IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER**, Defendant.	**CRIMINAL CASE NO.**: 19-431 (PAD)

MOTION TO MODIFY GAG ORDER

TO THE HONORABLE COURT:

COMES NOW Defendant Julia Beatrice Keleher ("Keleher"), through the undersigned counsel, and respectfully files this *Motion to Modify* the Gag Order currently operating in the above-entitled case. In support thereof, Keleher states as follows:

I. INTRODUCTION

On July 9, 2019, a Federal Grand Jury returned an indictment against Keleher and her co-defendants, charging her with conspiracy to commit wire fraud, in violation of 18 U.S.C. §1349; wire fraud, in violation of 18 U.S.C. §1343; and conspiracy to commit an offense against the United States (theft), in violation of 18 U.S.C. §§371, 641. *See* Docket No. 3. On July 10, 2019, the day following the return of the indictment, Keleher was arrested in Washington DC, her place of residence, and appeared before a Magistrate Judge for her initial appearance pursuant to the Federal Rules of Criminal Procedure. Keleher was released on her own recognizance and was ordered to report to the District of Puerto Rico for further proceedings.

Two days after Keleher's arrest, on July 12, 2019, the Court *sua sponte* entered an Order ("Gag Order") in enjoining Keleher and her codefendants from "divulging, talking to, or discussing

with, the press, media and public, including without limitation, through social networks, any information other than that entered without restriction on the Docket or disclosed in open court, relating to the facts of the captioned case." Docket No. 17.

For the reasons stated below, Keleher hereby requests the Court modify its Gag Order, as it is an unconstitutionally vague prior restraint on her First Amendment rights.

II. ARGUMENT

"Despite the fact that litigants' First Amendment freedoms may by limited in order to ensure a fair trial, gag orders . . . still exhibit the characteristics of prior restraints." *United States v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000)(citing *In re Dow Jones*, 842 F.2d 603, 609 (2d Cir.1988); *Levine v. United States District Court*, 764 F.2d 590, 595 (9th Cir.1985)). There is a "strong presumption that prior restraints on speech are unconstitutional." *Sindi v. El-Moslimany*, 896 F.3d 1, 31–32 (1st Cir. 2018)(citing *N.Y. Times Co. v. United States*, 91 S.Ct. 2140 (1971) (per curiam)). "A prior restraint cannot be imposed when those needs can be achieved through less restrictive means." *Id.* (citations omitted). Stated differently, "an order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 89 S. Ct. 347, 353 (1968).

The Supreme Court's decision in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) is our highest court's most recent foray into analyzing the limitations imposed on the speech of trial participants. In evaluating a challenge to a Nevada Supreme Court rule prohibiting any attorney from making extrajudicial comments to the media that the attorney knew or should have known would "have a substantial likelihood of materially prejudicing an adjudicative proceeding," *Gentile*, 111 S.Ct. at 2723, the Court found that demonstrating a "substantial likelihood of material

prejudice" from an attorney's extrajudicial comments, which the Nevada rule required, as opposed to a "clear and present danger," was constitutionally sufficient to justify prescribing attorney comments of that type. *Id.* at 2745.

Currently, circuits are split as to the proper constitutional standard of analysis when evaluating court-imposed restrictions on extrajudicial comments by trial participants. *See In re Russell,* 726 F.2d 1007, 1010 (4th Cir.1984)("reasonable likelihood" of prejudicing a fair trial); *United States v. Tijerina,* 412 F.2d 661, 666–67 (10th Cir.1969)(same); *United States v. Ford,* 830 F.2d 596, 600-02 ("clear and present danger"); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (7th Cir.1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers,* 96 S.Ct. 3201 (1976) ("serious and imminent threat"); *Levine v. United States District Court,* 764 F.2d 590, 596 ("clear and present danger"). The First Circuit has yet to chime in on the issue.

In this District, Local Rule 83G governs the Court's ability to regulate the speech of trial participants. Rule 83G provides, in relevant part, that:

> In widely-publicized or sensational cases, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses **likely** to interfere with the rights of the accused or the parties to a fair trial by an impartial jury, the seating and conduct in the courtroom or spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

PRD Local Rule 83G(g)(emphasis ours).

Turning to the Gag Order here, the Court enjoined Keleher and her codefendants from "divulging, talking to, or discussing with, the press, media and public, including without limitation, through social networks, any information other than that entered without restriction on the Docket

or disclosed in open court, relating to the facts of the captioned case." Docket No. 17. As discussed above, "an order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll,* 89 S. Ct. 347 at 353. Clearly, the broad prohibition on discussing "any information" that is unrestricted on the Docket is not narrowly tailored to protect the interests at stake.

Admittedly, in this case, "[u]nrestricted statements by the participants in this trial would only serve to increase the volume of pre-trial publicity." *Brown,* 218 F.3d at 428–29; *see, generally,* Docket No. 177 (Keleher's *Supplemental Motion in Support of Defendants' Joint Motion for Change of Venue*). Keleher, however, is not requesting the Court vacate its order. Keleher's request, instead, is for the Court to more narrowly tailor its order to appropriately achieve its goal without infringing on her rights under the First Amendment. In *Application of Dow Jones & Co., Inc.,* 842 F .2d 603 (2d Cir.1988), *aff 'g sub nom. United States v. Simon,* 664 F.Supp. 780 (S.D.N.Y.1987), for example, the Second Circuit affirmed the district court's Gag Order enjoining the parties from making "any extrajudicial statement ... except ... stating, without elaboration or characterization [ ] **the general nature of an allegation or defense** [ ] information contained in the public record; [ ] the scheduling or result of any step in the proceedings; or [e]xplaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record." *Dow Jones,* 842 F.2d at 606 (emphasis ours). Moreover, in *Brown*, the Fifth Circuit upheld the district court's Gag Order and, in so doing, noted the following: "the district court did not impose a 'no comment' rule, but instead left available to the parties various avenues of expression, including **assertions of**

innocence, general statements about the nature of an allegation or defense, and statements of matters of public record." *Brown*, 218 F.3d at 429–30 (emphasis ours).

Keleher has no intention of fueling the mediatic frenzy caused by this case. In fact, she is cognizant that doing so would run counter to her arguments in favor of a change of venue. Instead, Keleher simply seeks the freedom to generally assert her innocence and freely discuss the nature of her defenses in non-public forums in a manner which, obviously, would not have a substantial likelihood of prejudicing a fair trial for her of for the Government. *See Gentile*, 111 S.Ct. at 2723. This is a right afforded to her by the Constitution and one the Court should act to protect.

III. CONCLUSION

As currently drafted, the Gag Order in this case does not comport with Constitutional standards governing prior restraints on speech. Accordingly, Keleher respectfully requests the Court modify or amend the language of its order as follows:

> As a cautionary measure to protect the defendants' Sixth Amendment right to a trial before a fair and impartial jury of their peers, the following individuals are hereby enjoined from making any extrajudicial statement that has a substantial likelihood of prejudicing the parties' ability to have a fair trial, except stating, without elaboration or characterization the general nature of an allegation or defense, information contained in the public record, the scheduling or result of any step in the proceedings, or [e]xplaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record.

With this amendment, the Court would thus ensure the parties' First Amendment rights are duly protected while also ensuring their right to a fair trial is not prejudiced by improper extrajudicial commentary regarding case-related matters.

WHEREFORE, Defendant respectfully requests the Court **GRANT** her motion and modify its Gag Order (Docket No. 17) accordingly.

RESPECTFULLY SUBMITTED.

WE HEREBY CERTIFY: That today we have electronically filed the foregoing document with the clerk of the Court for the District of Puerto Rico, using the CM/ECF system which will send a copy and notification of filing to all counsel of record.

In San Juan, Puerto Rico, this 30th day of December, 2019.

By:

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