with defrauding a financial institution. 18 U.S.C. § 1344. Defendant argues that paragraphs 8-9 and 14-23 of Count One contain language that is completely irrelevant to the Grand Jury's charge of bank fraud, as those paragraphs describe activities allegedly entered into by Defendant after he had procured financing from Congress National Bank. Defendant further contends that this language will confuse the jury at trial, and will therefore be impermissibly prejudicial. The United States contends that the activities described in the paragraphs in question are relevant to the scope of and the intent behind Defendant's overall scheme to defraud Congress and its parent First Union. The United States alleges that the Defendant's scheme encompassed obtaining of the monies from Congress, diverting those monies to himself and his other corporations, driving the

borrowing companies into bankruptcy, and transferring the borrowing company's assets to his other corporations. All of these steps after the procurement of the financing were allegedly designed to hinder Congress' efforts to recoup its loan proceeds once bankruptcy proceedings began. The United States also contends that these allegations are relevant to establishing Defendant's state of mind, intent, and motive in carrying out the scheme.

The Court believes that the allegations in paragraphs 8-9 and 14-23 are relevant to the charge of bank fraud and are not prejudicial. In United States v. Abuhouran, Judge Pollak considered an indictment that referenced the same check in both a § 1344 bank fraud count and a § 1956 money laundering count. Abuhouran, 232 F. Supp. 2d. 447. In that case, the defendants ordered straw borrowers to apply for real estate and construction loans, then had the loan proceeds deposited into defendants' bank account. The bank fraud count detailed this activity, but went on to describe "a litany of financial transactions . . . which trace[d] the flow of money through the Abuhorans' elaborate shell game," including how defendants had written out various checks on the account after they had fraudulently obtained the money. Id. at 450. The Defendant argued, as Defendant does here, that the payment of the funds into the account concluded the execution of bank fraud and that the United States improperly included the subsequent transactions as part of the execution of the bank fraud scheme. Id. While Judge Pollak found that "an act of bank fraud had been completed at the time [the bank] initially made the loan," he did not find that the indictment was impermissibly written. Id. He wrote that there was no prejudice to the defendant where the bank fraud charge recited "an additional transaction – subsequent to other transactions assuredly constituting bank fraud – that further distanced the

fraudulently obtained money from its rightful owner." Id. at 451. The Court finds the same logic to be applicable in this instance.

Moreover, the Indictment charges Defendant under both provisions of § 1344, which is appropriate under Third Circuit case law. See United States v. Monostra, 125 F.3d. 183, 187 (3d Cir. 1997) (stating that the two provisions were not disjunctive, and that "it is evident that § 1344(2) was mainly intended to underscore the breadth of the statute's reach."). The overarching charge against Defendant is therefore "a scheme . . . to defraud a financial institution." 18 U.S.C. § 1344(1). The allegations in the contested paragraphs, therefore, are generally relevant to the charge of bank fraud, as they detail the scope of, and the steps in, Defendant's alleged scheme to defraud, as well as his intent and motive in taking the allegedly fraudulent actions. See United States v. Caruso, 948 F. Supp. 382, 391 (D.N.J. 1996) (stating that value of defendant's home and net amounts of charitable contributions to a university were not surplusage as they were relevant to the overall charity-refund scheme charged in the indictment); United States v. Gressett, 773 F. Supp. 270, 274 (D. Kan. 1991) (stating that allegations relevant to defendant's motive and intent in structuring fraudulent transactions were not surplusage). Lastly, the Court believes, based on the Indictment and other filings in this case, that the United States will attempt to prove at trial all of the allegations contained in paragraphs 8-9 and 14-23, which brings that information within the scope of what is properly included in an indictment under United States v. Yeaman, 987 F. Supp. 373 (E.D. Pa. 1997). See also, Caruso, 948 F. Supp. at 392.

For all the foregoing reasons, the allegations in paragraphs 8-9 and 14-23 of Count One do not warrant being stricken as surplusage.

2. Notice of Additional Factors

Defendant argues that the "Notice of Additional Factors" included at the end of the Indictment must be stricken as irrelevant and prejudicial surplusage. In addition, The Defendant alleges that the inclusion of the Notice of Additional Factors impairs his due process rights under the Fifth Amendment of the United States Constitution. By its own admission, the United States has included these factors as a preventative measure, as a result of the United States Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531, (2004), which held the Washington state sentencing guidelines unconstitutional. On October 4, 2004, the Supreme Court heard oral argument in United States v. Booker, 375 F.3d 508 (7th Cir. 2004) and United States v. Fanfan, 2004 WL 1723114 (D. Me. Jun. 28, 2004) on whether the federal Guidelines are invalidated under the logic articulated in Blakely. Though the United States took the position at oral argument that Blakely does not apply to the Guidelines, it has included notices of additional factors in Indictments returned or superceded since Blakely was decided, as a preventative measure in the event that the Supreme Court holds that any fact affecting a defendant's sentence must be found by a jury. See United States v. Mutchler, 333 F. Supp. 2d 828 (S.D. Iowa 2004); United States v. Cropper, No. 04-412 (E.D. Pa. Nov. 2, 2004); United States v. Gotti, 2004 WL 2389755 (S.D.N.Y. Oct. 26, 2004); United States v. Jamison, 2004 WL 2385003 (W.D. Wis. Oct. 21, 2004); United States v. Baert, 2004 WL 2009275 (D. Me Sept. 8, 2004); United States v. Cintron, No. 03-675-02 (E.D. Pa. Aug. 19, 2004); United States v. Brown, 2004 WL 1879949 (N.D. Ill. Aug. 18, 2004).

This Court's survey of the case law dealing with this relatively novel (and short-lived, given the imminent nature of the Supreme Court's decision on the issue) question of law reveals a split in the district courts. The Defendants rely heavily on United States v. Jardine, a case in

which Judge Schiller of the Eastern District of Pennsylvania, while appreciating the position in which the United States finds itself in a post-Blakely world, found that the inclusion of additional factors similar to those at issue here was both irrelevant to the offense charged and prejudicial to the Defendant. Jardine, 2004 WL 2314511, *6 (E.D. Pa. Oct. 8, 2004) The Southern District of Iowa reached a similar result in United States v. Mutchler, a decision in which the court emphasized that the United States could only predict what the United States Supreme Court might do, a situation that did not warrant the inclusion of factors for which there was no statutory or regulatory basis. Mutchler, 333 F.Supp., at 831-32.

In contrast, Judge Dalzell of the Eastern District of Pennsylvania allowed additional factors to remain in the indictment in United States v. Cintron, Crim. No. 03-675-02 (E.D. Pa. Aug. 19, 2004), stating that the additional factors were "relevant to the charged offenses because, if proven to and found by a jury, they would permit enhancement of the defendants' sentences under the Sentencing Guidelines." Id.; Gov't Mot. Ex. 1. Similarly, in United States v. Gotti, the Southern District of New York found that additional "Sentencing Allegations" were relevant to the racketeering charges detailed in the substantive part of the Indictment. Gotti, 2004 WL at *4-*8. In making this determination, the Gotti court rejected the reasoning of both Jardine and Mutchler. Id. at *8-*9. In United States v. Baert, the District of Maine held that the inclusion of sentencing allegations in an indictment was mandatory for the government until the Supreme Court speaks on the appropriate application of the Guidelines post-Blakely, citing the need for the government to be able to obtain "what it considers to be an appropriate sentence under the United States Sentencing Guidelines." Baert, 2004 WL at *1.

The Notice of Additional Factors included in the Indictment alleges a variety of sentence

enhancing circumstances with respect to the substantive offenses charged in Counts One through Twenty-Seven. The government cites the United States Sentencing Guidelines as the sole source for these additional factors, and none of these factors is an essential element of any criminal offense for which Defendant has been indicted.

Nevertheless, the Court will not strike the additional factors as surplusage. As above, this Court will apply both an irrelevant and prejudicial standard to questions of surplusage. With respect to relevance, the Court agrees with the reasoning of Cintron and Gotti. Though the factors are not criminal conduct as statutorily defined, they are relevant to both the criminal behaviors allegedly engaged in by Defendant and, should a jury find Defendant guilty, to sentencing issues. Moreover, while the Court is sensitive to the Defendant's concerns as to prejudice, it believes that prejudice can be eliminated by withholding the "Notice of Additional Factors" from the trial jurors until after they have reached an agreement on a verdict. Should the Supreme Court ultimately hold that facts underlying sentencing enhancements must be found by a jury, the Court will instruct the jury to engage in another round of deliberations with regard to the Additional Factors. The Court considers such a process to serve both the interests of the United States, in preserving its ability to address sentence enhancements to a constitutionally appropriate finder of fact, and the Defendant, by limiting any potential prejudice resulting from the United States' inclusion of those factors.

IV. CONCLUSION

The Grand Jury's inclusion of paragraphs 8-9 and 14-23 and the "Notice of Additional Factors" does not warrant the striking of that language as surplusage. The Court finds that the language contained in those selections does not meet the irrelevant and prejudicial standard

necessary for it to take such an action. An appropriate Order follows.

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UNITED STATES,	:	CRIMINAL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
GENE BORTNICK,	:	NO. 03-CR-0414
Defendant.	:	

ORDER

AND NOW, on this 30th day of November, 2004, it is hereby ORDERED that the Motion to Strike Surplusage filed by Defendant Gene Bortnick on October 29, 2004 (Doc. No. 94) is DENIED.

BY THE COURT:

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Legrome D. Davis, J.