UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al., Defendants.	CRIMINAL NO. 19-431 (PAD)

CONSOLIDATED RESPONSE IN OPPOSITION TO: (1) DEFENDANT JULIA BEATRICE KELEHER'S MOTIONS TO DISMISS COUNTS 15-23; (2) DEFENDANT FERNANDO SCHERRER-CAILLET'S MOTION TO DISMISS FOR FAILURE TO ALLEGE PERSONAL GUILT AND LACK OF SPECIFICITY, AND MOTION TO DISMISS FOR FAILURE TO ALLEGE A CRIME AND LACK OF DUE PROCESS NOTICE; (3) DEFENDANT ANIBAL JOVER-PAGES' MOTION TO DISMISS FOR FAILURE TO ALLEGE A PROSECUTABBLE SCHEME TO DEFRAUD; AND (4) DEFENDANT ALBERTO VELAZQUEZ-PIÑOL'S MOTION TO DISMISS
[Docket Nos. 413, 429, 433, 414, 415, 444]

The defendants raise a potpourri of arguments in their effort to claim that the indictment is deficient, and should be dismissed. In some instances, the same defendant raises nearly identical arguments in separately filed documents. *Compare, e.g.*, Docket No. 429 at 31-33 *with, e.g.*, Docket No. 433.[1] So as not to burden the Court with repetitious arguments, the United States respectfully submits this consolidated response in opposition to Defendant Julia Beatrice Keleher's motions to dismiss Counts 15-23, Docket Nos. 429, 433; Defendant Fernando Scherrer-Caillet's motions to dismiss for failure to allege a crime, and failure to allege personal guilt, Docket Nos. 414, 415; Defendant Anibal Jover Pages' motion to dismiss for failure to allege a prosecutable scheme to defraud, Docket No. 413; and Defendant Alberto Velazquez-Piñol's motion to dismiss, Docket No. 444.

[1] Under Local Rule 7(f), dispositive motions should not exceed 25 pages "[e]xcept by prior leave of court." The filing of multiple motions requesting the same relief on similar (or identical) grounds circumvents.

I. APPLICABLE LAW

The Supreme Court has observed that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The Federal Rules of Criminal Procedure require that an indictment satisfy this standard not with an exhaustive statement of the evidence against a defendant, but rather with "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment, therefore, "is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and enables him to enter a plea without fear of double jeopardy." *United States v. Chardón-Sierra*, No. 19-153 (FAB), 2019 U.S. Dist. LEXIS 119847, at *5 (D.P.R. July 16, 2019) (Besosa, J.) (internal quotation marks and citation omitted); *see also United States v. Flaharty*, 295 F.3d 182, 198 (2d Cir. 2002) ("[A]n indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms.").

The First Circuit has stated that "[w]hen a federal court uses its supervisory power to dismiss an indictment it directly encroaches upon the fundamental role of the grand jury. That power is appropriately reserved, therefore, for *extreme limited circumstances*." *Whitehouse v. United States District Court*, 53 F.3d 1349, 1360 (1st Cir. 1995) (emphasis added); *see also United States v. Stokes*, 124 F.3d 39, 44 (1st Cir. 1997) ("Because the public maintains an abiding interest in the administration of criminal justice, dismissing an indictment is an extraordinary step."). This is why "courts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency

of the evidence behind an indictment's allegations." *See United States v. Guerrier*, 669 F.3d 1, 4 (1st Cir. 2011).

II. DISCUSSION

For purposes of this consolidated response, the United States will group the counts alleged in the superseding indictment as follows: (1) aggravated identity theft counts [Counts 9-11]; (2) sham selection process counts [Counts 12-14]; (3) subcontracting counts [Counts 16-22, 50-71, 91-98]; (4) lobbying fees counts [Counts 25-49; (5) bribery count [Count 24]; and (6) confidential information counts [Counts 1-8, 72-90].[2] For the reasons that follow, there is no legally compelling reason to dismiss any count.

A. Defendant Keleher's motion to dismiss the aggravated identity theft counts [Docket No. 425]

Under 18 U.S.C. § 1028A, anyone who "during and in relation to a felony violation enumerated in subsection (c), knowingly transfers, possesses, *or* uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of two years." 18 U.S.C. § 1028A(a)(1) (emphasis added). Wire fraud is a legally recognized offense upon which the crime of aggravated identity theft may be predicated. 18 U.S.C. § 1028A(c)(5) (listing "mail, bank, and wire fraud" as predicate crimes for aggravated identity theft).

Although Defendant Keleher provides an explanation of the vagueness doctrine in her motion, she does not cite *any* authority to support the proposition that the aggravated identity theft statute is unconstitutionally vague either on its face, or as applied. Nor can she. It is well

[2] The United States has filed a separate response in opposition to the motions requesting dismissal of counts involving schemes to deprive the Puerto Rico Department of Education ("PRDE") and the *Administracion de Seguros de Salud de Puerto Rico* ("ASES") of confidential information. Additionally, Defendant Keleher has not moved for the dismissal of the bribery count. Accordingly, the United States will not address groups 5 and 6 in this response.

settled that "[s]tatutes duly enacted by Congress are presumed to be constitutional." *United States v. Sampson*, 486 F.3d 13, 20 (1st Cir. 2007) (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983)). As the Supreme Court has consistently stated, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "As a general matter, moreover, courts should strive to interpret statutes so that *each word* in the statutory text has meaning." *Woo v. Spackman*, 988 F.3d 47 (1st Cir. 2021) (emphasis added). "[I]f the language of a statute is clear, that language must be given effect…at least in the absence of a patent absurdity." *United States v. Chisholm*, 940 F.3d 119, 133 (1st Cir. 2019) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring)).

Based on the unambiguous language of the aggravated identity theft statute, it is clear that Congress meant to proscribe the "knowing[] transfer[], possess[ion] , *or* use[]" of a means of identification of another without lawful authority. *See* 18 U.S.C. § 1028A(a)(1); *see also Zucker v. Rodriguez*, 919 F.3d 649, 657 (1st Cir. 2019) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("[C]ourts must presume that [Congress] says in a statute what it means and means in a statute what it says there."). Wishing this were not so, Defendant Keleher urges the Court to disregard the words "transfer" and the disjunctive conjunction "or." In so doing, she draws the Court's attention to the "use" modality of the statute, and then goes on to explain why it does not fit. Defendant Keleher ultimately delivers the *coup de grace* to her case by proclaiming that the superseding indictment fails to allege that which it does not charge. Her motion is meritless, and should be denied.

1. <u>The superseding indictment alleges all the elements of aggravated identity theft</u>

The superseding indictment sets forth each element of all aggravated identity theft offenses charged. Specifically, Counts 9-11 allege that Defendant Keleher "did knowingly

transfer, without lawful authority, a means of identification of other persons…during and in relation to a felony violation enumerated" in 18 U.S.C. § 1028A(c), "to wit, wire fraud…" Notably, Defendant Keleher does not argue that Counts 9-11 are deficiently pleaded. Rather, she argues that the Court should: (1) avoid construing the statute as Congress drafted it to avoid confronting a constitutional issue, (2) construe the statute in such a way as to read the word "transfer" as "transfer for the purpose of facility [sic] the use of a false identity"; and (3) dismiss the aggravated identity theft counts because they fail to allege the transfer of any means of identification for the purpose of facilitating its use. The main premise underlying Defendant Keleher's motion is that the mere transfer of a means of identification should not suffice to satisfy an element of an aggravated identity theft offense. The Court should reject this premise because it runs contrary to the plain language of 18 U.S.C. § 1028A.

Indeed, to adopt Defendant Keleher's reading of section 1028A, the Court would have no choice but to ignore the statute's use of the word "or" and, in essence, interpret a statute that Congress never enacted. As the Supreme Court has observed, the use of the word "or" "is almost always disjunctive, that is, the words it connects are to be given *separate meanings*." *United States v. Woods*, 571 U.S. 31, 45 (2013) (observing, as exceptional cases, instances in which the word "or" may "introduce an appositive—a word or phrase that is synonymous with what precedes it" and giving as examples "Vienna or "Wien," "Batman or the Caped Crusader");[3] *see also Loughrin v. United States*, 573 U.S. 351, (2014) (rejecting argument that two phrases of the bank fraud statute, 18 U.S.C. § 1344, connected by the word "or" mean the same thing because to accept such an argument would render "'or' to mean 'including'—a definition foreign to any dictionary we know of."). It follows, therefore, that one may commit aggravated identity if one

[3] In the aggravated identity theft statute, the word "or" does not introduce an appositive because the words "transfer," "possess," and "use" have separate meanings and thus, are not synonymous.

"*transfers*, possesses, *or* uses, without lawful authority, a means of identification of another…" 18 U.S.C. § 1028A(a)(1).

Aside from being inconsistent with the statutory text, Defendant Keleher's interpretation of section 1028A is also inconsistent with how courts have interpreted this statute. *See, e.g.*, *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009) (stating that "[a] federal criminal statute forbidding '[a]ggravated identity theft' imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if,* during (or in relation to) the commission of those other crimes, the offender '*knowingly* transfers, possesses, *or* uses, without lawful authority, *a means of identification of another person.*'") (second emphasis added); *United States v. López-Díaz*, 794 F.3d 106, 118 (1st Cir. 2015) ("Section 1028A punishes the knowing *transfer*, possession, *or* use without lawful authority of protected information…") (emphasis added); *United States v. Rodríguez-Morales*, 647 F.3d 395, 397 (1st Cir. 2011) (approvingly noting that, at a change of plea hearing, the lower court clarified to the defendant that section 1028A "did not require that a defendant seek to assume another's identity, but required only that '[the defendant] *transfer* a means of identification of another person") (emphasis added); *United States v. Phanor*, 729 Fed. Appx. 877, 879 (11th Cir. 2018) ("On their plain language, neither § 1028A(a)(1) nor § 1028(a)(7) require as an element that the defendant knew that the identification information he *transferred* would be used for an offense. The illicit *transfer* of information must only have occurred 'in relation to' or 'in connection with' a qualifying state or federal crime.") (internal citations omitted); *United States v. Forest*, CR-08-155-B-W, 2010 U.S. Dist. LEXIS 58216, at *33-34 (D. Me. June 11, 2010) ("To prove aggravated identity theft against Ms. Forest, the Government must establish the following elements: 1) that the defendant committed access fraud, a violation of 18 U.S.C. § 1029(a)(2); 2) that during and in relation to that felony, she knowingly

transferred a means of identification without lawful authority; 3) that the means of identification actually belonged to another person; and, 4) that she knew that the means of identification belonged to another person.").

At bottom, Defendant Keleher's challenge to the viability of the aggravated identity theft counts distorts the statute's unequivocal text, making the commission of the offense by one modality (*i.e.*, "transfer") dependent on another modality (*i.e.*, "use").[4] The "vague" aggravated identity theft statute that Defendant Keleher interprets in her motion is neither the one which Congress wrote, nor the one with which she has been charged. Only one of the three modalities of aggravated identity theft must be alleged to state an offense. The superseding indictment does just that. Consequently, Defendant Keleher's motion to dismiss the aggravated identity theft counts should be denied.

B. Defendant Keleher's motion to dismiss Counts 12-15—the sham selection process [Docket No. 429]

Relying generally on *Kelly v. United States*, 140 S. Ct. 1565 (2020) without specifically articulating why the legal principles announced in that decision compel the dismissal of Counts 12-15, Defendant Keleher claims that the sham selection process counts should be dismissed because the superseding indictment "suggests, *without so stating*, that [the PRDE] and the public were deprived of an intangible right to a fair and open bidding process because Ms. Keleher 'steered' the contract to C&P through a 'sham' process on account of her special assistant's

[4] Nearly all the cases that Defendant Keleher cites in her motion involve the "use" modality. *See* Docket No. 425 at 8-11. These cases are inapposite because Defendant Keleher is charged under the "transfer" modality of section 1028A. Defendant Keleher's invocation of the rule of lenity is equally misguided because this rule applies only when one "can make no more than a guess as to what Congress intended." *See United States v. Wells*, 519 U.S. 482, 499 (1997). No guesswork is needed to interpret the unambiguous words of section 1028A. *See United States v. Ozuna-Cabrera*, 663 F.3d 496, 501 n.4 (1st Cir. 2011) ("The rule of lenity does not apply here, however, because § 1028(a)(1)'s text is unambiguous.").

relationship with the company." Docket No. 429 at 30 (emphasis added). Defendant Keleher's arguments are premised both on her misperception of what Counts 12-15 actually allege, and her distorted notion of what these counts must allege to survive dismissal.

As stated in response to other motions, "[t]he well-established elements of wire fraud are: "(1) a scheme or artifice to defraud using false or fraudulent pretenses; (2) the defendant's knowing and willing participation in the scheme or artifice with the intent to defraud; and (3) the use of the interstate wires in furtherance of the scheme." *United States v. Arif*, 897 F.3d 1, 9 (1st Cir. 2018) (citing *United States v. Appolon*, 715 F.3d 362, 367 (1st Cir. 2013)). "A scheme or artifice to defraud is defined to include any plan, pattern or [course] of action . . . intended to deceive others in order to obtain something of value." *United States v. Colón-Muñoz*, 192 F.3d 210, 221 (1st Cir. 1999) (citations omitted) (bracketed text in original) (emphasis added). The false representations in the scheme to defraud must be material. *Appolon*, 715 F.3d at 367-68. A false statement is material as long as it "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed, *Id.* at 368 (quoting *Neder v. United States*, 527 U.S. 1, 25 (1999)). There is no need, however, for the United States to prove that the false statement was actually relied on or necessarily led to monetary damages. *Id.* Materiality is a "question of fact for the jury to decide." *United States v. Sharp*, 749 F.3d 1267, 1280 (10th Cir. 2014).

Counts 12-15 state each element of a wire fraud offense, provide sufficient facts to inform Defendant Keleher of the charges against which she must defend, and enable her to plead an acquittal or conviction in bar of future prosecutions. *See Hamling*, 418 U.S. at 117. More specifically, these counts: (1) assert that Defendant Keleher participated in a scheme to defraud and deprive PRDE of moneys in connection with a PRDE contract paid with federal funds," Docket

No. 368. at ¶ 40; (2) generally describe Defendant Keleher's conduct in furtherance of the scheme to defraud, *id.* at ¶¶ 32-35, 38-39; and (3) generally describe Defendant Keleher's deceptive conduct as causing the PRDE to make misrepresentations to other government officials to obtain authorization for the C&P contract, *id.* at ¶¶ 37-38. Under such circumstances, there is no basis to conclude that these counts fail to satisfy the "simple and few" requirements of an indictment. *See United States v. Acevedo-Vila*, 2009 U.S. Dist. LEXIS 2729, at *6 (D.P.R. Jan. 9, 2009) ("The requirements of an indictment are simple and few: it must set forth the elements of the offense charged, alert the defendant to what he is facing, and show the defendant to what extent he may plead double jeopardy.") (internal quotation marks and citation omitted).

Defendant Keleher's complaints about the superseding indictment's failure to allege either that the PRDE "did not require the services of C&P," or that Defendant Keleher "lacked the authority" to issue a contract to C&P, have no bearing on whether Counts 12-15 are adequately alleged. The need for C&P's services, whether these services were performed satisfactorily, and Defendant Keleher's authority (or lack thereof) are not elements of a wire fraud offense. And courts have consistently recognized that contracts procured under false pretenses, as the C&P contract was, may constitute property for purposes of the wire fraud statute. *United States v. Richter*, 796 F.3d 1173 (10th Cir. 2015) (observing that the "Fourth, Seventh, and Eighth Circuits have held that payments made in exchange for services provided under a contract induced by false representations, even where the services are performed constitute a deprivation of money or property sufficient to invoke the federal fraud statutes) (citing cases); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (holding that contracts awarded by the government may be considered property when the contract results in a loss of money); *see also United States v. Dingle*, No. 19-00215-01-CR-W-RK, 2021 U.S. Dist. LEXIS 49865, at (W.D. Mo. Feb. 3, 2021) (denying

motion to dismiss wire fraud indictment alleging that "conspirators fraudulently obtained small business program certifications and veteran-owned business certifications as to the status of the companies and used those certifications to obtain approximately $346 million in federal contract payments to which they were not entitled" while observing that "the fact that the federal government received satisfactory work under the contracts is of *no consequence*.") (emphasis added).

To the extent Defendant Keleher wishes to argue that the object of the fraud alleged in Counts 12-15 was not money, but some non-cognizable intangible right, the argument is a factual one that should be left for the jury to decide. *See, e.g.*, First Circuit Pattern Criminal Jury Instruction 4.18.1343 (defining the term "defraud" as "deceiv[ing] another in order to obtain money or property" and requiring jury to find beyond a reasonable doubt that the defendant "knowingly and willfully participated in…scheme with the intent to defraud"); *see also United States v. Tulio*, 263 Fed. Appx. 258, 262 (3d Cir. 2008) (affirming district court's denial of motion to dismiss indictment charging mail fraud, and holding that court properly instructed the jury to consider whether money or property constituted object of the fraud) (unpublished opinion). Alternatively, if at the close of the trial the Court is convinced that the evidence cannot sustain a finding of guilt beyond a reasonable doubt as to each element of the offense, the Court is entitled to enter a judgment of acquittal under Federal Rule of Criminal Procedure 29. Dismissal of Counts 12-15 is not, however, the proper means of remedying the problems which Defendant Keleher perceives with the allegations in these counts (which are not problems at all).

C. Defendants' motions to dismiss counts pertaining to subcontracting schemes (Counts 16-22; 50-71; 91-97)
[Docket Nos. 413, 414, 415, 429]

> "According to the official English translation of Law 388, "**subcontractor**" – includes any person or persons who, as independent contractors, do any part of the work awarded to the contractor. P.R. Laws Ann. 22 § 58 (official translation)" *Bethlehem Steel Export v. Redondo Const. Corp.*, 140 F.3d 319 (1st Cir. 1998).

In moving to dismiss counts pertaining to the various subcontracting schemes in which they are charged, the defendants once again put the cart before the horse. They proclaim their innocence,[5] and ask this Court to put its seal of approval on their proclamation by dismissing the superseding indictment before a jury hears from a single witness or sees a single item of evidence. As far as the United States is aware, there is no authority under the Constitution, any statute, the Federal Rules of Criminal Procedure, or case law, that justifies a pretrial dismissal of an indictment grounded on a finding that the evidence would not suffice to sustain a finding of guilt beyond a reasonable doubt. *See, e.g.*, *United States v. Harris*, 805 F. Supp. 166, 172 (S.D.N.Y. 1992) (denying pretrial motion to dismiss the indictment on the ground that the evidence was insufficient); *United States v. Payden*, 613 F. Supp. 800, 809 (S.D.N.Y. 1985) (observing that "it is well established that a facially valid indictment…may not be challenged on the ground that it was based on inadequate evidence.").

The defendants presumably know they face an uphill legal battle in convincing this Court to dismiss counts of the superseding indictment. *See United States v. Davidson*, 1:07-CR-204

[5] To be sure, the United States recognizes that each defendant is presumed innocent until proven otherwise beyond a reasonable doubt. But a claim of innocence is not a legally valid basis to justify the pretrial dismissal of an indictment, and no defendant has cited any authority suggesting otherwise.

(LEK), 2010 U.S. Dist. LEXIS 17239, at *5 (N.D.N.Y. Feb. 19, 2010) ("Pretrial motions attacking an indictment must overcome a difficult standard to prevail in obtaining dismissal."); *United States v. Joseph*, No. 19-cr-10141-LTS, 2020 U.S. Dist. LEXIS 132387, at *10 (D. Mass. July 27, 2020) (observing that "fact-laden determinations are outside the scope of a motion to dismiss [an indictment]."). For this reason, some of the defendants cleverly try to frame factual issues as legal issues, sprinkling seemingly magic words like "as a matter of law" from time to time. *E.g.*, Docket Nos. 413, 429. A close analysis of the defendants' arguments reveals that they are generally fact-based, and not ripe for disposition on a motion to dismiss.

To provide but one example, in separately filed motions, Defendants Keleher, Scherrer, and Jover move to dismiss all counts pertaining to the subcontracting schemes in which they are respectively charged, alleging that the superseding indictment does not charge an offense because PRDE and ASES received what they bargained for in the professional services contracts at issue. This argument, like many of the arguments raised in the defendants' various motions to dismiss, is not ripe for disposition. And for the reasons discussed both in Section II.B, *supra* and *infra*, they are irrelevant.

More to the point, the counts related to each of the three charged subcontracting schemes adequately allege the elements of a wire fraud offense. That is, each of three subcontracting schemes: describes a scheme to defraud government agencies of money; describes the defendants' roles in subcontracting services in spite of the contracts' prohibition of such practices; describes false and fraudulent representations in invoices to make subcontractors such as Alberto Velazquez, Individual C, and others, appear as employees of the contracting entity when they, in fact, were not; and describes how the scheme caused government agencies (*i.e.*, PRDE and ASES) to make payments for services which the government of Puerto Rico never actually bargained for.

In short, the three charged subcontracting schemes satisfy the "simple and few" requirements of an indictment, and more than adequately apprise each defendant of what he or she is accused of. *See Acevedo-Vila*, 2009 U.S. Dist. LEXIS 2729, at *6. In the sections that follow, the United States will address: (1) the relevance of *Kelly* to the defendants' arguments; (2) the relevance of Puerto Rico law to the Court's interpretation of the contracts at issue; and (3) each defendant's particular argument in support of dismissal not previously addressed.

1. *Kelly* does not warrant dismissal of the subcontracting scheme counts

As stated in a separate response, *Kelly* had nothing to do with the pleading requirements for alleging a wire fraud offense or with the sufficiency of an indictment's allegations. The Supreme Court in *Kelly* vacated the wire fraud convictions of state officials who devised a sham traffic study merely to create a traffic jam in Fort Lee, New Jersey to retaliate against that town's mayor for his refusal to endorse then-incumbent Governor Chris Christie. The Supreme Court rejected the prosecution's argument that property was the object of the fraud inasmuch as the state officials commandeered traffic lanes, and made a government entity (*i.e.*, the Port Authority of New York and New Jersey) to incur costs in having to pay employees to implement the sham study.

Unlike this Court, the *Kelly* court had the benefit of a fully developed trial record before deciding that neither money nor property, but political payback, constituted the object of the alleged scheme to defraud. *Kelly* is distinguishable on this basis alone. Should this Court determine that the United States has failed to carry its burden of proving beyond a reasonable doubt that the alleged scheme in the subcontracting scheme counts had money or property as its object, it may enter a judgment of acquittal even after the return of a guilty verdict. *See* Fed. R. Crim. P. 29. But there is no basis to grant any defendant what would be akin to summary judgment or a

pretrial judgment of acquittal, concepts that are foreign to the federal criminal system.

Be that as it may, the superseding indictment alleges—and at trial the United States will prove—that property was at the center of the subcontracting scheme to defraud. This scheme was aimed at obtaining money from government agencies through professional services contracts obtained under false and fraudulent pretenses. And there is ample authority to support the proposition that a wire fraud prosecution may be predicated on a scheme to obtain money under a contract that is entered into under false and fraudulent pretenses. *See, e.g.*, *United States v. Leahy*, 464 F.3d 773, 780 (7th Cir. 2006) (rejecting argument that city merely lost intangible regulatory interest where defendants misrepresented ownership structures of businesses that allowed them to win contracts to which they would not otherwise be entitled); *United States v. Bunn*, 26 Fed. Appx. 139, 143-43 (4th Cir. 2001) (affirming wire fraud convictions of defendants who falsely certified they would subcontract disadvantaged businesses when obtaining city contracts, while rejecting the argument that there was no deprivation of property inasmuch as "the subcontract work was performed satisfactorily" and holding that property interest was money as a result of contract procured by false representation); *Richter*, 796 F.3d 1173; *Granberry*, 908 F.2d at 280; *Dingle*, 2021 U.S. Dist. LEXIS 49685.

2. Subcontracting prohibitions under Puerto Rico law

Because the contracts at issue in this case were entered into under the laws of the Commonwealth of Puerto Rico, their construction should take Puerto Rico law into account. The legal concept of a "subcontractor" is central to the fraudulent conduct charged in the superseding indictment, and is not a complicated one. The term "subcontractor" has had a definition under Puerto Rico law for over half a century. Law 388 of May 9, 1951, a Puerto Rico statute modeled

after the Miller Act,[6] 40 U.S.C. § 270, *et seq.*, defines the terms "contractor" and "subcontractor" as follows:

> "Contractor. – Shall include any person or persons to whom is awarded a contract for the construction, reconstruction, alteration, enlargement, repair of improvement of a public work, and who has posted the bond required by sections 47-58 of this title.
>
> Subcontractor. – Includes any person or person who, as independent contractors, do any part of the work awarded to the contractor."[7]

An identical definition of "subcontractor" is set forth in Puerto Rico Law 111 of June 22, 1961, 29 L.P.R.A. 195, a statute requiring contractors to issue bonds in construction projects.

As Judge Raúl Arias-Marxuach recently observed, "the Constitution of the Commonwealth of Puerto Rico [recognizes that] the State has an obligation to apply the highest fiduciary and ethical principles when managing public funds. Accordingly, contracts with the government of Puerto Rico must satisfy strict[er] requirements than those agreed upon by private parties in order to be valid and enforceable." *Disaster Sols., LLC v. City of Santa Isabel*, No. 18-1898 (RAM), 2019 U.S. Dist. LEXIS 213779, at *5 (D.P.R. Dec. 10, 2019) (citations omitted). "Strict compliance with government contract requirements has been enforced even in cases … [involving a] declared state of emergency." *Id.* at *7 (citation omitted). Such "strict requirements for government contracts exist to protect public interests and funds, not those of the private parties…who are presumed to know that they need to comply with said requirements." *Id.* Thus, "if a party contracting with any government entity fails to comply with these contracting requirements, they run the risk of having to assume responsibility for their losses." *Id.* (citations

[6] The Miller Act (Title 40 U.S.C. Section 3131 to 3134) is a Federal law that requires contract surety bonds on federal construction projects.

[7] "The original Spanish version reads, '*subcontratista' – incluye a cualquier persona o personas que, como contratista independiente, ejecute cualquier parte de la obra adjudicada al contratista*.'" *Bethlehem Steel*, 140 F.3d at 320 (quoting P.R. Law Ann. tit. 22, § 58).

omitted); *see also Rodriguez-Rivera v. Quiles Ocean & Land Corp.*, 2012 WL 3234956 (P.R. Cir. June 29, 2012) (holding that subcontractor's services in violation of a clause in government contract prohibiting subcontracting were not payable ("*no es exigible*" in Spanish)).

Puerto Rico Law 237 of August 31, 2004, known as the "Law to Establish Uniform Parameters in the Contracting Processes of Professional or Consultive Services for Government Agencies and Entities, as amended, 3 L.P.R.A. secs. 8611-8615 sets forth requirements applicable to contracts for professional services with government entities. Article 2 of the law establishes that government contracting of professional services must be the exception to the norm, and that it shall only be used when the government agency cannot use its internal resources to provide the contracted services or when the expertise, skill or experience of the contractor is necessary for the achievement of the goals for which the private entity was contracted.

With this legal background in mind, the fraudulent nature of the allegations in the subcontracting schemes becomes even more apparent. Because the law establishes that government contracts for professional services should be the exception rather than the norm, contracting entities must provide services that the government agency cannot. Consequently, subcontracting prohibitions are not mere formalities. They ensure that professional services which government entities contract are performed by a vetted qualified contractor, and not some third party. And the federal government has a particular interest in the enforcement of such subcontracting prohibitions when the contracts involve federal money—as all the contracts at issue in this case do.

3. Defendants' individual arguments

To the extent not already addressed, the United States will proceed to address each defendant's individual arguments in connection with the subcontracting schemes.

a. *Defendant Keleher*

Counts 16-23 charge Defendant Keleher with three wire fraud counts in connection with a scheme whereby she obtained employment for Individual C as a subcontractor—first at C&P and then at BDO—despite knowing that PRDE's contracts with these entities prohibited the subcontracting of services. As alleged in the superseding indictment, the professional services contract into which C&P entered with PRDE contained the following provision:

Original Spanish text	***English translation***
"La Segunda Parte no podrá subcontratar, ceder ni traspasar los servicios objeto de este contrato. La Segunda Parte será responsable de la contratación y/o reclutamiento del personal que ofrecerá los servicios y actividades estipulados en la cláusula TERCERA de este Contrato. ..."	"The Second Party may not subcontract, give or transfer the services object of this contract. The Second Party will be responsible for the hiring and/or recruitment of the personnel that will offer the services and activities stipulated in the THIRD clause of this Contract … …"

Tellingly, Defendant Keleher acknowledges that the "'no subcontracting' clauses" in PRDE's contracts with C&P and BDO "do not allow the contractor to subcontract the duty of performance of the contract to [sic] third party." Docket No. 433 at 3. Yet, without anywhere providing a definition of what it means to "subcontract," Defendant Keleher claims that the contracts "do not preclude the contractor from employing independent contractors to assist the contractor in the contractor's performance of the contract." *Id.* In reliance of this proposition, she points to language in the C&P contract which allows C&P to "invoice [PR]DOE for the work of each 'person or employee," and makes C&P "responsible for 'hiring and/or recruiting personnel"; she also points to similar language in the BDO contract which allows BDO to "invoice for time incurred by each 'employee or resource,' and makes reference to "'personnel recruited' by BDO." *Id.* at 8-9. These arguments are misplaced.

First, inasmuch as Defendant Keleher argues that she lacked the specific intent to defraud because she reasonably interpreted the contract to permit the conduct which the superseding

indictment alleges is criminal, the argument is not ripe for disposition absent a factually developed trial record. *See, e.g.*, *United States v. Liberto*, No. RDB-19-0600, 2020 U.S. Dist. LEXIS 188034, at *19-24 (D. Md. Oct. 9, 2020) (denying pretrial motion to dismiss wire fraud counts stemming from allegation that defendant defrauded Postal Service of over $2 million by causing contractor to conceal the use of subcontractors so that it could submit invoices in excess of the amount pain to said subcontractors, and rejecting the argument that defendant's allegedly criminal conduct was based on a reasonable interpretation of the contracts at issue because such a question implicated factual issues which "must be left to the jury"); *United States v. Bryant*, 556 F. Supp. 2d 378 (D.N.J. 2008) ("[W]hen faced with a motion to dismiss an indictment based on the ambiguity of a contract, several courts have held that the issue is properly deferred until *after* the court has the opportunity to consider the government's presentation of pertinent extrinsic evidence.") (citing cases); *cf. United States v. Attick*, 649 F.2d 61, 64 (1st Cir. 1981) (affirming conviction of defendant who submitted false bank statements to obtain bank loan, while rejecting his argument that statements were true in light of his interpretation of a contract because "[u]nder Rhode Island law governing the interpretation of contracts…the meaning of the terms in an agreement depends upon the understanding of the parties, determined from the words of the contract and the circumstances surrounding the choice of those words, including representations made in the course of the negotiations.").

Second, PRDE's contracts with C&P and BDO state that they are entered into under the laws of the Commonwealth of Puerto Rico. Consequently, they must be construed through the prism of Puerto Rico law. Defendant Keleher overlooks this fact, and in so doing draws a false distinction between the terms "independent contractor" (which she concedes Individual C was) and "subcontractor" (which she argues Individual C was not). *See generally* Docket No. 433. But

an application of the long-standing definition of "subcontractor" found in Laws 111 and 388 to the facts alleged in the indictment makes clear that the term "subcontractor" means "any person or persons, who as independent contractors [*i.e.*, Individual C], do *any* part of the work awarded to the contractor" [*i.e.*, C&P and BDO]. *See Bethlehem Steel*, 140 F.3d at 320 (emphasis added). Any interpretation that would allow the subcontracting of services to independent contractors would leave the "no subcontracting" provisions empty and meaningless, and would run contrary to the principle of interpreting government contracts strictly which is enshrined in Puerto Rico law.

To support her claim of factual innocence, Defendant Keleher mis-relies on *Itzep v. Target Corp.*, No. SA-06-CA-568-XR, 2010 U.S. Dist. LEXIS 55185 (W.D. Tex. June 4, 2010), civil case having nothing whatsoever to do with the sufficiency of an indictment's allegations, the pleading requirements for alleging a wire fraud, or the circumstances under which it would be appropriate to grant a pretrial motion to dismiss an indictment. Docket No. 433 at 6-10. She cites *Target* in a misguided effort to draw an analogy between the "no subcontracting" provision in the contract at issue in that case, and the "no subcontracting" provision in the PRDE contracts at issue here. *Id.*

Target involved a claim brought under the Fair Labor Standards Act ("FLSA") against both Target, Inc. and Jim's, the entity which Target contracted to perform cleaning maintenance work. The plaintiffs claimed that both Target *and* Jim's failed to pay them overtime wages in violation of the FLSA. Target subsequently filed a cross-claims for breach of contract and indemnification against Jim's (i.e., the contractor), arguing, in relevant part, that Jim's breached contractual "provisions requiring it to hire its cleaners as employees rather than independent contractors." The contract at issue in *Target*, however, specifically referred to the "contractor" as Jim's "agents, servants, employees, assigns, *independent contractors*, or anyone else retained by Contractor for

the performance of Contractor's obligations under this Agreement." *Id.* at *33. The court held that Jim's did not breach the "no subcontracting" provision of its contract with Target because it considered the plaintiffs as "*employees* of Jim's" as a matter of law. *Id.* at *13. The court did, nevertheless, conclude that Jim's "treatment of its employees as independent contractors was a violation of applicable wage and hours laws, and thus breached the contract [with Target] in that regard." *Id.* at 11.

Unlike the plaintiffs in *Target*, no defendant in this case claims that either Individual C, Defendant Velazquez, or any other "independent contractor" was an actual employee of the entities that contracted them. Additionally, unlike the contract at issue in *Target*, none of the contracts at issue here, equate a "contractor" with an "independent contractor."[8] Finally, *Target* does not touch upon Puerto Rico law which, as previously discussed, requires government contracts for professional services to be interpreted strictly. In so interpreting the contracts at issue here, Defendant Keleher's arguments of what certain words *could* mean fizzles.

[8]In fact, the Spanish words for "independent contractor"—*contratista independiente*—appear nowhere in any of the contracts at issue in this case.

b. *Defendant Scherrer*[9]

Defendant Scherrer boldly proclaims that he "was *entitled* to hire an independent contractor to work on BDO contracts," yet claims there was no subcontracting arrangement between BDO and Defendant Velazquez or any other individual that ran afoul of the "no subcontracting" provisions in BDO's contracts with either PRDE or ASES. Docket No. 415 at 27. He claims that "the prosecution's theory rests upon a flawed understanding of a commonly define [sic] term, the meaning of 'sub-contracting.'" *Id.* Yet he overlooks that the term has a very specific meaning under Puerto Rico law, *see supra*.

Disputing the facts rather than the adequacy of the allegations, Defendant Scherrer claims that:

> "[h]ad the work been subcontracted, BDO would have delegated a third party the responsibility to complete part of the project and the discretion as to how it should be done. For example, a general contractor building a house may sub-contract specialized work like plumbing or electrical for others to do."
>
> Docket 415 at 27.

Rather than use a made-up example, let us apply the factual allegations in the superseding

[9] Defendant Scherrer rehashes the same arguments as to why he believes Counts 50-70 are defective in his motion to dismiss filed at Docket No. 414, and his motion to dismiss filed at Docket No. 415. *Compare* Docket No. 414 at 14-18, *with* Docket No. 415 at 27-34. Inasmuch as the motion filed at Docket No. 414 is designed to be specifically tailored to suggest that no conviction may lie based on guilt by mere association, the United States agrees. Indeed, the counts in which Defendant Scherrer is charged not only plead statutory language, but also describe conduct on the part of Defendant Scherrer; he, himself, acknowledges as much. *See* Docket No. 414 at 30 (enumerating *some* actions of Defendant Scherrer described in the superseding indictment). Any notion that the superseding indictment alleges mere guilt by association is belied by specific allegations of Defendant Scherrer's conduct, and the factual descriptions of the schemes in which he is charged. *See* Docket No. 368 at ¶¶ 64, 66-80, 89-90. Nothing more is required. *See, e.g.*, *United States v. Keleher*, No. 20-19 (FAB), 2020 U.S. Dist. LEXIS 225991, at *7 (D.P.R. Dec. 1, 2020) (Besosa, J.) ("At the indictment stage, the government need not 'show,' but merely must allege, the required elements. When a defendant seeks dismissal of the indictment, the question is not whether the government has presented enough evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense.") (citations omitted).

indictment to the definition of the term "subcontractor" under Puerto Rico law:

> Subcontractor – includes any person or persons [*e.g.*, Alberto Velazquez/Azur and others], who, as independent contractors [conceded by Defendant Scherrer] do any part of the work awarded to the contractor [also conceded by Defendant Scherrer].

See Bethlehem Steel, 140 F.3d at 320.

Glaringly missing from Defendant Scherrer's motion is any reference to *Bethlehem Steel* or Puerto Rico Laws 111 and 388. Instead, he cites other authorities that define "subcontractor" and claims that these definitions constitute the term's "common and ordinary meaning." Docket No. 415 at 28-30. In so doing, Defendant Scherrer misconstrues the legal concept of "subcontracting," conflating it with that of an "assignment." Specifically, Defendant Scherrer argues that because the responsibility of performing the services under its contracts remained with BDO, BDO's use of independent contractors such as Defendant Velazquez does not constitute subcontracting:

> "Because BDO remained responsible for all contractual obligations on the contract Velazquez worked on, he was not a subcontractor of any BDO contracts – his relationship to BDO's contracts was equivalent to that of BDO's employees."
>
> Docket No. 415 at 30.

This argument is contrary to law.

Subcontracting is a distinct legal concept than an assignment, also known as transfer of rights (and known in Puerto Rico contract law as *"cesión"* or "*asunción de contratos*"). *See Goya de Puerto Rico v. Rowland Coffee*, 206 F. Supp. 2d 211 (D.P.R. 2002). In an "assignment," all rights and obligations under a contract are transferred from the assignor to the assignee, with the consent of the obligor. *Id.* at 217. It is an arrangement that needs the consent of three parties—the assignor, the assignee, and the obligor. *Id.* "The consent of the obligor is of essential importance because the liberation of the assignor as a debtor

of the party with whom [sic] initially had contracted can only be obtained with his will." *Id.*at 218. In a subcontracting scenario, by contrast, the contractor remains responsible for all of its obligations under a contract, including those obligations which it has delegated to a subcontractor. *See, e.g.*, *Gen. Ship Corp. v. United States*, 634 F. Supp. 868, 869 (D. Mass. 1986) ("Prime contractors alone are responsible for the work of the subcontractors.").

Bayou Steel Corp. v. National Union Fire Ins. Co., 642 F.3d 506 (5th Cir. 2011) aptly illustrates the concept of subcontracting.[10] This case involved a steel company (Bayou) that entered into a contract with cargo hauling company (Memco) to transport cargo from Louisiana to Illinois on one of Memco's barges. The agreement with Memco did not contemplate services for offloading the cargo from Memco's barge. For this service, Bayou entered into an entirely separate contract with Kindra, a stevedoring, to offload the cargo in Illinois. During the course of Kindra's offloading of Bayou's cargo from Memco's barge, an employee of Kindra was seriously injured. The ensuing litigation centered on whether Kindra was Bayou's subcontractor, in which case an insurance policy provision excluding coverage for injuries sustained by employees of Bayou's subcontractor's would have been triggered. The Fifth Circuit disagreed with the district court's conclusion that Kindra was Bayou's *subcontractor*, holding that it was its

[10] Defendant Scherrer cites *Bayou Steel v. Evanston Ins. Co.*, 2010 U.S. Dist. LEXIS 59588 (E.D. La. June 9, 2010), *rev'd by* 642 F.3d 506 (5th Cir. 2011), to underscore that the court "relied on numerous dictionary definitions of 'subcontractor.'" Docket No. 415 at 29. Defendant Scherrer, however, omitted that the decision he cites settled on the following definition of subcontractor—"a subcontractor is simply some person hired to do part of another person's work." The Fifth Circuit concurred with this definition. *See Bayou Steel*, 642 F.3d at 510.

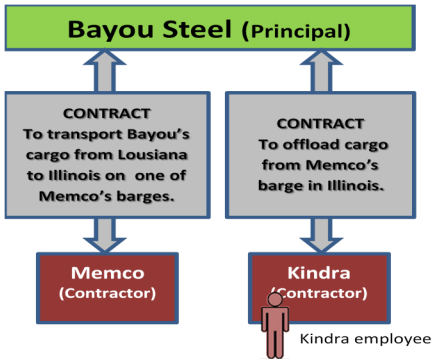
[11] To provide a visual illustration:

contractor. That is, the Fifth Circuit held that Bayou was a principal vis-à-vis Memco, and was also a principal vis-à-vis Kindra, reasoning that an "indispensable prerequisite to sub-contractor status is the pre-existence of a primary contract, i.e., an agreement between a principal party (the paying party) and a prime contractor (the performance party)." *Bayou Steel*, 642 F.3d at 511.[11]

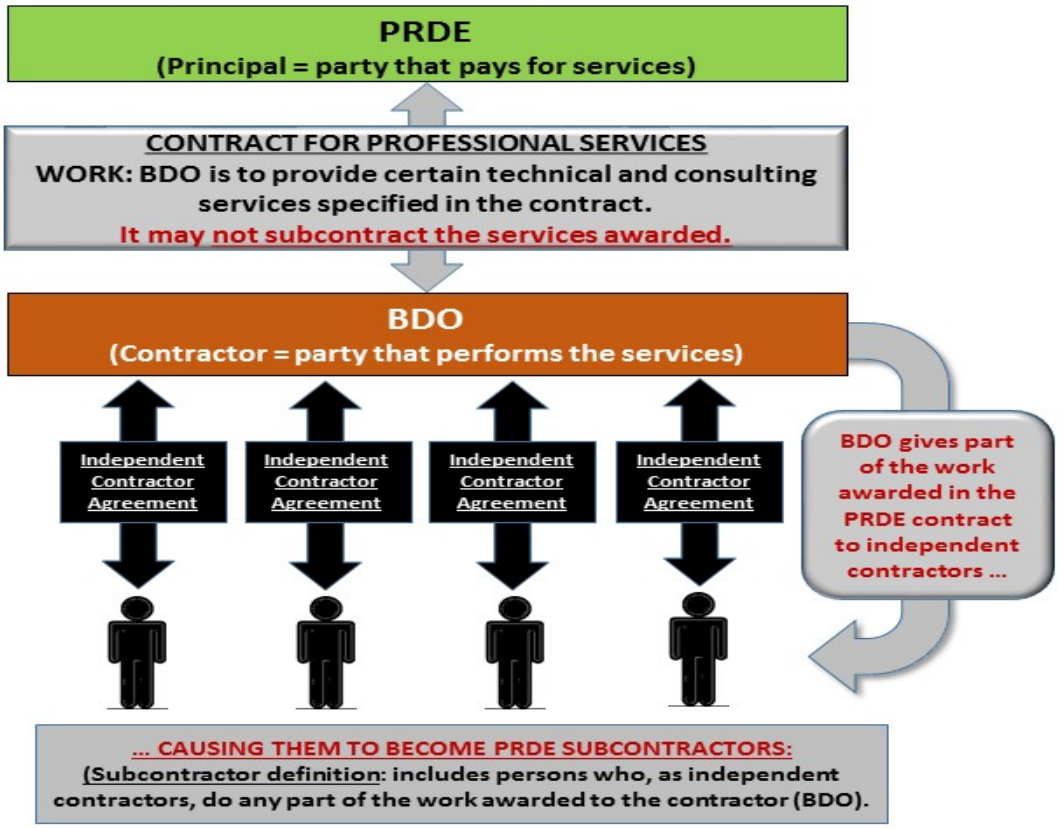
The teaching of *Bayou* is that not all independent contractors are subcontractors, only those that perform work that is awarded in a primary contract to a contractor. *See also Walter Oil & Gas Corp. v. Safeguard Disposal Systems, Inc.*, 901 F. Supp. 931 (E.D. La. 1996) (recognizing that the "terms 'subcontractor' and 'independent contractor' are not mutually exclusive because a subcontractor may or may not have an agency agreement with the contractor").

Here, the superseding indictment makes clear (and Defendant Scherrer concedes) that Defendant Velazquez was an independent contractor of BDO who performed services under BDO's contracts with PRDE and ASES. Applying the principles of *Bethlehem Steel*, *Bayou Steel*, and *Water Oil & Gas* makes clear that, as alleged in the superseding indictment, BDO was a contractor vis-à-vis PRDE and ASES. And Defendant Velazquez

[11] To provide a visual illustration:



and the other BDO "independent contractors" to whom BDO delegated tasks under its contracts with PRDE and ASES were subcontractors,[12] unauthorized to perform services under BDO's contracts with these government entities. A visual illustration makes the point:



i. Not a mere breach of contract

Notwithstanding Defendant Scherrer's argument to the contrary, the superseding indictment does not pretend "to turn a supposed civil breach of contract in which there was no injury into a federal crime." Docket No. 415 at 26. Defendant Scherrer's own acknowledgment

[12] BDO delegated services under its government contracts to individuals that were employees of temporary service companies, such as Macoss and Adecco, causing said companies, who were independent contractors of BDO to become unauthorized subcontractors.

that "BDO's arrangement with Velazquez …*predated* and was not specific to the BDO contracts he worked on," undercuts his argument that the indictment alleges, at most, a mere civil breach of contract. *Id.* at 30 (emphasis added). As alleged in the superseding indictment, Defendant Scherrer knew as early as March 9, 2017 that Defendant Velazquez would be "working as a contractor on in a Project in Education." Docket No. 368 at ¶ 69. Yet he signed professional services contracts with PRDE on BDO's behalf on *multiple* occasions *after* this date acknowledging the subcontracting prohibition knowing that BDO would not comply, *id.*at ¶ 64 ; and he did the same in signing professional services contracts with ASES on BDO's behalf, *id.* at ¶ 66. Under these circumstances, the superseding indictment alleges not a mere breach, but a calculated misrepresentation intended to deceive.[13] *See, e.g.*, *United States ex rel. O'Donnell v. Contrywide Home Loans, Inc.*, 822 F.3d 650, 660 (2d Cir. 2016) ("Failure to comply with a contractual obligation is only fraudulent when the promisor *never intended* to honor the contract.") (emphasis in original). Based on the facts alleged in the superseding indictment, Defendant Scherrer is adequately on notice that the United States intends to prove that "he never intended to honor" the contracts he signed on BDO's behalf and knew that BDO would breach these contracts when he signed them.

ii. *Getting what one bargains for*

Without citing a single case, statute, or other legal authority, Defendant Scherrer suggests that the Counts 50-70 should be dismissed because "the use of Velazquez did not cost the government more than a comparable BDO employee, so there can be no scienter of fraud to deprive the government of property." Docket No. 415 at 33-34. This argument is factual, and consequently has no place in a motion to dismiss an indictment. *Guerrier*, 669 F.3d at 4. More importantly, the

[13] In the subcontracting scheme involving Defendant Jover,

argument is legally meritless for the same reasons stated in response to Defendant Keleher's motion to dismiss, *see* Section II.B, *supra*.[14] *See also Leahy*, 464 F.3d at 780; *Bunn*, 26 Fed. Appx. at 143; *Richter*, 796 F.3d 1173; *Granberry*, 908 F.2d at 280; *Dingle*, 2021 U.S. Dist. LEXIS 49685.

iii. *The subcontracting scheme is adequately alleged*

While the United States has made a conscious effort to avoid repetitious argument, this point cannot be repeated enough—"the requirements of an indictment are simple and few." *Acevedo-Vila*, 2009 U.S. Dist. LEXIS 2729, at *6.

Defendant Scherrer does not argue that Counts 50-70 fail to allege the elements of wire fraud. Nor can he. Counts 50-70 properly allege that Defendants Scherrer and Velazquez participated in a scheme to defraud PRDE and ASES by depriving said agencies of moneys in connection with their contracts with BDO. Docket No. 368 at ¶ 89. These counts further allege that Defendants Scherrer and Velazquez "*caus[ed]* BDO to invoice PRDE and ASES for subcontractor services, *knowing* that said contracts expressly prohibited BDO from subcontracting its services, *causing* BDO to *misrepresent* Velazquez as a BDO Manager and Senior in its invoices to PRDE, and as a BDO Principal in its invoices to ASES," when in fact he was neither. *Id.* (emphasis added). Finally, Counts 50-70 allege that Defendants Scherrer and Velazquez caused

[14] For these same reasons, Defendant Jover's argument that Counts 91-98 should be dismissed because "ASES received the services it bargained for" is also meritless. And his reliance on *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) to suggest otherwise is misplaced because *Regent* involved the reversal of a *trial* conviction, not the sufficiency of an indictment's allegations.

the transmission of interstate wires "for the purpose" of executing the scheme.[15] *Id.* at ¶ 90.

c. *Defendant Jover*

Many of Defendant Jover's arguments in support of dismissal of Counts 91-98 are repetitive of those which have already been addressed. Defendant Jover does, nonetheless, raise three issues warranting a specific response.

First, contrary to what he claims, ASES did not "receive the services it bargained for," Docket No. 413 at 3. ASES did *not* bargain for subcontractor services, and certainly did not bargain for the services of a subcontractor (*i.e.*, Defendant Velazquez) disguised as an IGS partner. Docket No. 368 at ¶ 123.

[15] In relation to the PRDE and ASES contracts, BDO used individuals with whom BDO entered into Independent Contractor Agreements ("*Contratos de Contratista Independiente*," in Spanish). To give the Court an idea of the pervasiveness and scope of the scheme, in 2018 alone, BDO invoiced $1,035,483 for services provided by six of its independent contractors, including Individual C (but not defendant Velazquez), as shown below:

A BDO Independent Contractors	B Invoiced by BDO to PRDE	C Paid by BDO to Independent Contractor	D Difference (B minus C)
INDIVIDUAL C	$117,584	$49,510	$68,074
CBB	160,743	66,322	94,421
ICF	201,743	55,957	145,786
JL	147,072	28,455	118,617
AM	205,746	32,698	173,048
ELDC	202,595	113,906	88,689
Totals	**$1,035,483**	**$346,848**	**$688,635**

BDO also contracted with two companies, Adecco and Macoss, for provision of temporary employees that BDO used to service its contracts with PRDE. As to the ASES contract, without any permission from ASES to do so, BDO entered into a Subcontractor Agreement with a company known as CONECTICS, which in turn, subcontracted two individuals to provide services for ASES. All the individuals providing services in the manner described above were represented as BDO employees in invoices to PRDE and ASES in the manner described in paragraph 86 of the indictment.

Docket 413, at 3. Jover fails to recognize that ASES did not bargain for subcontractor services, but expressly forbade them, unless written authorization was provided by ASES.

Second, Defendant Jover's claim that the "contracts themselves contemplated that IGS *would* use contractors," Docket No. 413 at 5, is inaccurate. IGS's contract with ASES prohibited the subcontracting of its services, *unless* ASES provided written approval.[16] That the contracts contemplate that IGS *could* use contractors with "the written approval of ASES" does not mean, as Defendant Jover states, that the contracts contemplated that IGS *would* use subcontractors. In any event, IGS "*never* obtained written approval from ASES to subcontract any services under its contracts with ASES" during 2017 and 2018. Docket No. 368 at ¶ 120.

Third, Defendant Jover's argument that "[n]o deception is alleged that persuaded ASES into contacting [sic] IGS," Docket No. 413, is unavailing. The United States recognizes that a mere breach of contract will not sustain a wire fraud conviction. But the subcontracting scheme alleged in Counts 91-97 is *not* premised on a mere breach of contract theory. Nor is it premised only on a theory that IGS fraudulently induced ASES into contracting with it. Rather, the scheme is premised on that allegation that Defendants Jover and Velazquez "caused IGS to invoice ASES for services contracted by IGS to Velazquez and others, *while misrepresenting Velazquez in IGS invoices as an IGS Partner, and misrepresenting other IGS contractors as employees of IGS,* in violation of IGS's contracts with ASES, which expressly prohibited IGS from subcontracting the services under the contracts." Docket No. 368 at ¶ 123 (emphasis added). Thus, the sufficiency

[16] The "no subcontracting" provision in IGS's contract with ASES, Contract 2017-000020, reads as follows:

> "10. Neither this Agreement, nor the services to be provided hereunder, may be assigned or subcontracted without the written approval of ASES. The request to contract a third party must specify the matters in which he/she will intervene and must be submitted in writing."

of Counts 91-97 does not turn on whether the superseding indictment alleges that Defendant Jover intended for IGS to breach its contract with ASES at the time the contracts were entered into.

To conclude, Counts 91-97 sufficiently allege: (1) that Defendants Jover and Velazquez "schemed to defraud and deprive ASES of its moneys," Docket No. 368 at ¶ 123; (2) that Defendants Jover and Velazquez used "false and fraudulent pretenses, representations, and promises," *id.* at ¶ 124; (3) facts pertaining to specific misrepresentations, *id.* at ¶ 123; and (4) that Defendants Jover and Velazquez caused interstate wire communications to be transmitted "for the purpose of executing" the scheme, *id.* at ¶ 124. These allegations more than suffice both to apprise Defendant Jover of the nature of the accusations, and to allow him to plead a conviction or acquittal in bar of future prosecutions.

D. Defendant Scherrer's motion to dismiss the Counts 25-48 (the lobbying services scheme)

Defendant Scherrer claims that he "was *entitled* to have BDO pay Velazquez a commission for business development and this did not violate any prohibition on lobbying." Docket No. 415 at 10 (emphasis added). What is "truly remarkable" is not this prosecution, as Defendant Scherrer claims. Docket No. 415 at 10. It is his unapologetic suggestion that the federal government should idly watch as a private entity (BDO) pays a political operative (Defendant Velazquez) a 10% contingency fee for government contracts he generates—contracts that are funded with federal money. Contrary to what Defendant Scherrer professes, the United States has not gone to "great lengths…in search of a crime against" against any defendant. The allegations in the superseding indictment represent an effort to hold all defendants accountable for alleged violations of federal law, nothing more and nothing less.

Defendant Scherrer raises four arguments in support of his motion to dismiss Counts 25-48: (1) the payment of lobbying fees "was constitutionally protected"; (2) the anti-lobbying

provision of a Puerto Rico law cited in the superseding indictment, Article 17 of Law 103 of 2006, is irrelevant; (3) lobbying has a meaning different from what the superseding indictment suggests; and (4) the anti-lobbying provisions the PRDE contracts described in the superseding indictment and in Law 103 are inapplicable to the commissions that BDO paid Velazquez. For the reasons that follow, these arguments are meritless.

1. The superseding indictment does not seek to punish any constitutionally protected conduct

Contrary to what Defendant Scherrer argues, there is no First Amendment right to enter into fee agreements that are contingent on the success or failure of procuring government contracts, and any suggestion to the contrary flies in the face of Supreme Court precedent dating back to the 19th Century. *See Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314 (1853) (invalidating contingency fee contract between railroad company and an individual who did not reveal he was acting on behalf of corporation before Virginia legislature, stating that "all contracts for a contingent compensation for obtaining legislation, or to use person or any secret or sinister influence on legislators, is void by the policy of the law."); *Providence Tool v. Norris*, 69 U.S. 45 (1864) (invalidating fee agreement between contractor and individual who procured contract with the War Department that was contingent on the number of muskets delivered, reasoning that [a]greements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.") (emphasis added); *Hazelton v. Sheckells*, 202 U.S. 71 (1906) ("The general principle was laid down broadly in …*Norris* that an agreement for compensation to procure a contract from the Government to furnish supplies could not be enforced irrespective of the question of whether improper means were contemplated or used for procuring it."); *see also Bradley v. Am. Radiator & Standard Corp.*, 159 F.2d 39, 40 (2d Cir. 1947)

(invalidating contingency fee arrangement involving lobbying Army for a contract to supply weapons components based on executive order that required said awarded government contractors to guarantee that they did not hire lobbyists on a contingency fee basis to secure the contract).[17]

If, as Defendant Scherrer claims, contingency fee arrangements for procuring government contracts constitute protected activity under the First Amendment, there are a number of longstanding federal statutes waiting to be struck. *See, e.g.*, Federal Procurement Statute, 41 U.S.C. § 254(a) (requiring government contracts contain "suitable warranty" that, with some exceptions, contingent fees or commissions have not been used to obtain any contract other than a contract awarded based on sealed-bid procedures); Lobbying Disclosure Act, 2 U.S.C. § 1601 *et seq.* (regulating lobbying activities efforts to influence federal government); Armed Services Procurement Act, 10 U.S.C. § 2306(b) (requiring contract awarded under the statute to contain warranty that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business); Byrd Amendment, 31 U.S.C. § 1352 (prohibiting use of appropriated funds to pay any person for influencing or attempting to influence legislative or executive branch). These statutes all enjoy a presumption of constitutionality, *see Bowen v. Kendrik*, 483 U.S. 1304 (1987), and none—to date—has been struck.

BDO's obligation not to use the funds it received to pay lobbying services was part of the terms and conditions of contracts and contract amendments it negotiated with PRDE. By agreeing

[17] Circuit courts have more recently recognized the continuing validity of the holding in *Norris*. *See, e.g.*, *Midway Leasing, Inc. v. Wagner Equip. Co.*, Nos. 19-2099, 19-2108, 2021 U.S. App. LEXIS 476, at *6 (10th Cir. Jan. 8, 2021) (rejecting the argument "that the U.S. Supreme Court has expressly rejected the common law's prohibition on contingency fees for legislative lobbying.").

to the contracts' terms and conditions, Scherrer promised that BDO would not use the funds it received under the contracts for the payment of lobbying services. However, this was an empty promise, since, before signing the contract amendment with PRDE on March 14, 2017, he had already in place a contingency fee agreement with Velazquez to pay Azur for lobbying services for obtaining any contracts for BDO. Scherrer, on six (6) occasions between November 2016 and March 2019, signed contracts and contract amendments with PRDE reaffirming said certification and false promise that no lobbying services would be paid with said funds.

Under Puerto Rico law contracting parties are free to establish the clauses and conditions they deem advisable, "provided they are not in contravention of law, morals or public order." Article 1207, Puerto Rico Civil Code, cited in *Ysiem Corp. v. Commercial Net Lease Realty, Inc.*, 198 F.Supp.2d 110, 115 (D.P.R. 2002). As a general rule, all rights are waivable, except when the waiver is contrary to law, the public interest or order, or prejudicial to third parties. Article 4, Puerto Rico Civil Code, 31 L.P.R.A. sec. 4. *See Ponce Gas Service Corp. v. J.R.T.*, 104 D.P.R. 698, 702 (1976) (Unless a prohibition or limitation by the law, rights are waivable and transacted). First Amendment rights may also be waived by contractual provisions. [18]

Scherrer's First Amendment argument, however, takes a tailspin by stating that "the prosecution is infringing upon the First Amendment Rights of BDO to petition the government." (Docket 415, at 17). Nowhere does Scherrer allege any such infringement upon his right to do so.

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[18] See discussion in *Janus v. American Federation of State, County and Mun. Employees, Council 31*, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018):

> "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence." (citations omitted) Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Janus*, 138 S. Ct. at 2486.

BDO is not a defendant in this case and Scherrer offers no authority that would allow him to transfuse another person's First Amendment rights as a defense to his wire fraud charges. Scherrer, as part of a negotiated contract, agreed to comply with its terms and agreed that BDO would not use any of the public funds received from PRDE for the purpose of paying for lobbying services. Said clause created an obligation for BDO not to use moneys paid by PRDE to pay for said purposes. The contract did not create any obligation that would limit Scherrer's First Amendment rights.

The indictment alleges that on March 14, 2017 and subsequently, whenever Scherrer signed a contract or contract amendment with PRDE, he certified a promise that he was not going to keep: that no moneys received under the contract with would be used to pay for lobbying services. These false promises were made to secure PRDE contracts for BDO. Fraudulent statements are not protected by the First Amendment. "[I]t is well settled that the First Amendment does not protect fraud." *United States v. Philip Morris USA Inc*., 556 F.3d 1095, 1123 (D.C. Cir. 2009), citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (government "may, and does, punish fraud directly"). See *United States v. Harkonen*, 510 Fed.Appx. 633 (9th Cir. 2013) (press release regarding clinical drug trials, for which defendant was charged with wire fraud, was fraudulent, and thus the release was not protected by the First Amendment).

Furthermore, any determination as to whether BDO waived such a right is a determination of fact, which is a matter that is to be determined at trial by the jury and not susceptible to a pre-trial motion to dismiss the indictment. The United States need not belabor the point. Defendant Scherrer's argument as to the "constitutionally protected" status of his alleged criminal conduct is meritless because it has no basis in law.

2. Article 17 of Law 103 of 2006

On May 25, 2006, the Puerto Rico Legislature promulgated Law 103 of 2006, the 'Act for Fiscal Reform of 2006" *("Ley para la Reforma Fiscal de 2006,"* in Spanish). The purpose of this law was, among other things, to limit the use of public funds to pay for professional lobbying services. Said law was in effect during the period charged in the superseding indictment. Section 17 of Law 103, which the superseding indictment quotes, Docket No. 368 at ¶ 63, reads as follows:

> **Use of Public Funds for the Payment of Professional Lobbying Services.**
> The use of public funds to defray the cost of professional lobbying services shall be limited to those services whose finality is only and exclusively the attainment of federal funds or that legislation that promotes the economic welfare of Puerto Rico. Any contract for these services shall have to produce a greater amount of federal funds or benefits than the amount of public funds disbursed to cover the amount of the contract. If otherwise, the amount shall be automatically cancelled, when its effectiveness is for more than a year. Likewise, upon its expiration, the renewal thereof shall be prohibited if during its term it has not produced a sum of federal funds or benefits greater than the cost incurred for the services.

According to Defendant Scherrer's misguided reading, the statute is "irrelevant" because "it applies to *government agencies* employing someone to provide the government with lobbying services to obtain federal funds or benefits." Docket No. 415 at 6. The critical flaw with this reasoning is that it overlooks the provisions for payment of lobbying services in contracts with PRDE. The first clause of such provisions largely tracks the language of the aforementioned law. The second clause, however, contains the following language:

> "The SECOND PARTY [i.e., BDO] certifies that: … (b) the funds assigned under this contract will not be used for the *payment* of lobbying services, without distinction of their purpose."

This second clause, only makes sense if read in conjunction with the clause immediately preceding it, which cites Section 17 of Law 103. If Law 103 were irrelevant, as Defendant Scherrer claims, then there would be no need for BDO to certify anything when it entered into its contracts with PRDE.

3. Definition of lobbying

Defendant Scherrer argues that "it is clear the contracting parties did not understand the term [lobbying] to include BDO paying Velazquez commissions for business development." Docket No. 415 at 13. The United States begs to differ, which further underscores the need for a trial to resolve factual disputes.

Be that as it may, the term lobbying is not as ambiguous or confusing as Defendant Scherrer wishes it were. He claims that "[t]he traditional definitions of 'lobbyist' and 'lobbying' are restricted to efforts to influence *legislation* before a *legislature*."[19] Docket No. 415 at 14. But as Defendant Scherrer acknowledges, irrespective of what the traditional definition may be, or may have been, the PRDE contracts that Defendant Scherrer signed did not merely prohibit using funds under the contract to pay for legislative lobbying. They categorically prohibited paying for lobbying services of *any type*.[20]

Insisting that the common and ordinary meaning of "lobbying" undercuts the prosecution's theory, Scherrer omits any mention of the common and ordinary meaning of the term "lobbyist" found in a federal law that was in effect during 2017, and remains in effect today, the Lobbying Disclosure Act, 2 U.S.C. § 1602.[21] Mention of this law shines for its absence in Scherrer's 42-

[19] It bears mentioning that a case which Defendant Scherrer cites to support his proposition as to what "traditional" lobbying encompasses fits the conduct described in the superseding indictment. *See United Nurses & Allied Professionals v. NLRB*, 975 F.3d 34, 40 (1st Cir. 2020) (citing Merriam-Webster Unabridged Dictionary) (defining "lobby" as "to conduct activities (as engaging in personal contacts or the dissemination of information) with the *objective of influencing public officials* and especially members of a legislative body with regard to legislation and *other policy decisions*") (emphasis added)

[20] The Spanish text reads: "La Segunda Parte certifica que: (a) los servicios objeto de este contrato no incluyen servicios profesionales de cabildeo (lobbying) y (b) los fondos asignados bajo este contrato no utilizarán para el pago de servicios de cabildeo, *sin distinción de su finalidad*." (emphasis added).

[21] The terms "lobbying activities," "lobbying contact" and "lobbyist" are defined in the Lobbying

page brief.

Further buttressing the notion that a fair understanding of the term lobby (or *cabildear*) embraces Defendant Velazquez's conduct in the superseding indictment is the fact that on February 22, 2017, the Puerto Rico House of Representatives approved Project 808 to create a Puerto Rico Government Lobbyist Register. Said project defined the terms "lobbying activities," "lobbying contacts" and "lobbyist" as follows:

Original Spanish text	**English translation**
"(6) Actividades de Cabildeo– significará todos aquellos contactos de cabildeo y sus esfuerzos a favor o en contra de los mismos, incluyendo la preparación y planificación de actividades, indagaciones o cualquier otro trabajo de trasfondo cuya intención, al momento de ser realizado, sea para el uso de contactos y coordinación con las actividades de cabildeo de otras personas."	" (6) Lobbying activities – means all those lobbying contacts and its efforts in favor or against the same, including the preparation and planning of activities, questioning or any other background work whose intention, at the moment it is made, is for use of contacts and coordination with lobbying activities of other persons."
"(7) Contactos de cabildeo– significará cualquier comunicación, oral o escrita (incluyendo comunicaciones electrónicas) dirigidas, hechas o enviadas a algún oficial de la rama ejecutiva u oficial de la rama legislativa, realizada a nombre de un cliente con relación a:	"(7) Lobbying contacts – means any communication, oral or written (including electronic communications) address, made or sent to any official of the executive branch or officer of the judicial branch, make on behalf of a client with relation to:
iii. la administración o ejecución de un programa estatal o política pública (incluyendo la negociación, otorgación o administración de un contrato estatal,	iii. the administration or execution of a state program or public policy (including the negotiation, awarding or administration of a state contract, loan, permit,

Disclosure Act, as follows:

> **"(7) Lobbying activities**
> The term "lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."
>
> **"(8) Lobbying contact**
> **(A) Definition**
> The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to--
>
> > **(iii)** the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license);"
>
> **"(10) Lobbyist**
> The term "lobbyist" means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period."

préstamo, permiso, licencia, o fondos federales; … … …" *"(9) Cabildero – significará cualquier individuo que sea empleado, que actué como agente de o sea retenido por un cliente, y que reciba compensación financiera o de otra índole, por llevar a cabo actividades de cabildeo. Se excluye de esta definición a las uniones, pero no así a cualquier persona o entidad que reciba remuneración alguna y que se entiende es una actividad de cabildeo."*	license, or federal funds; … … …" "(9) Lobbyist – means any individual who is employed, that acts as an agent of or is retained by a client, and that receives financial compensation or of other kind, to perform lobbying activities. Excluded from this definition are unions, but not any person or entity that receives any remuneration and is understood is a lobbying activity."

Although the measure ultimately did not pass, this was not a failed effort to *expand* the definition of lobbying as Scherrer suggests. Far from representing a failed expansion of what it means to lobby, Bill 808's definition of the term was a mere reflection of what is understood to be modern-day lobbying conduct, with much of Bill 808's wording lifted from the Lobby Disclosure Act, a federal statute that has existed since 1995.

4. **The lobbying provisions are applicable to the commissions**

Based on the allegations in the superseding indictment, it is apparent that when Defendant Scherrer signed the BDO-PRDE contracts from March 14, 2017[22] onward, he did so knowing that his certification as to the non-payment of lobbying services was false. This is so, because as alleged in the superseding indictment, *before* March 14, 2017, Defendant Scherrer had already established an agreement with Defendant Velazquez, Under the terms of this agreement, Defendant Velazquez would receive a 10% commission for the contracts he generated for BDO. Docket No. 368 at ¶¶ 69, 72.

Defendant Scherrer confirms the United States' theory in his motion. Specifically, he concedes that:

> "…**BDO paid Velazquez a commission for his work in securing the contract itself**, **work that necessarily preceded BDO's contract with the government**, not for any

[22] On March 14, 2017, Defendant Scherrer signed an amendment to the BDO-PRDE contract, which increased its value by $490,480.00. Docket No. 368 at ¶ 64. As alleged in the indictment, all contract amendments incorporated by reference the certification as to the non-payment of lobbying services. *Id.* at 65.

> services (lobbying or otherwise) that were to be performed under that contract after it was signed. BDO's obligation to pay Velazquez a commission arose from a prior contractual arrangement between BDO and Velazquez (not any Puerto Rico agency) in which Velazquez agreed to help secure work for a commission. The government agencies paid BDO for the work they hired BDO to do under the contracts, which did not involve **the work that BDO retained Velazquez to do in helping to secure that contract**."[23]
>
> Docket 415, at 13-14. (emphasis added).

It is precisely because the Defendant Scherrer's agreement with Defendant Velazquez preceded the signing of the contract between BDO and PRDE that this is not a case of mere breach of contract. The chronology of events described in the indictment makes pellucidly clear what the theory of fraud laid out in the superseding indictment is. Inasmuch as Defendant Scherrer desires to challenge this theory, he should do so before a jury.

A few final points-- Puerto Rico Law 103 limits the use of public funds for two kinds of lobbying activities: (1) those for obtaining Federal funds for Puerto Rico; and (2) those to enact legislation to promote the Island's economic well-being. All other lobbying activities are prohibited from being paid with public funds.

Scherrer claims that Velazquez was a "salesman," not a professional lobbyist and that BDO paid him out of BDO's funds, not public funds. The allegations in the indictment are not dependent on job descriptions, but on conduct. The indictment alleges that Velazquez was paid for his lobbying services and that BDO paid for such services with moneys from its contracts with PRDE and ASES. Money is fungible and Velazquez was paid as public funds were received by BDO for contracts that Velazquez obtained for the company. Scherrer so indicated to the Human Resource Manager:

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[23] This concession by Defendant Scherrer's counsel, acting in a representative capacity, qualifies as a statement of an opposing party pursuant to Federal Rule of Evidence 801(d)(2), which could be introduced against Scherrer at trial during the Government's case-in-chief.

"Here's the commissions invoice. **The way it works is that he (Velazquez) gets paid as we get paid.** This first one that has to do with the $95,000 amendment we will pay him in advance. It will not be the norm." (emphasis added) Paragraph 76 of the superseding indictment.

So much for the notion that Velazquez was a "salesman" on "commission." In any case, the allegations in the superseding indictment contain detailed facts, that place Defendant Scherrer and all charged defendants in a position to assist in their own defense, and know what they are accused of. The forum for a battle of the facts is a courtroom before a jury.

***

For the reasons stated above, defendants' motions to dismiss should be denied.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 26th day of March, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/ José A. Ruiz-Santiago
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