

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA :

v. :

Case No. 8:03-cr-77-T-30TBM

SAMI AMIN AL-ARIAN, :
SAMEEH HAMMOUDEH, :
GHASSAN ZAYED BALLUT, :
HATIM NAJI FARIZ :

**RESPONSE BY THE UNITED STATES TO MOTION TO STRIKE SURPLUSAGE BY
DEFENDANT HATIM NAJI FARIZ**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following response to Motion to Strike Surplusage by Defendant Hatim Naji Fariz.

The United States hereby opposes Defendant HATIM NAJI FARIZ's ("FARIZ") Motion to Strike Surplusage ("Motion to Strike"), and in support thereof states the following:

I. BACKGROUND

On February 19, 2003, a grand jury returned an indictment charging FARIZ and others with numerous crimes related to their alleged involvement with the Palestinian Islamic Jihad, Jihad-Shiqaqi Faction ("PIJ"), an international terrorist organization whose purpose is to destroy Israel and end all Western influence in the Middle East. (See Doc. 1, Indictment) Specifically, the grand jury charged FARIZ with conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(c), conspiracy to murder, maim, or injure persons outside the United States in violation of 18 U.S.C. § 956(a)(1), conspiracy to provide material support to a Foreign Terrorist Organization ("FTO") in violation of 18 U.S.C. § 2339B, conspiracy to make and receive contributions of

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funds, goods, or services to a Specially Designated Terrorist (“SDT”) or Specially Designated Terrorist Group (“SDTG”) in violation of 18 U.S.C. § 371, as well as nine counts of violations of the Travel Act (18 U.S.C. § 1952(a)) for his participation in interstate or international telephone conversations intended to promote PIJ’s extortion and money laundering. (Id.)

On September 5, 2003, FARIZ filed the instant motion under Federal Rule of Criminal Procedure 7(d) seeking to strike a laundry list of allegations contained in the indictment. (See Doc. 251 ¶ 5.) At the outset, FARIZ contends that all references to “terrorism,” “terrorist,” and “terrorist activities” are surplusage because they have “no independent legal significance” and are “editorial” in nature. (Id. at 3, 4.) FARIZ further seeks to eliminate any portion of the indictment that could be interpreted as exhibiting animus towards the United States and its President and military, the United Nations, and the 1991 Gulf War. (Id. at 4.)

Moreover, FARIZ objects to several overt acts listed in Count One of the indictment. First, he claims that overt acts 208, 209, 211, 215, and 244 are irrelevant because they lack allegations of conduct in furtherance of the conspiracy, or any other illegal activity or intent. (Id. at 5.) Next, he argues that overt act 238 and the last sentence of overt act 239 should be stricken because they only relate his post factum knowledge of a PIJ bombing in Israel and “insinuate that Mr. FARIZ was pleased with that event.” (Id.)

Any reference to unmentioned coconspirators or undescribed conduct is also alleged to be surplusage because it “invites the jury to infer improperly that Mr. FARIZ was involved in acts, or with persons, in an illegal manner not articulated within the charging document.” (Id. at 6.) FARIZ additionally objects to the identification of FARIZ as a “close” associate of SAMI AMIN AL-ARIAN (“AL-ARIAN”), SAMEEH HAMMOUDEH (“HAMMOUDEH”), and GHASSAN

ZAYED BALLUT (“BALLUT”). (Doc. 251 Ex. 1 Ct. 1 ¶ 15.) Lastly, FARIZ repeats and expands the arguments set forth in his separate “Motion to Strike as Surplusage Paragraphs 43(236), (240), (247), and (253) of the Indictment, and to Dismiss Counts 35, 37, 41, and 43 of the Indictment.”

II. LEGAL STANDARD

A motion to strike language from the indictment as surplusage under Federal Rule of Criminal Procedure 7(d) may not be granted unless it is clear that the language is *both* “not relevant to the charge” *and* “inflammatory and prejudicial.”¹ United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). ‘Relevant evidence’ is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Allegations or evidence are not prejudicial simply because they are adverse to the defendant, but rather must tend to suggest a decision on an improper basis. See United States v. Ballou, 656 f.2d 1147, 1155 (5th Cir. 1981); Dollar v. Long Mfg., 561 F.2d 613, 618 (5th Cir. 1977).²

Under this standard, courts may not strike an allegation from the indictment if the allegation is admissible and relevant to the charges, regardless of how prejudicial the language is to the defendant. United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990); United States v.

¹Generally when adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5th Cir. 1960). Thus, the challenged allegations must be considered in light of the rest of the indictment.

² In Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit Court of Appeals held that decisions of the United States Court of Appeals for the Fifth Circuit handed down on or before September 30, 1981 would be binding precedent in the Eleventh Circuit appellate, district and bankruptcy court. Id. at 1207.

Edwards, 72 F. Supp. 2d 664, 667 (M.D. La. 1999). Similarly, if the language is information that the United States hopes to properly prove at trial and is relevant, it cannot be considered surplusage no matter how prejudicial it may be. United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979), aff'd sub nom, United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir. 1983); United States v. Hill, 799 F. Supp. 86, 88-89 (D. Kan. 1992). United States v. Wecker, 620 F. Supp. 1002, 1007 (D. Del. 1985).

The standard for striking surplusage is “most exacting,” Awan, 966 F.2d at 1426, and has been “strictly construed against striking surplusage,” United States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998). See also 1 Charles A. Wright, Federal Practice and Procedure § 127 (3d ed. 2003) (“only rarely has surplusage been ordered stricken”). Because Rule 7(d) is written in permissive and not mandatory language, district courts retain the discretion to deny such motions. See Rezaq, 134 F.3d at 1134; Fed. R. Crim. P. 7(d).

III. ARGUMENT AND AUTHORITIES

The Court should deny FARIZ’s Motion to Strike in its entirety because all of the challenged allegations contain information that is relevant to the charges against him, which the United States intends to prove at trial. Thus, they cannot be stricken as surplusage even if they are prejudicial. The United States will address each request of the defendant in turn.

A. References to “Terrorism”

The defendant first requests that all references to the words “terrorism,” “terrorist,” and “terrorist activities,” should be stricken as surplusage. Contrary to FARIZ’s assertion, the inclusion of these terms are not editorial in nature and the grand jury did not gratuitously insert “terrorism” and like phrases into the Indictment simply to add unnecessary “color.” (See Doc.

251 at 3.) Rather, such words are employed in the Indictment as “a succinct method of describing the alleged activities of the persons [and entities] with whom [the defendant] was associated,” and as such they are relevant and material. See United States v. Riggs, 739 F. Supp. 414, 424 (N.D. Ill. 1990) (refusing to strike “hacker” from an indictment because it described the defendant and his activities in which he defrauded a company by gaining unlawful access to its computer system). Analogous to Riggs, “terrorism” or “terrorist” as used here is simply shorthand used to describe evidence that will be presented at trial of the nature of activities of PIJ and HAMAS (another designated terrorist organization), as carried out by their members and agents, activities which at their core involve the systematic use of violence to coerce Israel and the United States into acceding to their extortionate demands. (See Doc. 251 Ex. 1 Ct. 1 ¶¶ 2, 30, 31, 32, 35, 36, 40, 43(5), 43(19), 43(23), 43(27), 43(84), 43(111), 43(159), 43(163), 43(171), 43(185)(2), 43(186)(2), 43(193), 43(229), 43(240), 43(249); id. Ct. 3 ¶ 3(b), 3(i), 3(l), 3(r); id. Ct. 45 ¶ 2(a); id. Ct. 46 ¶ 1(a).) Such usage is entirely consistent with dictionary and statutory definitions and colloquial convention, especially with respect to violence in the Middle East. See e.g. Merriam Webster’s Collegiate Dictionary 1217 (10th ed. 1997); 18 U.S.C. § 2331(1) (defining international and domestic terrorism). Accordingly, there is “no reason why [this] properly descriptive term should be excluded from the Indictment.” United States v. Poindexter, 725 F. Supp. 13, 35-36 (D.D.C. 1989) (refusing to strike a description of supplies shipped during the Iran Contra affair as “lethal” because the term was commonly used to distinguish arms from humanitarian assistance).

Moreover, the evidence supporting the allegation of “terrorism” is relevant because it forms a critical “part of the United States’ theory of the case about the affairs of the charged enterprise [and] its operations.” United States v. Giovanelli, 747 F. Supp. 875, 888 (S.D.N.Y. 1989). Specifically, the evidence helps establish the nature of the PIJ enterprise, intent and motive of PIJ members, and the character, purpose and means of PIJ’s attacks and activities. See United States v. Gotti, 42 F. Supp. 2d 252, 293 (S.D.N.Y. 1999) (refusing to strike allegations explaining the nature and structure of the enterprise in a racketeering indictment); United States v. Jackson, 850 F. Supp. 1481, 1507 (D. Kan. 1994) (refusing to strike allegation supporting the defendant’s motive and intent); Giovanelli, 747 F. Supp. at 888 (“The Government is entitled to present proof, if any exists, surrounding the manner in which the charged enterprise is conducted and the purpose for which it is operated.”). Just as in United States v. Bin Laden, 91 F. Supp. 2d 600 (S.D.N.Y. 2000), evidence that the PIJ committed “terrorist” acts may support an inference that FARIZ “agreed with others to attempt to achieve the criminal objectives set forth in the Indictment.” Id. at 621-22 (refusing to strike references to “terrorist groups and affiliated terrorist groups”). Accordingly, because this information is relevant to the charges, allegations of “terrorism” are not surplusage.³ Scarpa, 913 F.2d at 1013; Bin Laden, 91 F. Supp. 2d at 622.

³Courts have routinely refused to strike similar types of descriptive words and phrases from indictments. See, e.g., Gotti, 42 F. Supp. 2d at 293 (refusing to strike “brutal retribution” because it described methods by which the enterprise maintained power over its members); United States v. Andrews, 749 F. Supp. 1517, 1519 (N.D. Ill. 1990) (refusing to strike “street gangs” “hit team” “hitmen” and “enforcers” used to describe defendants and associates); United States v. Santoro, 647 F. Supp. 153, 176-77 (E.D.N.Y. 1986) (refusing to strike mafia-related terminology from an indictment because they established the identity of the RICO enterprise and would be included in the government’s proof at trial), rev’d on other grounds sub nom, United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988); United States v. DePalma, 461 F. Supp. 778, 798 (S.D.N.Y. 1978) (refusing to strike the terms “skimming” and “looting” as relevant to the nature and objectives of bankruptcy fraud conspiracy).

Indeed, “terrorism” is particularly relevant here because it encapsulates the whole “gist of the case.” United States v. Sciandra, 529 F. Supp. 320, 322 (S.D.N.Y. 1982) (refusing to strike description of transactions in criminal tax fraud case as “sham”); see also United States v. Eisenberg, 773 F. Supp. 662, 701 (D.N.J. 1991) (refusing to strike “bribery” and “bribes” as describing the nature of an agreement that formed an “integral part” of the alleged schemes). At its essence, FARIZ and his co-defendants are charged with assisting an organization that has been determined by the United States as both an FTO and SDTG, the goal of which is to carry out classical terroristic activities, i.e. attacks upon Israeli citizens designed to coerce the Israeli and United States governments. (Doc. 1 Ct. 1 ¶¶ 3, 8, 12, 21, 22, 29.) The statutes under which FARIZ is charged in Counts Two, Three, and Four are even identified within the United States Code as specific ‘crimes of terrorism.’ See 18 U.S.C. § 2332b(g)(5) (defining ‘Federal crime of terrorism’ to include violations of § 956(a)(1) and § 2339B). Thus, the concept of terrorism permeates the entire fabric of the case.

Second, the terms “terrorism,” “terrorist,” and “terrorist activities” have “independent legal significance,” (see Doc. 251 at 3), in this case as an actual statutory term in 18 U.S.C. § 2339B alleged in Count Three. See 18 U.S.C. ¶ 2339B. “There is nothing irrelevant or unduly prejudicial about the use of terms that are lifted directly from the face of the very statutes under which defendants are indicted.” Giovanelli, 747 F. Supp. at 889 (refusing to strike “racketeering” from a RICO indictment); see also United States v. Ianniello, 621 F. Supp. 1455, 1479 (S.D.N.Y. 1985) (same), aff’d, 808 F.2d 184 (2d Cir. 1986). Similarly, “terrorism” is integral to the violations alleged in Counts Three and Four since they rely on the executive designation of PIJ, HAMAS, and several defendants as FTO’s, SDT’s, and SDTG’s. The word is

even embedded in the official name of the “pending terrorism legislation,” namely the Omnibus Anti-Terrorism Act of 1995, which the Indictment alleges was discussed by one of the indicted defendants in an intercepted telephone conversation with the then Secretary General of PIJ. (See Doc. 251 Ex. 1 Ct. 1 ¶ 43(163).)

Furthermore, FARIZ’s concern that jurors will believe that he and his co-defendants actually used the word “terrorism” in conversations described in the Indictment is patently unfounded. In accordance with ordinary rules of grammar, the Indictment consistently places direct quotations within quotation marks and thus fosters the logical inference that any language not in quotation marks is not a verbatim quote. (See, e.g., Doc. 1 Ct. 1 ¶¶ 43(84), 43(111), 43(164), 43(176), 43(178).) Most importantly, the jurors will hear evidence regarding the content of the conversations and be able to determine for themselves what was actually said. The Court will also instruct the jury that the Indictment does not constitute evidence, but rather only summarizes the charges and findings of the grand jury. Given these instructions and the clear context of the allegations, there is no risk that the jury will misunderstand the paraphrasing in the Indictment. See United States v. Giampa, 904 F. Supp. 235, 272 (D.N.J. 1995). In any event, because the Indictment’s references to “terrorism,” “terrorist,” and “terrorist activities” are relevant to the charges and will be supported by evidence at trial, they cannot be stricken under Rule 7(d). See Scarpa, 913 F.2d at 1013; Climatemp, Inc., 482 F. Supp. at 391.

B. Allegations Reflecting Political Animus against the United States

FARIZ further challenges as prejudicial a host of allegations that he believes display animus against the United States and its activities. All of these allegations, however, relate the self-proclaimed purpose of the PIJ and are probative of the goal of the alleged conspiracies.

Accordingly, they are highly relevant to the case and cannot be considered surplusage.

Many of the challenged allegations were made during public speeches given by the defendants in their capacity as representatives of PIJ or its components, and made in furtherance of PIJ activities. (See Doc. 251 Ex. 1 Ct. 1 ¶¶ 3, 43(5), 43(7), 43(17), 43(120), 43(147), 43(150), 43(185)(1).) For example, FARIZ objects to inclusion of a statement by Fathi Shiqaqi, the former Secretary-General of PIJ, made during a published interview about PIJ and its objectives explaining their determination to seek the destruction of Israel in part because of its partnership with the United States. (Id. Ct. 1 ¶¶ 6, 43(147); see also id. ¶ 43(120).) AL-ARIAN, RAMADAN ABDULLAH SHALLAH (“SHALLAH”), and BALLUT each expressed anger over the Gulf War and identified the United States as their enemy during speeches they gave as representatives of the Islamic Concern Project, a component of the PIJ enterprise. (See id. Ct. 1 ¶¶ 25, 43(5), 43(7), 43(17).) Similarly, FARIZ seeks to excise a direct quotation of the phrase “Great Satan America” from the PIJ “Manifesto,” (which was presumably created for publicity or proselytizing purposes) where it was used to describe the Western influence in the Middle East that PIJ has vowed to eliminate. (See id. Ct. 1 ¶¶ 3, 43(185)(1).)

Considering their context, these allegations are directly probative of the nature and goals of the PIJ enterprise as charged in Count One, as well as the motive and intent of the defendants and other PIJ members in participating in all of the charged conspiracies and offenses. Jackson, 850 F. Supp. at 1507 (refusing to strike allegation addressing intent and motive for future actions); Giovanelli, 747 F. Supp. at 888 (noting the relevance of allegations of “the purpose for which [the charged RICO enterprise] is operated”). In addition, they provide a background to PIJ’s overall scheme and activities. See Giampa, 904 F. Supp. at 271-272 (refusing to strike

language relevant to the “overall scheme charged in the indictment”). As such they cannot be struck from the Indictment regardless of any prejudicial impact.⁴ See Scarpa, 913 F.2d at 1013.

FARIZ’s assertion that the allegations are irrelevant because the Indictment does not involve terrorist activity against the United States is unsustainable. The Indictment flatly alleges that United States’ citizens were killed, injured, or targeted in PIJ suicide attacks. (See Doc. 1 Ct. 1 ¶¶ 43(151), 43(190).) Moreover, as explained above, a significant motive and intent behind PIJ’s terrorist activities is to end the United States’ influence over the Middle East region. (See id. Ct. 1 ¶ 26.) Even where there is no direct targeting, terrorist acts committed abroad nonetheless have profound effects on United States’ interests. It is widely recognized that the nature of international terrorism is such that it transcends national boundaries and is directed at all peoples. See El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 771 (2003) (“Terrorism crosses national borders, even our own.”); Tachiona v. Mugabe, 169 F. Supp. 2d 259, 278 (S.D.N.Y. 2001) (“[A]cts of terrorism . . . respect no national borders”). Indeed, when naming PIJ and HAMAS as SDTGs, President Clinton concluded that “grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.” See Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995); see also Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct

⁴FARIZ further seeks to strike an allegation of a statement made during a telephone conversation in which SHALLAH and an unidentified person expressed a desire for PIJ members within the Occupied Territory to receive training which would be funded by the United Nations. (See Doc. 251 Ex. 1 Ct. 1 ¶ 43(150).) FARIZ, however, fails to explain how this statement indicates any ‘animus’ towards the United Nations. Regardless, the statement is probative of the means by which PIJ operated and its goals, and thus is relevant to the charges.

Terrorism Act of 2001 § 301(a), Pub. L 104-132, 110 Stat. 1214 (finding that international terrorism “is a serious and deadly problem that threatens the vital interests of the United States”). For all these reasons, the terrorist activity in which PIJ engages plainly targets and intimately affects the United States.

Moreover, FARIZ cannot claim prejudice from the inclusion of the challenged language in the Indictment since most of the references that FARIZ seeks to strike derive from the defendants’ own statements.. See United States v. Fahey, 769 F.2d 829, 842 (1st Cir. 1985) (affirming district court’s refusal to strike as surplusage terms used by employees of the defendant’s company and in sales material generated by the company); Climatemp, 482 F. Supp. at 391. Allegations of relevant matters of which the United States intends to offer evidence to establish the charge can “scarcely be called ‘surplusage’ . . . for the danger to be protected against (by [Rule 7(d)]) is that material prejudicial and otherwise inadmissible will be conveyed to the jury when the indictment is read.” United States v. Chas Pfizer & Co., 217 F. Supp. 199, 201 (S.D.N.Y. 1963). Thus, there is no basis for striking the references to “terrorism,” “terrorist” and “terrorist activities” from the Indictment.

C. **Reference to a Document Describing the Structure and Operation of a Hostile Intelligence Organization within the United States**

FARIZ further objects to an allegation describing a document possessed by AL-ARIAN during the course of the alleged RICO conspiracy that sets forth a plan for structuring and operating a hostile intelligence organization affiliated with a university. (See Doc. 251 Ex. 1 Ct. 1¶ 43(186).) His contention that this allegation is irrelevant and prejudicial is meritless, however, because the scenario it describes parallels the conduct and schemes alleged in this

Indictment. The grand jury found that the defendants “utilized the University of South Florida” as cover for PIJ members and as an instrumentality through which they conducted their illegal activities. (See Doc. 1 Ct. 1 ¶¶ 16, 28.) Thus, the document is clearly probative of the plans, means, and methods of operation of the PIJ enterprise and conspiracy alleged in Count One, as well as of the other conspiracies charged in Counts Two through Four, and of the promotion of the unlawful activities in the Travel Act violations. Furthermore, the allegation speaks directly to the defendants’ motive and intent in engaging in the conspiracies. Given its relevance to several of the offenses charged against FARIZ, the allegation cannot be stricken.⁵

D. Overt Acts 208, 209, and 211

Given that they expressly reference each other, Overt Acts 208, 209, and 211 should be construed collectively. Overt Act 208 alleges that an individual in Chicago called HAMMOUDEH and told HAMMOUDEH’s wife that he had been trying to reach FARIZ. (Doc. 251 Ex. 1 Ct. 1 ¶ 208.) Overt Act 209 is a conversation between HAMMOUDEH and his father, while the latter was overseas, discussing the location and arrival of the individual referenced in Overt Act 208. (Id. Ct. 1 ¶ 209.) Finally, Overt Act 211 relates a conversation between HAMMOUDEH and his sister during which he says that he had seen this individual and discussed whether the individual would give HAMMOUDEH money and that the individual had already donated to the “family” (i.e. PIJ) (Id. Ct. 1 ¶ 211.)

⁵In addition, there is no basis for FARIZ to claim that this allegation is prejudicial since it does not facially reflect any negative animus directed against the United States government or people. See Doc. 251 at 4. It merely creates an espionage plan using facilities that may be located in the United States or elsewhere.

Initially, Overt Act 211 is relevant to the charges even when examined by itself since it alleges a specific instance of illicit solicitation and supply of money to PIJ, conduct which is clearly in furtherance of alleged conspiracies. Taken together, however, the overt acts demonstrate links between HAMMOUDEH, FARIZ, and an individual who had allegedly donated money to PIJ and had traveled to the Occupied Territories. Thus they are probative of the scope of the PIJ enterprise and the Defendants' conspiracies alleged in Counts One through Four and cannot be stricken as surplusage.

E. Overt Act 215

There is similarly no basis for striking Overt Act 215 from the Indictment as surplusage. Overt Act 215 describes a conversation between FARIZ and HAMMOUDEH about an "institution in Chicago" that would be permanently governed by FARIZ and BALLUT and in whose governance AL-ARIAN had apparent interest. (Id. Ct. 1 ¶ 215.) The United States intends to present evidence at trial that the institution referenced in Overt Act 215 is the Chicago Islamic Center.⁶

In this context, the alleged conversation indicates the scope and components of the PIJ enterprise. It also is probative of the relationship between FARIZ, HAMMOUDEH, BALLUT, and AL-ARIAN during the course of the alleged conspiracies, as well as the means and methods by which PIJ solicited funds and conducted its operations. It is immaterial that the overt act does not describe facially illegal activity because it is well established that overt acts alleged in

⁶ This is the same mosque that attempted to offer the value of its property as security for defendant BALLUT's bailbond. See Doc. 53 at 1. The United States did not identify the mosque outright in the Indictment in an attempt to avoid prematurely besmirching the reputation of a religious institution. Defendants BALLUT and FARIZ, however, freely acknowledged their association with the mosque during the course of the detention hearing.

support of a conspiracy need not be illegal in and of themselves. See United States v. Jones, 642 F. 2d 909, 914 (11th Cir. 1981). Rather, such acts are relevant to the conspiracy if they further the criminal venture. Id. The defendants' conspiracy to assist in the conduct of PIJ's jihad in part by soliciting funds would clearly be furthered by gaining control over a large Islamic religious institution and its assets, and gaining influence over its congregants. Thus, Rule 7(d) does not permit Overt Act 215 to be stricken from the Indictment.

F. Overt Act 244

FARIZ's claim that Overt Act 244 lacks an "allegation of conduct in furtherance of the conspiracy" defies credibility. (See Doc. 251 at 5.) Overt Act 244 details a conversation between BALLUT and FARIZ discussing preparations FARIZ and AL-ARIAN made in the case of AL-ARIAN's arrest. (Doc. 1 Ct. 1 ¶ 43(244).) This allegation must be considered in light of the fact that the Indictment charges FARIZ and AL-ARIAN with conspiring to unlawfully conduct an enterprise through a pattern of racketeering activity. With this backdrop, Overt Act 244 is relevant to Counts One through Four.

At the outset, that FARIZ and AL-ARIAN believed that they needed to fashion a contingency plan in case of the latter's arrest indicates that they were engaged in a joint venture or common undertaking that they wanted to continue operating. The fact that FARIZ informed BALLUT about the plan indicates that he too was an interested participant. Thus, the allegation is probative of the existence of an agreement and common enterprise among Defendants which the evidence at trial will establish was in fact the PIJ enterprise and the various alleged conspiracies. Moreover, the fact that FARIZ and AL-ARIAN had discussed the potential for AL-ARIAN's arrest and took the prospect of his arrest seriously enough to contrive contingency

plans support an inference that they were conscious of their guilt and the illegal nature of their activities and their determination to see their criminal enterprise succeed. It also indicates that they acted knowingly in participating in the conspiracies. In all of these ways, Overt Act 244 is relevant to the charges against FARIZ and is not surplusage.

G. Overt Acts 238 and 239

FARIZ's bald assertion that the conversations about a suicide bombing in Israel committed by PIJ detailed in Overt Acts 238 and 239 are irrelevant absent an allegation that "the bombing was an act contemplated and agreed-to by Mr. FARIZ in any of the conspiracies alleged" rests on a fundamental misapprehension of law. (See Doc. 251 at 5.) "The focus [in a RICO conspiracy] is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts." United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995). Thus, the United States does not have to show that FARIZ explicitly agreed with his coconspirators to commit individual substantive crimes. See United States v. Harriston, 329 F.3d 779, 785 (11th Cir. 2003); see also Salinas v. United States, 522 U.S. 52, 63 (1997) ("A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense"). Similarly, under general conspiracy law, FARIZ may be held responsible for violent acts committed by other PIJ members during the course and in furtherance of the conspiracies, notwithstanding his lack of direct participation, lack of agreement to commit the specific act, or lack of knowledge of commission of the act. United States v. Mothersill, 87 F.3d 1214, 1218 (11th Cir. 1996); see also Pinkerton v. United States, 328 U.S. 640, 646-47 (1946). Since the indictment alleges that the various bombings and terrorist acts occurring in Israel were the principal method used to

accomplish the goals of the conspiracies alleged in Counts One and Two, i.e. the extortion of land from Israel, (see, e.g., Doc. 1 Ct. 1 ¶ 29), they were reasonably foreseeable as part of the conspiracies.

The conversations alleged in Overt Acts 238 and 239 are further relevant to the alleged conspiracies because they are probative of the existence and intimate nature of FARIZ, BALLUT, and AL-ARIAN's relationship, and their shared interest in the PIJ and its terrorist activities. Also, the allegations demonstrate their knowledge of and their respective states of mind about these PIJ activities. The last sentence of Overt Act 239 in particular provides critical insight into the attitudes and opinion that these defendants held towards PIJ's activities. Thus, the allegations and the evidence supporting them are probative of essential elements of the offenses, including the existence of an agreement between FARIZ, BALLUT, and AL-ARIAN to further PIJ's unlawful activities and their knowledge of the objectives of the conspiracies. Given the relevancy of these overt acts to numerous facts of consequence to the charges, they should not be stricken.

H. References to Unnamed Coconspirators or Conduct

FARIZ's complaints of the inclusion of phrases such as "among others" or "and others" are specious. Most of the instances that FARIZ cites allege that he, his co-defendants, or PIJ conspired with other persons or entities to commit the specified offenses. (See Doc. 251 Ex. 1 Ct. 1 ¶¶ 25, 26; id. Ct. 2 ¶¶ 2-4; id. Ct. 3 ¶¶ 2, 3, 3(g), 3(s), 3(u), 3(v); id. Ct. 4 ¶ 9.) Thus, the allegations refer to the number of PIJ members and other persons participating with the defendants in the commission of the charged offenses. The size of the PIJ enterprise and the conspiracy is "entirely relevant to proving" the enterprise and conspiracy's "existence, nature and

scope.” Andrews, 749 F. Supp. at 1520 (refusing to strike references to unnamed enterprise members). For this reason, the allegations of unnamed coconspirators cannot be stricken under Rule 7(d).

Furthermore, the allegations are in no way prejudicial. Allowing a jury to infer that an enterprise has more members than are explicitly named is not the same as allowing a jury to infer that a defendant committed more crimes than are charged. Id. at 1520. The allegations here regarding additional unnamed coconspirators and participants are clearly distinguishable from those in the cases cited by FARIZ because they in no way broaden the substantive scope or objective of the conspiracy. See Parker, 165 F. Supp. 2d at 473 (refusing to strike references to unknown coconspirators); United States v. Eisenberg, 773 F. Supp. 662, 700 (D.N.J. 1991) (same). Instead, the allegations here merely signal that the grand jury found that the number of such participants is larger than just those persons named in the Indictment, United States v. Parker, 165 F. Supp. 2d 431, 473 (W.D.N.Y. 2001), and preserve the United States’ ability to present evidence of additional participants at trial.

The remaining two challenged allegations refer to unlisted overt acts in connection with Count One and means and methods of achieving the § 2339B conspiracy. (See Doc. 251 Ex. 1 Ct. 1 ¶ 43; id. Ct. 3 ¶ 3.) The context in which these phrases are used in this Indictment would not lead a jury to infer that FARIZ is charged with additional crimes because they specifically refer only to overt acts and means and methods used to further the charged conspiracy. Thus, the situation is very different from cases in which courts have stricken similar language. In these cases, “and others” or like phrases referred to the object of the conspiracy and thus could support an inference of multiple conspiracies and hence multiple offenses. Compare United States v.

DeFabritus, 605 F. Supp. 1538, 1547 & n.11 (S.D.N.Y. 1985) with DePalma, 461 F. Supp. at 798-99 (distinguishing between similar phrases used in the charging paragraph – where they create a danger of enlarging the charges at trial – and in the means paragraph – where they merely relate to the matter of proof to sustain the charges – and refusing to strike the latter) and United States v. Washington, 947 F. Supp. 89, 90 (S.D.N.Y. 1996) (same). Indeed, the language in this indictment only confirms the logical assumption that the United States will prove at trial additional acts performed in furtherance of the charged conspiracies.⁷ See Climatemp, 482 F. Supp. at 392 (explaining that such terms should not be stricken because they “only refer[] to the proof of the crimes, and serve as a device to allow the government to prove more than that alleged in the indictment). Accordingly, these allegations cannot be considered surplusage under the Rule 7(d) standard. Eisenberg, 773 F. Supp. at 700 (finding such phrases are relevant and, “as innocuous, non-pejorative terms, non-prejudicial”).

I. Allegation of FARIZ’s “Close” Association with his Co-Defendants

Lastly, in Exhibit 1 to his motion FARIZ indicates his objection to an allegation that he was a “close” associate of AL-ARIAN, HAMMOUDEH, and BALLUT. Even cursory consideration, however, confirms the relevant and non-prejudicial nature of this language.

The level and depth of the relationship between the co-defendants is highly probative of the existence of the conspiracies and the likelihood of each defendant’s participation therein.

The description of their association as ‘close’ is certainly supported by the large number and the

⁷The jury will be instructed that the conspiracy must be established by the United States’ evidence. Thus, if the United States “fails to support the allegation[s] . . . , it is more likely that such failure could undermine the jury’s assessment of the strength of the United States’ case than it will work to the disadvantage of the defense.” Parker, 165 F. Supp. 2d at 475.

nature of the contacts between the four co-defendants outlined in the Indictment. (See generally Doc. 1 Ct. 1 Pt. E.). Furthermore, even if the term “close” is irrelevant, it is non-pejorative and innocuous, and not the type of loaded or colorful language that could cause sufficient prejudice so as to warrant being stricken under Rule 7(d).

J. References to FARIZ’s conversations with or about ABD AL AZIZ
AWDA

FARIZ repeats his plea to strike Overt Acts 236, 240, 247, and 253 for the reasons stated in his “Motion to Strike as Surplusage Paragraphs 43(236), (240), (247), and (253) of the Indictment, and to Dismiss Counts 35, 37, 41, and 43 of the Indictment.” (Doc. 251 at 5.) To avoid unnecessary repetition, the United States respectfully incorporates the arguments set forth in its response in opposition to that motion (hereinafter “Gov’t Resp.”).

For the same reasons explained therein, FARIZ’s new challenge to the last sentence in paragraph 3(v) of Count Three fails. First, that the allegation may be false is of no consequence under Rule 7(d) because courts cannot look behind the findings of a grand jury and evaluate their truth or falsity. (See Gov’t Resp. at [9-11].) Second, the exculpatory information does not affect the relevance of the allegation because the United States can still show – and the Indictment supports – that FARIZ transferred funds to a PIJ member to be used for PIJ activities. Thus, the allegation is still relevant to Counts Three and Four since those offenses as alleged prohibit provisions of funds to the entity itself, once it has been designated as a FTO or SDTG. Which member of the proscribed entity physically receives the funds is immaterial. Similarly, the fact that FARIZ had such dealings with other PIJ members is just as probative of his participation in all of the various conspiracies regardless of whether his contacts were with AWDA or another

member. (See Gov't Resp. at [11-17].) Finally, the allegations presented in the Indictment impose no prejudice upon FARIZ. (See Gov't Resp. at [17-18].)

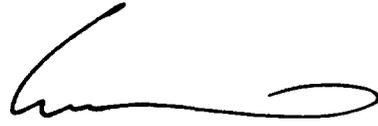
IV. CONCLUSION

For the foregoing reasons, the Court should deny FARIZ's Motion to Strike Surplusage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by facsimile and U.S. mail this 27th day of October, 2003, to the following:

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