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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Hon. Robert B. Kugler
v. : Crim. No. 07-459 (RBK)
:
MOHAMAD IBRAHIM SHNEWER, :
DRITAN DUKA, :
a/k/a "Tony Duka," :
ELJVIR DUKA, :
a/k/a "Sulayman," :
SHAIN DUKA, :
a/k/a "Shaheen," and :
SERDAR TATAR :

UNITED STATES' OPPOSITION TO: (A) THE MOTIONS OF ALL DEFENDANTS
TO STRIKE ALLEGED SURPLUSAGE FROM THE SUPERSEDING INDICTMENT; AND
(B) ELJVIR DUKA'S MOTION FOR A BILL OF PARTICULARS

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INTRODUCTION

All five defendants move to strike various allegations in the superseding indictment on the ground that they are "surplusage." Although all defendants seek to strike references to al Qaeda and jihadist ideology, they disagree about which other allegations should not be heard by the jury. The Court should deny all of those motions.

To be sure, the defendants' associations with the jihadist teachings of al Qaeda and other radical Islamist organizations paints them in a very unfavorable light. But that does not justify striking indictment allegations or precluding evidence at trial regarding that association. That evidence is highly relevant to prove the defendants' motivations for the charged crimes, and the fact that the defendants' plot, although disturbing and audacious, was one that they intended to carry out, and not, as they have suggested in their pre-trial papers, merely loose talk. Defendants' attacks on other aspects of the indictment are likewise unavailing under the heavy burden that a defendant must surmount to prevail under Fed. R. Crim. P. 7(d) to obtain judicial editing of an indictment returned by a duly constituted grand jury.

Defendant Eljvir Duka ("Eljvir") moves for a bill of particulars regarding the places, times, and manner in which he was "inspired by al Qaeda," in the event that the Court declines

to strike the reference to al Qaeda from the indictment. This Court should reject Eljvir's request that the United States read his mind and report the results back to Eljvir.

ARGUMENT

A. THE THIRD CIRCUIT'S "EXACTING" CONJUNCTIVE TEST FOR STRIKING ALLEGED SURPLUSAGE.

In an effort to rewrite the indictment in a way that is more favorable to them, the defendants claim that numerous allegations of the superseding indictment are surplusage, and should be stricken. The challenged allegations are not surplusage, however, because they pertain to facts that are relevant to material issues in the case. Defendants have failed to meet the "exacting standard" for obtaining excision of indictment allegations.

Fed. R. Crim. P. 7(d) provides that, "upon the defendant's motion, the court may strike surplusage from the indictment." Under that rule, this Court has discretion to strike surplus language in an indictment, but only if the challenged allegations are both irrelevant to the crime charged and prejudicial. See United States v. Hedgepeth, 434 F.3d 609, 612 (3d Cir. 2006) (requiring that the challenged allegations be "both irrelevant (or immaterial) and prejudicial");¹ see also United States v.

¹ Before Hedgepeth, some courts in the Third Circuit applied a disjunctive test, striking irrelevant or prejudicial language. Hedgepeth definitively resolved the surplusage

(continued...)

Terrigno, 838 F.2d 371, 373 (9th Cir. 1988) (motion to strike surplusage should only be granted "to protect a defendant against prejudicial or inflammatory allegations that are neither relevant nor material to the charges") (internal quotation marks omitted). This is an "exacting standard which is met only in rare cases."² United States v. Eisenberg, 773 F. Supp. 662, 700 (D.N.J. 1991) (internal citations omitted); see also United States v. DeSalvo, 797 F. Supp. 159, 169 (E.D.N.Y. 1992) ("This standard is an exacting one and rarely satisfied."); United States v. Jimenez, 824 F. Supp. 351, 369 (S.D.N.Y. 1993) ("[i]t has long been the policy of courts within the Southern District to refrain from tampering with indictments")(quoting United States v. Claytor, 52 F.R.D. 360, 361 (S.D.N.Y. 1971) (internal quotation marks omitted)).³

¹(...continued)
standard in favor of a conjunctive test. 434 F.3d at 612.

² Given that strenuous burden, it is unsurprising that defendants resort to citing cases in which surplusage claims were rejected by the Courts. E.g., Brief in Support of Tatar's Motion to Strike ("STB") at 3 (citing United States v. Awan, 966 F.2d 1415, 1426-27 (11th Cir. 1992); United States v. Huppert, 917 F.2d 507, 511 (11th Cir. 1990); and United States v. Bullock, 451 F.2d 884, 889 (5th Cir. 1981)); Eljvir Duka's Amended Brief In Support of Omnibus Pre-Trial Motions ("EDB") at 47-48 (citing United States v. Ramirez, 710 F.2d 535, 544-45 (9th Cir. 1983) and United States v. Terrigno, 838 F.2d 371, 373-74 (9th Cir. 1988)).

³ Given the Third Circuit's clarification in Hedgepeth that the conjunctive test applies in this Circuit, defendants' reliance on United States v. Vastola, 670 F. Supp. 1244 (D.N.J. (continued...))

As will be shown herein, defendants' complaints about various allegations of the indictment fail to meet this "exacting" test.

B. ALLEGATIONS THAT DEFENDANTS WERE INSPIRED BY AL QAEDA AND ESPOUSED VIOLENT JIHADIST PRINCIPLES PERTAIN TO HIGHLY RELEVANT EVIDENCE AND SHOULD NOT BE STRICKEN.

(POINT ONE OF DRITAN'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 167)

(TATAR'S MOTION TO STRIKE, DOCKET 174)

(POINT III OF SHNEWER'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 176)

(POINT ONE OF SHAIN DUKA'S OMNIBUS PRE-TRIAL MOTIONS, DOCKET 179)

(POINT V OF ELJVIR'S AMENDED BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 181)

All defendants move to strike ¶ 3 of Count 1 of the superseding indictment, which states:

3. The defendants . . . were inspired by, among others, al Qaeda, a foreign terrorist organization which sponsored, managed and financed terrorist attacks against the United States and its citizens, including the terrorist attacks of September 11, 2001, the attack on the U.S.S. Cole, and attacks on United States military forces fighting in Iraq and Afghanistan, to form a conspiracy to kill United States military personnel stationed in New Jersey and elsewhere.

³(...continued)

1987) (e.g., Dritan Duka Brief In Support Of Omnibus Pre-Trial Motions ("DDB") at 3), in which the Court employed a disjunctive test in ruling on a motion to strike (670 F. Supp. at 1254, a surplusage motion 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") is misplaced.

Defendants also move to strike ¶ 6 of Count 1, which states:

6. It was part of the conspiracy that [defendants] acquired, distributed and/or viewed digital video discs ("DVDs") and other videos which depicted violent attacks on United States military personnel; espoused jihadist propaganda produced by al Qaeda and others; and attempted to recruit the viewer to engage in armed attacks against the United States Government.⁴

Defendants argue that the foregoing references to al Qaeda, the terroristic attacks on September 11, 2001, the terrorist attacks on the U.S.S. Cole, the attacks on American soldiers in Iraq and Afghanistan, and the defendants' use of DVDs containing messages from al Qaeda and images of violence in order to recruit others to their cause are not "necessary" to describe the conspiracy charged in Count 1. They further argue that the allegations are inflammatory. Shnewer and Eljvir also contend that references to the defendants' jihadist "philosophy" and beliefs amounts to an improper attack on their religious beliefs and practices, in violation of the First Amendment.

All of these claims fail. For starters, a "speaking indictment" such as this one, which contains a narrative of the alleged events and circumstances that make up the charged crimes, is a common-place and permissible charging method in a federal criminal case. Although Fed. R. Crim. P. 7(c) requires that the indictment contain a "plain, concise, and definite . . .

⁴ As the indictment explains, "[j]ihad,' in this context, is defined as a holy war." Count 1, ¶ 6, fn. 1.

statement of the essential facts constituting the offense charged," the Rule does not limit the indictment allegations to facts that are "necessary" to establish the bare elements of an offense. To the contrary,

if the government intends to properly prove a matter at trial, then it is proper for the indictment to include those matters, even if they are not "essential elements" of the crime charged. Furthermore, language in an indictment will not be stricken where, while not essential to the charges, it is in a general sense relevant to the overall scheme charged in the indictment.

United States v. Giampa, 904 F. Supp. 235, 271-72 (D.N.J. 1995)

(internal citations and quotations omitted); see also United States v. Parker, 165 F. Supp. 2d 431, 473 (W.D.N.Y. 2001)

(refusing to strike an averment that the defendants committed robbery in furtherance of the charged offense, even though the charging statute required proof of only theft-type offenses, where the indictment alleged that robbery was among the conspiracy's objectives); accord, United States v. Persico, 621 F. Supp. 842, 860 (S.D.N.Y. 1985).

The challenged averments pertain to evidence that could hardly be more relevant to the charged crimes in this case. The trial evidence will show that the defendants were inspired to commit mass murder against American soldiers stationed at Ft. Dix and elsewhere by, *inter alia*, their viewing of DVDs and other media containing radical and violent jihadist propaganda produced by al Qaeda and other like-minded entities and persons.

Defendant Shnewer showed the two cooperating witnesses DVDs containing images and speeches by the readily recognizable Usama Bin Laden and other prominent terrorists. The defendants repeatedly spoke to the cooperating witnesses, each other, and third persons about their devotion to the cause of violent jihad against the United States and other targeted countries.

Much of the trial evidence will come from the defendants' own statements and from the numerous DVDs and other video files they possessed. The challenged allegations in the indictment recite, and the trial evidence will show, that the defendants' advocacy of jihadist principles and violent practices mirrored those video files. It was precisely those jihadist principles that caused the defendants to undertake the criminal conduct charged in this case.

The defendants' surreptitiously recorded conversations are rife with their discussions of those jihadist principles, animosity towards the United States, and approval of violent attacks against American interests in the Muslim world. To take only a few examples:

1. On August 1, 2006, Shnewer quoted Usama Bin Laden as saying that the imprisonment of Omar Abdul Rahman must be avenged. Shnewer then stated:

We are going to exert our efforts, and you exert your effort upon those. But do not sit down and do nothing. Let the people that will act up . . . strengthen their morals. If you are not going to strengthen their morals that means you must stay quiet.

* * * *

When we chose to battle, we chose it being certain of war Whatever happens to us that is it. This is what we . . . this is what we chose for ourselves. If you do not want to assist us in such dire times, that means shut up. No good will ever come out of you.

* * * *

You will find . . . God, praise and glory upon Him, states in the Qur'an: "You will not find more bitter enemies to the believers than the Jews and their Christian partners."

* * * *

It's not just prayers. Pray to God with certainty that God, may He be praised and glorified, is the only one who could change our conditions. Do you understand me? Do you understand? How, you are in this country, but I Egypt there . . . in Egypt it is very easy to do anything . . . to go to Iraq or Jordan. But here, you can not do anything. Here, if you want . . . if you want to do anything . . . there is Fort Dix . . . Fort ... here Mahmoud . . . I am not exaggerating how easily you can strike an American base.

Later in that same conversation, Shnewer told CW-1 that Shnewer owned a .357 magnum revolver, and had considered camping near the "Black House" [i.e., White House] in an attempt to assassinate President Bush.

2. On August 4, 2006, the following exchange occurred between Dritan Duka ("DD") and CW-1:

DD: People like me and you we have . . . we have no education. We don't know; only we know right from wrong. I think best thing for us is to go fight Jihad. To die is better. Better we die man 'cause this life is fucked up.

CW-1: Yeah.

DD: Better we go fight for Allah maybe at least we go

Jannah, [to Heaven or Paradise] Inshallah [God willing]. Over there we have good wives, everything. Whatever we want we have over there. Because over here we don't getting nothing it's better we sacrifice our life.

3. On August 5, 2006, Shnewer told CW-1:

Believe me when I tell you, that, look at the nineteen brothers who changed the whole world. Changed the face of this earth. . . . They plan, they planned ahead, do you understand me? They started out when Usama Bin Laden and Abdullah Azzam may he rest in peace, started? In Mecca in the Holy Mosque [Ka'abah] Abdullah Azzam told Bin Laden I am going to Pakistan, I want you to follow me there, they knew what they were talking about.

4. On August 11, 2006, Shnewer told CW-1 that Shnewer had a video that contained instructions for making an improvised explosive device ("IED").
5. On August 13 and 14, 2006, Shnewer and CW-1 surveilled Dover Air Force Base in Delaware. During that surveillance, they apparently noticed some activity on the base. Shnewer stated:

Keep tight. This is not a problem. This is not a problem, they might be from the army who will be same ones we are going to put bullets in their heads, God willing.

6. While conducting the surveillance of the Air Force Base on August 13, Shnewer told CW-1 that Shnewer was formulating an attack in which the conspirators would hijack a gasoline tanker truck, drive it onto a military base, crash it, and cause it to explode. This was not Shnewer's original idea: one of the videos recovered from his computer showed just such an attack in Iraq.
7. Also during that surveillance trip, Shnewer played the video for CW-1 that contained instructions for making an IED. The video also contained footage of a Mujahideen firing a rocket at an American military aircraft, as well as footage of blown up and burned out vehicles.

8. On February 1, 2007, the following exchange occurred between Eljvir Duka ("ED"), Dritan Duka, Agron Abdullahu ("AA"), and CW-2:

ED: Would you hit the American soldiers in Iraq?

DD: From a mile away.

AA: Not quite a mile, it shoots about three quarters of a mile.

ED: Do you think I can be like Juba the sniper?

DD: Do you think I can stand far enough from the White House?

ED: Do you think I can hit George Bush from [UI - car noise]

. . . .

ED: Can you shoot an American soldier from a mile away and kill him?

CW-2: Uh huh.

DD: That kind of bullets destroy you.

DD: That's a one shot kill, that's what they expect.

DD: One shot and the business is finished. [UI]

. . . .

ED: What happened to that commander? Right when he entered the kitchen of that building boom got shot.

DD: Right in the head.

AA: Which commander?

ED: The American commander in Iraq.

DD: That 10 hour battle in Haifa Street?

AA: Yeah.

DD: This commander was raiding a building, an

apartment building. He just went to the kitchen boom right in the head, Sergeant, the leader of the squad. He just went in, not even ten seconds he got fucked in the head. This guy just waited.

ED: It's dangerous you don't know where he's at.

ED: They just closed themselves in the room, in the apartment.

DD: If he hits you and he leaves, that's it, he did his job. Got one, that's good enough.

ED: Play it safe, let me come to kill another day.

DD: Fuck somebody up.

DD: You don't want to lose your position, once they find your position.

AA: You don't want to see nobody's brain blow up.

DD: You don't even give a shit. Too far away. You don't feel . . . [UI]

9. On March 9, 2007, Dritan insisted that Shain, Tatar, CW-2, and others come to Dritan's house to listen to a recorded lecture titled "Constants on the Path of Jihad." Dritan said the lecture had been authored by an associate of al Qaeda. Dritan, Shain, Tatar, CW-2, and the others then listened to a lengthy excerpt from the lecture, which exhorted Muslims to engage in violent jihad. For example, the narrator says, in English:

This 'Ibadah [rite/ritual] which the Kuffar [infidels] are trying to cover means, cover and calling it terrorism, and they're calling it terrorism and criminal acts and they are branding the followers of this path as being terrorists, extremists, revolutionary and malicious, and you see this point is important because these names deceive us. Whenever you see the word terrorist, replace it with the word Mujahid [holy warrior]. Whenever you see the word terrorism, replace it with the word Jihad [holy struggle]. The

reason why they are not using Jihad [holy struggle] and Mujahideen [holy warriors] is because these are words of Qur'an so you can't erase those, so they choose another word and give it their own definition and their choice was terrorist and terrorism and other names that they try to use, but in reality what it is, is fighting dirty [UI]. Terrorism is Jihad [holy struggle], that's what they mean by it.

10. Also on March 9, 2007, Dritan made several statements consistent with the violent themes of "Constants on the Path of Jihad." For example, Dritan stated:

Whoever comes against you, you kill them. The other people that don't do nothing [UI] you understand? Allah said this religion has to prevail and you have to [UI] doesn't mean you only kill those that come at you, that's it. Whoever said, even if these guys say, say I'm against it [noise] kill them, he's a gangster. 'Cause he's gonna be a burden.

11. During that same March 9, 2007 discussion, the following exchange ensued between Dritan and Tatar ("SD"):

DD: Go to Jihad, after only the first war they wanted to defense the battle of Baghdad he [UI] the war again, against, they didn't wait only when they attacked us, no! They wanted to spare themselves [UI] against the people that rejected them in reality we were saving those people. Those people would make this life something which is [UI] you're attacking but these people when they're crying on the streets and stuff for true justice, that is the true justice. What they're fighting against is what they actually want, but they don't realize it. You want true justice, saddle up."

ST: A lot of people are waking up.

DD: They are waking up! They're gonna wake up even more when, when they see the shining of the [UI] sword. [Laughing].

12. On multiple occasions, Shnewer showed and provided violent jihadist videos to CW-1 and CW-2, including videos titled

"19," "DVD Islam," and "The London Expedition." Many of these DVDs and video files were produced and distributed by As-Sahab, the media arm of al Qaeda. Many of those DVDs and video files purported to expose atrocities committed against Muslims worldwide, and encourage and glorify violent attacks against the perceived oppressors, particularly the United States. The videos often featured Usama Bin Laden, Ayman al-Zawahiri, Abu Musab al-Zarqawi, Adam Gadahn, and other terrorists praising particular acts of terrorism and suicide bombings, including the 9/11 hijackers and the July 2005 London train bombing. Many of the videos also emphasized that all Muslims were obliged to wage jihad against the United States and anyone who does not worship Allah. Other videos depicted sniper operations and IED and vehicle-borne-explosive-device attacks against American soldiers. They included footage of mujahideen fighters removing the identification tags and equipment from murdered American soldiers. Additionally, during the February 2007 trip to the Poconos, Shnewer played videos for CW-1, CW-2, and other attendees that depicted the shooting and bombing of United States soldiers.

13. Dritan and Eljvir Duka also discussed violent jihadist videos with CW-2. For example, on September 15, 2006, Dritan discussed with CW-2 a video depicting the decapitation of an Iraqi, and told CW-2 that the man had been beheaded as punishment for spying for the United States. On separate occasions, Dritan and Eljvir Duka told CW-2 that they had seen so many decapitation videos, it did not bother them anymore.
14. On numerous occasions during the course of the investigation, the defendants themselves discussed the very subjects they now seek to strike from the indictment. For example, by the most conservative estimate, the defendants themselves used the word "jihad" more than one hundred times. They also referred to the September 11, 2001 terrorist attacks many times.

Having employed al Qaeda and its ideology of violence as recruiting tools, defendants should not be heard to complain that any mention of al Qaeda and radical jihad must be excluded from trial. The argument is tantamount to the untenable claim that

evidence in a contract murder case regarding a defendant's extra-marital affair should be excluded as inflammatory even though the affair provided the motive for the murder.

That the jurors likely have a dim view of al Qaeda and Usama Bin Laden does not render the challenged allegations, or the evidence that will prove those allegations, irrelevant and subject to excision from the indictment. When a defendant allegedly advances the criminal goals of a loathsome enterprise, allegations regarding that enterprise are properly included in the indictment, regardless of whether the defendant is charged with actively participating in that enterprise. See United States v. Scarpa, 913 F.2d 993, 1011-12 (2d Cir. 1990) (affirming the denial of a motion to strike allegations that the defendants composed a "crew" of criminals who "reported to the Colombo Organized Crime Family"; the allegation was "relevant to the identity and character of the RICO enterprise charged in the indictment, [and] the reference to the Colombo Family should not be stricken even though the Colombo Family itself is not the alleged enterprise"); see also United States v. Gotti, 2004 WL 32858, *10 (S.D.N.Y. 2004) (denying a motion to strike the indictment's reference to the "Gambino Organized Crime Family," even though defendants and their alleged co-conspirators did not refer to themselves by this term, which was invented by law enforcement officials, and the term was "inherently

prejudicial").

In like fashion, district courts have repeatedly denied motions to strike indictment references to a defendant's relationship with violent Islamic ideology, such as the challenged references here, even though the jurors may be inflamed by those references. In United States v. Bin Laden, 91 F. Supp. 2d 600 (S.D.N.Y. 2000), the defendants were charged with numerous crimes, including (as in this case) conspiracy to commit murder, in violation of, *inter alia*, 18 U.S.C. § 1114.⁵ Defendant Salim moved to strike as surplusage, *inter alia*, any references to "terrorist groups and affiliated terrorist groups." The Court denied the motion, explaining that

those allegations (assuming they are supported by competent evidence at trial) could very well be relevant to the crimes with which Mr. Salim is charged. The Indictment alleges that Mr. Salim participated in five criminal conspiracies. The Government is permitted to prove such participation, and the existence of the alleged conspiracies, by demonstrating that Mr. Salim committed certain acts which support the inference that he agreed with others to attempt to achieve the criminal objectives set forth in the

⁵ The charges there arose from the defendants' involvement in the August 1998 bombings of the United States Embassies in Kenya and Tanzania. The charges included conspiracy to kill United States nationals, in violation of 18 U.S.C. § 2332(b); conspiracy to murder, kidnap, and maim United States nationals outside of the United States, in violation of 18 U.S.C. § 956(a); conspiracy to use weapons of mass destruction against United States nationals, in violation of 18 U.S.C. §§ 2332a(a)(1) and 2332a(a)(3); conspiracy to destroy buildings and property, in violation of 18 U.S.C. § 844(f); and conspiracy to attack national defense utilities, in violation of 18 U.S.C. §§ 2155(a) and 2155(b).

Indictment. That the groups with which he was affiliated committed terrorist acts . . . if supported by adequate evidence, could support such an inference; those allegations are not, therefore, surplusage.

91 F. Supp. 2d at 621-22 (internal citations and parentheticals omitted).

Similarly, in United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004), the defendants were charged with, *inter alia*: conspiring to provide, and providing material support and resources to a foreign terrorist organization in violation of 18 U.S.C. § 2339B, and soliciting others to commit violent crimes, in violation of 18 U.S.C. § 373. Like the defendants here, defendant Stewart moved to strike references to such terms as "jihad," variations on "terrorism," and "fatwah." The Court denied the motion, finding that "the Court cannot conclude at this stage of the proceedings that any aspect of the . . . Indictment is either irrelevant or prejudicial." Id. at 320-21.⁶

Finally, in United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), defendants were charged with providing material support to a terrorist organization. They unsuccessfully moved to strike the words, "terrorism," "terrorist," and "terrorist activity" from the indictment. The Court explained that "an

⁶ The Sattar Court denied the motion to strike without prejudice and with leave to renew the motion at the close of trial in the event that the United States failed to adduce evidence to support the challenged allegations. 314 F. Supp. 2d at 321.

essential element of two of the charges against Defendants is that they supported and conducted prohibited transactions with groups designated by the United States as terrorists." Id. at 1357. The provided an additional reason for denying the motion, noting that "the government [would be permitted to] prove [at trial] Defendants' participation, intent, and the existence of the four conspiracies alleged in the Indictment in part by showing the acts of the groups with which he was affiliated with and aided committed terrorist acts." Id. at 1356.

Although defendants here are charged with conspiring to commit mass murder that was "inspired" by al Qaeda and like-minded terrorist organizations, rather than providing material support to al Qaeda or other terrorist organizations, the challenged allegations are still relevant to the instant charges, even if they are not necessary to prove an element. For starters, evidence that the conspiracy was motivated by violent jihadist ideology is highly relevant to prove the defendants' motives to commit charged crimes. "[M]otive is always relevant in a criminal case, even if it is not an element of the crime." United States v. Sriyuth, 98 F.3d 739, 747 n.12 (3d Cir. 1996) (evidence of the defendant's sexual assault of the kidnaping victim was relevant to show motive and non-consent to the transportation); see also Fed. R. Evid. 404(b) (evidence of uncharged criminal conduct is admissible to prove, *inter alia*,

"motive"). Because of its unquestioned relevance, motive evidence should not be excluded because of undue "prejudice" under Fed. R. Evid. 403, see United States v. Cody, 498 F.3d 582, 591 (6th Cir. 2007) (defendant's wife permissibly testified in bank robbery prosecution that defendant committed the charged robbery in order to purchase crack cocaine and to pay off his drug debts; his "drug habits" were "extremely probative of motive"), even when that evidence shows the defendant's connection to highly unsavory persons, United States v. Tomero, 496 F. Supp. 2d 253, 256 (S.D.N.Y. 2007) (admitting evidence that defendant's motive to commit the charged extortion was to support a high-ranking member of the Genovese organized crime family). Likewise, allegations that pertain to a defendant's motive should not be stricken under Rule 7(d).⁷

The challenged allegations are relevant for a second, compelling reason. As the indictment alleges, Shnewer showed both of the cooperating witnesses DVDs that contained various al Qaeda inspired messages. Confronted with irrefutable, videotaped evidence of their tactical training with firearms in the Poconos, defendants will likely claim that they were merely "gun

⁷ Shnewer's reliance on United States v. Miller, 471 U.S. 130 (1985) (Shnewer's Brief in Support of Omnibus Pre-Trial Motions, Docket 176-2 ("MSB") 29, is wholly inapposite. That case involved a claim of unconstitutional amendment of the indictment by the United States, which was rejected by the Court, and had nothing to say about a motion to strike surplusage.

enthusiasts" engaged in purely recreational activity. Confronted with tape-recordings of their expressed hostility against the United States and American soldiers fighting in predominantly Muslim countries such as Iraq, defendants will doubtlessly claim that their beliefs did not include an endorsement of violence.

Allegations that defendants were inspired by al Qaeda, the pre-eminent jihadist organization in the world, which has successfully launched terrorist attacks that have killed thousands of Americans at home and abroad, are relevant to prove that the defendants intended to enter into the charged conspiracy, and were not engaged merely in "idle chatter." See United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007) (evidence, including religious organization's anti-tax teachings, defendants' commitment to those teachings, their positions within the organization, and their steady ascent up the tiers of influence within the organization, was sufficient to prove conspiracy to interfere with government function and non-payment of taxes); cf. United States v. Abu-Jihaad, 531 F. Supp. 2d 289, 294 (D. Conn. 2008) (only statements in furtherance of the conspiracy, and not mere "idle chatter," are admissible under Fed. R. Evid. 801(d)(2)(E)). Proof of conspiratorial intent is an element of the Count 1 offense, Salinas v. United States, 522 U.S. 52, 65 (1997), United States v. Korey, 472 F.3d 89, 93 (3d Cir. 2007), and proof of intent to kill is an element of Count 2.

See United States v. Kwong, 14 F.3d 189, 194 (2d Cir. 1994); United States v. Harrelson, 766 F.2d 186, 188 (5th Cir. 1985). Evidence that the defendants acquired, observed, discussed, and maintained DVDs containing calls to violent jihad by Usama Bin Ladan, Sheik Abdul Rahman, and others, makes it far more likely that the defendants had agreed to commit mass murder of American soldiers than if evidence of such self-indoctrination had not occurred.⁸

Finally, Shnewer's and Eljvir's contentions that the challenged allegations should be stricken because they trench upon the defendants First Amendment rights of free expression, free association, and free exercise of their religion are

⁸ This case is distinguishable from United States v. Quinn, 401 F. Supp. 2d 80 (D.D.C. 2005). There, the defendants were charged with trading with a country (Iran) that was subject to an embargo without first obtaining government approval for the transactions. They moved to strike as surplusage two references in the indictment to Iran's support for international terrorism and the threat it posed to the United States. The district court granted the motion, concluding that the policies underlying the trade embargo against Iran were irrelevant to the charges, because the defendants were not charged with providing material support to terrorists or a similar crime.

The court noted that the "the crime that defendants are charged with is no more or less criminal because of the reasons the embargo is in place; the *scienter* element in this case requires the government to show only that defendants knew their conduct was illegal, not that they understood the policy motivations underlying the decision to prohibit it." Id. at 99. Here, by contrast, evidence that the defendants themselves were personally inspired to commit the charged crimes because they imbibed the violent jihadist philosophy of al Qaeda and its ilk makes the challenged allegations highly relevant to motive and intent to kill.

baseless. See United States v. Marzook, 426 F. Supp. 2d 820, 826-27 (N.D. Ill. 2006) (in a prosecution for providing material support to a "Specially Designated Terrorist Organization" and a "Foreign Terrorist Organization" (Hamas), denying motion to strike predicate acts that the defendant allegedly committed before Hamas was designated as a SDTO in 1995 or a FTO in 1997, on the ground that defendant's conduct was then protected by the First Amendment; "even before the United States designated Hamas as an FTO, it was illegal to agree to conduct the affairs of an enterprise through a pattern of racketeering activity").

The defendants are not charged with holding jihadist beliefs. Had they done nothing but adhere to and advocate such beliefs, without also entering into an unlawful agreement and taking steps to carry out an agreement to kill, their beliefs and expressions would have been constitutionally protected.

As the indictment alleges, however, defendants did far more than "subscribe to" or "advocate" ideas. Rather, the indictment charges the defendants with conspiring to commit and attempting to commit mass murder, motivated by an ideology that purports to justify those acts. That conduct is not constitutionally protected. See McKee, 506 F.3d at 239 (although "First Amendment protections require that the government produce more than evidence of association to impose liability for conspiracy," even persons who are associated through an ostensibly religious

organization can be convicted if "the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims"). That being so, the First Amendment creates no justification to strike the challenged averments.⁹

C. ALLEGATIONS THAT THE DUKAS WERE ILLEGALLY IN THE UNITED STATES DURING THE CONSPIRACY PERIOD PERTAINS TO AN ELEMENT OF COUNTS 6 AND 7, AND MAY NOT BE STRICKEN.

(POINT III OF SHNEWER'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 176)

(POINT ONE OF SHAIN DUKA'S OMNIBUS PRE-TRIAL MOTIONS, DOCKET 179)

Shnewer and Shain contend that the allegations in Count 1, ¶ 1 that the three Dukas are "illegal aliens" is surplusage to that Count. The allegations, however, pertain to an element of Counts 6 and 7, both of which charge unlawful possession of a firearm by an illegal alien, in violation of 18 U.S.C. § 922(g)(5). That statute provides:

(g) It shall be unlawful for any person-

* * * *

⁹ Given those considerations of relevance, the challenged allegations are also admissible as "background" of the charged conspiracy. See United States v. Awadallah, 202 F. Supp. 2d 17, 54 (S.D.N.Y. 2002) (refusing to strike averments regarding the grand jury's investigation of the September 11, 2001 terrorist attacks, as relevant background to the charge of lying to the grand jury); see also United States v. Mulder, 273 F.3d 91, 100 (2d Cir. 2001) (affirming district court's refusal to strike relevant background evidence); United States v. Cisneros, 26 F.Supp.2d 24, 55 (D.D.C. 1998) (declining to strike averments that provide "useful and important background information").

(5) who, being an alien-

(A) is illegally or unlawfully in the United States; or

(B) . . . has been admitted to the United States under a nonimmigrant visa

. . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(5).

Counts 6 and 7 incorporate the Count 1 allegation that Dritan, Eljvir, and Shain are illegal aliens. Count 6, ¶ 1; Count 7, ¶ 1. Even if the allegation is not relevant to Count 1, it is not only relevant, but necessary to Counts 6 and 7.

Defendants would receive no benefit from transferring the allegations from Count 1 to Counts 6 and 7. Since the allegations regarding the Dukas' status are plainly relevant, they may not be stricken. See Al-Arian, 308 F. Supp. 2d at 1356 (denying motion to strike allegations regarding terrorism where the defendants were charged with, *inter alia*, providing material support to a terrorist organization, since proof of the nature of the organization was an element of the offense).

D. ALLEGATIONS THAT REFER TO UNSPECIFIED LOCATIONS AND METHODS SHOULD NOT BE STRICKEN.

(POINT ONE OF DRITAN'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 167)

(POINT III OF SHNEWER'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 176)

Dritan and Shnewer seek the excision of what they claim are "indefinite" allegations. Dritan seeks to strike the allegation in Count 1, ¶ 5 that the defendants sought to kill American soldiers in "New Jersey and elsewhere." He also challenges the allegation in Count 1, ¶ 14 that the defendants used "various methods" to conceal the conspiracy. Shnewer, for his part, challenges the allegation in Count 1, ¶ 12 that the defendants "conducted surveillance operations at several United States military installations, including but not limited to" several identified installations. The Court should deny these requests.

The courts recognize a distinction between the improper inclusion in the charging paragraph of an indictment of phrases which suggest the commission of additional offenses, and the permissible inclusion of such phrases in the "means" section of a count, which serves to explain that the acts identified in the indictment are not necessarily the only ones in furtherance of the charged crime. Compare United States v. Mayo, 230 F.Supp. 85, 86 (S.D.N.Y. 1964)(Weinfeld, J.)(inclusion of "among others" language in the means paragraph was permissible) with United

States v. Pope, 189 F. Supp. 12 (S.D.N.Y. 1960)(Weinfeld, J.) (holding that such language in the charging paragraph was improper); see also United States v. Hsia, 24 F. Supp. 2d 14, 27-28 (D.D.C. 1998) (denying motion to strike phrases such as "among others" and "and elsewhere" from the introductory statement in the paragraph listing overt acts in furtherance of the conspiracy; the phrases do not accuse the defendant "of criminal acts in addition to those explicitly charged in the substantive counts") (citing cases), rev'd in part on other grounds, 176 F.3d 517 (D.C. Cir. 2000); United States v. Washington, 947 F. Supp. 87, 90 (S.D.N.Y. 1996)(denying a motion to strike the phrases "by various means" and "among other things" from the means paragraph); United States v. Daniels, 95 F. Supp. 2d 1160, 1168 (D. Kan. 2000) (denying motion to strike the phrase "for example"). As one court has explained:

such terms 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. If the government were required to detail all of its proof in an indictment, rather than the portions they include now, the indictments in many cases would resemble books.

United States v. Eisenberg, 773 F. Supp. 662, 700 (D.N.J. 1991) (internal citation and quotation marks omitted).

Here, each of the challenged allegations occur either in the "means and methods" section, or the "object" section of the conspiracy count. See Parker, 165 F. Supp. 2d at 471 (denying a motion to strike as prejudicial an averment that the victims

included "persons in the state of New York, including individuals in the City of Buffalo," where the charged conspiracy was not directed solely to specific persons known to the grand jury). Although there is contrary authority, e.g., United States v. Espy, 989 F. Supp. 17, 35 (D.D.C. 1997), affirmed in part, reversed in part on other grounds, 145 F.3d 1369 (D.C. Cir. 1998), this Court should exercise its broad discretion by not striking allegations that have little if any prejudicial impact. At the very least, this Court should reserve ruling on this particular request until the close of the evidence. See generally United States v. Rittweger, 259 F. Supp. 2d 275, 293 (S.D.N.Y. 2003) (withholding a ruling on a motion to strike in order to afford the Government an opportunity to present evidence at trial in support of the averment); Parker, 165 F.Supp. 2d at 472-73 (rejecting motion to strike averment that defendants conspired with "others unknown" to prevent the jury from inferring that the conspiracy was broader than the evidence would show; averment could be stricken at the conclusion of trial if the evidence failed to support the averment).

E. DRITAN'S MOTION TO STRIKE THE "MANNER AND MEANS" SECTION OF COUNT 1 SHOULD BE DENIED.

(POINT ONE OF DRITAN'S BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 167)

Dritan also moves to strike the entire, ten-paragraph "manner and means" section of the indictment as surplusage. He

contends that the allegations are not "necessary" to charge the elements of the offense. DDB 5. The claim that the "manner and means" section is "too much" pleading not only contradicts his contention (Point II of his Omnibus Motions) that Count 2 does not contain "enough" allegations of a "substantial step," since the substantial steps are set forth in the Manner and Means Section of Count 1. The claim is also meritless on its own terms.

As demonstrated above, allegations are not surplusage merely because they recite facts beyond the elements of the offense. See Sattar, 314 F. Supp. 2d at 320-21 (rejecting, as unsupported by law, defendant's motion to strike the entire introductory section of the indictment, on the ground that the introductory paragraphs were not part of any count and could not be incorporated by reference in any other count). Even though a conspiracy count could satisfy Rule 7(c) without a "manner and means" section, the presence of such a section does not violate that rule. See United States v. Gotti, 42 F. Supp. 2d 252, 293 (S.D.N.Y. 1999) (rejecting a challenge to the entire "manner and means" section of a RICO count, where the government represented that it would "present evidence at trial that one of the ways the enterprise maintained power was by meting out 'brutal retribution' against informants or threatening to do so," and the allegation that members of the enterprise "possessed deadly

weapons" was "directly relevant to Racketeering Act Seven which charges Gotti with a robbery at gun point"). Since the allegations in the manner and means section pertain to clearly relevant evidence, those allegations should not be stricken.

F. ELJVIR'S MOTION FOR A BILL OF PARTICULARS SHOULD BE DENIED.

(POINT V(3) OF ELJVIR'S AMENDED BRIEF IN SUPPORT OF OMNIBUS PRE-TRIAL MOTIONS, DOCKET 181)

Eljvir requests that, if the Court declines to strike the allegations regarding al Qaeda, it should direct the United States to inform him, by way of a bill of particulars, "when, where, and how [he] was inspired by al Qaeda." Eljvir Duka Amended Brief In Support Of Omnibus Pre-Trial Motions, 52. The Court should reject this meritless claim.

Under Fed. R. Crim. P. 7(f), the trial judge has discretion to order that the government present a bill of particulars where "an indictment's failure to provide factual or legal information significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial." United States v. Rosa, 891 F.2d 1063, 1066-67 (3d Cir. 1989); United States v. Addonizio, 451 F.2d 49, 62-63 (3d Cir. 1971). A bill of particulars is required only when an indictment is too vague to permit the defendant to (a) understand the charges and prepare a defense, (b) avoid unfair surprise, and (c) assert a claim of double jeopardy where appropriate. See, e.g., United

States v. Chen, 378 F.3d 151, 163 (2d Cir. 2004). "Only where an indictment fails to perform these functions, and thereby 'significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial[,] will we find that a bill of particulars should have been issued." United States v. Urban, 404 F.3d 754, 771-72 (3d Cir. 2005) (internal citations omitted). As long as the indictment enables the defendant to understand the accusations against him and the central facts that the United States will present at trial, a bill of particulars is unwarranted. See Rosa, 891 F.2d at 1066-67; United States v. Zolp, 659 F. Supp. 692, 706 (D.N.J. 1987); United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 809-10 (E.D. Pa. 1980).¹⁰

¹⁰ The Third Circuit has emphasized that the need for a bill of particulars is obviated in those cases where, as here, the United States supplements a detailed charging document with substantial discovery. Urban, 404 F.3d at 772; see also United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990); United States v. Munoz, 736 F. Supp. 502, 504 (S.D.N.Y. 1990) (provision of substantial discovery weighs against ordering bill of particulars); United States v. Laughlin, 768 F. Supp. 957, 967 (N.D.N.Y. 1991) (information contained in a government brief negated the need for a bill of particulars). Thus, where, as here, "discovery provided by the government fills in the outline of the indictment, the necessity for a bill of particulars declines." United States v. Caruso, 948 F.Supp. 382, 393 (D.N.J. 1996); United States v. Grasso, 173 F. Supp. 2d 353, 365 (E.D. Pa. 2001) (stating that "the Government has provided extensive discovery, which significantly lessens any need for a bill of particulars"); United States v. Beech-Nut Nutrition Corp., 659 F. Supp. 1487, 1499-1500 (E.D.N.Y. 1987) (government's production of 30,000 pages in discovery "must have answered a great many, if not all, of defendants' requests" for bills of particulars).

Eljvir's request for dates, locations, and the manner in which he was inspired by the jihadist ideology of al Qaeda seeks nothing less than an explanation by the United States of the inner workings of Eljvir's own mind. That would be possible only if Eljvir himself sat down with law enforcement officials and truthfully recounted his thought processes to them. He does not offer to undertake such an explanation, however. That the evidence will show that Eljvir was inspired by that ideology does not require a precise demonstration of when, where, and how that occurred. Like other aspects of *mens rea*, the United States can prove Eljvir's state of mind circumstantially. See United States v. Anderskow, 88 F.3d 245, 254 (3d Cir. 1996).

Even if the United States was capable of providing the particulars that Eljvir demands, his request should still be denied because requests "for exact dates, places, and times in which events occurred . . . ignore the proper scope and function of a bill of particulars and are to be denied." United States v. Jabali, 2003 WL 22170595, *3 (E.D.N.Y. Sept. 12, 2003). See also United States v. Armocida, 515 F.2d 49, 54 (3d Cir. 1975) (defendant's "request for the 'when, where and how' of any overt acts not alleged in the indictment was tantamount to a request for 'wholesale discovery of the Government's evidence,' which is not the purpose of a bill of particulars"); see also United States v. Traitz, 1999 WL 551924, *2 (E.D. Pa. July 15, 1999). "A

bill of particulars . . . is not intended to provide the defendant with the fruits of the government's investigation, but is instead intended to give the defendant the minimum amount of information necessary to permit the defendant to conduct his own defense." United States v. Mariani, 90 F. Supp.2d 574, 591 (M.D. Pa. 2000) (emphasis added) (citing United States v. Smith, 776 F.2d 1104 (3d Cir. 1985)); United States v. Bellomo, 263 F. Supp. 2d 561, 580 (E.D.N.Y. 2003) ("[a] bill of particulars is not designed to: obtain the government's evidence; restrict the government's evidence prior to trial; assist the defendant's investigation; obtain the precise way in which the government intends to prove its case; interpret its evidence for the defendant; or disclose its legal theory").

CONCLUSION

For all of the foregoing reasons, defendants' motions to strike alleged surplusage from the indictment and Eljvir's motion for a bill of particulars should be denied.

Respectfully submitted,

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Date: July 18, 2008
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