IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO
DEFENDANT ELDER'S MOTION TO STRIKE SURPLUSAGE

COMES NOW the United States of America, by its undersigned counsel, and in response to defendant Christopher L. Elder's Motion to Strike Surplusage states as follows:

A. Background

On February 6, 2008, a Grand Jury returned a Twenty-Four Count Indictment charging all named defendants with participating in a conspiracy to distribute and dispense controlled substances, in violation of 21 U.S.C. § 846. In addition, Defendant Elder was charged with eight counts of aiding and abetting the illegal distribution and dispensation of controlled substances, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

B. Discussion

Defendant Elder moves to strike paragraphs one through seven from the indictment.

Rule 7(d) of the Federal Rules of Criminal Procedure provides that a court, on motion of the defendant, may strike surplusage from an indictment. However, as the Eighth Circuit Court of Appeals has stated, a motion to strike allegations in an indictment as surplusage should be granted "only where it is clear that the allegations contained therein are not relevant to the

charge made or contain inflammatory and prejudicial matter." *United States v. Michel-Galaviz*, 415 F.3d 946, 948 (8th Cir. 2005); *see also*, *Dranow v. United States*, 307 F.2d 545, 558 (8th Cir. 1962) (stating a court may only strike allegations as surplusage if they are "not relevant to the charge made or contain inflammatory and prejudicial matter.") Federal Rule of Evidence 401 states that evidence is relevant if it has 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; *United States v. Schraud*, 2007 WL 4289660, at *8 (E.D. Mo. Dec. 4, 2007). Due to this "exacting standard," motions to strike information as surplusage are rarely granted. *United States v. Gambale*, 610 F. Supp. 1515, 1543 (D. Mass. 1985); *United States v. Bucey*, 691 F. Supp. 1077, 1081 (N.D. Ill. 1988), *aff'd in part, rev'd in part on other grounds*, 876 F.2d 1297 (7th Cir.), *cert. denied*, 110 S. Ct. 565 (1989); *see also*, *Schraud*, 2007 WL 4289660, at *8 ("Motions to strike surplusage are not granted lightly, and carry a significant burden of persuasion.")

Furthermore, courts have routinely held that general background information intended to explain the charges contained in the indictment should not be stricken as surplusage. *See*, *e.g.*, *Schraud*, 2007 WL 4289660, at *8 ("In cases of factual and legal complexity, background information is particularly helpful for providing context to the alleged criminal conduct"); *United States v. Wecker*, 620 F. Supp. 1002, 1006 (D. Del. 1985); *United States v. Climatemp*, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979), *aff'd*, 705 F.2d 461 (7th Cir.), *cert. denied sub nom.*, *Fakter v. United States*, 462 U.S. 1134 (1983).

Given this legal framework, it is clear that the language challenged by Defendant Elder should not be stricken as surplusage because it is legally relevant and because it is not

inflammatory and prejudicial. The indictment in this case does not charge an ordinary drug case. As a result, the first seven paragraphs of the indictment provide important background information, that is neither inflammatory nor prejudicial, and that is essential for the jury's understanding of the charges contained in the indictment.

Paragraph One cites to the authority under the federal drug laws for distributing and dispensing controlled substances: the Controlled Substances Act and the Code of Federal Regulations.

Defendant Elder claims that paragraph Two contains "vague terms" such as "usual course of a physician's practice," and "usual course of professional treatment." *Motion to Strike Surplusage*, at 1. This claim is without merit. Paragraph Two describes the law regarding when a physician is authorize to prescribe a controlled substance – by acting "for a legitimate medical purpose and in the course of the physician's professional practice." The regulatory language sets forth that a properly licensed physician can be held criminally liable for distributing controlled substances outside "the usual course of professional practice." Furthermore, this paragraph is relevant to the charges against Defendant Elder, who is a licensed physician, because the central issue is whether he acted outside the usual course of professional practice. Further, the phar

Paragraph Three explains that pharmacists have a corresponding responsibility to that of physicians issuing the prescriptions. This paragraph is relevant to the charges against defendant Rostie, who is a licensed pharmacist.

Paragraph Four explains scheduling of controlled substances based on their potential for abuse. Only Schedules III, IV, and V are described, which are relevant to Counts One and Three

through Twelve. Thus, this paragraph provides relevant background to the charges against the defendants.

Paragraphs Five, Six, and Seven explain the central terms – "hydrocodone," "alprazolam," and "promethazine with codeine" – of the indictment. Allegations describing the charged controlled substances are relevant and material.

Clearly, information about the Controlled Substances Act, the Code of Federal Regulations, and the charged controlled substances are relevant to the jury's understanding of the charges contained in the indictment. Indeed, courts have consistently refused to strike similar background information contained in indictments for this very reason. *See, e.g., Climatemp*, 482 F. Supp. at 391-92 (refusing to strike general language about sheet metal industry because relevant to charges); *Bucey*, F. Supp. at 1081-82 (refusing to strike allegations that funding for narcotics transactions came from illicit sources because relevant to charges); *Wecker*, 620 F. Supp. at 1006 (refusing to strike allegations that "while not essential to the charges, are certainly in a general sense relevant to the overall scheme . . . charged.").

Furthermore, none of the challenged paragraphs contain any allegations that are inflammatory and prejudicial. To the contrary, numerous courts have upheld language that was much more inflammatory and prejudicial than the neutral language that is used in this indictment. *See, e.g., United States v. Rastelli*, 653 F. Supp. 1034, 1055-56 (E.D. N.Y. 1986) (refusing to strike such language as "Mafia," "La Cosa Nostra," and "The Bonanno Crime Family"); *United States v. Persico*, 621 F. Supp. 842, 860-61 (S.D. N.Y. 1985) (refusing to strike references to "organized crime" and aliases such as "the Beast" and "the Snake"); *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988) (refusing to strike allegations that diverted funds were destined

for the "poor and homeless" and that rightful recipients were "lulled and deceived"). As the discussion above makes clear, the defendants has not met the exacting standard of showing that the challenged language is irrelevant, inflammatory and prejudicial. Accordingly, Defendant Elder's motion is without basis and should be denied.

II. CONCLUSION

For the reasons previously stated, the defendant's motion to strike surplusage should be denied.

Respectfully submitted,

John F. Wood
United States Attorney

By ***/s/ Rudolph R. Rhodes, IV***

Rudolph R. Rhodes IV #39310
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on May 5, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

John R. Osgood
Attorney at Law
740 NW Blue Parkway, Suite 305
Lee's Summit, Missouri 64086

/s/ Rudolph R. Rhodes, IV

Rudolph R. Rhodes IV
Assistant United States Attorney

RRR/rah