**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 22-20290-CR-BLOOM(s)**

**UNITED STATES OF AMERICA**

**vs.**

**ERIC DEAN SHEPPARD,**

**Defendant.**
_____________________________________/

**UNITED STATES' RESPONSE IN OPPPOSITION TO DEFENDANT'S**
**<u>MOTION TO STRIKE SURPLUSAGE FROM THE SUPERSEDING INDICTMENT</u>**

The United States of America, through the undersigned Assistant United States Attorney, files this response in opposition to the defendant's motion to strike surplusage from the Superseding Indictment, pursuant to Fed. R. Crim. P. 7(d). The defendant argues that certain language in the Superseding Indictment is inflammatory and prejudicial, and should be stricken as surplusage. The defendant's motion lacks merit and should be denied.

## <u>ARGUMENT</u>

### I. <u>Legal Standard</u>

Federal Rule of Criminal Procedure 7(d) provides that, "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." In the Eleventh Circuit, "[a] motion to strike surplusage from an indictment should not be granted 'unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial. . . . This is a most exacting standard.'" *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992) (quoting *United States v. Huppert*, 917 F.2d 507, 511 (11th Cir. 1990)); *United Stats v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971) (the proper analysis must focus on whether "the allegedly excessive language was irrelevant, inflammatory and prejudicial."); *see also, United States v. Saintvil*, 2023 WL 3644976 (11th Cir. May 25, 2023) at *5 (quoting *Awan,* 966 F.2d at 1426) (Court upheld trial court's ruling denying motion to strike surplusage because the defendant failed to meet the "exacting standard" for a motion to strike surplusage). "Therefore, it is proper to reserve ruling on a motion to strike surplusage until the trial court has heard evidence that will establish the relevance of the allegedly surplus language …." *Awan*, 966 F.2d at 1426. "[E]ven when prejudice can be shown, the Court should not strike the information contained in the indictment if it is relevant to the charged offense." *United States v. Northcutt*, 2008 WL 162753, at *7 (S.D. Fla. Jan. 16, 2008) (unpublished disposition).

The defendant objects to a number of statements in the Superseding Indictment that describe aspects of the Paycheck Protection Program ("PPP") or the Economic Injury Disaster Loan ("EIDL") program, and their basic requirements. The defendant is charged with carrying out a scheme to defraud the Small Business Administration ("SBA") and private lenders, and with specific wire fraud counts that serve as examples of the defendant's execution of that scheme. The Superseding Indictment sets forth allegations that the government intends to prove through the testimony of its witnesses and documentary evidence. Nothing that was alleged – least of which the allegations about the basic parameters of the PPP and EIDL programs – can be deemed to be surplusage. The defendant has not satisfied the exacting standard of the Eleventh Circuit for striking allegedly excessive language from the Superseding Indictment, which requires that the allegations be irrelevant, inflammatory and prejudicial.

## II. Response to Specific Claims of Surplusage

Page 2, Paragraph 3:

The defendant seeks to strike a sentence and a phrase from Page 2, Paragraph 3, as being irrelevant to the charges. These are in italics below:

(1) *Because independent contractors were able to apply for PPP loans on their own, employers' payroll calculations and number of employees were based on wages paid to W-2 employees, not payments to independent contractors.*

(2) In addition, these businesses had to provide documentation evidencing their payroll expenses; *typically, businesses would supply documents showing the amount of payroll taxes reported to the IRS.*

Paragraph 3 of the Superseding Indictment sets forth general requirements of the Paycheck Protection Program ("PPP"), which the government witnesses are expected to discuss in their testimony. These statements are relevant to the charges, as the defendant is charged with carrying out a scheme to defraud involving PPP loans. As for the phrase regarding what businesses "typically" supplied by way of documentation, it is meant to illustrate the types of documents that businesses provided and that lenders requested. The defendant is in no way prejudiced by that statement because the defendant supplied the very same type of documents identified in that sentence, which purportedly showed the amount of payroll taxes reported to the IRS. The defendant's documents just happened to be falsified.

The defendant has not met his burden to show that these statements are irrelevant, inflammatory and prejudicial.

<u>Page 2, Paragraph 4</u>:

The defendant argues that Page 2, Paragraph 4 should be stricken as being "completely irrelevant" to the charged offenses. The paragraph generally discusses the role of the SBA in the PPP loan process. The government's witnesses are expected to testify about this PPP loan application process. The paragraph is relevant to the wire fraud charges involving the PPP loans.

The defendant has not met his burden to show that the statements in this paragraph are irrelevant, inflammatory and prejudicial.

Page 2, Paragraph 5:

The defendant argues that Page 2, Paragraph 5, should be stricken as irrelevant because the defendant did not seek loan forgiveness on the charged loans. This paragraph discusses the general criteria for having a PPP loan forgiven, which the government expects its witnesses will testify about. The defendant is charged with devising a scheme to defraud the SBA and private lenders, which began approximately in April of 2020. The government's evidence includes a PPP loan application, which the defendant submitted on behalf of HM-UP Development Alafaya Trails, LLC, in April 2020. The defendant sought and obtained forgiveness for this PPP loan in 2021.

The defendant has not met his burden to show that the contents of Paragraph 5 are irrelevant, inflammatory and prejudicial.

Page 3, Paragraph 7:

The defendant argues that the information the government chose to highlight in Page 3, Paragraph 7 is prejudicial and inflammatory to the defendant. The sentence to which the defendant objects states: "In order to obtain a COVID-19 EIDL, a qualifying business was required to submit an EIDL application to the SBA and provide information about its operations, such as the number of employees and gross revenues and cost of goods sold for the 12-month period preceding January 31, 2020." The government expects its witness to testify about the basic requirements for an EIDL application, which is set forth in this paragraph. The notion that a statement outlining the most basic information required under the COVID-19 EIDL program is inflammatory and prejudicial to the defendant is absurd.

Page 3, Paragraph 8:

The defendant seeks to strike a portion of Page 3, Paragraph 8 as irrelevant, inflammatory and prejudicial. This Paragraph outlines the information relevant to the SBA's calculation for the amount of an EIDL. The government's witness will testify to the EIDL requirements and how the loan amount is determined. No statement in this Paragraph is irrelevant, inflammatory or prejudicial to the defendant.

References to the defendant's accomplices:

The defendant argues that the references to the defendant's accomplices should be stricken as irrelevant, inflammatory and prejudicial because the defendant was not charged with being in a conspiracy, nor were others charged alongside the defendant. The defendant neither has to be charged in a conspiracy, nor does the government need to charge others in this case to allege that the defendant's wire fraud scheme had accomplices. For instance, the subject of three wire fraud counts in the Superseding Indictment is an EIDL loan involving the defendant's company HM Four, LLC. The person listed as the applicant and the signer on that loan application was the defendant's wife, J.S., who has not been charged in this case. The government has a factual basis for the references to accomplices in the Superseding Indictment.

## CONCLUSION

For the reasons set forth above, the government respectfully requests that the Court deny the defendant's motion to strike language from the Superseding Indictment as surplusage. The language about which the defendant complains is facially relevant, and not at all inflammatory or prejudicial in a way that renders it unfair. Alternatively, the government requests that the Court reserve ruling on the motion to strike until it has heard the testimony and evidence in the case relating to these issues.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on October 19, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

*s/Aimee Jimenez*
Aimee C. Jimenez
Assistant United States Attorney