IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' OPPOSITION TO "DEFENDANT B&H'S MOTION TO STRIKE SURPLUSAGE FROM THE INDICTMENT" (DOCKET # 46)

I. Introduction

Defendant B&H Maintenance & Construction, Inc. ("B&H") has moved this Court to strike language from the Indictment pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure.[1] (Def. B&H's Mot. to Strike (Docket # 46).) This motion should be denied because: (1) B&H lacks standing to challenge all but one of the clauses it seeks to strike; (2) the language in the Indictment is relevant to proving the crimes charged; and (3) B&H has failed to show that the language is so prejudicial that it cannot be cured with a jury instruction.

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[1]Defendant Landon Martin has moved to join this motion. (*See* Landon Martin's Mot. for Leave to Join Mot. Filed by Co-Def. B&H Maint. & Constr., Inc. (Docket # 49) ¶5.) If Defendant Martin is allowed to join, this opposition applies to Martin's motion to strike surplusage, as well.

II. Facts

The Defendants are charged in a two-count Indictment. Count I charges Landon Martin, Jon Paul Smith, and B&H Maintenance and Construction, Inc., with conspiring to rig bids in violation of 15 U.S.C. § 1. (Indictment Count I.) Count II charges Defendant Smith alone with obstructing the investigation into Count I by tampering with a witness. (Indictment Count II.)

The conspiracy in Count I initially involved Defendant Smith, who was vice president of B&H Maintenance and Construction, Inc., and Kenneth Rains, an executive at a company called Flint Energy Services, Inc.[2] Smith and Rains conspired to rig bids for pipelines projects their companies were submitting to BP America Production Company ("BP America"). *(See* Indictment ¶ 3(d).) Because their two companies were the only competitors for certain BP America projects, Defendant Smith and Rains agreed to divide the work so that B&H would win some bids and Flint would win the others. (Indictment ¶ 3(c).) B&H would provide Rains with the prices it was bidding, and Rains agreed to bid higher than B&H on certain projects and lower on others. Defendant Martin, who was also an employee of B&H, was aware of the conspiracy and joined it no later than September 23, 2005, when he provided B&H's bid numbers to Kenneth Rains at Defendant Smith's request. Sometime in December of 2005, the conspiracy ended (although Defendant Smith did not know it), after a Flint employee reported the illegal activity to Flint executives. Both Rains and Flint have pled guilty to the conspiracy.

Count II charges Defendant Jon Paul Smith alone with obstructing the investigation into

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[2]Defendant B&H participated in the conspiracy through the acts of its employee agents, Defendant Smith and Defendant Martin.

Count I by attempting to persuade Kenneth Rains to lie to the grand jury and the FBI about the conspiracy. (Indictment ¶ 19, 20.) After the United States learned of the bid rigging conspiracy, investigators from the FBI and Department of Justice visited Defendant Smith at his home to question him about the conspiracy. At the interview, Defendant Smith denied rigging bids and indicated that he did not know Rains well. At the close of the interview, he was served with a grand jury subpoena. Shortly after the government investigators left his house, Defendant Smith telephoned Kenneth Rains to coordinate their stories so that Rains would tell the same lies to the FBI and grand jury. Defendant Smith relayed to Rains the false statements he had made to the FBI and indicated that the government would never be able to prove the conspiracy. Both Smith and Rains knew that Smith's story was false and Rains understood that Smith was attempting to persuade him to tell the same lies.

III. Standing

As a threshhold matter, the United States notes that B&H lacks standing to challenge any language in Count II, which contains seven of the eight phrases B&H seeks to strike. A party has standing to challenge a count of an indictment only if the party is charged in that count. *See United States v. Tanner*, 471 F.2d 128, 139-40 (7th Cir. 1972) (coconspirators lacked standing to challenge count in which they were not charged); *United States v. Bennett*, 190 F. Supp. 181, 182 (S.D.N.Y. 1958) ("Defendant . . . has no standing to demand dismissal of a count in which he is not charged with commission of an offense."). B&H is not charged in Count II of the Indictment and

therefore lacks standing to challenge language in that Count.[3] For this reason alone, the Court should deny the portions of B&H's motion that relate to Count II.

IV. Legal Standard

This Court may strike language from the Indictment under Federal Rule of Criminal Procedure 7(b) only if the defendant establishes that the language is both "not relevant to the charge at issue *and* inflammatory and prejudicial to the defendant." *United States v. Schuler*, 458 F.3d 1148, 1153 (10th Cir. 2006) (quoting *United States v. Collins*, 920 F.2d 619, 631 (10th Cir. 1990)) (emphasis added); *see also United States v. Gressett*, 773 F. Supp. 270, 274 (D. Kan. 1991) ("A motion to strike surplusage should be granted only if the disputed allegations are clearly not relevant to the charge and are inflammatory and prejudicial."). This standard is an exacting one, "met only in rare cases." *United States v. Nacchio*, No. 05-cr-00545, 2006 WL 2475282, at *4 (D. Colo. Aug. 25, 2006) (unpublished)[4] (quoting *United States v. Eisenberg*, 773 F. Supp. 662, 700 (D.N.J.1991)); *accord United States v. Cooper*, 283 F. Supp. 2d 1215, 1240 (D. Kan. 2003) (rule "has not been construed by the courts to favor the striking of language"); *United States v. Daniels*, 159 F. Supp. 2d 1285, 1300 (D. Kan. 2001) ("Courts rarely strike portions of the indictment as surplusage . . . .").

The Court must first determine whether the disputed language is relevant. If the language is

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[3]Defendant Martin has moved to join this motion, but he does not have standing to challenge the language in Count II, either, because only Defendant Smith is charged in Count II. Defendant Smith has not moved to strike language in Count II, and should not be allowed to do so because the deadline to file non-evidentiary motions has expired.

[4]*See* attached Exhibit A.

relevant, that is the end of the inquiry. *See United States v. Hill*, 799 F. Supp. 86, 88-89 (D. Kan. 1992) ("If the language is information which the government hopes to prove at trial, it cannot be considered surplusage no matter how prejudicial it may be."); *United States v. Napolitano*, 552 F. Supp. 465, 480 (S.D.N.Y. 1982) ("The determinative question in a motion to strike surplusage is not the potential prejudice, but rather the relevance of the allegation to the crime charged in the indictment."); *Daniels*, 159 F. Supp. 2d at 1300 (explaining that "relevance of an allegation is the key factor in deciding whether an allegation is surplusage").

If the Court determines that disputed language is irrelevant, it must then determine whether the language is sufficiently prejudicial to be stricken. Only if the language is so prejudicial that it cannot be cured with a jury instruction is it appropriate to strike the language. *See Daniels*, 159 F. Supp. 2d at 1300 ("a proper instruction to the jury ordinarily can alleviate the potential prejudicial effect of contested allegations in the indictment."); *Lowther v. United States*, 455 F.2d 657, 666 (10th Cir. 1972), *cert denied*, 409 U.S. 887 (1972) (language not prejudicial because of Court's curative instructions); *United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir. 1990) (denial of motion to strike surplusage proper where court repeatedly instructed jury that the indictment was not evidence of any kind), *cert. denied*, 496 U.S. 942 (1990); *United States v. Ramirez*, 710 F.2d 535, 544-45 (9th Cir.1983) ("court properly instructed the jury both at the outset and at the completion of the trial that the indictment is not evidence against the accused and affords no inference of guilt or innocence").

V. Argument

Far from meeting this demanding standard, B&H's motion merely quotes Rule 7(d) and

refers to an attached copy of the Indictment, leaving the Court to speculate, without the benefit of any supporting case law, about why the indicated language should be stricken. (Def. B&H's Mot. to Strike at ¶¶ 1, 4.) Because the contested allegations are relevant to proving the crimes charged the Indictment, they should not be stricken as surplusage. *Daniels*, 159 F. Supp. 2d at 1300; *Hill*, 799 F. Supp. at 88-89; *Napolitano*, 552 F. Supp. at 480. Moreover, because B&H has failed to show any prejudice – much less prejudice so severe that it cannot be addressed by a curative instruction – it is inappropriate to strike language from the Indictment.

A. The disputed language is relevant.

1. Count I Paragraph 3(f): Concealment and attempted concealment are relevant to the means and methods of proving the bid-rigging conspiracy.

B&H first seeks to strike paragraph 3(f), which describes one of the "means and methods" the defendants used to carry out their conspiracy. (Def. B&H's Mot. to Strike Ex. A at ¶ 3(f).) In its entirety, paragraph 3(f) accuses the defendants of "[c]oncealing and attempting to conceal the conspiracy."

Paragraph 3(f) is not surplusage because it describes a "means and method" that the Defendants used to carry out the conspiracy charged in Count I. *See United States v. Naegele*, 341 B.R. 349, 364 (D.D.C. 2006) (manner and means allegations are proper and ordinarily included in conspiracy indictment); *Gressett*, 773 F. Supp. at 275 (refusing to strike as surplusage allegations that defendants used "deceitful and dishonest means"); *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 392 (N.D. Ill. 1979). At trial, the United States will present evidence that the Defendants furthered the bid-rigging conspiracy charged in Count I through concealment and attempted concealment. For example, the United States will prove that Defendant Smith met with

coconspirator Kenneth Rains in a truck in the parking lot of a casino because the two did not want to discuss their conspiracy in their offices, where others might overhear. In addition, the United States will prove that Rains, Defendant Smith, and Defendant Martin kept their conspiracy secret from their victim, since that would obviously have undermined the whole purpose of the conspiracy. Therefore, Paragraph 3(f) is relevant to proving Count I, and it would be improper to strike it from the Indictment. *See Hill*, 799 F. Supp. at 88-89 ("If the language is information which the United States hopes to prove at trial, it cannot be considered surplusage no matter how prejudicial it may be.").

Using similar reasoning, numerous courts have held that the acts set forth in the "means and methods" portions of indictments for conspiracy do not constitute surplusage. For example, the District Court for the District of Columbia recently denied a motion to strike manner and means allegations. *Naegele*, 341 B.R. at 364. As the court noted, manner and means allegations "are not required to . . . allege a crime in and of themselves," and are appropriate because they "set forth acts or conduct intended to illustrate how the scheme to defraud was carried out." *Id.* (internal citations omitted); *see also Gressett*, 773 F. Supp. at 275; *Climatemp, Inc.*, 482 F. Supp. at 392; *United States v. Sather*, No. 99-7144. 2001 WL 28040, at *3 (10th Cir. Jan. 11, 2001) (unpublished)[5] (arguably prejudicial acts relevant to demonstrate steps taken to avoid taxation in prosecution for tax evasion).

Moreover, other courts have specifically held that acts of concealment in furtherance of a conspiracy are not surplusage. For example, in *Gressett*, the defendants sought to strike from

[5]*See* attached Exhibit B.

various paragraphs of the indictment the words "concealment," "concealed," and "concealing" as irrelevant and prejudicial to proving the existence of a bank fraud conspiracy. 773 F. Supp. at 275. The court denied this motion based on the government's intention to demonstrate that the defendants had executed the fraud through acts of concealment. *Id.* The *Climatemp, Inc.*, court similarly denied the defendants' motion to strike language referring to "overt acts and effects" of an antitrust conspiracy, finding such acts and effects relevant as proof of "the existence of the unlawful combination and the intent of the participants in forming it." 482 F. Supp. at 392; *see also United States v. Weidner*, 437 F.3d 1023, 1036 (10th Cir. 2006) (affirming guilty verdict in light of evidence indicating concealment of conspiracy to commit bank fraud as helping to demonstrate defendant's participation in the conspiracy).

For these reasons, the language in Paragraph 3(f) should not be stricken.

2. Count II, Paragraph 16: Paragraph 16 alleges legally relevant facts the United States intends to prove at trial to show context, intent, and motive.[6]

With respect to Count II, Defendant B&H first moves this Court to strike the whole of paragraph 16, which reads in its entirety:

> On or about January 11, 2006, defendant J.P. SMITH told the FBI Special Agent that he had never talked about a bid or exchanged bid prices with a competitor until after the bid was submitted to the company that requested the bids, knowing that what he told the FBI Special Agent was false.

(Indictment, Count II, ¶ 16.) Because the language in paragraph 16 is relevant to prove Count II with respect to Defendant Smith, it is properly included as legally relevant.

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[6]As already argued, B&H lacks standing to challenge any language in Count II. Nevertheless, for completeness, the United States addresses why the language in Count II is relevant.

First, the acts alleged in paragraph 16 are relevant to Count II because they explain crucial background information for understanding the witness tampering charge. To prove that Defendant Smith tampered with a witness, the United States will show that he first lied to the FBI about his business practices and involvement in a bid rigging conspiracy and then that he relayed the substance of this conversation to coconspirator Kenneth Rains. To understand why Defendant Smith had a conversation with Rains, the jury will have to understand the context: that Smith had just finished lying to the FBI and was attempting to persuade Rains to tell the same lies. The lies to the FBI are thus relevant to help the jury understand the sequence of events and to provide context for the crime. *See United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (evidence of other acts is admissible as part of *res gestae* in proving the crime charged); *Sather*, 2001 WL 28040, at *3; *cf. Hill*, 799 F. Supp. at 89 (denying motion to strike "introductory paragraphs" providing "background information" setting forth defendant's alleged conduct).

Second, Defendant Smith's lies to the FBI go to motive because they show that he was attempting to convince Rains to lie so that Defendant Smith's own lies to the FBI would not be discovered. They also go to intent because they show that Defendant Smith was attempting to interfere with the FBI and grand jury investigations: far from speaking to Rains with an innocent purpose, Smith intended to "influence, delay, or prevent the testimony of [Rains] in an official proceeding," or to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." *See* 18 U.S.C. § 1512(b); *United States v. Serrata*, 425 F.3d 886, 897 (10th Cir. 2005).

For these reasons, Paragraph 16 provides relevant context and background to Count II, and it should not be stricken from the Indictment.

3. Count II, Paragraphs 13, 14, and 20: Background information is relevant and proper in an indictment.

Finally, B&H seeks to strike language (highlighted in bold in this paragraph) relating to the scope of the investigations that Defendant Smith is charged with obstructing. (Def. B&H Mot. to Strike, Ex. A ¶¶ 13, 14, 20.) Specifically, B&H seeks to strike language indicating that the FBI and a federal grand jury had been investigating "**among other things, possible violations of federal criminal statutes, including**" the antitrust laws. *(See* Indictment ¶¶ 13, 14, and 15). In addition, it seeks to strike language charging that Smith intended to prevent a witness from communicating information about the possible commission of "**a Federal offense, including, among other things,**" possible violations of the criminal antitrust laws. As explained below, this language is relevant to the charges in Count II and should not be stricken.[7]

The contested language regarding the scope of the FBI and grand jury investigations provides pertinent background information to the charge of witness tampering. The investigation leading to this case focused on a wide range of potentially criminal acts, including, among others, bid rigging, mail fraud, and wire fraud. *Cf. United States v. Washita Constr. Co.*, 789 F.2d 809, 817-18 (10th Cir. 1986) (bid rigging constitutes a scheme to defraud for purposes of mail fraud

[7]Moreover, because it refers to actions taken by the FBI and the grand jury – not by Defendant Smith – it is nonprejudicial to the Defendant. *See Hill*, 799 F. Supp. at 89 ("[I]t is proper for the indictment to contain relevant background information." (citing *Climatemp, Inc.*, 482 F. Supp. at 391-92)).

statute); *United States v. Azzarelli Constr. Co.*, 459 F. Supp. 146, 149-150 (E.D. Ill. 1978) (noting that bid rigging may be charged as both Sherman Act violation and mail fraud). By downplaying the scope of the investigation and the number of crimes being investigated, B&H perhaps wishes to minimize the harm that could have resulted from witness tampering.

But details of the nature and importance of the investigation is important to the United States' case, a fact numerous courts have recognized. For example, in *Hill* the defendants were charged with, among other things, misapplication of bank funds and sought to strike as surplusage a paragraph stating that the FDIC is a federal agency, claiming it "overemphasize[d] the importance of the FDIC and [was] not relevant to any essential element of the misapplication counts." 799 F. Supp. at 88-89. In denying the motion, the court emphasized that the indictment may include matters and information not essential to elements of the crimes charged so long the government intends to prove them at trial. *Id.* Whatever the particular category of federal offense the defendant's actions may have prevented the FBI from investigating, the fact remains that the charged witness tampering was commissioned in response to an expansive criminal investigation involving possible violations of multiple federal criminal statutes.

The phrase "among other things" is common shorthand for facts the United States intends to prove at trial, and courts have held that such language, when included as background information, "serves as a device to allow the government to prove more than that alleged in the indictment." *Climatemp, Inc.*, 482 F. Supp. at 392; *see United States v. Fahey*, 769 F.2d 829, 842 (1st Cir. 1985); *Hill*, 799 F. Supp. at 88-89. Thus, the court in *Climatemp, Inc.*, denied the defendant's motion to strike "among other things" from an indictment charging an antitrust conspiracy, where

the phrase referred to unspecified acts the government intended to prove as methods of carrying out the conspiracy. 482 F. Supp. at 392. In particular, the court noted the impracticality of requiring the government to detail all its proof in the indictment. *Id.* Likewise, in *Fahey*, the First Circuit upheld the district court's refusal to strike "among other things" from an indictment charging mail and wire fraud, where the phrase appeared "in the introductory paragraphs detailing the alleged omitted or misrepresented acts." *Id.* Because the phrase "among other things" refers to the background facts of the investigation the United States intends to prove at trial, it is properly included in the Indictment.

The language in Counts 13, 14, and 20 contains pertinent context and background to the crime charged. Therefore, the disputed language should not be stricken.

B. B&H has failed to demonstrate prejudice incapable of being cured by a jury instruction.

Finally, if B&H had met its burden of showing that some of the included language is irrelevant, it would then have to demonstrate that the disputed language is so prejudicial that it cannot be cured by a jury instruction. *See Daniels*, 159 F. Supp. 2d at 1300 ("a proper instruction to the jury ordinarily can alleviate the potential prejudicial effect of contested allegations in the indictment."); *Lowther*, 455 F.2d at 666 (language not prejudicial because of Court's curative instructions); *Figueroa*, 900 F.2d at 1218 (denial of motion to strike surplusage was proper where court repeatedly instructed jury that the indictment was not evidence of any kind); *Ramirez*, 710 F.2d at 544-45 ("court properly instructed the jury both at the outset and at the completion of the trial that the indictment is not evidence against the accused and affords no inference of guilt or innocence"). Absent some specific showing to the contrary, this Court must presume that the jury

would follow its instruction, *cf. United States v. Eads*, 191 F.3d 1206, 1209 (10th Cir. 1999) (court presumes jury will follow limiting instruction), because "a proper instruction to the jury ordinarily can alleviate the potential prejudicial effect of contested allegations in the indictment," *Daniels*, 159 F. Supp. 2d at 1300; *see also Lowther*, 455 F.2d at 666; *Figueroa*, 900 F.2d at 1218; *Ramirez*, 710 F.2d at 544-45.[8]

B&H has not even argued – much less proven – that a curative instruction would be ineffective. Therefore, it has failed to show that it is appropriate to strike language from the Indictment. As a result, the language must remain in the Indictment, and the Court must presume that the jury will follow its instruction not to consider the Indictment as evidence.

VI. Conclusion

For the foregoing reasons, B&H's motion to strike surplusage from the Indictment should be DENIED.

Respectfully Submitted,

s/Diane Lotko-Baker
DIANE C. LOTKO-BAKER
s/Carla M. Stern
CARLA M. STERN

s/Mark D. Davis
MARK D. DAVIS

[8]The Court should instruct the jury that "the indictment is simply a charge by the government to begin a case and that it is not, in any sense, evidence of the allegations or statements it contains." O'Malley et al., 1A *Federal Jury Practice and Instructions* § 10.01,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing United States' Opposition to Defendant B&H's Motion to Strike Surplusage from the Indictment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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