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)

RESPONSE IN OPPOSITION TO DEFENDANT JULIA BEATRICE KELEHER'S MOTION TO STRIKE A PORTION OF THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS
[DOCKET NO. 426]

Without specifically articulating why they are *both* irrelevant *and* prejudicial, Defendant Julia Beatrice Keleher requests that this Court strike the allegations pertaining to Individual B, Individual C, Company D, and her salary. *See generally* Docket No. 426. In the alternative, Defendant Keleher requests that the Court order the United States to provide a bill of particulars concerning these allegations, claiming that her ability to prepare a defense would otherwise be compromised. *See id.*

Defendant Keleher's motion represents an inappropriate attempt to preview the United States' case-in-chief, and narrow the proof it may present at trial. Her motion should be denied because she neither has satisfied her heavy burden of establishing the propriety of striking any of the superseding indictment's allegations, nor has she adequately justified why a bill of particulars is warranted.

I. DISCUSSION

A. Defendant Keleher's request to strike alleged surplusage should be denied

a. Applicable legal standard

Rule 7(d) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may strike surplusage from the indictment." Rule 7(d) exists "to protect the defendant against immaterial or irrelevant allegations in an indictment, . . . which may . . . be prejudicial"' *United States v. Berroa*, 856 F.3d 141, 157 (1st Cir. 2017) (alteration in original) (internal quotation marks and citation omitted). "Language in the indictment which is information the government, in good faith, intends to properly prove at trial cannot be stricken as surplusage, no matter how prejudicial it may be." *United States v. Bravo-Fernandez*, 792 F. Supp. 2d 172, 176 (D.P.R. 2011) (Besosa, J.) (citation omitted).

Courts should refuse to strike surplusage unless "it is clear that the allegations are not relevant to the charge *and* are inflammatory and prejudicial." *United States v. Colón-Ledeé*, 785 F. Supp. 2d 1, 2 (D.P.R. 2010) (McGiverin, M.J.) (citing Charles Alan Wright and Andrew D. Leipold, *Federal Practice and Procedure* § 128 (4th ed. 2008) (emphasis added)). "Logic demands the conjunctive standard: information that is prejudicial, yet relevant to the indictment, must be included for any future conviction to stand and information that is irrelevant need not be struck if there is no evidence that the defendant was prejudiced by its inclusion." *Colón-Ledeé*, 785 F. Supp. 2d at 2 (quoting *United States v. Hedgepeth*, 434 F.3d 609, 612-13 (3d Cir. 2006)). Consequently, a defendant moving to strike alleged surplusage shoulders a "most severe burden" of establishing that the language she seeks to strike "is (1) not relevant to the charges; (2) inflammatory; *and* (3) prejudicial." *United States v. Rezaq*, 908 F. Supp. 6, 8 (D.D.C. 1995) (emphasis in original); *see also United States v. Ervin*, No. 1:11cr7-MHT (WO), 2011 U.S. Dist. LEXIS 37637, at *8 (S.D.

Ala. Apr. 2011) (observing that a defendant must establish that "the contested portions of the indictment" are "irrelevant," and "must *also* show that the challenged language is unfairly prejudicial or inflammatory.") (emphasis added); *United States v. Coffey*, 361 F. Supp. 2d 102, 123 (E.D.N.Y. 2005) ("A motion to strike surplusage from the indictment will be granted only when the movant sustains the heavy burden of demonstrating that the challenged terms are: 1) irrelevant to the crime charged; *and* 2) inflammatory and prejudicial.") (emphasis added). "Because the standard to strike surplusage is so exacting, courts have interpreted it narrowly and alleged surplusage is rarely stricken." *Bravo-Fernandez*, 792 F. Supp. 2d at 176.

b. Defendant Keleher has not satisfied her burden of proving that the challenged allegations are irrelevant, prejudicial, or inflammatory

As alleged in the superseding indictment, Individual C worked as the campaign manager of Individual B, a gubernatorial candidate during the Puerto Rico General Elections of 2016. Docket No. 368 at ¶ 46. Individual B was also an incorporator of Company D, a non-profit organization through which Defendant Keleher sought to be paid for her services as the Puerto Rico Secretary of Education, and through which she sought a salary increase of over $100,000. *Id.* At Individual B's request, and based on his recommendation, Defendant Keleher hired Individual C to work at the Puerto Rico Department of Education (PRDE) but did not do so directly. *Id.* at ¶¶ 46-54. Rather, she caused Colón & Ponce and BDO—two entities which had contracts to provide professional services to PRDE—to subcontract Individual C. *Id.* And she did this notwithstanding the fact that the PRDE's respective contracts with Colón & Ponce and BDO prohibited subcontracting. *Id.*

Defendant Keleher's efforts to ensure Individual C's employment at the request of Individual B lie at the heart of both the subcontracting scheme alleged in Counts 16 through 23, and

the bribery offense alleged in Count 24.[1] Furthermore, the allegations pertaining to Individual B's relationship with Individual C, Individual B's involvement with Company D, and Defendant Keleher's efforts to receive a salary increase through Company D, are relevant to show that Defendant Keleher had a motive to please Individual B, and sought to do so by ensuring employment for Individual C.[2] Under these circumstances, there is no basis to credit Defendant Keleher's claim that the allegations she seeks to strike are "wholly irrelevant," Docket No. 426 at 6. *See Berroa*, 856 F.3d at 157 ("[E]vidence that bears on the question of motive ordinarily has some probative value in a criminal case.") (quoting *United States v. Pires*, 642 F.3d 1, 11 (1st Cir. 2011)); *see also United States v. Cuti*, No. 08 Cr. 972 (DAB), 2009 U.S. Dist. LEXIS 90871, at *26 (S.D.N.Y. Sept. 24, 2009) (denying motion to strike surplusage from indictment upon concluding that challenged language was "relevant to proving motive"); *United States v. Abuhouran*, No. 01-629-01, 03, 2002 U.S. Dist. LEXIS 22905, at *21 (E.D. Pa. Nov. 27, 2002) (holding that "[p]roof of motive is proper" in the context of a motion to strike surplusage from an indictment); *United States v. Marker*, 1994 U.S. Dist. LEXIS 6407, at *32-33 (D. Kan. Apr. 15, 1994) (denying motion to strike surplusage because "the portions of the indictment the defendant [sought] to strike are

[1] As alleged in Count 24, Defendant Keleher facilitated the increase of the value of Colón & Ponce's contract with the PRDE in exchange for Colón & Ponce subcontracting Individual C to provide services to the PRDE. Count 24 incorporates by reference the allegations pertaining to Individual B, Company D, and Defendant Keleher's request for a salary increase. Docket No. 368 at ¶ 59.

[2] Inasmuch as Defendant Keleher wishes to argue otherwise, she should do so before a jury. Additionally, to the extent Defendant Keleher wants to argue that there is a valid legal basis for the Court to exclude such evidence (there is not), she should file an appropriate motion, and the United States will respond.

relevant to understand his intent and motive in structuring the transactions set forth in the indictment as he did.").

Because the allegations pertaining to Individual B, Company D, and the request for a salary increase are relevant to Defendant Keleher's motive to engage in the criminal conduct alleged in Counts 16 through 24, Defendant Keleher cannot satisfy her "most severe burden" of showing that the Court should strike these allegations no matter how prejudicial they may be. *See Rezaq*, 908 F. Supp. at 8; *see also Bravo-Fernández*, 792 F. Supp. 2d at 176. Her motion to strike surplusage should therefore be denied.[3]

B. Defendant Keleher's request for a bill of particulars should be denied

a. Applicable legal standard

Under Rule 7(f) of the Federal Rules of Criminal Procedure, courts "may direct the government to file a bill of particulars . . . [which] [t]he government may amend . . . subject to such conditions as justice requires." "A bill of particulars is a formal written statement by the prosecutor providing details of the charges against the defendant." *United States v. Ellison*, 442 F. Supp. 3d 491, 496 (D.P.R. 2020) (Besosa, J.) (citation omitted). Its purpose "is to provide the accused with detail of the charges against him where necessary to enable him to prepare his defense, to avoid surprise at trial, and to protect against double jeopardy." *Bravo-Fernandez*, 792 F. Supp. 2d at 177. "Courts refuse to grant motions for bills of particulars that are not necessary" to satisfy this purpose.

[3] The United States will not respond to Defendant Keleher's baseless accusation that inclusion of the challenged allegations in the superseding indictment amounts to "mudslinging," "inject[s] politics into the [superseding indictment]," and "toy[s] with the jury's impartiality." Docket No. 426 at 6-7. While the allegations against Defendant Keleher are undoubtedly prejudicial, they are not unduly so because, as explained above, they are probative of the criminal conduct with which Defendant Keleher is charged. *See Bravo-Fernandez*, 792 F.2d at 176; *cf. United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is *only unfair* prejudice which must be avoided.") (emphasis in original).

Ellison, 442 F. Supp. 3d at 496; *see also United States v. Ackerly*, No. 16-10233-RGS 2017 U.S. Dist. LEXIS 188885, at *7 (D. Mass. Nov. 15, 2017) (observing that "because a bill of particulars strictly confines the government's proof at trial within its four corners, judges are reluctant to order particulars which, in their requirement for detail or otherwise, amount to the imposition of a straitjacket on the prosecution.") (internal citation omitted); *id.* (noting that "bills of particulars are rarely granted, at least in federal practice.") (citing *United States v. Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993)).

"A bill of particulars is not an investigative tool for defense counsel to obtain a detailed disclosure of the government's evidence prior to trial." *United States v. Tirado-Menendez*, 301 F. Supp. 3d 300, 305 (D.P.R. 2018) (Besosa, J.); *United States v. Dubon-Otero*, 76 F. Supp. 2d 161, 169 (D.P.R. 1999) (Fusté, J.) (same). Nor is it an appropriate mechanism for a defendant to obtain "disclosure of the government's legal theory or legal conclusions." *Ellison*, 442 F. Supp. 3d at 496 (internal quotation marks and citation omitted); *id.* (noting that "courts deny a request for a bill if the information sought would simply be helpful to the defense rather than strictly necessary to a fair trial.") (internal quotation marks and citation omitted).

In deciding whether to grant a motion requesting a bill of particulars, "courts may consider the complexity of the crime charged, the clarity of the indictment, and the degree of discovery and other sources of information otherwise available to the defendants." *Ellison*, 442 F. Supp. 3d at 496. While indictments "need not be infinitely specific," one that is "sufficiently specific" obviates the need for a bill of particulars. *See id.* Furthermore, "no bill is required if the government has provided the desired information through pretrial discovery or in some other satisfactory manner." *Id.*

b. There is no need for a bill of particulars

As an initial matter, the United States has no obligation "to disclose the precise manner in which the crimes charged in the indictment were committed." *United States v. Kanekar*, No. 17 CR 353(4), 2020 U.S. Dist. LEXIS 25588, at *12-13 (E.D.N.Y. Feb. 12, 2020). What is more, the United States is not required to "recite all its evidence in the indictment, nor is its trial proof limited to the overt acts specified therein." *United States v. Rivera-Donate*, 682 F.3d 120, 131 (1st Cir. 2012) (quoting *United States v. Marrero-Ortiz*, 160 F.3d 768, 773 (1st Cir. 1998)); *see also United States v. Savarese*, 686 F.3d 1 (1st Cir. 2012) ("The government need not recite all of its evidence in the indictment."). Defendant Keleher nonetheless argues that "the Government should be required to provide information detailing Individual B's and Company D's involvement in the alleged scheme in Counts 16 through 23, including their roles in the scheme," and claims that the United States must explain the relevance of her "attempt to increase her salary through Company D to the wire fraud scheme charged in Counts 16 through 23." Docket No. 426 at 8. These arguments are meritless and illustrate that the true purpose of Defendant Keleher's motion is to preview the United States' theory of the case, something which is improper to do through a motion for a bill of particulars. *See Ellison*, 442 F. Supp. 3d at 496.

Be that as it may, the United States understands that the identities of Individual B and Company D are known to Defendant Keleher and her counsel. The relevance of the allegations pertaining to Individual B, Company D, and Defendant Keleher's request for a salary increase are self-evident, particularly when read in light of the discovery the United States has provided. *See, e.g.*, *Ellison*, 442 F. Supp. 3d at 496. And the United States has gone above and beyond its obligations by explicitly articulating that these allegations are probative of Defendant Keleher's motive to engage in the criminal conduct alleged in Counts 16 through 24. *See* Section I.A.b. If

there was ever any doubt, Defendant Keleher should now be on notice that the United States intends to present evidence of the allegations she seeks to strike because it understands that such evidence is probative of motive. The weight to be given to such evidence is properly a matter to be decided by a jury, which will have the final say as to whether United States proves Defendant Keleher's guilt beyond a reasonable doubt.

II. CONCLUSION

Defendant Keleher has failed to meet the legal standard justifying her request to strike what she claims is surplusage. Furthermore, because the superseding indictment, the discovery provided, and the contents of this very document provide more than sufficient information to enable Defendant Keleher to prepare a defense, there are no grounds to warrant a bill of particulars. Accordingly, Defendant Keleher's motion should be denied in its entirety.

RESPECTFULLY SUBMITTED.

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

W. STEPHEN MULDROW
United States Attorney

/s/ Alexander L. Alum
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Assistant United States Attorney

/s/ Jose Ruiz Santiago
Jose Ruiz Santiago
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy of such filing will be emailed to defense counsel of record.

/s/ Alexander L. Alum
Alexander L. Alum
Assistant United States Attorney