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)

JULIA BEATRICE KELEHER'S
MOTION TO STRIKE A PORTION OF THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS

COMES NOW the defendant, Julia Beatrice Keleher ("Ms. Keleher"), through her undersigned counsel, and respectfully files this motion to strike a portion of the Superseding Indictment pending against her, pursuant to Rules 7(c) and (d) of the Federal Rules of Criminal Procedure.

Counts 16 through 23 of the Superseding Indictment allege seven (7) counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, and one count of wire fraud conspiracy, in violation of 18 U.S.C. §1349 . These counts are premised on allegations that Ms. Keleher, who was at the time the Secretary of the Department of Education ("PRDE"), "schemed to defraud and deprive PRDE of its moneys in connection with PRDE contracts for professional services with Colon & Ponce and BDO" by allegedly causing Colon & Ponce, Inc. ("Colon & Ponce") and BDO Puerto Rico, P.S.C. ("BDO") to contract with Individual C to perform services under these contracts, despite Ms. Keleher knowing that the contracts prohibited these entities from subcontracting the services that were the object of said contracts. (Docket No. 368 at 17-18).

Paragraphs 44 through 54 of the Superseding Indictment (Docket No. 368) purport to set forth the alleged facts underlying this purported subcontracting scheme. According to Paragraph 46: "Individual B was an incorporator of Company D, a nonprofit organization organized under the laws of the Commonwealth of Puerto Rico on November 15, 2017. In 2018, defendant [1] KELEHER sought an increase in her annual salary as Secretary of PRDE, from $200,000.00 to $450,000.00, payable by Company D."

These allegations involving Company D are offered by the Government in a vacuum and with no seeming connection to the charged scheme. The Superseding Indictment fails to allege any involvement by Company D in the subcontracting scheme alleged in relation to Counts 16 through 23. The charging document further fails to allege how Ms. Keleher's request for a raise has any bearing on the alleged scheme to have Individual C perform services for PRDE under PRDE contracts with Colon & Ponce and BDO, allegedly in breach of those contracts, or any other allegation brought forth in the Superseding Indictment. This Court, therefore, should strike this superfluous and prejudicial allegation from the Superseding Indictment, as it constitutes surplusage. In the alternative, the Government should be ordered to provide a bill of particulars regarding the relevance of these allegations to Counts 16 through 23.

THE ALLEGED SUBCONTRACTING SCHEME

In relation to Counts 16 through 23, the Superseding Indictment alleges that, in July 2017, Individual B emailed Ms. Keleher and recommended that she hire Individual C to work for the PRDE. Docket No. 368 at ¶ 47. According to the Superseding Indictment, Individual C began working for the PRDE in August 2017. *Id*.

The Superseding Indictment further alleges that, on October 25, 2017, Ms. Keleher informed Individual C that Individual C would be working for the PRDE under Colon & Ponce's

professional services contract with the PRDE. *Id.* ¶ 48. According to the Superseding Indictment, on the same day, PRDE then amended Colon & Ponce's contract, increasing the value of the contract, and extending its duration until December 31, 2017 and Colon & Ponce entered into a contract with Individual C to provide services at the rate of $40 per hour. *Id.* at ¶¶ 49-50. The Superseding Indictment alleges that Colon & Ponce's contract with the PRDE prohibited the company from subcontracting, giving, or transferring the services that were the object of the contract. *Id.* ¶¶ 45, 49.

The Superseding Indictment also alleges that in December 2017, Ms. Keleher advised Individual C that BDO, and not Colon & Ponce, would pay for Individual C's professional services from January 2018 onwards. *Id.* at ¶ 52. According to the Superseding Indictment, on December 28, 2017, Individual C signed an independent contractor agreement with BDO, whereby BDO would pay Individual C at a rate of $40.00 per hour for Individual C's services in relation to BDO's contract with the PRDE. *Id.* at ¶ 53. The Superseding Indictment alleges that BDO's contract for professional services with the PRDE also prohibited BDO from subcontracting its services. *Id.* ¶ 55.

Based on these facts, the Superseding Indictment charges Ms. Keleher with having "schemed to defraud and deprive PRDE of its moneys in connection with PRDE contracts for professional services with Colon & Ponce and BDO." *Id.* The essence of the alleged scheme is that Ms. Keleher, with awareness of the subcontracting prohibition contained in the Colon & Ponce and BDO contracts, caused these companies to subcontract for Individual C's services. Counts 16 through 22 consist of seven (7) emails that were allegedly transmitted in interstate commerce in furtherance of the subcontracting scheme. *Id.*

Paragraph 46 of the Superseding Indictment alleges that "Individual B was an incorporator of Company D, a nonprofit organization organized under the laws of the Commonwealth of Puerto Rico on November 15, 2017. In 2018, defendant [1] KELEHER sought an increase in her annual salary as Secretary of PRDE, from $200,000.00 to $450,000.00, payable by Company D." The Superseding Indictment, however, fails to allege any facts which connect this alleged conduct to the alleged subcontracting scheme. The allegations regarding Ms. Keleher's efforts to increase her salary simply have no bearing on the alleged wire fraud scheme. In fact, beyond this singular paragraph, neither Individual B nor Company D is never mentioned again in any of the paragraphs related to Counts 16 to 22 of the Superseding Indictment, nor is the fact that Ms. Keleher attempted to raise her salary.

For the reasons briefly stated above and detailed below, the Government's allegations involving Company D and Ms. Keleher's attempt to raise her salary are nothing more than unessential surplusage, which this Court must strike from the Superseding Indictment pursuant to Rules 7(c) and (d). In short, these allegations will serve only to inflame the passions of the jury, confuse the issues, and blur the elements necessary to convict Ms. Keleher of what she is being charged with in Counts 16 through 23. More importantly, these allegations have absolutely no bearing over the charged conduct.[1]

---

[1] The Superseding Indictment notes that Individual B was a gubernatorial candidate, and that Individual C was Individual B's campaign manager. *Id.* at ¶ 46. As noted above, the paragraphs of the Superseding Indictment related to Counts 16 through 23, however, never mention Individual B or Company D again. The Superseding Indictment does not allege that Ms. Keleher caused Colon & Ponce or BDO to contract with Individual C as a quid pro quo in return for Individual B causing Company D to fund an increase in Ms. Keleher's salary. To the extent that this is the Government's convoluted theory as to how Ms. Keleher's desire to obtain an increase in her salary is related to the alleged subcontracting scheme, it should be required to state so explicitly in a bill of particulars.

ARGUMENT

I. Paragraph 46 of the Superseding Indictment related to Individual B and Company D should be stricken from the Superseding Indictment.

Under Rule 7(d), "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." The purpose is "to protect the defendant against immaterial or irrelevant allegations in an indictment which may be prejudicial." *United States v. Lewis*, 40 F.3d 1325, 1346 (1st Cir. 1994); *United States v. Fahey*, 769 F.2d 829, 841-42 (1st Cir. 1985) (quoting Fed. R. Crim. P. 7(d), advisory committee note to subdivision (d)). For purposes of this Rule, surplusage constitutes "additional facts beyond those which compromise the elements of the crime." *United States v. Bravo-Fernandez*, 2017 WL 1400569 (April 13, 2017) (quoting *United States v. Valencia*, 600 F.3d 389, 432 (5th Cir. 2010)). While a motion to strike should be granted "only if the allegations are inflammatory, prejudicial, and irrelevant" to the crime charged, *United States v. Colburn*, 2020 WL 4275465 (D. Mass. July 24, 2020) (quoting *United States v. Sawyer*, 878 F. Supp. 279, 294 (D. Mass. 1995), aff'd, 85 F.3d 713 (1st Cir. 1996)), the definitive question in a motion to strike surplusage is not the prejudice, but the relevance of the allegation to the crime charged. *Sawyer*, 878 F. Supp. at 294. 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 the end, the decision of whether to strike is "left to the sound discretion of the district court." *Lewis*, 40 F.3d at 1346. A court may strike as prejudicial "[t]he inclusion of clearly unnecessary language in an indictment that could serve only to inflame the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved." *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971).

Here, with respect to the allegations related to Individual B and Company D in Paragraph 46, the Superseding Indictment fails to provide any general description of how these allegations

relate to any of the charged offenses in Counts 16 through 23, or any other charged offenses in the Superseding Indictment. Thus, with respect to the definitive question of how relevant the allegations are, *Sawyer*, the answer is that they are wholly irrelevant. In other words, the additional facts alleged in Paragraph 46 are beyond those which compromise the elements of the crimes charged in Counts 16 through 23.

"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 allegations involving Individual B and Company D serve only to inflame the passions of the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved in Counts 16 through 23. Through these allegations, the Government is engaging in mudslinging, by injecting prejudicial allegations which are wholly irrelevant to the charged offenses yet cast Ms. Keleher in a negative light. Ms. Keleher is already fighting an uneven legal battle where public opinion is stacked against her, due to the negative and irresponsible reporting of her case, and the volatile political climate in Puerto Rico. *See generally* Docket Nos. 172 and 177 (wherein Ms. Keleher discusses these issues in detail).

By including irrelevant allegations about the former gubernatorial candidate, the Superseding Indictment feeds into this frenzy by injecting politics into the allegation. Further, by unnecessarily airing Ms. Keleher's salary as Secretary of Education, and her desire to increase that salary substantially, these allegations in the Superseding Indictment can only prejudice Ms.

Keleher in the eyes of the jury, a jury selected from a population that has been severely affected by the island's calamitous economic crisis, which has only worsened due to the coronavirus pandemic and other dire emergencies. 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 founded by a former gubernatorial candidate would surely be prejudicial in a jurisdiction where so many are struggling financially. *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."). These prejudicial allegations will not aid the Government in proving the allegations of the wire fraud scheme alleged in Counts 16 through 23, nor do they have any relevance to the issues at hand. This Court should not condone the Government's attempt to toy with the jury's impartiality.

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 Individual B and Company D and her alleged

attempt to increase her salary. *See* Fed. R. Crim. P. 7(f); *United States v. Barbato*, 471 F.2d 918, 921 (1st Cir. 1973) (A defendant "uncertain as to the nature of the charges against him . . . [may] file a motion for a bill of particulars."); *see also 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]ince [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 Individual B's and Company D's involvement in the alleged scheme in Counts 16 through 23, including their roles in the scheme. The Government should also be required to provide information as to the relevance of Ms. Keleher's attempt to increase her salary through Company

D to the wire fraud scheme charged in Counts 16 through 23. 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 its absence, Ms. Keleher would be unable to adequately 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 the Court GRANT this motion and STRIKE Paragraph 46 of the Superseding Indictment or, in the alternative, direct the Government to file a Bill of Particulars with respect to the allegations related to Individual B and Company D.

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.

DMRA Law LLC
Counsel for Defendant Julia B. Keleher
Centro Internacional de Mercadeo
Torre 1, Suite 402
Guaynabo, PR 00968
Tel. 787-331-9970

s/Maria A. Dominguez
Maria A. Dominguez
USDC-PR No. 210908
maria.dominguez@dmralaw.com

s/ Javier Micheo Marcial
Javier Micheo Marcial
USDC-PR No. 305310
javier.micheo@dmralaw.com

s/ Carlos J. Andreu Collazo
Carlos Andreu Collazo
USDC-PR No. 307214
carlos.andreu@dmralaw.com