

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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UNITED STATES OF AMERICA

v.

MARTIN L. GRASS, FRANKLIN C.  
BROWN, FRANKLYN BERGONZI,  
and ERIC S. SORKIN

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1:CR-02-146-01, 02, 03, 04  
The Honorable Yvette Kane

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' JOINT MOTION TO STRIKE SURPLUSAGE**



illegal prior to the presentation of any evidence. The Indictment also cites alleged events that are irrelevant to the crimes charged, misleadingly implying to the jury that defendants are somehow responsible for these events as well.

In addition, the Indictment makes repeated references to Rite Aid's internal investigation and its findings. These references are extremely prejudicial to defendants, suggesting that independent investigators have already determined that the defendants' conduct is illegal and encouraging the jury to prejudge the case. Finally, the Indictment seeks to usurp this Court's function by purporting to summarize the applicable law, and in the process makes oversimplified and misleading statements regarding SEC requirements and filings.

If allowed to stand, this rhetoric-filled, "speaking" Indictment would deny Defendants a fair trial by an unbiased jury.<sup>1</sup> Pursuant to Fed. R. Crim. P. 7(d), Defendants respectfully request that this Court order the government to delete the extensive surplusage in this Indictment.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

On June 21, 2002, a grand jury issued a 37-count, 96-page Indictment alleging, *inter alia*, that Defendants conspired to defraud Rite Aid and its

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<sup>1</sup> The passages that Defendants request to have stricken or modified are set forth in the accompanying Motion to Strike Surplusage.

shareholders, misrepresent Rite Aid's financial condition, make false statements to the SEC, and obstruct justice.

### **QUESTION PRESENTED**

Should this Court strike certain irrelevant and prejudicial passages from the Indictment as surplusage, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure?

### **ARGUMENT**

#### **I. THE COURT HAS BROAD DISCRETION TO STRIKE SURPLUSAGE**

Rule 7(d) of the Federal Rules of Criminal Procedure provides that “[t]he court on motion of the defendant may strike surplusage from the indictment. . . .” Fed. R. Crim. P. 7(d). Rule 7(d) is a “means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial.” Fed. R. Crim. P. 7 (Original (1944) committee note to subdivision (d)). A reviewing court should strike as surplusage “immaterial and irrelevant allegations which may be prejudicial.” United States v. Ahmad, 329 F. Supp. 292, 297 (M.D. Pa. 1971) (citations omitted); see also United States v. Milestone, 626 F.2d 264, 269 n.9 (3d Cir. 1980); United States v. Hernandez, 85 F.3d 1023, 1030 (2d Cir. 1996) (court

should grant motion to strike “where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial.”) (citations omitted).

## **II. THIS COURT SHOULD STRIKE SURPLUSAGE IN THE INDICTMENT**

### **A. “Loaded” and Prejudicial Language**

The function of an indictment is to serve as a “plain, concise, and definite statement of the essential facts constituting the offenses charged.” Fed. R. Crim. P. 7(c)(1); see also United States v. Edmond, 924 F.2d 261, 269 (D.C. Cir.) (“the function of a federal indictment is to state concisely the essential facts constituting the offense.”). In this case, however, the Indictment is an advocacy document that repeatedly employs “loaded” and inflammatory words and phrases that serve only to cause the jury to prejudge the case.

Such “speaking indictments” are improper. As the court stated in United States v. Rush, 807 F. Supp. 1263 (E.D. La. 1992):

The government creates difficulty when it seeks to recast the traditional form of indictment from a vehicle for stating the offense into a vehicle for arguing its case. The indictment will be read to the jury at trial and will be available for study (and presumably studied) by the jury during deliberation. Thus, the jury will carry into the jury room the government’s version of the case -- in effect, the government’s written oral argument in support of the alleged individual criminal acts. Premitting that a defendant does not have the same opportunity, it would seem such arguments are more properly left for trial.

Id. at 1265.<sup>2</sup>

Courts regularly strike prejudicial and “loaded” language from indictments. For example, in United States v. Hubbard, 474 F. Supp. 64 (D.D.C. 1979), the court struck terms such as “infiltrate,” “cover up,” “covertly,” and “illegally” from an indictment, because the “use of such colorful words to describe the allegations in the indictment is improper where less colorful and more accurate words would suffice.” Id. at 83. See also United States v. Vastola, 670 F. Supp. 1244, 1256 (D.N.J. 1987) (striking repeated references to “loansharking” as having an “inflammatory effect on the jury”); United States v. Trie, 21 F. Supp. 2d 7, 20 (D.D.C. 1998) (striking the allegation that defendant “purchased access to high level government officials” as irrelevant, prejudicial, and inflammatory language); United States v Poindexter, 725 F. Supp. 13, 36 (D.D.C. 1989) (striking the term “cover up” because of its inflammatory connotations).

The Indictment in this case contains a litany of such “colorful” words and phrases that are unnecessary to set forth the essential facts and the crimes charged and serve only to inflame and prejudice the jury. For example, the

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<sup>2</sup> The Rush court struck argumentative allegations in the indictment suggesting that the impact of defendant’s scheme would be a loss of \$10 million by the State of Louisiana, when the amount of any resultant loss to the taxpayers was not relevant to the crime charged. The court noted that “such allegation is not necessary in the indictment, and, in fact, its inclusion could prejudice the defendant.” Id. at 1266.

government gratuitously describes Rite Aid's accounting as a "ruse and a mirage" (Indictment at 15, ¶ 31), refers to an "Accounting Department Revolt" at Rite Aid (Indictment at 18, ¶ 37), and calls an accounting entry a "plug number." (Indictment at 54, ¶ 104) The government characterizes documents or accounting entries as "bogus" on at least ten occasions and "arbitrary" at least four times. The Indictment refers three times to "massive accounting fraud." (Indictment at 15, ¶ 31; 22, ¶ 49; and 25, ¶ 4) Most notably, the Indictment describes documents as "back-dated" or Defendants as "back-dating" documents on no fewer than 45 occasions, rather than simply stating that a document was dated on a specified date. This Court should strike all of these prejudicial and inflammatory words and phrases as irrelevant and prejudicial.

The repetition in the Indictment is not limited to phrases. The entire text of paragraph four on page 25 of the Indictment -- the paragraph in which the government describes the Company's accounting as a "ruse and a mirage" and refers to "massive accounting fraud" -- duplicates word-for-word the text of paragraph 31 on pages 15-16. Such repetition -- especially of a passage that is simply inflammatory rhetoric -- has no place in a "plain, concise and definite" recitation of the relevant facts. Fed. R. Crim. P. 7(d).

Similarly, the government uses loaded words or phrases such as "boasted" (Indictment at 13, ¶28), "arbitrarily inflated" (Indictment at 27, ¶ 7),

“merely estimated” (Indictment at 29, ¶ 14), “secretly reimbursed” (Indictment at 33, ¶ 21), “concealed” (ten references), “interrogated” (Indictment at 47, ¶ 73), “coached” (Indictment at 79, ¶ 8), “lured” (Indictment at 80, ¶ 15), “stripped” (Indictment at 81, ¶16) and “solicited” (Indictment at 86, ¶ 42), to describe actions allegedly taken by various defendants. Each of these prejudicial words or phrases should be stricken, or at the very least replaced with more neutral terms. See United States v. Espy, 989 F. Supp. 17, 37 (D.D.C. 1997) (“A more neutral term should be employed [in place of prejudicial surplusage]. . . without altering the essential substance”), aff’d in part, rev’d on other grounds, 145 F.3d 1369 (D.C. Cir. 1998). It is difficult enough for Defendants to obtain a fair trial in light of the current media-fed furor over accounting scandals; this Court should not permit the government to fuel this prejudice.

Finally, the Indictment in this matter is rife with argumentative editorializing. Specifically, each of the following passages constitutes irrelevant and prejudicial argument:

“In an attempt to stop the decline, and as a public show of confidence, on March 15, 1999, Noonan bought 10,000 shares and GRASS bought 200,000 shares (approx. cost \$4.6 million) of Rite Aid stock.” (Indictment at 16, ¶ 33)

“In order to silence the fired SVP, GRASS and BROWN quickly settled the lawsuit.” (Indictment at 28, ¶ 11)

“In late February of 1999 [Defendants]. . . devised yet another scheme. . .” (Indictment at 29, ¶ 13)

“Despite the SEC’s inquiries and the protracted nature of the FY 1999 audit, BERGONZI continued to direct his subordinates to make unsupported entries. . .” (Indictment at 18, ¶38)

“Not to be deterred, BERGONZI replaced many of the reversals with other unsupported entries.” (Indictment at 18, ¶ 38)

“In order to conceal the improper entries, GRASS, BROWN, and BERGONZI withheld the existence of the . . . letters of intent. . .” (Indictment at 47, ¶ 71)

“In order to conceal the reversal from the Rite Aid employee with the responsibility for monitoring the accrual, BERGONZI created a fictitious “contra-account” in the Company’s books and records.” (Indictment at 47, ¶ 72)

“. . . the letter acknowledged that only drafts of a definite settlement agreement had been exchanged and the letter had not yet been signed. Thus, BROWN did not provide it to KPMG as support for BERGONZI’s \$17 million dollar entry.” (Indictment at 49, ¶ 78)

“Despite the fact GRASS became angry when Harrison refused his request, Harrison did not meet with GRASS.” (Indictment at 86, ¶ 40)

Deletion of each of the words or phrases underlined above would leave the reader with a short statement of the factual allegations, minus the government’s argumentative “spin.” The Court should strike these argumentative transition phrases and statements from the Indictment, leaving only the “plain, concise, and definite” allegations for the jury’s review.

## B. Other Misleading Allegations

### 1. References to Rite Aid's Restatement

The Indictment's characterization of Rite Aid's restatement of earnings as "the largest restatement of corporate income in the history of the United States" (Indictment at 22, ¶ 48) is irrelevant, prejudicial and incorrect. First, several companies have announced that they have issued or will issue larger restatements.<sup>3</sup> Second, references to the magnitude of Rite Aid's restatement relative to that of other companies' restatements serves no purpose other than to inflame the jury. Finally, the government misleadingly suggests that Rite Aid's entire restatement was due to the conduct alleged in the Indictment, which is not the case. If allowed to stand, the Indictment's suggestion that Defendants were responsible for the entire Restatement will significantly prejudice the Defendants in the eyes of the jurors.<sup>4</sup>

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<sup>3</sup> For Example, WorldCom, Inc. has restated its earnings by \$7.1 billion, while other companies are preparing restatements of their own that may well exceed the restatement by Rite Aid. See WorldCom, Inc., Form 8-K, August 8, 2002 (Attachment A).

<sup>4</sup> In fact, Rite Aid stated in its press release announcing the restatement that one of the principal components of the restatement related to the Company's improper use of purchase accounting with respect to certain acquisitions. This and other transactions cited as the source of Rite Aid's Restatement are clearly not attributable to Defendants alleged conduct in this case. See Rite Aid Press Release, July 11, 2000 (Attachment B).

The Indictment goes on to allege:

48. The Restatement was the largest restatement of corporate income in the history of the United States. The filing fixed FY 2000 as a *\$1.133 billion loss*, FY 1999 as a *\$461.5 million loss*, and FY 1998 as a *\$165.2 million loss*. Although the Restatement did not specifically address net income for FY 1996 or FY 1997, it reduced retained earnings for all years prior to FY 1998 by an additional \$547.1 million. As such, the Restatement effectively eliminated all profits originally reported by Rite Aid between FY 1996 and the 1<sup>st</sup> Quarter of FY 2000. The following table compares the Company's original reported net income to the July 11, 2000 Restatement: [Table omitted]

(Indictment at 22, ¶ 48) This paragraph and the accompanying table are misleading and prejudicial, as the restatement encompassed accounting issues in addition to those addressed in the Indictment. Accordingly, the Court should strike each of the government's misleading references to Rite Aid's restatement from the Indictment.

2. Hypotheticals

The Indictment also contains inappropriate paragraphs that the Indictment acknowledges are hypothetical. Specifically, the Indictment alleges:

BROWN and GRASS also attempted to defraud Rite Aid and its shareholders by devising a scheme that would have doubled the number of shares awarded them under the Company's LTIP I plan.

Indictment at 34, ¶ 25. This statement is hypothetical because (1) the Indictment alleges that Plan participants would be eligible to receive additional shares under

the Plan only if specified additional contingencies relating to stock price growth were met (Indictment 34, ¶ 26), and (2) the Indictment alleges that no payments were ever made to Defendants under the LTIP I plan (Indictment at 35, ¶ 28). This sentence should be stricken. The government goes on to include a paragraph in the Indictment with a hypothetical calculation of these payments that were never made, based upon hindsight regarding Rite Aid's stock price. See Indictment at 35, ¶27 (emphasis added). Because these hypothetical calculations of non-existent payments based on hindsight are grossly misleading, this Court should strike these paragraphs from the Indictment.

3. "Gross-Up" Feature

The Indictment also makes the following misleading allegation regarding Defendant Brown's Deferred Compensation Agreement:

The agreement contained a 'gross up' feature that had the potential to double BROWN's deferred compensation benefits in the event there was a change in control of Rite Aid.

(Indictment at 37, ¶ 32) However, footnote 14 on page 37 of the Indictment specifically alleges that "[t]he 'gross-up' feature obligated Rite Aid to pay an additional amount equal to BROWN's taxes on the \$2.5 million. . ." Such a provision could never double the amount paid under the agreement. Accordingly, this Court should strike the sentence in paragraph 32 referenced above as misleading and prejudicial.

4. Misleading Use of Aggregation

On certain occasions, the Indictment aggregates dollar amounts or values relating to each individual Defendant's bonus or options into a single, collective figure for all "Defendants," in a blatant attempt to make the amounts involved appear artificially larger. For example, the government charges:

Annual bonuses awarded to Defendants Grass, Brown, and Bergonzi from 1996-98 totaled "more than \$4 million"  
(Indictment at 31, ¶ 17)

[T]he Committee approved the payment of FY 1998 bonuses totaling \$1.5 million to GRASS, BROWN, and BERGONZI.  
(Indictment at 41, ¶ 47)

Each of these passages is misleading with respect to the amounts paid to individual Defendants and serves only to further the government's inflammatory characterization of Defendants as greedy corporate executives. Accordingly, the Court should strike these misleading "totals" from the indictment.

5. Additional Irrelevant and Prejudicial Statements

Finally, the government makes a number of other assertions about Defendants that are simply irrelevant to the crimes charged and would prejudice Defendants in the minds of the jurors. First, the government asserts that "BERGONZI became a Certified Public Accountant (CPA) in Pennsylvania in 1970, but his certification expired in 1983. . ." (Indictment at 5, ¶ 10) Second, the government on two occasions describes Defendants Grass, Brown and Bergonzi

and Timothy Noonan as the “top 4 corporate officers at Rite Aid.” (Indictment at 4, ¶ 7; and 6, ¶ 11) Finally, the Indictment states: “However, no executive owned more Rite Aid stock than Martin GRASS.” (Indictment at 11, ¶ 23) These and other statements set forth in the Motion to Strike Surplusage are irrelevant to the crimes charged. None of the alleged crimes hinge on whether the individual Defendants held particular positions at the Company, whether Defendant Bergonzi was a CPA, nor on the quantity of Company stock Defendant Grass owned relative to other investors. The statements serve only to prejudice Defendants by appealing to current charged public animosity with regard to the accounting profession and corporate executives in general.

In footnote 11 on page 28 of the Indictment, the government refers to the Company’s settlement agreement with the “fired SVP,” stating that “GRASS contributed no funds towards the settlement.” Indictment at 28, n. 11. This statement is simply a gratuitous slap at Defendant Grass that has no relevance to the matters at issue.

In similarly prejudicial fashion, the Indictment describes a statement Grass made to a Wall Street Journal reporter in which he uses a mild profanity (Indictment at 45, ¶ 62), and two irrelevant references to Rite Aid’s inability to pay its bills because of “insufficient funds.” (Indictment at 17, ¶ 36; 53, ¶ 99) Each of

these passages is a gratuitous reference that is irrelevant to the crimes charged and should be stricken as surplusage.

C. References to Rite Aid Internal Investigation

A number of courts have held that a court should exclude evidence suggesting that another reviewing body has already found the defendant responsible for the conduct at issue, because the prejudicial impact of such evidence substantially outweighs its minimal probative value. For instance, in United States v. Thomas, 155 F.3d 833 (7th Cir. 1998), the U.S. Court of Appeals for the Seventh Circuit ruled that the trial court should have excluded evidence of the findings of a Department of Corrections disciplinary hearing board at defendant's criminal trial because "[t]he jury was unaware that [the defendant] was not given the procedural protections that exist in federal court, or that the IDOC did not have to decide whether [the defendant] was guilty beyond a reasonable doubt." Id. at 836 (citations omitted).

Similarly, in Stump v. Gates, 211 F.3d 527 (10th Cir. 2000), the U.S. Court of Appeals for the Tenth Circuit found that a sealed report issued by a state court grand jury that detailed a police chief's role in a homicide and destruction of evidence was not admissible in a wrongful death trial because "submission of the evidence of the grand jury's conclusions created a high risk that the trial jury in this matter would be influenced by the fact that another group of private citizens

had previously [ruled on defendant’s conduct].” Id. at 536-37. And in United States v. Daniels, 95 F. Supp. 2d 1160, 1167 (D. Kan. 2000), the court struck references to an investigation conducted by a criminal defendant’s former partner into conduct related to that charged in the indictment on the grounds that such references were “highly prejudicial” and “could be taken by the jury as objective indications of fault as to the charged conduct.” Id. (citation omitted). These and other courts agree that references to the findings of alternate investigative bodies risk confusing and misleading the jury into believing that the investigators or adjudicators operated with the same procedural protections under the same standard of proof applicable in the criminal case. See Stump, 211 F.3d at 536; Thomas, 155 F.3d at 836.<sup>5</sup>

In this case, the Indictment repeatedly refers to Rite Aid’s internal investigation and its findings. See Indictment at 21-22, heading and ¶¶ 45-49; 32, ¶ 21; 76, ¶ 3; 78, ¶¶ 7(a),(b); 79, ¶¶ 8, 10, 12-13; and 81, ¶ 17. By detailing to the jury, inter alia, the fact that Rite Aid conducted a “massive internal investigation into the Company’s accounting and financial reporting” (Indictment at 21, ¶ 46),

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<sup>5</sup> See also United States v. Riddle, 103 F.3d 423, 431 (5th Cir. 1997) (excluding Comptroller of the Currency reports, describing defendant’s failure to comply with certain regulations, in a criminal prosecution of former bank chairman because mention of the reports would prejudice jury); Nordgren v. Mitchell, 716 F.2d 1335, 1339 (10th Cir. 1983) (“because of the different degrees of proof in civil and criminal proceedings,” admission of a civil court judgment to prove part of a criminal case “presumably would be error prejudicial to the defendant.”).

and that the Company “shar[ed] the results of [its] internal investigation” with federal criminal investigators (Indictment at 76, ¶ 3), the Indictment sends the message to the jury that independent investigative bodies have already investigated Defendants’ conduct and found it to be problematic. In one passage, for example, the Indictment states:

Beyond massive accounting fraud, Rite Aid’s internal investigation uncovered substantial evidence GRASS, BROWN, and BERGONZI had perpetrated other offenses in the course of their scheme to manipulate the Company’s earnings. Among other crimes, the investigation revealed schemes to defraud Rite Aid’s investors out of millions of dollars, schemes to defraud financial institutions, and other schemes designed to personally enrich GRASS, BROWN, and BERGONZI.

Indictment at 22, ¶49.

The government should not be allowed to use the Indictment as a mechanism to provide the jury inadmissible evidence under the guise of allegations. Because these passages will cause the jury to prejudge Defendants’ conduct as already investigated and judged by an “independent” body, the Court should strike all references to Rite Aid’s internal investigation.

D. Irrelevant and Misleading Statements of Law

1. Misleading Statements About SEC Filings

Several allegations in the Indictment mislead the jury with respect to the Defendants' roles in SEC filings. For example, the Indictment refers to “[t]he Quarterly Reports (Form 10-Q) and Annual Reports (Form 10-K), which were signed by GRASS, Noonan, BROWN, and/or BERGONZI. . .” Indictment at 13, ¶ 27. However, as the referenced SEC periodic filings themselves demonstrate, and as the government is well aware, Defendants Grass and Brown did not sign any of Rite Aid’s Form 10-Qs. By lumping all SEC filings together, and listing all of the signatories of any SEC filing, the government creates the misleading impression that all of the Defendants signed all SEC filings.

Several paragraphs of the Indictment are similarly misleading because they incorrectly suggest that individuals, rather than companies, file annual and quarterly reports with the SEC. Section 13(a) of the Securities Exchange Act of 1934 provides that every “issuer of a security” registered with the SEC shall file such annual reports and such quarterly reports as the Commission may prescribe. Rite Aid is the “issuer” here, and Rite Aid made SEC filings. Nonetheless, the Indictment suggests that the Defendants individually, rather than Rite Aid as a corporate entity, filed annual, quarterly and other reports with the SEC. For example, paragraph 30 of the introduction refers to “the financial statements filed

and earnings announcements made by GRASS, Noonan, BROWN and BERGONZI;” and paragraph 15 on page 30 alleges that “GRASS and BROWN failed to disclose the loan guarantees in Rite Aid’s 1999 Proxy Statement, as required by the SEC.” See Indictment at 30, ¶ 15; see also 32, ¶ 20; 33, ¶ 24. The Court should order the government to delete these misleading and prejudicial allegations. See United States v. White, 766 F. Supp. 873, 886 (E.D. Wash. 1991) (government characterization of a particular chemical as “listed hazardous waste” would be misleading to the jury because the applicable regulatory guidelines required that conditions be met before application of the chemical would constitute “disposal of a hazardous waste”).

2. *Purported Summaries of the Applicable Law*

Courts have stricken paragraphs of an indictment purporting to summarize applicable law, recognizing that such statements are unnecessary and infringe on the responsibility of the court to direct the jury as to applicable legal standards. For instance, in White, 766 F. Supp. at 885, the court held that nine paragraphs of an indictment that set forth “the government’s version of [two environmental statutes]” went “beyond a plain, concise and definite statement of the essential facts constituting the offense charged,” and contained unnecessary statements of the law that were “neither relevant nor material to the charges.” Id. Accordingly, the White court ordered the paragraphs stricken from the indictment.

Similarly, in Daniels, 95 F. Supp. 2d at 1167-68, the court ruled that an entire paragraph of the indictment setting forth the government’s “grossly over-simplified” definition of the legal concept of “informed consent” should be stricken as surplusage. The court concluded that the statement of the government’s view of the law was irrelevant and “likely to prejudice the jury.” See also United States v. Spalding, No. 01-152-CR-01 B/F, 2002 WL 818129 at \*4-\*5 (S.D. Ind. April 24, 2002) (striking as surplusage government’s “statements of the law” which “may lead to confusion of issues and, in any event, will be furnished in proper form to the Jury in the final instructions.”) (Attachment C).

In this case, several paragraphs in the introductory section of the Indictment similarly contain over-simplified, prejudicial statements of the government’s view of the law. For example, paragraph 5 of the “introduction” purports to inform the jurors as to the requirements of the federal securities laws:

5. The SEC also requires publicly held corporations like Rite Aid to disclose related party transactions, including loans and loan guarantees, between the corporation, its directors, and officers in excess of \$60,000 in an Annual Proxy Statement (Form DEF 14A). The Annual Proxy Statement must also disclose all forms of compensation awarded, accrued, earned, or paid to the company’s chief executive officer and the four other highest paid officers. Other significant events a company deems important to its shareholders are reported to the SEC on a Current Report (Form 8-K).

Indictment at 3, ¶ 5. This description is incomplete and misleading. For example, the instructions to Item 404 of Regulation S-K (referenced in Schedule 14A) direct

an issuer to exclude certain amounts from the calculation of indebtedness, including amounts relating to transactions in the ordinary course of business. Securities and Exchange Commission, 17 C.F.R. § 229.404 (2001) (Attachment D). See also Indictment at 2, ¶ 3 (purporting to summarize applicable SEC requirements).

Similarly, paragraph 11 of the Indictment's introduction purports to state the applicable corporate law:

11. . . . As Rite Aid's four most senior officers, GRASS, Noonan, BROWN, and BERGONZI owed fiduciary obligations to manage the Company's affairs honestly and to provide complete and candid information to Rite Aid's directors, shareholders, and investors. GRASS, Noonan, BROWN, and BERGONZI were duty bound to provide truthful, complete and accurate information to Rite Aid's accountants, auditors, and government regulators, and had statutory duties to disseminate accurate information with respect to the Company's true financial condition and earnings.

Indictment at 6, ¶11. This statement is overbroad, incorrectly suggesting that officers of a public corporation have a personal obligation to affirmatively communicate all information in their possession to all of these parties on an ongoing basis, regardless of the materiality of the information or the circumstances.

This Court's jury instructions are the appropriate vehicle in which to provide the jury with the proper interpretation of applicable legal requirements. The paragraphs of the Indictment cited above usurp this Court's function to inform

the jury as to the applicable law, and prejudice Defendants with the government's dramatically over-simplified and incomplete interpretation of the law.

Accordingly, the Court should strike these paragraphs of the Indictment as surplusage.

### **CONCLUSION**

For the foregoing reasons, the Court should strike as surplusage those portions of the Indictment set forth in the accompanying Motion to Strike Surplusage.

Respectfully submitted,

By:

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