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.: 19-431 (PAD)

JULIA BEATRICE KELEHER'S MOTION
TO SEVER COUNTS OF THE SUPERSEDING INDICTMENT

TO THE HONORABLE COURT:

COMES NOW Julia Beatrice Keleher ("Ms. Keleher"), through the undersigned counsel, and respectfully moves to sever counts in the Superseding Indictment. The Superseding Indictment alleges 98 offenses, which are comprised of seven distinct conspiracies and substantive counts related to each of the seven conspiracies. The first three alleged conspiracies and related substantive offenses as to which Ms. Keleher is charged (Counts 1 through 24), are factually unrelated, and none of them have anything whatsoever to do with the four remaining alleged schemes, as to which Ms. Keleher is not charged (Counts 25 through 98). Pursuant to Federal Rules of Criminal Procedure 8 and 14, the factually distinct and unrelated schemes charged in the Superseding Indictment must therefore be tried separately. Specifically, Ms. Keleher requests that the charges be severed for trial as follows: 1) Counts 1–11 of the Superseding Indictment (the alleged "Confidential DOE Information Scheme" or the "First Alleged Scheme"); 2) Counts 12–15 of the Superseding Indictment (the alleged "Colón Scheme" or the "Second Alleged Scheme"); 3) Counts 16–24

of the Superseding Indictment (the alleged "Individual C Sub-Contracting Scheme" or the "Third Alleged Scheme"); and (4) Counts 25–98.[1]

In support thereof, Ms. Keleher respectfully states as follows:

I. PRELIMINARY STATEMENT

Federal Rule of Criminal Procedure 8(a) permits joinder of counts only "if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Rule 8(b) permits joinder of defendants in the same indictment only "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." The allegations of the seven schemes in the Superseding Indictment, and their respective participants, can be summarized as follows:

As part of the **First Alleged Scheme** (Counts 1 through 11), Ms. Keleher is alleged to have defrauded and deprived the Puerto Rico Department of Education ("DOE") of some purported "right to the exclusive use of its confidential information" through unidentified "deceptive means." Ms. Keleher is essentially charged with federal wire fraud and aggravated identity theft for allegedly violating her employment agreement by sending DOE-created spreadsheets containing information about DOE schools to a former colleague who worked for a company that was seeking to provide services to the Commonwealth. Neither Ms. Keleher nor her former colleague are alleged to have benefitted personally from this alleged "scheme."[2] Counts 1 through 11 charge only Ms.

[1] Ms. Keleher is charged for her alleged involvement in only the first three alleged schemes, Counts 1–24. Therefore, it would be sufficient for her purposes to sever the First, Second, and Third Alleged Schemes from Counts 25–98 and from each other as described. For purposes of this Motion, however, Ms. Keleher will discuss all seven alleged schemes in order to emphasize that none of the alleged schemes not involving Ms. Keleher properly can be tried with any of the First, Second, or Third Alleged Schemes.

[2] The fact that this alleged "scheme" falls woefully short of meeting the elements of the Wire Fraud and Aggravated Identity Theft statutes is the subject of a motion to dismiss that is being filed today.

Keleher. None of the other defendants are alleged even to have known about, much less participated in, the First Alleged Scheme. With one exception that appears to be a scrivener's error, none of Counts 12–98 incorporate by reference any of the paragraphs of Counts 1–11.[3]

As part of the **Second Alleged Scheme** (Counts 12 through 15), Ms. Keleher is alleged to have conspired with Glenda and Mayra Ponce-Mendoza (who were charged in the Original Indictment but are not charged in the Superseding Indictment) in connection with the DOE's award of a contract to the company Colón & Ponce. Counts 12 through 15 allege that Ms. Keleher sought to cause DOE to award the contract to Colón & Ponce under "the guise of a sham competitive RFQ process." Again, it is not alleged that Ms. Keleher benefitted personally from this alleged scheme. Again, none of the other defendants named in the Superseding Indictment are alleged to have participated in, or even known about, the Second Alleged Scheme. None of Counts 1–11 or 16–98 incorporate by reference any of the paragraphs of Counts 12–15.

As part of the **Third Alleged Scheme** (Counts 16 through 24), Ms. Keleher is alleged to have arranged for Individual C to be hired as a subcontractor by Colón and Ponce and then another company, BDO Puerto Rico, P.S.C. ("BDO"), even though DOE's contracts with Colón and Ponce and with BDO did not allow for subcontracting. Specifically, Counts 16–23 charge Ms. Keleher with Wire Fraud and Wire Fraud Conspiracy for her alleged participation in a purported scheme to have DOE pay Colón and Ponce and BDO for services that were performed by someone who subcontracted with Colón and Ponce and BDO, which was allegedly not allowed under the DOE contracts. Count 24 charges Ms. Keleher with Federal Program Bribery for allegedly arranging for the subcontracting agreement for the benefit of Individual C in exchange for influence in

[3] Count 15, the Wire Fraud Conspiracy charge stemming from the Second Alleged Scheme, incorporates Paragraphs 25 and 26 from Count 11, but it is not clear why, as the email forming the basis of Count 11 is not alleged to have been sent as part of the Second Alleged Scheme. (Superseding Indictment ¶ 42.) The substantive Wire Fraud counts for the Second Alleged Scheme also do not reference Paragraphs 25–26. (*Id.* ¶ 27.).

connection with a contract amendment to benefit Colón and Ponce. Again, Ms. Keleher is not alleged to have benefitted personally from the Third Alleged Scheme. And, again, there is no allegation that any of the other defendants in the Superseding Indictment participated in, or even knew of, the Third Alleged Scheme. None of Counts 1–15 or 25–98 incorporate by reference any of the paragraphs of Counts 16–24.

The First, Second, and Third Alleged Schemes are not alleged to relate to one another. The only purported connection between the First, Second, and Third Alleged Schemes is Ms. Keleher herself. The Ponce sisters, Individual A, and Individual C are each alleged to have participated in only one of the First, Second, or Third Alleged Schemes. None is alleged to have even been aware of the other two of these three schemes.

The First, Second, and Third Alleged Schemes are the only schemes for which Ms. Keleher is charged in the Superseding Indictment. These schemes are not alleged to relate to the remaining four alleged schemes. The remaining four alleged schemes not only do not involve any alleged conduct by Ms. Keleher. Rather, they involve various combinations of defendants Scherrer-Caillet, Velazquez-Piñol, Avila-Marrero, and Jover-Pages.

Across the Fourth, Fifth, Sixth, and Seventh Alleged Schemes in the Superseding Indictment, there is no allegation that Ms. Keleher was aware of, much less participated in, any of the schemes charged. As noted above, there is likewise no allegation that defendants Scherrer-Caillet, Velazquez-Piñol, Avila-Marrero, or Jover-Pages were aware of, much less participated in, any of the First, Second, or Third Alleged Schemes.

When considered in this manner, it is clear that joinder of these seven distinct schemes does not comply with Rule 8, because there is not a "common activity binding [Keleher] with all the other indictees" that "encompasses all the charged offenses." *United States v. Natanel*, 938

F.2d 302, 307 (1st Cir. 1991). Further, even if joinder were permissible under Rule 8, severance would be warranted under Rule 14, as Ms. Keleher would be unduly prejudiced by a joint trial of any of the First, Second, or Third Alleged Schemes with any other, let alone in combination with any of the Fourth, Fifth, Sixth, or Seventh Alleged Schemes. If the separate schemes were tried together, it would lead to unacceptable jury confusion and substantial prejudice to Ms. Keleher. Separate trials as proposed herein, in contrast, would avoid these issues while sacrificing little in the way of judicial economy. The First, Second, and Third Alleged Schemes must be severed from the remaining Schemes alleged in the Superseding Indictment, and from each other.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2019, a federal grand jury returned a thirty-two-count indictment against six defendants, including Ms. Keleher. (Indictment, Docket No. 3.) On August 10, 2020, after Ms. Keleher and the other named defendants had filed various pre-trial motions, including a motion to sever relevant counts of the Indictment, a federal grand jury returned a ninety-eight-count superseding indictment against five defendants, including Ms. Keleher. (Superseding Indictment, Docket No. 368.) Ms. Keleher is charged in less than a quarter of those counts. (*Id.*)

The Superseding Indictment lays out three unique alleged schemes involving Ms. Keleher, and four additional distinct schemes in which Ms. Keleher is not charged. No other named defendant in the Superseding Indictment was charged in the three sets of counts against Ms. Keleher, and Ms. Keleher was not charged in any of the counts against any other named defendant. In other words, Ms. Keleher overlaps with no other defendant. Even among the three schemes in which Ms. Keleher is charged, there is no meaningful overlap of participants, time period, methods, or objectives.[4]

[4] Presumably, the reason that these disparate schemes were all charged in the same indictment is that they all arose out of the same investigation. The impermissible manner in which the investigators used evidence gathered during the

Specifically, the Superseding Indictment alleges with respect to Ms. Keleher, in essence:

1. **The First Alleged Scheme:** Keleher improperly disseminated confidential DOE information to Individual A, for the benefit of Individual A and Company A. It is not alleged that Keleher personally benefitted in any way from this alleged scheme. The period for this alleged conspiracy is February 2017–March 2017. [Counts 1–11]

2. **The Second Alleged Scheme:** Keleher was involved in awarding a DOE contract to the company Colón & Ponce, which was owned by Mayra Ponce-Mendoza, based not on any personal financial interest of Ms. Keleher, but instead based on her friendship with Mayra Ponce-Mendoza's sister, Glenda Ponce-Mendoza, who worked as one of Ms. Keleher's special assistants. It is not alleged that the alleged conspirators intended that Ms. Keleher would personally benefit in any way from this alleged conspiracy. The period for this alleged conspiracy is March 2017–June 2017. [Counts 12–15]

3. **The Third Alleged Scheme:** Keleher was involved in setting up an arrangement whereby Individual C was hired by Colón and Ponce, and later by BDO, as a subcontractor. Colón and Ponce and BDO sought payment from the DOE for Individual C's services, despite the fact that the DOE contracts with Colón and Ponce and BDO did not allow subcontracting. It is alleged that Keleher participated in this arrangement not out of any personal financial interest, but rather intending to be influenced in connection with an amendment to DOE's contract with Colón and Ponce. The period for this alleged scheme is October 2017–March 2018. [Counts 16–24]

The remainder of the Superseding Indictment, and the vast majority of the charges, relate to alleged schemes in which Ms. Keleher is not alleged to have been involved. These schemes also do not involve Individual A, Company A, or Individual C. Ms. Keleher is the only defendant named in the Superseding Indictment who will be tried on Counts 1–24. She will not be tried on any of the remaining counts, Counts 25–98, which allege, in essence:

4. **The Fourth Alleged Scheme:** Velazquez-Piñol and Scherrer-Caillet conspired to deprive DOE and ASES [which is not part of DOE] of money by causing those entities to pay BDO for lobbying services and subcontracted services, which was not permitted under the terms of the contract. Although emails sent to Ms. Keleher are alleged to have been in furtherance of this alleged scheme, Ms. Keleher is not alleged to have participated in the scheme or even to have had any knowledge

course of the investigation to expand the investigation and bring additional charges is the subject of a motion to suppress, also filed by Ms. Keleher today. This motion, however, is confined to discussing the propriety of including all of these wholly distinct charges in a single charging document.

whatsoever of this scheme. The period for this alleged conspiracy is February 2017–January 2019. [Counts 25–71]

5. **The Fifth Alleged Scheme:** Avila-Marrero improperly disseminated confidential ASES information to Velazquez-Piñol and Scherrer-Caillet. The alleged scheme does not involve Ms. Keleher or the department for which she worked, the DOE. Ms. Keleher is not alleged to have any knowledge of the Fifth Alleged Scheme. The period for this alleged conspiracy is January 2017–February 2017 [Counts 72–84]

6. **The Sixth Alleged Scheme:** Avila-Marrero improperly disseminated confidential ASES information to Velazquez-Piñol and Jover-Pages. The alleged scheme does not involve Ms. Keleher or her department, the DOE. Ms. Keleher is not alleged to have any knowledge of the Sixth Alleged Scheme. The period for this alleged conspiracy is January 16–23, 2017. [Counts 85–90]

7. **The Seventh Alleged Scheme:** Velazquez-Piñol and Jover-Pages conspired to deprive ASES of money by causing those entities to pay IGS for subcontracted services, which was not permitted under the terms of the contract. The alleged scheme does not involve Ms. Keleher or her department, the DOE. Ms. Keleher is not alleged to have any knowledge of the Seventh Alleged Scheme. The period for this scheme is March 2017–July 2017. [Counts 91–98]

None of Counts 25–98 (the non-Keleher counts) incorporate by reference any paragraph from Counts 1–24 (the Keleher counts). (Superseding Indictment ¶¶ 62, 81, 82, 91, 93, 100, 108, 110, 115, 117, 125.) With the one apparent typographical-error exception noted above (*see supra* n. 3), none of the First, Second, or Third Alleged Schemes incorporates by reference any paragraph from any other alleged scheme. (*Id.* ¶¶ 12, 21, 23, 25, 27, 42, 44, 57, 59.) Indeed, each separate alleged scheme is largely confined to its own set of facts and a handful of general, introductory background allegations, without incorporating by reference any allegations from any other alleged scheme. (*See generally id.* ¶¶ 12, 21, 23, 25, 27, 42, 44, 57, 59, 62, 81, 82, 91, 93, 100, 108, 110, 115, 117, 125.)

As the Court already is aware, the filing of the Original Indictment in this matter and a lengthy U.S. Attorney's Office press conference about the Indictment stoked intense anger and outrage among the public in Puerto Rico. There is anecdotal and empirical evidence that the public

has lumped all the defendants together and formed hardened negative opinions about the defendants, presupposing their guilt. These arguments and the evidence in support thereof have been laid out in detail in the briefings and oral argument on the defendants' joint motion to transfer venue. (*See* Docket Nos. 172, 177, 217, 258.) There is also evidence that the public, including the media, misapprehended the allegations in the Original Indictment. These arguments have also been laid out before the Court, including in Ms. Keleher's request to modify the gag order. (Docket Nos. 199, 258.) As a result of these considerations, which apply with equal force to the charges set forth in the Superseding Indictment, the risk of prejudicial spillover between the charged offenses and between the defendants is far greater than it would be in a typical case involving multiple charges and multiple defendants.

III. LAW AND ARGUMENT

The seven charged schemes all involve public agencies of the Commonwealth of Puerto Rico but are otherwise distinct in terms of identity of participants, time periods, methods, and goals. As a result, any similarity that exists between the distinct and separate schemes is not sufficient to satisfy Rule 8's joinder requirements. To the contrary, the superficial similarities between the schemes would only increase the risk of substantial prejudice to Ms. Keleher (and the other defendants) in a joint trial by confusing the jury and leading to probable spillover evidence. This prejudice would trigger a grave injustice against Ms. Keleher, who is already struggling to defend herself amidst widespread public misunderstanding of the charges against her and overwhelming negative public sentiment presuming her guilt.

1. The Seven Separate Schemes Are Misjoined as a Matter of Law Under Rule 8.

A. The seven schemes do not involve the same act or transaction and do not involve a common scheme; the schemes are factually unrelated.

Federal Rule of Criminal Procedure 8 governs joinder of offenses and defendants in criminal cases. Rule 8(a) forbids joinder of two or more charges unless the charges are (1) based on the same act or transaction; (2) connected with or constitute parts of a common scheme or plan; or (3) are of the same or similar character. Fed. R. Crim. P. 8(a). Two or more defendants may be joined in the same indictment only if the defendants are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense. Fed. R. Crim. P. 8(b).

Here, none of the alleged schemes are properly joined under Rule 8(a)—least of all the First, Second, and Third Alleged Schemes with the remaining alleged schemes—because they are wholly factually unrelated. They do not allege the same act or transaction or a common scheme or plan. And defendants Velazquez-Piñol, Scherrer-Caillet, Avila-Marrero, and Jover-Pages are not alleged to have engaged in any of the same acts or transactions as Ms. Keleher. While a defendant need not be involved in each offense charged in an indictment, Rule 8 only allows joinder of defendants when there is "some common activity binding the objecting defendant with all the other indictees and that common activity encompasses all the charged offenses." *United States v. Natanel*, 938 F.2d 302, 307 (1st Cir. 1991).

A rational basis for joinder must be discernible from the face of the indictment. *United States v. Boylan*, 245 F.2d 230, 245 (1st Cir. 1990). Moreover, "mere similarity of acts, without more, does not justify joinder" under Rule 8(b). *Id.*; *Natanel*, 938 F.2d at 307. If counts or defendants are misjoined, the remedy is severance. *Natanel*, 938 F.2d at 306; *see also* Charles Alan Wright, 1A Federal Practice & Procedure: Criminal § 145, at 89–90 (3d ed. 1999) ("Misjoinder of offenses or defendants . . . raises only a question of law. If there has been misjoinder, the trial court has no discretion to deny the motion [to sever].").

Here, misjoinder is clear from the face of the Superseding Indictment. There is no common activity binding Ms. Keleher with all the other defendants in the case in a manner that encompasses all the charged offenses. Indeed, Ms. Keleher has no alleged involvement whatsoever in the Fourth, Fifth, Sixth, or Seventh Alleged Schemes. There is no allegation even that Keleher *knew about* the Fourth, Fifth, Sixth, or Seventh Alleged Schemes. The Fifth, Sixth, and Seventh Alleged Schemes do not even involve the DOE, much less Ms. Keleher. Similarly, there is no allegation that defendants Avila-Moreno, Velazquez-Piñol, Scherrer-Caillet, or Jover-Pages knew about or had any involvement in any of the First, Second, or Third Alleged Schemes.

Indeed, even among the First, Second, and Third Alleged Schemes the only common thread is Ms. Keleher herself. The alleged schemes do not even overlap in time period: the First is alleged from February to March 2017; the Second is alleged from March to June 2017; and the Third is alleged from October 2017 to January 2018. Also, the participants in each of those three alleged schemes has no alleged involvement with either of the other two schemes: Individual A and Company A's involvement is confined to the First Alleged Scheme; the Ponce sisters' involvement is confined to the Second Alleged Scheme; and Individual C's involvement is confined to the Third Alleged Scheme. In short, even the first three alleged schemes are unrelated, and none of them have anything whatsoever to do with the remaining charges in the Superseding Indictment.

Unsurprisingly, the First Circuit and district courts in the First Circuit routinely grant severance pursuant to Rule 8 in similar situations. In *United States v. Fuentes*, for example, an indictment charged twenty defendants with conspiracy to possess with the intent to distribute cocaine from San Juan to the East Coast of the mainland United States. 979 F.Supp.2d 224, 225 (2013) (D.P.R. 2013) (Besosa, J.). A superseding indictment was returned, adding a charge against one of those defendants and adding two new defendants. The new charge alleged a conspiracy to launder

proceeds of drug smuggling between the Dominican Republic and Puerto Rico. Judge Besosa severed the money-laundering count under Rule 8 because "[t]he only links between the two schemes apparent from the indictment are 1) the identity of one participant . . . and 2) the fact that count three relate[d] to a drug trafficking conspiracy." In severing the relevant counts, Judge Besosa also emphasized that not a single overt act or substantive offense alleged in the drug-distribution counts related in any meaningful way to the overt acts and substantive offenses alleged in the money-laundering count. The Court also noted that there was no allegation in the indictment that the other nineteen defendants charged in the drug distribution counts were even aware of the money laundering scheme.

Similarly, in *United States v. Ramallo-Diaz*, the indictment charged two schemes, one a conspiracy to embezzle and launder union funds in the form of membership dues, and the other a conspiracy to embezzle and launder funds from the union's health care plan. 455 F.Supp. 2d 22, 25–26, 30 (D.P.R. 2006) (Perez-Gimenez, J.). The Government argued that joinder was proper because the victims of the two schemes were the same: the union members. *Id.* at 30. The Government also argued that the co-defendant involved in picking up the checks that were diverted in the first scheme was employed by the health care plan targeted in the second scheme. *Id.* The court found those links "superficial at best, and chimerical at worst." *Id.* More specifically, the court found that the two separate conspiracies had "at most, two common participants and, generously construed, one common purpose, i.e. personal enrichment at the expense of [the union's] assets." *Id.* The Court severed the indictment, including splitting portions of several forfeiture counts to fit their place with one of the two schemes alleged in the indictment. *Id.* at 31.

Here, as in *Fuentes* and *Ramallo-Diaz*, the only link between the First, Second, and Third Alleged Schemes is "the identity of one participant[,]" Ms. Keleher, and the fact that both alleged

schemes involve Ms. Keleher's position as Secretary of Education. The only link between the first three schemes and the Fourth Alleged Scheme is that DOE is an alleged victim in each, although it is the sole victim in the first three schemes and one of two alleged victims in the Fourth Alleged Scheme. There is no alleged link with respect to the alleged participants in the Fourth Alleged Scheme and the first three schemes or any other factual overlap between them. And there are no links at all between the First, Second, and Third Alleged Schemes and the Fifth, Sixth, and Seventh Alleged Schemes. There is no overlap whatsoever between either the alleged participants or the alleged victims. Any general, broad connection the Government could try to point to—like the schemes all involving public agencies of Puerto Rico, for example—would be "superficial at best, chimerical at worst." And this alone plainly cannot provide a valid basis for joinder.

Just as in *Fuentes*, it is also clear from the Superseding Indictment that the overt acts alleged in furtherance of the various schemes do not in any way pertain to, let alone aid the commission of the other schemes. Furthermore, there is no allegation that the non-overlapping individuals purportedly involved in the various schemes knew about the other schemes in which they are not charged. In essence, the Government has simply strung these separate schemes together by general theme: alleged public corruption. That is not sufficient to justify joinder. The Superseding Indictment must therefore be severed under Rule 8.

B. Judicial economy cannot justify joinder under Rule 8.

The Government may attempt to oppose severance by arguing that trying these seven distinct schemes together would promote judicial efficiency and conserve judicial resources. But courts consistently have rejected considerations of judicial economy—and must do so—where, as here, there is otherwise no proper basis for joinder under Rule 8. As the Court reasoned in *Ramallo-Diaz*, "[t]hough a system cannot be fair if it is not efficient, ours is not one of mere expediency

and convenience, but of fundamental fairness and impartiality based on established rules and principles." *Ramallo-Diaz*, 455 F.Supp. 2d at 31. Stated less eloquently, appeals to efficiency and the conservation of resources—even if factually supported—cannot justify joinder where, as here, there is no common activity joining all the defendants and charges.

In any event, whatever purported efficiencies the government may claim from stringing the seven distinct schemes together would, in practice, be minimal at best. Stated simply, there is little efficiency to be had from trying distinct schemes together—like the schemes in the Superseding Indictment—that relate to different participants, different government agencies, and different time periods. Severance, in contrast, will drastically simplify the cases and issues presented to the jury, and in so doing avoid substantial prejudice to Ms. Keleher (and the other defendants).

2. Even if the First, Second, and Third Alleged Schemes Were Properly Joined Under Rule 8, Which They Are Not, to Prevent Undue Prejudice to Ms. Keleher, They Should be Severed and Tried Separately from Each Other and From the Other Alleged Schemes Under Rule 14(a).

As set forth above, the First, Second, and Third Alleged Schemes are not properly joined with each other or with any of the other alleged schemes under Rule 8. Severance must therefore be granted without regard to Rule 14. *See United States v. Jawara*, 474 F.3d 565, 573 (9th Cir. 2007) ("Rule 14 should not be viewed as a backstop or substitute for the initial analysis."). Even if the charges and defendants were properly joined in the same indictment under Rule 8, however, which is not the case here, Rule 14 would permit the Court to order separate trials of charges or defendants in its discretion "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant . . . ." Fed. R. Crim. P. 14(a).

While there is a "preference in the federal system to jointly try defendants who are indicted together," *United States v. Ayala Lopez*, 319 F.Supp.2d 236, 237 (D.P.R. 2004) (Cassellas, J.) (citing *Zafiro v. United States*, 506 U.S. 534, 537 (1993)), the United States Supreme Court has

also cautioned that district courts should grant severance under Rule 14 "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 237–38 (citing *Zafiro*, 506 U.S. at 539). Indeed, if the presumption in favor of trying properly joined counts together were not a rebuttable one, there would be no need for Rule 14. Here, if the Court does not find that severance is mandated under Rule 8, severance of the counts under Rule 14 is warranted. *See id.* at 238 (citing *United States v. O'Bryant*, 998 F.2d 21, 25 (1st Cir. 1993)).

Ms. Keleher has no alleged involvement in the Fourth, Fifth, Sixth, or Seventh Alleged Schemes, and all but the Fourth Alleged Scheme do not even involve the agency at which Ms. Keleher was employed (the DOE). Similarly, none of the other charged defendants are charged in the First, Second, or Third Alleged Schemes. Where a defendant is not charged as a co-conspirator with other defendants, she "faces a slightly smoother road" to demonstrate prejudice actionable under Rule 14 than co-defendants charged in a conspiracy. *See United States v. Vazquez-Rijos*, Crim. No. 08-216/15-562 (DRD), 2017 WL 2628871 at *6 (D.P.R. June 19, 2017) (Dominguez, J.).

The First Circuit has recognized that joinder of several offenses in an indictment potentially involves three kinds of prejudice: (1) embarrassment or confusion "in presenting separate defenses"; (2) evidentiary spillover through which proof of one offense may be used to convict a defendant of a second, "even though such proof would be inadmiss[i]ble in a second trial for the second offense"; and (3) forcing a defendant who wants to testify "in his own behalf on one of the offenses but not another" to choose between "testifying as to both or testifying as to neither."

United States v. Richardson, 515 F.3d 74, 81 (1st Cir. 2008) (quoting *United States v. Jordan*, 112 F.3d 14, 17 (1st Cir. 1997)).[5]

Here, the second of these factors, by itself, justifies severance because the risk of evidentiary spillover is unacceptably high. For but one example, the evidence that will be adduced at trial with regard to the Fourth and Fifth Alleged Schemes (involving lobbying and subcontracting of BDO and conspiracies relating to BDO contracts with ASES) will not be admissible against Ms. Keleher. But those schemes do involve separate allegations involving BDO, which is alleged to have paid a portion of Individual C's wages as charged in the Third Alleged Scheme, and another public agency. The Fourth Alleged Scheme also involves emails sent to Ms. Keleher, despite Ms. Keleher not having any alleged involvement in or knowledge of the scheme. If the jury is convinced that the Fourth and Fifth Alleged Schemes took place, and that Velazquez-Piñol and Scherrer-Caillet conspired with Avila-Marrero in relation to BDO's contracts with ASES, they will surely be more inclined to believe that Ms. Keleher schemed to use BDO in relation to the Third Alleged Scheme and BDO's contract with DOE. Velazquez-Piñol, Scherrer-Caille, and Avila-Marrero would experience the same prejudice in reverse. If the jury believes one of the schemes, they will be inclined to believe all of them. The risk of such spillover in this case is particularly high, given the extraordinary pretrial publicity related to the case and the widespread reporting (and misreporting) that has conflated the allegations in the eyes of the public. No limiting instruction at trial possibly can adequately mitigate the resulting prejudice to Ms. Keleher.

[5] This early before trial, undersigned counsel is not prepared to set forth in detail each of the defenses that may be offered at trial for the various schemes at issue, or commit Ms. Keleher to testifying in her own defense. But Ms. Keleher's trial strategy generally, and her decision to testify specifically, plainly will be affected if these seven schemes are tried together. Ms. Keleher reserves the right to raise other specific objections to joinder if additional grounds develop based on Ms. Keleher's trial defenses.

Moreover, as between the First, Second, and Third Alleged Schemes, if the jury is convinced that Ms. Keleher is guilty of any one of them, they will surely be more inclined to believe that Ms. Keleher is guilty of all of them, despite the fact that almost none of the evidence admissible as to any one count would be admissible as to the others. This would thoroughly compromise the presumption of innocence and would effect a subversion of Federal Rule of Evidence 404, among other prejudices.

Rule 404(b) "reflects the reflects the longstanding concern that evidence . . . offered only to show the defendant's propensity to commit the charged crime, 'is said to weigh too much with the jury and to so over persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *United States v. Caldwell*, 760 F.3d 267, 275 (3d Cir. 2014) (internal citations omitted). For example, by trying these schemes together, the jury might infer, as it otherwise could not, that Ms. Keleher's violation of her employment contract by disseminating information helpful to a company seeking a public contract (the First Alleged Scheme) is itself probative of her guilt on the other two sets of charges against her in the Superseding Indictment. By joining the additional Second Alleged Scheme and Third Alleged Scheme, the implied kicker would be that the jury would be left to impermissibly wonder: "what are the chances that two different companies associated with two of Ms. Keleher's friends just happen to both have benefitted from Ms. Keleher's public position?" Before then impermissibly inferring that Ms. Keleher has a propensity for committing such offenses.

Put another way, the Superseding Indictment positions seven dominoes so that if any one of them falls, it will knock down the other six. The unfairness and prejudice comes from the fact that the schemes here at issue have nothing to do with each other, except sharing a very general common theme and the public agencies of Puerto Rico. The potential prejudicial evidentiary

spillover is "so pervasive that a miscarriage of justice looms." *United States v. Trainor*, 477 F.3d 24, 26 (1st Cir. 2007). This conclusion is further supported by the fact that Glenda Ponce-Mendoza and Mayra Ponce-Mendoza pleaded guilty in connection with the alleged Second Alleged Scheme (as stated in the original Indictment). If either sister testifies about conversations they had with Ms. Keleher related to the Second Alleged Scheme, or otherwise purports to implicate Ms. Keleher in that scheme, there is little doubt that the jury will be more inclined to believe the charges leveled against Ms. Keleher in connection with the First and Third Alleged Schemes as well.

Moreover, the Superseding Indictment involves numerous individuals with multiple separate conspiracies. If everything is tried together, it will be an ordeal sorting through evidentiary concerns like admissibility of co-conspirator statements. Indeed, under the current circumstances, there is a significant risk that a purported co-conspirator statement may be presented to the jury, only to be later deemed inadmissible. Courts have found that "[t]he danger of prejudicial spillover is great when such inadmissible statements are heard by the jury." *United States v. McNatt*, 842 F.2d 564, 566 (1st Cir. 1988).

Finally, while the Court ruled on the first motion to transfer venue and Ms. Keleher will not re-litigate that issue here, she respectfully submits that the evidence supporting that motion is also relevant to the Court's weighing of the potential for Rule 14 prejudice with a joint trial. The evidence shows a public chomping at the bit to see Ms. Keleher found guilty, and in so doing, is already inclined to lump the defendants together in precisely the way Rules 8 and 14 are designed to prevent.

Indeed, the Government's joinder of Ms. Keleher and Scherrer-Caillet and Velazquez-Piñol in Counts 12–18 of the original Indictment and the extraordinary publicity surrounding that indictment has only worked to make it more difficult to separate Ms. Keleher from the Fourth,

Fifth, Sixth, Seventh, and Eights Alleged Schemes in the minds of prospective jurors considering the Superseding Indictment. Even if an impartial jury can be impaneled, in light of the preexisting biases and negative publicity of this case, there is an unacceptable risk that—consciously or not—jurors will allow evidence from one scheme to spill over into their consideration of guilt or innocence for the other, separate schemes. This is exactly the kind of situation in which the Court, even if it were to find the charges and defendants properly joined under Rule 8, should conclude that severance is appropriate under Rule 14.

A joint trial here would also result in juror confusion. There are seven complex frauds alleged in the Superseding Indictment, each with almost entirely different players and time periods. There will already be significant jury instructions as a result of the nature of the cases, number of defendants, trial publicity, and the complexity of each individual scheme. It will be difficult for a juror to remember at the end of a long trial, for instance, whether Scherrer-Caillet was talking to Ávila-Marrero when he said "X," or was he talking to Ms. Keleher. Separate trials eliminate this risk. Jurors will hear only evidence related and probative to the scheme at issue in that trial, and each trial itself will be shorter.

As discussed above, the lack of factual overlap between the alleged schemes minimizes the judicial economy that would otherwise be gained by a joint trial. The only minor inefficiency in trying the cases separately would be empaneling multiple juries and having a very limited number of witnesses called in more than one trial. But it is difficult to envision any witnesses who would be relevant to all seven alleged schemes. Under the circumstances of this case, the inconvenience to each individual witness of having to likely be present across multiple long days, only to be examined by multiple attorneys, largely about facts unrelated to six out of seven of the other schemes being considered, vastly outweighs the minor inconvenience to a handful or fewer

witnesses by having to appear at multiple trials at a date and time more certain, to testify for a more limited duration, about a more focused issue.

More importantly, any inefficiency pales in comparison to the benefits of mitigating risk of juror confusion and spillover evidence or "guilt by association." The relevant facts and circumstances therefore weigh heavily toward severing these charges and defendants under Rule 14, even if they had been properly joined in the first place, which they were not.

IV. CONCLUSION

The Superseding Indictment improperly joins seven separate schemes together. The only common thread between these seven sets of charges is that they all seem to have arisen from the same investigation, and this is not nearly enough to permit joinder in one indictment. Because the sets of charges are misjoined as a matter of law, the charges must be severed under Rule 8. Moreover, there would be substantial risk of undue prejudice to Ms. Keleher (and the other defendants) if the seven sets of charges were tried together, which would warrant severance under Rule 14, even if joinder had been proper under Rule 8, which it was not.

Severance will ultimately promote efficiency by simplifying the issues placed in front of the jury. But most importantly, severance will promote "fundamental fairness and impartiality based on established rules and principles," *see Ramallo-Diaz*, 455 F. Supp.2d at 31, and in doing so will promote respect for the law and the criminal-justice system itself.

WHEREFORE, Julia Beatrice Keleher respectfully requests that the Court GRANT this motion and sever the Superseding Indictment into at least four sets of charges: (1) Counts 1–11; (2) Counts 12–15; (3) Counts 16–24; and (4) Counts 25–98.[6]

[6] There is substantial basis to believe that certain of Counts 25–98 should themselves be severed from one other, but as Ms. Keleher is not charged in those counts, she only asks that none of them be joined with any of Counts 1–24 for trial.

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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