

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

v.

JULIA BEATRICE KELEHER [1],

Defendant.

CASE NUMBER: 19-431 (PAD)

**JULIA BEATRICE KELEHER’S MOTION TO DISMISS COUNTS SIXTEEN  
THROUGH TWENTY-THREE OF THE SUPERSEDING INDICTMENT**

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this motion to dismiss Counts Sixteen through Twenty-three of the *Superseding Indictment* (Docket No. 368) pursuant to Rule 12 of the Federal Rules of Criminal Procedure, because each of these Counts “joins two or more offenses in the same count (duplicity).” Fed. R. Crim. P. 12(b)(3)(B)(i).

**I. INTRODUCTION**

The Superseding Indictment charges Ms. Keleher with various crimes related to what the Government characterizes as three distinct schemes orchestrated by Ms. Keleher while she was Secretary of the Puerto Rico Department of Education (“DOE”). Relevant to this motion, Counts Sixteen through Twenty-three allege Ms. Keleher participated in a single scheme or conspiracy lasting from October 2017 to July 2018 to have two different companies, Colon & Ponce, Inc. (“C&P”) and BDO Puerto Rico, P.S.C. (“BDO”) hire Individual C as an independent contractor at different points in time and charge DOE for Individual C’s services, despite C&P’s and BDO’s respective contracts with the DOE each prohibiting the contractor from subcontracting. The Superseding Indictment refers to this as the “Individual C Subcontracting Scheme.”

Counts Sixteen to Twenty-two allege substantive wire fraud offenses based on seven different emails allegedly sent in furtherance of this scheme, without identifying anyone involved in the alleged scheme other than Ms. Keleher. Count Twenty-three, based on the same allegations of a scheme to violate both the C&P and BDO contracts, charges a conspiracy between Ms. Keleher, “Mayra Ponce and persons associated with BDO” to commit wire fraud.

The factual allegations on which these Counts of the Superseding Indictment rely allege two distinct schemes or conspiracies: 1) Ms. Keleher allegedly schemed with Mayra Ponce, a partner in C&P, to have C&P hire Individual C as an independent contractor and to amend C&P’s contract with DOE so that DOE would pay for Individual C’s services in violation of C&P’s contract; and 2) Ms. Keleher allegedly schemed with individuals affiliated with BDO to have BDO hire Individual C as an independent contractor and have the DOE pay BDO for Individual C’s services in violation of BDO’s pre-existing contract with DOE. The two schemes are plainly distinct. There is no allegation that, when Ms. Keleher agreed with C&P that it would hire Individual C as an independent contractor and charge DOE for Individual C’s services through an amended contract, anyone affiliated with BDO was aware of this agreement between Ms. Keleher of C&P, much less participated in it. Two months later, Ms. Keleher allegedly entered into an agreement with BDO under which BDO would hire Individual C as an independent contractor and charge DOE for her services under its contract with DOE. There is no allegation Mayra Ponce had any role in this scheme, which was carried out by “persons associated with BDO.”

Because Counts Sixteen through Twenty-three, therefore, each impermissibly join two distinct schemes or conspiracies in the same count, they must be dismissed as duplicitous.

## **II. THE ALLEGED INDIVIDUAL C SUBCONTRACTING SCHEME**

The factual allegations on which Counts Sixteen through Twenty-three are premised are set forth in Paragraphs 44 through 56 of the Superseding Indictment. On October 25, 2017, Individual C signed a contractor agreement with C&P to provide services to C&P for \$40.00/hr. (*Id.* at ¶50). On the same day, C&P executed an amended contract, 2017-AF0220-A, with DOE. (*Id.* at ¶49.) The total value of the amended contract was \$95,000.00. (*Id.*). C&P invoiced the DOE for services provided by Individual C to DOE. (*Id.* at ¶51) Paragraph 24 of C&P’s contract with DOE prohibited C&P from subcontracting, giving, or transferring the services object of the contract, but made C&P responsible for the hiring and/or recruitment of personnel that would provide the services needed by DOE. (*Id.* at ¶45). The Superseding Indictment alleges that the arrangement by which DOE would pay C&P for Individual C’s services was in breach of Paragraph 24 of C&P’s contract with DOE.

Sometime in December 2017, Ms. Keleher allegedly informed Individual C that her professional services would be paid for by BDO. (*Id.* at ¶52). On December 28, 2017, Individual C signed an independent contractor agreement with BDO whereby Individual C would provide services to BDO at a rate of \$40.00/hr. (*Id.* at ¶53). BDO invoiced the DOE for services provided by Individual C to DOE. (*Id.* at ¶54). The Superseding Indictment alleges BDO breached its contract with DOE by contracting with Individual C in violation of the provision in that contract precluding subcontracting. (*Id.* at ¶55).

Based on these allegations, Paragraph 55 alleges that Ms. Keleher engaged in a scheme with unnamed others who are not defendants in this case scheme to “deprive [DOE] of its moneys in connection with [DOE] contracts for professional services with Colon & Ponce and BDO, in that [1] KELEHER, knowing that said contracts prohibited these entities from subcontracting its

services, caused Colon & Ponce and BDO to subcontract such services to Individual C, while concealing this fact in their invoices to [DOE], causing [DOE] to pay for said services.” Paragraph 56 then specifies seven emails allegedly sent in furtherance of this scheme and charges each as a separate count of wire fraud. The first two of these emails (charged as Counts Sixteen and Seventeen) are December 2017 emails between Individual C and Mayra Ponce that pertain Individual C receiving payment from C&P under its amended contract with DOE. The remaining five emails (charged as Counts Eighteen through Twenty-two), dated between February and May 2018, are each emails from a BDO internal accountant to Individual C pertaining to payment by BDO to Individual C as a BDO contractor.

### III. ARGUMENT

#### 1. Duplicity

“Duplicity is the joining in a single count of two or more distinct and separate offenses.” *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir.1999) (quoting *United States v. Canas*, 595 F.2d 73, 78 (1st Cir.1979)). “The purposes of the prohibition against duplicitous indictments include: (1) avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another; (2) avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged; (3) assuring the defendant adequate notice; (4) providing the basis for appropriate sentencing; and (5) protecting against double jeopardy in a subsequent prosecution.” *United States v. Fernandez*, 389 F. App'x 194, 198–99 (3d Cir. 2010) (citations omitted). The charging of separate acts in one count is permissible only “if those acts could be characterized as part of a single continuing scheme.” *Id.*

In all duplicity challenges, “the threshold question is whether the indictment describes one crime or multiple crimes, and then in turn, whether the alleged crime or crimes is set forth in the

proper number of counts.” 1A Charles Allen Wright and Andrew D. Leipold, *Federal Practice and Procedure* § 143 (5th ed. 2008). The first step in assessing duplicity is identifying the “unit of prosecution” for the charged offense.” *United States v. Acevedo Vila*, 588 F. Supp. 2d 194, 201 (D.P.R. 2008)(Barbadoro, J.)(quoting *Verrecchia*, 196 F.3d at 297). The U.S. Supreme Court has recognized that “the essence of a conspiracy is an ‘agreement to commit an unlawful act,’” *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (citations omitted). Thus, the unit of prosecution for the offense of conspiracy is the criminal agreement on which the conspiracy charge is based. *Braverman v. United States*, 317 U.S. 49, 54 (1942).

When assessing whether a count charges one or multiple schemes or conspiracies, courts have evaluated “whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy.” *United States v. Ramallo-Diaz*, 455 F. Supp. 2d 22, 26 (D.P.R. 2006) (Perez-Gimenez, J.) (quoting *United States v. Gordon*, 844 F.2d 1397, 1401 (9th Cir.1988)); *see also Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (reversing conviction because the evidence reflected multiple conspiracies where the only tie between and among co-defendants was that each used the same individual to obtain a fraudulent loan); *United States v. Pinson*, 860 F.3d 152, 162 (4th Cir. 2017) (per curiam) (explaining, in the context of vacating RICO conspiracy conviction, the evidence did not support a single conspiracy where the “conspiratorial tie . . . boils down to just two members”). Based on the factual allegations underlying Counts 16 through Twenty-three of the Superseding Indictment, the so-called “Individual C Subcontracting Scheme” alleges two distinct schemes or conspiracies—one between Ms. Keleher and unidentified others, presumably C&P and Mayra Ponce, to breach the contract between the DOE and C&P and another between Ms. Keleher and “individuals associated with BDO” to breach the contract between the DOE and BDO.

**2. A weighing of relevant factors demonstrates that Counts Sixteen through Twenty-three each charge two distinct schemes.**

Count Twenty-three provides that Ms. Keleher “and Mayra Ponce and persons associated with BDO” conspired to commit wire fraud in relation to the so-called “Individual C Subcontracting Scheme” that is detailed in paragraphs 44 through 56 of the Superseding Indictment. Paragraphs 44 through 56 set forth a single wire fraud scheme the alleged objectives of which were to “defraud and deprive the [DOE] of its monies in connection with [the C&P and BDO] contracts” by causing C&P and BDO to improperly subcontract Individual C’s services “knowing that said contracts prohibited these entities from subcontracting [her] services.” Counts Sixteen through Twenty-two are each interstate wires allegedly sent in furtherance of this scheme. Thus, Counts Sixteen through Twenty-three each rely on the same factual allegations in support of a single charged wire fraud scheme and single charged conspiracy. Whether there is a single scheme or conspiracy, or multiple schemes and conspiracies, is generally a determination of fact for the jury. This generalization is only true, however, when the indictment as drawn permits the government to prove a set of facts that would support a finding of one conspiracy. *See, e.g., United States v. Eury*, No. 14-39, 2015 WL 1861807, at \*5 (M.D.N.C. Apr. 23, 2015). A review of the factual allegations on which these Counts rely leads to the inevitable conclusion that Counts Sixteen through Twenty-three the Superseding Indictment charges two distinct schemes or conspiracies in each Count.

When evaluating whether one scheme or conspiracy, or multiple schemes or conspiracies, are charged in a particular count, “courts consider the totality of the circumstances, paying particular heed to factors such as the existence of a common goal, evidence of interdependence among the participants, and the degree to which their roles overlap.” *United States v. Niemi*, 579 F.3d 123, 127 (1st Cir. 2009)(quoting *United States v. Fenton*, 367 F.3d 14, 19 (1st Cir.2004)); *see*

also *United States v. Calderon*, 578 F.3d 78, 89 (1st Cir. 2009) (to determine whether there was a variance at trial because the evidence established multiple conspiracies rather than a single conspiracy, the court considers “the existence of a common purpose ... (2) interdependence of various elements of the overall play; and (3) overlap among the participants.”). Interdependence can be found based on a “pattern of mutual cooperation between participating individuals” or “activities of alleged co-conspirators in one aspect of the charged scheme [that] are necessary or advantageous to the success of the activities of co-conspirators in another aspect of the charged scheme, or the success of the venture as a whole.” *United States v. Stewart*, 256 F.3d 231, 251 (4th Cir. 2001); *United States v. Munoz-Franco*, 986 F. Supp. 70, 72 (D.P.R. 1997) (Cerezo, J.) (Finding duplicity when one conspiracy count contained two distinct conspiracies where the description of overt acts was divided between two distinct sets of co-conspirators, and the only element of commonality was that the two conspiracies were to defraud one bank, and both included same bank officers.).

*i. The conspiracies each had a distinct goal and are not interdependent.*

The Superseding Indictment alleges that both C&P and BDO breached their contracts with DOE by contracting with Individual C in violation of the provision in each contract precluding subcontracting. (Docket No. 368 at ¶55). This course of alleged conduct, however, despite its description in the aggregate, consisted of two separate schemes with two distinct, albeit similar, goals.

The first overt act pertaining to the C&P Subcontracting conspiracy is alleged to have occurred on October 25, 2017, when Individual C signed a contractor agreement with C&P to provide services to C&P for \$40.00/hr. (*Id.* at ¶50). This set into motion a scheme whereby the Superseding Indictment alleges Ms. Keleher and C&P deprived the DOE of the monies it paid in

relation to invoices submitted by C&P to the DOE for Individual C's services. Simply stated, the goal of the scheme was for C&P to receive payment for Individual C's services, despite C&P's contract allegedly prohibiting C&P from subcontracting its services. That scheme's goal was met every time the DOE paid C&P for Individual C's services in direct circumvention of C&P's contractual provisions. The last alleged act in furtherance of this scheme is an email communication pertaining to C&P's payment to Individual C for her services on December 26, 2017, which is charged as Count Seventeen. The C&P contract with the DOE terminated on December 31, 2017. (*Id.* at ¶49).

Individual C's contract with BDO, in turn, commenced on January 2, 2018. (*Id.* at ¶53), While this scheme too sought to breach a contractual provision which prohibited subcontracting, the contract in question was an entirely different contract with a different contractor and the breach of BDO's contract with the DOE was in no way alleged to have been facilitated by the earlier breach of C&P's contract. Nor was the by then-completed breach of C&P's now-expired contract allegedly facilitated by the subsequent alleged breach BDO's contract.

Despite being charged as a single scheme to breach both contracts, the only reasonable conclusion from the facts as alleged in the Superseding Indictment is that the successful breach of one contract did not depend on the breach of the other. Accordingly, the goals of the two schemes were distinct and two schemes were not interdependent. This factor militates in favor of a finding that Counts Sixteen through Count Twenty-three each charge two distinct schemes or conspiracies.

ii. *The roles of Ms. Keleher's alleged co-conspirators do not overlap.*

Counts Sixteen through Twenty-two do not identify the participants in the alleged Individual C Subcontracting Scheme. Count Twenty-three, on the other hand, charges Ms. Keleher with conspiring with Mayra Ponce and individuals associated with BDO. The Superseding



Indictment is silent on what were the respective roles of the alleged conspirators. The only reasonable inference, however, is that Mayra Ponce, who the Superseding Indictment alleges was one of two partners of C&P (*id.* at ¶ 5), was the person affiliated with C&P who was responsible for ensuring Individual C contracted with C&P, C&P amended its contract with DOE, and C&P invoiced DOE for her services. Indeed, Mayra Ponce is a participant in both of the email communications that were allegedly in furtherance of a scheme to breach C&P's contract with DOE, which are charged as Counts Sixteen and Seventeen.<sup>1</sup>

Similarly, the only reasonable inference is that the "persons associated with BDO," and not Mayra Ponce, would have had those same responsibilities in the context of the BDO contract. Indeed, Counts Eighteen through Twenty-two are based on efforts by an internal BDO accountant to ensure that Individual C was paid as a contractor of BDO. Mayra Ponce is not a participant in any of these email communications and is not referenced in any of these Counts.

The roles of the alleged conspirators, therefore, do not overlap. Mayra Ponce's role was to carry out the C&P contracting scheme. There is no factual allegation that any individual associated with BDO participated in any way in accomplishing the goal of having DOE pay C&P for Individual C's services in breach of the C&P contract. Indeed, there is not even an allegation that anyone affiliated with BDO was aware of the fact that C&P had hired Individual C as an independent contractor and charging DOE for her services. Similarly, there is no factual allegation of Mayra Ponce, or anyone else affiliated with C&P, doing anything to facilitate the separate goal

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<sup>1</sup> Count Twenty-three specifies that Mayra Ponce was the only alleged co-conspirator affiliated with C&P. The conspiracy count alleges that the co-conspirators were Ms. Keleher, Myra Ponce, and persons associated with BDO. Unlike many indictments, the Superseding Indictment does not charge that the identified conspirators conspired with unidentified "others." Rather, it sets forth an exhaustive list of the alleged conspirators, thereby eliminating the possible participation in the conspiracy of anyone affiliated with C&P other than Myra Ponce.

of having DOE pay BDO for Individual C's services in breach of the BDO contract. This factor assessing the respective roles of the alleged conspirators also weighs in favor of the conclusion that Counts Sixteen through Twenty-three each charge multiple schemes or conspiracies.

*iii. The two schemes occurred sequentially in different time periods.*

This factor weighs strongly in favor of a finding of duplicity, as there is no overlap in the time periods during which the two schemes were executed. Paragraphs 48 through 51 and Counts Sixteen and Seventeen detail a scheme for DOE to pay C&P for Individual C's services that commenced on October 25, 2017 and lasted through December 26, 2017, the date of the last act identified in the Superseding Indictment in furtherance of this scheme. Conversely, Paragraphs 52 through 54 and Counts Eighteen through Twenty-two detail a scheme for DOE to pay BDO for Individual C's services that began, at the earliest, on December 28, 2017, when Individual C entered into an independent contractor agreement with BDO, effective January 2, 2018, and lasted through July 2018, when BDO submitted invoices to DOE for services including those of Individual C. (*Id.* at ¶¶ 53-54). Thus, based on the specific factual allegations in the Superseding Indictment, there is no overlap whatsoever between the two schemes—the C&P scheme ended before the BDO scheme began.

Even the most generous reading of the Superseding Indictment establishes that, to the extent there was any overlap at all between the two schemes, it was *de minimis*. While no act in furtherance of the scheme to breach the C&P contract is alleged to have occurred any later than December 26, 2017 (Count Seventeen), necessarily this scheme had to have concluded by December 31, 2017, since the contract amendment through which DOE is alleged to have paid C&P for Individual C's services terminated on December 31, 2017. (*Id.* at ¶ 49). Individual C is alleged to have entered into an independent contractor agreement with BDO on December 28,

2017, which is the earliest act alleged in the Superseding Indictment in furtherance of the scheme to have DOE pay BDO for Individual C's services in breach of BDO's contract. Thus, even if one assumes, in the absence of any specific factual allegation, that the scheme to breach C&P's contract continued until the termination of the contract on December 31, 2017 and the scheme to breach BDO's contract began on December 28, 2017, the overlap between two schemes was a matter of a few days. This overlap is *de minimis* in the context of the C&P scheme that is alleged to have occurred over a two-month period and the BDO scheme that is alleged to have occurred over a seven-month period. The lack of any meaningful temporal overlap is a factor that weighs heavily in favor of concluding that the Superseding Indictment alleges two distinct schemes or conspiracies.

#### IV. CONCLUSION

Despite Counts Sixteen through Count Twenty-three each purport to charge a single scheme or conspiracy, the factual allegations on which they rely and all reasonable inferences from those factual allegations necessarily lead to the conclusion that the so-called Individual C Subcontracting Scheme sets forth two separate conspiracies—a scheme for DOE to pay C&P for Individual C's services in violation of C&P contract with DOE and a separate scheme for DOE to pay BDO for Individual C's services in violation of BDO's contract with DOE. The two schemes are not interdependent, their goals are distinct, their participants' roles do not overlap, and they occurred sequentially, not simultaneously. Counts Sixteen through Twenty-three are therefore duplicitous and must be dismissed.

**WHEREFORE**, the defendant, Julia Beatrice Keleher, respectfully requests the Court GRANT this motion and dismiss Counts Sixteen through Twenty-three of the *Superseding Indictment* (Docket No. 368).

Respectfully submitted on this 7th day of January 2021, 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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