

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**ANÍBAL ACEVEDO VILÁ, et al.,**

**Defendants.**

**CRIMINAL NO. 08-00036 (PJB)**

**REPLY BRIEF IN SUPPORT OF MOTION OF  
DEFENDANT ANÍBAL ACEVEDO VILÁ TO STRIKE SURPLUSAGE**

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## **INTRODUCTION**

The insinuations of corruption woven into Count 1 of the Superseding Indictment are baseless, prejudicial, and irrelevant to the campaign finance violations actually charged in that count. *See* Motion of Defendant Aníbal Acevedo Vilá to Strike Surplusage and Incorporated Memorandum of Law (Dkt. No. 181) (“Motion”); Motion to Strike Surplusage from the Superseding Indictment (Dkt. No. 179) (“Feldman Motion”). The government now concedes that “much of the language objectionable to the defendants does not constitute an element of the offense charged.” Omnibus Response of the United States to Pre-Trial Motions, at 6 (Dkt. No. 208) (“Response”). Yet it persists in trying to keep these allegations in the Indictment, advancing a far-reaching theory of Rule 7 by which even highly prejudicial allegations may remain if they are “in a general sense relevant to the overall scheme.” Response at 5. It offers little explanation as to how these allegations are legally relevant to the crime charged, other than to assert that they are “important background information,” *id.* at 6, and that they correspond to unspecified proof at trial, *id.* at 3. And the prosecution offers no response at all to our showing that the term “at least” must be struck from paragraphs 14 and 16, so this point must be taken as conceded. The motion to strike should be granted.

## **ARGUMENT**

### **I. THE ALLEGATIONS INSINUATING CORRUPTION SHOULD BE STRUCK FROM THE INDICTMENT.**

Count 1 of the Indictment is laced with numerous insinuations of quid pro quos and “pay-to-play” relationships. Motion at 6-7; *see* Indictment at 7 ¶ 3; *id.* at 11-12 ¶¶ 5(l)-(m); *id.* at 19 ¶ 26; *id.* at 20 ¶¶ 34-35; *id.* at 23-24 ¶ 40; *id.* at 24-25 ¶¶ 45-46; *see also generally* Feldman Motion at 5, 8-11. These allegations lack any basis in fact, *see* Motion at 8-11, and the prosecution in its Response has not claimed otherwise. They are also legally irrelevant to the

charged offense. Count 1 of the Indictment charges a conspiracy to violate the Federal Election Campaign Act and make false statements to the FEC. It does not, however, charge the defendants with bribery or corruption of any sort, nor does any other count in the Indictment. The government admits that bribery and corruption are not elements of the conspiracy charged in Count 1, and that these allegations are not elements of the crimes actually charged. Response at 6 (“[M]uch of the language objectionable to the defendants does not constitute an element of the offense charged.”);<sup>1</sup> *see* Motion at 7. That alone is ample reason to strike this language from the Indictment. *See* Motion at 7-8 & n.4; *United States v. Wells*, 127 F.3d 739, 743 (8th Cir. 1997).

It is significant that the government does not even attempt to dispute that these allegations are highly prejudicial. This is an important part of the surplusage analysis. *See* Motion at 5; Fed. R. Crim. P. 7 (1944 advisory committee note to subdivision (d)) (purpose of Rule 7(d) is to “protect[] the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial”); *United States v. Torres-Gonzalez*, 526 F. Supp. 2d 210, 212 (D.P.R. 2007) (striking surplusage that was “inflammatory and prejudicial to Defendants and if presented to the jury could color the jury’s perception of Defendants’ character”). The government leaves our showing on this issue unrebutted. Whether the prejudicial language has been inserted in the Indictment in an effort to sway the jury by presenting it with hints of corruption, or if instead these are merely vestiges of a lengthy and frustrating corruption investigation that led to naught, *see* Motion at 1-5, inclusion of this language is impermissible either way.

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<sup>1</sup> Notwithstanding its use of the limiting phrase “much of,” at no point does the government show how any of the language we have sought to strike is relevant to any element of any charged offense.

The government's only response is that these unfairly prejudicial allegations are "sufficiently relevant to the charged offense" that they should remain. Response at 5. In other words, because they are assertedly relevant in some general way, they belong in the Indictment. The prosecution asserts (at 10) that these allegations provide "important background information concerning the knowledge, intent, motive and willingness of the defendants to engage in" the alleged scheme. This naked assertion, however, has no grounding in the relevant case law, the elements of the offense, or the specific facts of this case, and it is not nearly sufficient to overcome the substantial prejudice that will result from a failure to strike. *See United States v. Mathis*, No. CR-1-97-15, 2004 WL 683648, at \*4 (S.D. Ohio June 2, 1997) (granting pretrial motion to strike allegations that were not "essential to" the charged crime over the government's objection that allegations related to intent and knowledge of the scheme); *see also United States v. Caraballo-Cruz*, 52 F.3d 390, 393 (1st Cir. 1995) ("On appeal, however, the government fails ... to address the substantive issue in any meaningful way. ... An enigmatic reference of this sort, totally devoid of developed argumentation, is like a month-old ketchup bottle: it may look full, but is surpassingly difficult to get anything out of it.").<sup>2</sup>

This is not the first time that prosecutors have sought to justify such allegations in an indictment as "background" and courts have properly recognized the dangers and impropriety of

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<sup>2</sup> Because the government has failed to explain with any specificity the relevance of these allegations to the elements of the conspiracy charge, the cases cited by the government (at 5-6) are readily distinguishable. *See United States v. Scarpa*, 913 F.2d 993, 1012 (2d Cir. 1990) (explaining relevancy of allegations to identity of RICO enterprise); *United States v. Bortnick*, No. Crim. A. 03-CR-0414, 2004 WL 2861868, at \*3-4 (E.D. Pa. Nov. 30, 2004) (explaining how allegations related to charged scheme to defraud); *United States v. Edwards*, 72 F. Supp. 2d 664, 666 (M.D. La. 1999) (allegations relevant to existence of conspiracy and victims' state of mind); *United States v. Caruso*, 948 F. Supp. 382, 391-92 (D.N.J. 1996) (explaining how allegations related to "an intrinsic part of the fraud"); *United States v. Giampa*, 904 F. Supp. 235, 272 (D.N.J. 1995) (allegations demonstrate relationship between members of RICO conspiracy).

going along. See *United States v. Brighton Bldg. & Maint. Co.*, 435 F. Supp. 222, 230 (N.D. Ill. 1977) (“Prosecutors have been known to insert unnecessary allegations for ‘color’ or ‘background’ hoping that these will stimulate the interest of the jurors.”).<sup>3</sup> It is simply not the case that any evidence that may be admissible at trial – something we do not concede with respect to the claimed evidence at issue here – may be charged in the indictment. In *United States v. Torres-Gonzalez*, for instance, this Court struck allegations from an indictment, notwithstanding that they “may be relevant to the case at hand and could be admissible.” 526 F. Supp. 2d 210, 212 (D.P.R. 2007) (footnote omitted); see also 1 Charles Alan Wright, *et al.*, Fed. Prac. & Proc. Crim. 3d § 128 (2008) (“This does not necessarily mean that any evidence that would be admissible at trial is therefore proper in an indictment; the question ... is whether the material is unnecessary in making out a prima facie case pleading of the violation.” (internal quotation marks omitted)).

Finally, the government briefly makes two procedural arguments. First, it suggests that this court should defer decision until after trial. Response at 4-5. It does not explain why this would be appropriate, and indeed such an approach would be inconsistent with Rule 12(b)(3)(B), which explicitly provides that “motions alleging a defect in the indictment” “must be raised before trial.” Motions to strike surplusage are routinely considered and granted prior to trial. *E.g.*, *Torres-Gonzales*, 526 F. Supp. 2d at 212-13; *United States v. Valencia-Meraz*, No. CRIM 06-82, 2006 WL 1704302, at \*25 (D. Minn. May 10, 2006) (“Motions to strike language from an Indictment are frequently addressed at the pretrial stage.”).

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<sup>3</sup> The government has also asserted (at 6) that the allegations should not be struck because they may have formed the basis for a grand juror’s decision to indict. If the grand jury had to rely on evidence of alleged “pay-to-play” relationships in order to charge a conspiracy to violate the FECA, this would only reinforce that the grand jury process and Indictment were flawed.

Second, the government argues that any defect in the indictment can be cured with jury instructions. The fact that jury instructions may sometimes mitigate the prejudice caused by surplusage does not mean that courts should willy-nilly allow it to remain, especially when seasonably challenged in a pretrial motion. That some such errors might be harmless at the end of trial when instructions have cured them is no reason to invite the errors in the first place.

## **II. THE MOTION IS UNOPPOSED AS TO THE PHRASE “AT LEAST.”**

The government acknowledges that we moved to strike the phrase “at least” from paragraphs 14 and 16 of Count 1. Response at 10. But it makes no argument in response. *See generally id.* at 9-10. Accordingly, this point is conceded, and the motion must be granted on this issue. *See Caraballo-Cruz*, 52 F.3d at 393 (“We believe it is apodictic that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. ... [T]he rule applies with undiminished vigor when, as now, a prosecutor attempts to rely on fleeting references to unsubstantiated conclusions in lieu of structured argumentation.”) (internal quotation marks and citations omitted).

## **CONCLUSION**

For the foregoing reasons, Mr. Acevedo Vilá’s motion to strike surplusage in paragraphs 3, 5(l), 5(m), 14, 16, 26, 34, 35, 40, 45, and 46 of Count 1 of the Indictment should be granted.

Dated: August 7, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Bradford A. Berenson, hereby certify that on this 7th day of August, 2008, I caused the foregoing Reply in Support of Defendant Aníbal Acevedo Vilá's Motion to Strike Surplusage to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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