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

UNITED STATES OF AMERICA, Plaintiff, V. **JULIA BEATRICE KELEHER**, Defendant.	**CRIMINAL NO.** 20-0019 (FAB)

REPLY TO GOVERNMENT'S OPPOSITION
TO MOTION TO DISMISS OR TO STRIKE PORTION OF COUNT ONE
OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS

I. INTRODUCTION

Count One alleges an honest services conspiracy for Company C to give Ms. Keleher concessions on an apartment in return for obtaining Ms. Keleher's agreement to the ceding of 1,034 square feet of the Padre Rufo School to Company C. The Government's opposition correctly notes that an overt act in furtherance of a conspiracy need not itself be an illegal act, but misses the more fundamental point that an overt act in furtherance of a conspiracy must actually be in furtherance of a conspiracy. The Indictment fails to allege how the August 21, 2018 email from Individual A to a representative of Company E and to Ms. Keleher, confirming that money should be disbursed to Company D, which is listed in Paragraph 30 of the Indictment as an overt act in furtherance of Count One's alleged conspiracy, was allegedly in furtherance of that conspiracy. The Indictment notes that Company D and Company E were both non-profit organizations and that Company D disbursed money to the government agency that paid Ms. Keleher's salary. But the Indictment never articulates what that has to do with the alleged conspiracy. The Government's opposition explains that Ms. Keleher was allegedly seeking to increase her salary through contributions by Companies D and E. But the Indictment never alleges

that her salary was a bribe or a kickback.

II. ARGUMENT

A. *Count One's allegations about Companies D and E should be dismissed pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B).*

While Ms. Keleher filed a motion to dismiss or to strike the allegations regarding Companies D and E, the Government focuses exclusively on the standard for a motion to strike and wholly ignores the standard for dismissal. Pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), a defendant may move to dismiss an indictment, or for partial dismissal of an indictment, for lack of specificity or failure to state an offense. "Although detailed allegations are not required to support charges, an indictment nonetheless fails to state an offense if the facts alleged therein fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Rojas*, No. 1:15-CR-00169, 2017 U.S. Dist. LEXIS 91009, at *4 (M.D. Pa. June 14, 2017) (citation omitted).

In *United States v. Menendez*, the defendant was charged with bribery and related crimes. *See* 132 F. Supp. 3d 635, 644 (D.N.J. 2015). He moved to dismiss several counts, arguing that they failed to allege an explicit *quid pro quo*. The counts baldly asserted that an individual made contributions to a Fund "in order to influence Menendez's official acts, as opportunities arose," and that Menendez sought and received these funds in return for "being influenced in the performance of official acts, as opportunities arose." *Id.* (internal citations omitted). The district court held: "[r]eading Paragraph 16 on its own and reading the indictment as a whole, the Fund [] was not one of the 'entities that benefited Menendez's 2012 Senate Campaign.' Nor does the indictment allege an explicit agreement tied to the donations to the Fund." *Id.* Thus, the court dismissed the relevant counts and struck all references to the fund issue. *See id.*

Similarly, in this case, the Government's recitation of the details of Ms. Keleher's

communication with Companies D and E fail to provide any nexus between these communications and the criminal activity alleged in the Indictment. The email exchange referenced in the Indictment and attached in the Government's response presents an individual engaged in salary negotiations. Like in *Menendez*, the Indictment makes a conclusory claim that one of these communications comprised an "overt act" that furthered an honest services fraud, but there are no facts alleged showing this email was related to and in furtherance of the charged scheme. *Id*. The Indictment does not allege that the statements were false or misleading, there are no factual connections asserted between Ms. Keleher's salary negotiations with a representative of Company E and an exchange for favorable official action. Because the allegations with respect to Companies D and E lack specificity and fail to state a claim, this Court should dismiss the portions of Count One that relate to Companies D and E.

B. *The references to Companies D and E should be stricken as surplusage.*

"The purpose of [Rule] 7(d) is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts." 1 Wright & Miller, supra, § 128 at 641. "[P]rosecutors have been known to insert [unnecessary facts] for 'color' or 'background' hoping that these will stimulate the interest of the jurors." *United States v. Johnson*, 1999 U.S. Dist. LEXIS 22299, 1999 WL 551332, at *1 (E.D. La. June 10, 1999) (citing 1 Charles A. Wright, Federal Practice & Procedure § 127, at p. 634 (3d ed. 1999); *see also* Note to Rule 7(d)). The court can strike as surplusage any irrelevant language that is unduly inflammatory and prejudicial in that it "serve[s] only to inflame the jury, confuse the issues, and blur the elements necessary for conviction[.]" *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971). But the court can also strike "[i]ndirect expressions, implied allegations, argumentative statements, and uncertainty due to generalizations in language[.]" *United States v. Williams*, 203 F.2d 572, 574 (5th Cir. 1953).

In *United States v. Simpson*, the district court struck surplusage in a fraud case even when the information actually detailed defendant's fraudulent representations in another context, that is, he lied to gain unemployment benefits. *See* No. 3:09-CR-249-D(06), 2011 U.S. Dist. LEXIS 76881, at *49-50 (N.D. Tex. July 15, 2011). The government claimed that "that this allegation [was] relevant because it show[ed] that Simpson made fraudulent representations and that the statements involved false information." *Id.* However, the district court held that "the allegation that Simpson applied for and collected unemployment payments from the State of Texas by falsely claiming to be employed is irrelevant to the offense charged." *Id.* Because, the court explained, "*the government has not demonstrated how this overt act manifests that the conspiracy charged was at work*: i.e., to fraudulently obtain property, such as computer and telecommunications equipment and infrastructure, and services without the intent to pay for them. Instead, the government contends that this allegation demonstrates Simpson's generally fraudulent behavior and his willingness to make false statements and to hide his true identity. Moreover, the court cannot discern from the indictment's other allegations regarding SC TXLink, or from the indictment as a whole, how this alleged overt act is relevant to the conspiracy charged." *Id.* (emphasis in the original).

The extraneous information in Ms. Keleher's Indictment is even farther removed than the surplusage in *Simpson.* In *Simpson*, the language detailed the defendant's own fraudulent statements. Here, the Indictment does not contend that the communication about her salary was false or fraudulent. Nor does the Indictment allege that her salary was a bribe or kickback. Like in *Simpson*, in which the government argued a relevancy because it showed the defendant generally made false statements, the government here attempts to make a similar, generalized claim, divorced from the allegations that actually appear in the Indictment, that Ms. Keleher's salary

negotiations were part of an "overall effort" of "Keleher's intent to use her position as Secretary of Education to receive things of value in exchange for favorable action." *See* ECF No. 147 at 4. There is no allegation in the Indictment, however, that Ms. Keleher's salary negotiations were in any way tied to the apartment concessions she allegedly accepted in return for her endorsing a letter supporting Company C's acquisition of 1,034 square feet of the Padre Rufo School.

While the allegations about her salary may "stimulate the interest of the jurors," that is not a proper basis for including these allegations in the Indictment. This, instead, appears merely to be an attempt by the Government to paint Ms. Keleher in an negative light, as someone who sought to enrich herself through public service. The allegation that Ms. Keleher, an extraordinarily controversial political figure not from Puerto Rico, who was highly compensated, was seeking additional compensation under an arrangement with a third-party foundation would surely be prejudicial in a jurisdiction where so many live in poverty. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (Douglas, J.) ("[A]ppeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them."); *United States v. Jackson-Randolph*, 282 F.3d 369, 376 (6th Cir. 2002) ("This court has already recognized that prosecutorial appeals to wealth and class biases can create prejudicial error, violating a defendant's right to due process of law under the Fifth Amendment.") (citation omitted); *United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986) ("Argument, especially the government's, should not degenerate into an appeal to [class] prejudice, and we encourage the district court to intervene whenever this happens); *see also Kinsey v. Cendant Corp.*, 588 F. Supp. 2d 516, 518 (S.D.N.Y 2008) (excluding evidence of plaintiff's compensation package: "[c]ourts have excluded evidence of compensation (even when assuming its relevance) based on the potential of such evidence to appeal 'to the fact finder's potential economic sympathies or prejudices."). While the

allegations about Ms. Keleher's salary may "stimulate the interest of the jurors," that is not a proper basis for including these allegations in the Indictment. These allegations have no place in the Indictment and should be stricken as the surplusage they are.

C. *Should the Court decline to dismiss or strike portions of Count One, the Government should be required to file a bill of particulars.*

Should the Court permit the references to Companies D and E and the August 21st email to remain, despite the Indictment's failure to connect them to the alleged Count One conspiracy, the Government should be required to file a bill of particulars. A defendant "uncertain as to the nature of the charges against him . . . [may] file a motion for a bill of particulars." *United States v. Barbato*, 471 F.2d 918, 921 (1st Cir. 1973). A bill of particulars is necessary to "amplify[y] the indictment by providing missing or additional information" so that the defendant can effectively prepare for trial. *See United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). A bill of particulars should be granted when it is necessary to provide sufficient information to a defendant of the charge against him, allow him to prepare for trial, and minimize the dangers of surprise. *United States v. Schembari*, 484 F.2d 931 (4th Cir. 1973); *see also United States v. Dicesare*, 765 F.2d 890, 897 (9th Cir. 1985) ("[A] Bill of Particulars is appropriate when the indictment is insufficient to permit the preparation of an adequate defense.").

Contrary to the Government's assertion, Ms. Keleher does not seek a preview of evidence or knowledge of how the Government intends to present its case. Ms. Keleher seeks, and has a right to know, what the Government *alleges* the August 21st e-mail did to further the conspiracy, not how the Government intends to prove that allegation at trial. The most the Government has provided in its opposition is that the amorphous assertion that the email shows an "overall effort" to commit fraud. *See* Docket No. 147 at 4. Ms. Keleher is not adequately on notice as to how the August 21st email is alleged to have furthered her alleged honest services fraud, and therefore,

she cannot defend herself against this allegation.

Similarly, the government posits a general and vague theory that "the allegations pertaining to Companies D and E are probative of Ms. Keleher's participation in conspiring to defraud the public of her honest services as Secretary of Education," but fails to allege how an effort to have private funds used to pay her salary caused a deprivation, rather than a benefit, to the tax-paying public. On its face, none of the facts alleged in the Indictment allege a fraudulent agreement involving Companies D and E. Therefore, if the Government intends to prove that Companies D and E, or their representatives, were conspirators, Ms. Keleher must know, at minimum, when the Government alleges these conspirators joined the conspiracy and how the Government alleges Companies D and E were involved in the conspiracy (not how the Government intends to prove these allegations). The Indictment as it stands is insufficient to permit the preparation of an adequate defense, and, therefore, should the Court allow inclusion of Companies D and E to remain, the Government should be required to produce a bill of particulars.

III. CONCLUSION

The Indictment cites an e-mail communication to Company E about funds being disbursed to Company D as an act in furtherance of the conspiracy alleged in Count One, but fails to allege any facts connecting that communication, or Company D or Company E, to the conspiracy alleged in Count One, a conspiracy pursuant to which Ms. Keleher allegedly accepted concessions from Company C related to her personal residence in return for her endorsement of the ceding of 1,034 square feet of the Padre Rufo School to Company C. The Government asserts that Ms. Keleher was negotiating her salary with Companies D and E and argues that this somehow shows that she was willing to take action related to the Department of Education in return for things of value. But the Indictment never alleges that Company D or E provided her

anything of value in return for her taking action related to the Department of Education or that her salary was otherwise a bribe or a kickback, much less does the Indictment allege any facts connecting Company D or E to the conspiracy to accept concessions on an apartment in return for agreeing to cede 1,034 square feet of the Padre Rufo School. Because the allegations pertaining to Company D and E fail to state an offense, they should be dismissed. Alternatively, they should be stricken because while the jury may be stimulated by evidence about Ms. Keleher's salary, the allegations about her salary are completely extraneous to the charged conspiracy. Finally, if the Court permits the allegations about Companies D and E to remain in the Indictment despite the failure of the Indictment to relate them to the conspiracy alleged in Count One, the Government should be ordered to provide a bill of particulars articulating when it alleges Companies D and E joined the conspiracy and what role they allegedly played in it.

Respectfully submitted on this 4th day of November 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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