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

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	CRIMINAL CASE NO.: 20-019 (FAB)

JULIA BEATRICE KELEHER'S MOTION TO DISMISS OR TO STRIKE PORTION OF COUNT ONE OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this motion to dismiss or strike a portion of Count One of the indictment against her, pursuant to Rules 12(b)(3) and 7(c) and (d), or for a bill of particulars, pursuant to Rule 7(f), of the Federal Rules of Criminal Procedure.

Count One of the indictment alleges a conspiracy in violation of 18 U.S.C. § 1349 to commit honest services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. Count One is based on an allegation that Ms. Keleher, who was the Secretary of the Puerto Rico Department of Education (PR DOE), accepted a thing of value, financial benefits related to a personal residence, in return for an alleged official act: agreeing to sign, and signing, a letter on PR DOE letterhead to Individual A, the CEO of Company C, authorizing Company C to acquire 1,034 square feet of the Padre Rufo School.

Paragraphs 26 - 30 of the indictment purport to set forth alleged overt acts in furtherance of the alleged conspiracy. Paragraph 30 lists wires that were allegedly sent "for the purpose of

executing and attempting to execute the scheme and artifice to defraud," one of which is an August 21, 2018 e-mail "from Individual A to representative of Company E and [1] JULIA BEATRICE KELEHER confirming that money should be disbursed to Company D." Because the indictment fails to allege any involvement of Company D or Company E in the conspiracy alleged in Count One, or otherwise offer any explanation whatsoever as to how this e-mail could conceivably be in furtherance of the alleged conspiracy to commit wire fraud, Ms. Keleher motions to dismiss or strike this allegation from Count One or for a bill of particulars.

THE INDICTMENT

In Count One, the indictment alleges a conspiracy between Mr. Gutierrez-Rodriguez and Ms. Keleher to commit honest services wire fraud. According to the indictment: "[i]t was a purpose of the conspiracy for [1] JULIA BEATRICE KELEHER to use her official position as the Secretary of Education to enrich herself by soliciting and accepting gifts, payments, and things of value from others, known and unknown to the Grand Jury, and for others to enrich themselves *by* obtaining favorable official action for themselves and their companies through corrupt means." *Id.* at ¶ 20 (emphasis added). Specifically, Ms. Keleher allegedly accepted the "receipt of financial benefits in connection with her lease and purchase of an apartment in Ciudadela in exchange for [l] JULIA BEATRICE-KELEHER's signing a letter purporting to give 1,034 square feet of the Padre Rufo School to Company C." *Id.* at ¶ 21.

Paragraphs 9 through 13 of the indictment describe five companies, Companies A-E, respectively. Paragraph 12, in its entirety, alleges: "Company D was a non-profit organization organized under the laws of the Commonwealth of Puerto Rico to promote education-related initiatives in the Commonwealth of Puerto Rico. Company D disbursed money to the Puerto Rico Fiscal Agency & Financial Advisory Authority (hereafter "AFAF" by its Spanish acronym), the

entity which paid the salary of [1] JULIA BEATRICE KELEHER." Paragraph 13, in its entirety, alleges: "Company E was a non-profit organization organized under the laws of the State of New Jersey. Company E disbursed in excess of $750,000.00 to Company D between 2017 and 2018 to promote its education-related goals in the Commonwealth of Puerto Rico." Paragraph 15 alleges that Individual A, the CEO of Company C, was "also served as the president of Company D until in or about August 2018."

The indictment proceeds to make numerous allegations about Company C at the heart of the alleged conspiracy. It also references to the participation of Companies A and B in the conspiracy. Yet, it provides no information whatsoever about any alleged role in the conspiracy of Companies D and E.

The core allegations of the conspiracy are that Company C owned Ciudadela, *id.* at ¶ 11, Ms. Keleher was offered a thing of value related to her lease and purchase of a personal residence at Ciudadela, *id.* at ¶ 23, and in return, Ms. Keleher, at the behest of Individual A, who was acting on behalf of Company C, agreed to sign a letter on Puerto Rico Department of Education letterhead authorizing Company C to acquire 1,034 square feet of Padre Rufo School. *Id.* at ¶ 29.

Count One alleges as part of the "manner and means" of the conspiracy that Mr. Gutierrez-Rodriguez and Company A, Company B, and Company C agreed to give Ms. Keleher a thing of value (an incentive bonus in connection with her purchase of an apartment in Ciudadela). *Id.* at ¶ 23. It further alleges that Mr. Gutierrez-Rodriguez undertook an overt act in furtherance of the conspiracy, "acting on behalf of Company A, Company B, and Company C, communicated with a PR DOE employee who worked at the Padre Rufo School for the purpose of obtaining that employee's assent to the ceding of 1,034 square feet of the Padre Rufo School to Company C." *Id.* at ¶ 23.

Having identified Companies D and E, the indictment never mentions them in the "manner and means" by which the conspiracy was conducted. Nor does it mention either company in the "overt acts" in furtherance of the conspiracy, until the last sentence of the last overt act. There, the indictment identifies an August 21, 2018 e-mail with the following description: "Email from Individual A to representative of Company E and [1] JULIA BEATRICE KELEHER confirming that money should be disbursed to Company D." *Id.* ¶ 30. The e-mail, which was produced in discovery and is attached as Exhibit A, says in its entirety: "This email is to confirm with you both that we are good to send the second distribution to Puerto Rico Education Foundation. Once you confirm will release the check."

Paragraph 30 identifies six other e-mails it alleges were sent in furtherance of the wire fraud conspiracy. Each of these six e-mails is charged as a substantive wire fraud offense in Counts Two through Seven of the indictment, respectively. The August 21st e-mail is the only e-mail the sending of which is identified as an overt act in furtherance of the conspiracy in Paragraph 30 that is not charged as a substantive wire fraud offense. Indeed, it is never referenced again.

The indictment fails to provide any information as to how Companies D or E were allegedly involved in the conspiracy or why the August 21st e-mail was allegedly in furtherance of the conspiracy. The conspiracy count makes no other references to Companies D or E. Nor does it explain how the disbursement referenced in the e-mail allegedly relates to the lease or purchase of an apartment in Ciudadela by Ms. Keleher or Ms. Keleher's alleged authorization of the acquisition by Company C of 1,034 square feet of the Padre Rufo School.

ARGUMENT

I. The portions of Count One related to Companies C and D and the last alleged overt act should be dismissed or stricken.

Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a pretrial motion, inter alia, to raise defects in instituting the prosecution and in the indictment. "District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997); *see also* Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); Fed. R. Crim. P. 12(b)(3) (noting that certain "defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits").

Under Rule 7(c)(1), while the prosecution may set out the offense using statutory language, "[w]here guilt depends so crucially upon … a specific identification of fact … cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962). "[W]here the definition of an offence … includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." *Id.* at 765 (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)); *see also Hamling v. United States*, 418 U.S. 87, 117-18 (1974) ("[T]he language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."). Thus, "[a]n indictment not framed to apprise the

defendant 'with reasonable certainty[ ] of the nature of the accusation against him is defective, although it may follow the language of the statute.'" *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976) (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877)).

Rule 7(d) permits a defendant to move to strike surplusage from an indictment. It states: "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information."

With respect to the allegations related to Companies C and D and the last overt act alleged in Count One of the indictment, the indictments fails to provide any general description of how these allegations relate to any charged offense or apprise Ms. Keleher with reasonable certainty why these allegations have been included in Count One. Accordingly, they should be dismissed or stricken.

II. In the alternative, the Government should be ordered to provide a bill of particulars.

In the alternative, Ms. Keleher requests the Court direct the government to provide a bill of particulars with respect to the allegations related to Companies C and D and the last overt act alleged in the Count One of the indictment. *See* Fed. R. Crim. P. 7(f) ("The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits."); *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989) (explaining that the drafters of Rule 7(f) intended to "encourage a more liberal attitude by the courts toward bills of particulars") (internal quotations omitted); *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987); *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976); *see also Coffin v. United States*, 156 U.S. 432 (1895) ("It is always open to the defendant to move the judge before whom trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the

acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid the danger of injustice.") (internal citations omitted). Any doubts as to whether a bill of particulars should issue should be resolved in favor of the defendant: "[s]since [a] defendant is presumed innocent . . . it cannot be assumed he knows the particulars sought." *United States v. Tucker*, 262 F. Supp. 305, 307 (S.D.N.Y. 1966); *see also United States v. Manetti*, 323 F. Supp. 683, 697 (D. Del. 1971) (giving the defendant the benefit of the doubt when deciding whether to order a bill of particulars). When the information requested is necessary to prepare a defense, refusal to order a bill of particulars constitutes reversible error. *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985).

Specifically, the government should be required to provide information detailing any misrepresentations it alleges were made in the August 21st e-mail, when Companies D and E joined the conspiracy, what their role was in the conspiracy, and how the August 21st e-mail allegedly furthered the conspiracy. *See United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988) (reversing defendant's conviction based on the denial of his request for a Bill of Particulars: "it is simply unrealistic to think that a defendant preparing to meet charges of extorting funds from one company had a fair opportunity to defend against allegations of extortion against unrelated companies, allegations not made prior to trial."); *United States v. Feola*, 651 F.Supp. 1068 (S.D.N.Y. 1987) (defendants were entitled to the names of the persons whom the government claimed were co-conspirators and the exact dates that the defendants joined the conspiracy); *United States v. Kole*, 442 F. Supp. 852, 854 (S.D.N.Y. 1977) (bill of particulars ordered to identify persons the government will claim at trial received bribes or gratuities allegedly paid by defendants, the dates of payments, the places where payments were made, and the names of the

individuals making the payment). *See also United States v. Holmes*, 2020 U.S. Dist. LEXIS 24551 * 23 (N.D. Calif. Feb. 11, 2020) (ordering the government to provide a bill of particulars with: "(1) the specific implicit and explicit false and fraudulent misrepresentations in the advertisements and marketing materials, (2) what about them is false, (3) who made them, and (4) how Defendants caused them to be made."); *United States v. Magalnik*, 160 F. Supp. 3d 909, 918 (W.D. Va. 2015) (directing the Government, in the context of a conspiracy related to visa and alien employment certification fraud, to produce a bill of particulars identifying "the specific visa and/or work applications that [the Government] intends to introduce at trial and [that] explains, in general terms, how each application is believed to be false or fraudulent"); *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) (district court erred in denying bill of particulars to identify the specific false or misleading statements alleged); *United States v. Trie*, 21 F. Supp.2d 7, 22 (D.D.C. 1998) (ordering the government to provide bill of particulars he government "as to exactly what the false statements are, what about them is false, who made them, and how Mr. Trie caused them to be made").

This information is necessary "to allow the defense to prepare its case adequately [and] to avoid prejudicial surprise." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 1 FED. PRAC. & PROC. CRIM. § 130 (4th ed.). In the absence thereof, Ms. Keleher would be essentially unable to prepare her defense and would be exposed to unjust surprise at trial. *See United States v. Sepulveda*, 15 F.3d 1161, 1192-93 (1st Cir. 1993).

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests that the Court GRANT this motion.

Respectfully submitted on this 1st day of July, 2020, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

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From: N[redacted] P[redacted] <NP[redacted]@[redacted].com>
To: B[redacted] B[redacted] <bb[redacted]@[redacted].org>
Cc: Julia Keleher <jbkprde@gmail.com>
Subject: Re: 2nd distribution
Received(Date): Tue, 21 Aug 2018 22:21:38 +0000

Dear B[redacted]: Good to go. Thank you!

N[redacted] P[redacted]
Chairman & CEO
[redacted]

On Aug 21, 2018, at 11:46 AM, B[redacted] B[redacted] <bb[redacted]@[redacted].org> wrote:

Hi N[redacted] and Julia,

This email is to confirm with you both that we are good to send the second distribution to P[redacted] R[redacted] E[redacted] F[redacted]. Once you confirm will release the check.

Thank you both,

B[redacted]

W[redacted] H. B[redacted], Vice President - Philanthropy

[redacted]

bb[redacted]@[redacted].org

telephone: [redacted]

mobile: [redacted]