IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, V. **JULIA BEATRICE KELEHER**, Defendant.	**CRIMINAL NO.** 20-0019 (FAB)

JULIA BEATRICE KELEHER'S RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION IN LIMINE

I. INTRODUCTION

The Indictment charges Ms. Keleher with seven counts of honest services fraud premised on bribery. In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court unanimously overturned the conviction of the former Governor of Virginia, who had been charged with conspiracy to commit, and committing, honest services wire fraud. The parties agreed, and the Supreme Court accepted, that the elements of honest services fraud alleging a bribe of a public official encompass the elements of 18 U.S.C. § 201(b)(2), the federal bribery statute, which requires that the public official solicit or accept something of value in return for being influenced in the "performance of any official act." *McDonnell*, at 2365; *see also Woodward v. United States*, 905 F.3d 40, 44 (1st Cir. 2018) ("In *McDonnell*, the parties 'agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C. § 201.' It is implicit in the parties' arguments here that we should do the same.") (internal citation omitted). Thus, to convict Ms. Keleher, the Government must prove beyond a reasonable doubt that Ms. Keleher accepted a thing of value intending to take official action in return. Specifically, based on the allegations in the Indictment, the Government must prove beyond a reasonable doubt that Ms. Keleher accepted concessions related to her purchase of an apartment (*i.e.*, a thing of value) intending in return to

provide a letter legally authorizing the transfer of a piece of land adjacent to the Padre Rufo School, believing this to be an official act.

Ms. Keleher is charged in Count Eight with a provision of § 666 that is violated when someone "*corruptly* solicits or demands for the benefit of any person, or *accepts or agrees to accept, anything of value* from any person, *intending to be influenced* or rewarded *in connection with any business*, transaction, or series of transactions *of such*, organization, *government* or agency," a government agency that receives more than $10,000 in federal benefits from a federal program. *See* 18 U.S.C. § 666(a)(l)(B). Thus, Ms. Keleher's conduct must have involved government business, *i.e.*, official government action.

While the Indictment expressly identifies Ms. Keleher's "signing [of] a letter purporting to give 1,034 square feet of the Padre Rufo School to Company C[]" as the official act she committed in exchange for purported benefits associated with her purchase of an apartment, (2020 Indictment at ¶ 21), during the course of pretrial motions practice, the Government pointedly has not contested either that Ms. Keleher, as the Secretary of Education, did not, in fact, have any authority to transfer the land on which the Padre Rufo School sits or that signing a letter endorsing the transfer was not an official act. Instead, the Government has moved *in limine* to bar Ms. Keleher from arguing or presenting evidence that: (1) she never took the official act of ceding any portion of the Padre Rufo School because she lacked the authority to do so; (2) she never intended to perform any official act; and (3) her letter purporting to authorize Company C to begin construction on Antonsanti Street was a meaningless gesture without any legally binding force and, therefore was not an official act, nor did she believe that it was. (*See* Government's *Motion in Limine*, Docket No. 183 at 2.)

Amazingly, the Government not only fails to recognize that such evidence would be dipositive of the charges and would warrant acquittal, but indeed argues that such evidence would be wholly irrelevant to the issues in the case and asks that the Court bar Ms. Keleher from presenting any of this exculpatory evidence. Because the Government's sweeping request has no basis in law, or fact, it must be **DENIED**.

II. FEDERAL RULES OF EVIDENCE 401 AND 403

Evidence is relevant if it "has **any** tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Fed. R. Evid. 401 (emphasis ours). "Evidence may be 'relevant' under Rule 401's definition, even if it fails to prove or disprove the fact at issue—whether taken alone or in combination with all other helpful evidence on that issue." *United States v. Guzman-Montanez,* 756 F.3d 1, 7 (1st Cir. 2014) (quoting *United States v. Candelaria–Silva,* 162 F.3d 698, 704 (1st Cir.1998)).

A trial court may exclude relevant evidence, *inter alia*, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Fed. R. Evid. 403. "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." *United States v. Guzman-Montanez,* 756 F.3d 1, 7 (1st Cir. 2014) (quoting *United States v. Rodríguez–Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)). Evidence produces unfair prejudice when it "invites the jury to render a verdict on an improper emotional basis." *United States v. Breton,* 740 F.3d 1, 14 (1st Cir. 2014) (citations omitted).

III. ANALYSIS

A. The Indictment

On January 14, 2020, Ms. Keleher was charged with Conspiracy to Commit Honest Services Wire Fraud (18 U.S.C. § 1349, § 1343, § 1346), substantive Honest Services Wire Fraud (18 U.S.C. § 1343, § 1346), and Federal Program Bribery (18 U.S.C. §§ 666(a)(1)(B)). The Indictment alleges that Ariel Gutierrez-Rodriguez was a consultant who provided services to Company A, a corporation dealing in real estate and that Company B operated out of the same office and had the same president as Company A. (2020 Indictment ¶¶ 9–10, 14.) Company C owned a luxury apartment complex called "Ciudadela." Individual A was the chief executive officer of Company C. Individual A also served as the president of Company D, a nonprofit that promoted education-related initiatives on the island.

On or about June 7, 2018, Ms. Keleher allegedly signed a lease agreement with a promise-to-purchase term for a two-bedroom apartment in the Ciudadela complex. (*Id.* ¶ 16.) Per the lease-to-purchase agreement, Ms. Keleher was permitted to occupy the apartment until August 15, 2018, for the nominal amount of $1.00. (*Id.*) Ms. Keleher was to then purchase the apartment for $297,500. (*Id.*) She was to receive a discount of $12,000 off the sales price as an incentive bonus for the purchase. (*Id.*) Although the agreement was meant to expire on August 15, 2018, Ms. Keleher remained living in the apartment without paying additional rent until she completed the purchase on or about December 4, 2018. (*Id.*)

In July 2018, Mr. Gutierrez-Rodriguez drafted a letter and sent it to Ms. Keleher; the letter was from Ms. Keleher to Individual A, the CEO of Company C, authorizing Company C to acquire 1,034 square feet of the Padre Rufo School for its business purposes. (*Id.* at ¶ 29.) Ms. Keleher

allegedly caused the letter to be placed on DOE letterhead and then affixed her signature to it. (*Id.*)[1]

In Count One, the Indictment alleges a conspiracy between Mr. Gutierrez-Rodriguez and Ms. Keleher to commit honest services wire fraud. According to the Indictment: "It was a purpose of the conspiracy for [1] JULIA BEATRICE KELEHER *to use her official position* as the Secretary of Education to enrich herself by soliciting and accepting gifts, payments, and things of value from others, known and unknown to the Grand Jury, and for others to enrich themselves *by obtaining favorable official action* for themselves and their companies through corrupt means." *Id.* at ¶ 20 (emphasis added). Specifically, Ms. Keleher allegedly accepted the "receipt of financial benefits in connection with her lease and purchase of an apartment in Ciudadela in exchange for [l] JULIA BEATRICE-KELEHER's signing a letter purporting to give 1,034 square feet of the Padre Rufo School to Company C." *Id.* at ¶ 21. The indictment thus specifies what it characterizes as the alleged official action by Ms. Keleher as follows:

> On or about July 17, 2018, [2] ARIEL GUTIERREZ-RODRIGUEZ sent via email the draft text of a letter addressed to Individual A from [1] JULIA BEATRICE KELEHER authorizing Company C to acquire 1,034 square feet of the Padre Rufo School for its business-related purposes. [1] JULIA BEATRICE KELEHER caused the text to be placed on PR DOE letterhead largely as drafted by [2] ARIEL GUTIERREZ-RODRIGUEZ, and affixed her signature.

Id. at ¶ 29.

[1] The letter signed by Ms. Keleher on PR DOE letterhead was produced by the Government in discovery. A certified translation of the letter is attached as Exhibit A. The sentence in the letter that Paragraph 29 of the indictment characterizes as Ms. Keleher "authorizing Company C to acquire 1,034 square feet of the Padre Rufo School for its business-related purposes" states: "based on the endorsements issued by the Municipality [of San Juan] and the DTOP [the Spanish acronym for the Department of Transportation and Public Works] for the expansion of Antonsanti Street, we hereby endorse your request and we authorize you to proceed with the construction to provide better road way to the Padre Rufo School and to all the residents of the sector."

Counts Two through Seven of the indictment charge substantive honest services wire fraud offenses, with each count specifying a wire allegedly sent in furtherance of the scheme set forth in Count One.

Count Eight re-alleges the paragraphs that are set forth in support of Count One and charges Ms. Keleher with federal program fraud. Count Eight alleges that Ms. Keleher "did corruptly solicit and demand for her own benefit, and accepted and agreed to accept things of value from [2] ARIEL GUTIERREZ-RODRIGUEZ and others known and unknown to the Grand Jury, namely: a lease with a promise to purchase agreement allowing her to occupy an apartment in Ciudadela for $1.00, and a $12,000.00 incentive bonus to purchase an apartment in Ciudadela, intending to be influenced and rewarded in connection with a transaction that involved $5,000.00 or more, that is, Company C's acquisition of 1,034 square feet of the Padre Rufo School from the PR DOE. All in violation of Title 18, United States Code, Section 666(a)(l)(B)." Indictment at ¶ 34.

B. *Evidence of Ms. Keleher's lack of authority to transfer land at the Padre Rufo School is relevant and admissible.*

At trial, the Government must prove beyond a reasonable doubt that Ms. Keleher did, in fact, accept improper concessions on her apartment purchase, which Ms. Keleher disputes, and that she accepted such concessions corruptly because she did so in exchange for action, endorsing the letter regarding the Padre Rufo School, that constituted an "official act" or, at a minimum, that Ms. Keleher believed to be an "official act."[2]

[2] With respect to the charge under § 666 alleged in Count Eight, rather than an "official act," which is required for honest services fraud premised on bribery, the Government must prove that the benefit accepted related to a transaction of, or the business of, the relevant government agency. This requirement is the functional equivalent of official action. *See United States v. Fernández*, 722 F.3d 1, 22 (1st Cir. 2013) (under § 666, "for bribery, there must be a quid pro quo – a specific intent to give or receive something of value in exchange for *an official act*."); *United States v. Carrasco-Castillo*, 442 F.Supp.3d 479, 490 (D.P.R. 2020) ("To sustain a conviction pursuant to section 666, the evidence must establish that Carrasco and Mercado agreed to 'exchange something of value for influence over *some official conduct* of the recipient.'"); *see also United States v. O'Brien*, 994 F. Supp. 2d 167, 187 (D. Mass.

Whether or not Ms. Keleher possessed the authority to cede the land in question is plainly relevant and probative of the latter issue, particularly as to her state of mind when she allegedly committed the offense. Title 18 U.S.C.A. § 201(a)(3) sets forth two requirements for conduct to constitute an "official act." "First, the Government must identify a 'question, matter, cause, suite, proceeding or controversy 'that may be pending' or 'may by law be brought' before a public official." *McDonnell*, 136 S. Ct. at 2368. In order to satisfy this prong, the Supreme Court has confirmed "that a 'question' or 'matter' must be similar in nature to a 'cause, suit, proceeding or controversy.'" *Id.* at 2369. "Second, the Government must prove that the public official **made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so**." *Id*. at 2368 (emphasis ours).

In order for the Government in this case to "identify a 'question, matter, cause, suit, proceeding or controversy 'that may be pending' or 'may by law be brought' before a public official," *id.*, it necessarily will have to introduce evidence at trial detailing the public official or officials before whom the transfer of the Padre Rufo property was pending. Plainly, the fact that such a transfer was not, as a matter of law, within Ms. Keleher's purview as Secretary of the Education is relevant to that inquiry. If it is somehow able to meet this initial prong, the Government will then have to prove, beyond a reasonable doubt, that Ms. Keleher "made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id*. The scope of Ms. Keleher's actual authority over the Padre Rufo property speaks directly to this issue as well, as she could not have "made a decision" or taken "action" on a "question, matter, cause, suit, proceeding, or controversy" as to which she was powerless. Ms.

2014) ("In order to prove a bribery offense under § 666, the government must prove that the bribe-giver intended to effect a *quid pro quo*. Although the language in § 201 and § 666 differ somewhat, it appears that both statutes require an "exchange"—that is, a payment for an *official act*, or course of action, such as a particular vote on a particular piece of legislation.") (internal citations omitted) (emphasis added).

Keleher's objective lack of authority over the Padre Rufo property is likewise probative of whether she subjectively, but mistakenly, believed that she could take some official action on the land in question. That fact that she did not have this authority is evidence that tends to make it less likely that she subjectively believed she had such power.

C. *The Government is bound by its allegation that Ms. Keleher took official action by signing the endorsement letter.*

The Government's motion argues, in part, that Ms. Keleher should be precluded from introducing evidence concerning her lack of authority to transfer the property at issue because: (1) honest services fraud and federal program bribery cover solicitations and agreements to take official action, even where the public official takes no action; (2) honest services fraud and federal program bribery also cover solicitations and agreements even where the public official never intends to perform the official act, provided she simply agrees to do so; and (3) honest services fraud and federal program bribery cover situations where a public official is not actually able to perform the intended official act because she lacks the authority to do so. (Docket No. 183, pp. 2-4.) Each of these arguments ultimately is irrelevant. The Indictment does not allege that Ms. Keleher accepted a benefit agreeing to sign the letter relating to the Padre Rufo School but failed to do so. It likewise does not allege that she accepted a benefit purportedly in return for signing the letter, but never intended to do so. And, finally, it does not allege that she intended to sign the letter but did not do so because she lacked authority to do so. Rather, the Indictment alleges that Ms. Keleher accepted the alleged apartment-related concessions with the intent to endorse the letter pertaining to the Padre Rufo School (the only action it alleges she agreed to take) and that she subsequently did, in fact, take such action by executing a letter pertaining to the property adjacent to the Padre Rufo School. Thus, whether writing that letter was, in fact, official action (or

the business of her government agency, the Department of Education) or, at a minimum, that she believed this to be the case, is relevant, and, indeed, dispositive of the allegations in the Indictment.

Here, the Government charged Ms. Keleher with taking official action, not attempting to do so or accepting a bribe with the mistaken belief that she had the authority to take official action on the land transfer in question. It follows, therefore, that the Government must prove beyond a reasonable doubt that the signature of the letter was official action. The Government's failure to do so must result in Ms. Keleher's acquittal.

The Government seems to suggest in its motion that it plans to pivot from its allegations in the Indictment and instead present evidence, for example, that Ms. Keleher was under the mistaken belief that the signing of the letter was official action. As a matter of law, however, it cannot do so because that would constitute an impermissible variance from the Indictment that would itself require Ms. Keleher's acquittal. *See United States v. Cianci*, 378 F.3d 71, 94 (1st Cir. 2004)("A variance arises when the proof at trial depicts a scenario that differs materially from the scenario limned in the indictment.").

Further, even if the Indictment had charged that Ms. Keleher mistakenly believed that signing the letter was an official act, there is no First Circuit authority that would allow for a prosecution when the official lacks authority to take the official action that was contemplated in return for the benefit received. While the Department of Justice itself has noted that it is "possible *in some circuits* to convict either the giver or the taker of a bribe (or both) even if the public official does not have the power to bring about the result that prompted the bribe," the Justice Manual does not include the First Circuit as one of those circuits. *See* Justice Manual, Criminal Resource Manual § 2044 (citing case law from the 6th, 7th, and 9th Circuits) (emphasis added). Further, the Justice Manual goes on to note: "If, however, the public official has no authority at all to act in the

matter and his or her acts in response to the payment of a bribe are unauthorized and illegal, it has been held that the 'official act' component is lacking. *Blunden v. United States*, 169 F.2d 991 (6th Cir. 1948)." *Id.* Thus, under the Department of Justice's own interpretation of the law, whether the official, in fact, has authority to take the contemplated action is not only relevant, but is dispositive in that it negates an element of the offense.

Moreover, even if that were not the case, the fact that Ms. Keleher objectively lacked the authority to transfer the property at issue would still be relevant under any alternative theory the Government might pursue, because it is evidence that tends to make it less likely that Ms. Keleher subjectively, but mistakenly, believed she had that power. Thus, however the Government may attempt to style its case at trial, the scope of Ms. Keleher's authority as Secretary of Education is relevant and the Government's motion should be denied.

D. *The Government's interpretation of McDonnell is erroneous.*

The Government's motion also must be denied because it relies on an incorrect interpretation of the Supreme Court's decision in *McDonnell*. Specifically, in support of their seemingly new theory of the case, the Government relies upon an excerpt from *McDonell* that states that "a public official is not required to actually make a decision or take an action on a question, matter, cause, suit, proceeding or controversy'[in order to commit honest services fraud]; it is enough that the official agree to do so." *United States v. McDonnell*, 136 S.Ct. 2355, 2370-71 (2016). But what the official must agree to do is to take an "official act."

In *McDonnell*, Government alleged that the former governor of Virginia, Robert McDonnell, took official action when he invited Jonnie Williams, the CEO of Star Scientific, to meetings, introduced him to state employees, arranged meetings, hosted events, and made phone calls to other state officials to endorse and support Star Scientific's pursuit of studies aimed at

eventually securing the Food and Drug Administration's approval of Antabloc, an anti-inflammatory drug. The Supreme Court disagreed and unambiguously held that "[s]imply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, **as long as the public official does not intend to exert pressure on another official or provide advice**, knowing or intending such advice to form the basis for an 'official act.'" *Id.* at 2371 (emphasis ours). In other words, the Supreme Court vacated McDonnell's conviction because setting up a meeting, hosting events, and making phone calls were not official acts. Indeed, if the Government's interpretation of the *McDonnell* decision were correct, and *McDonnell* made evidence of whether the action the public official agreed to take in return for the benefit is an official act irrelevant, the Supreme Court would have simply affirmed McDonnell's conviction.[3]

Ms. Keleher is entitled to adduce evidence at trial that: 1) her signing of the letter was not, and could not have been, an official act; and 2) her acceptance of the concessions in her purchase of an apartment was not corrupt, because she did not believe that she was offering anyone an official act or taking action with respect to the business of the Department of Education.

E. At a minimum, the Government's motion should not be granted before trial and on the current record.

[3] Notably, McDonnell's interactions with businessman Jonnie Williams were shocking. Williams asked McDonnell for his help securing research studies at Virginia's public universities. He asked McDonnell, as governor, to make the appropriate introductions. Williams took the governor's wife on a shopping spree and gifted her with $20,000 worth of designer clothing. Williams was a frequent visitor at the Governor's Mansion. Mrs. McDonnell discussed family financial troubles with him, and asked him for a $50,000 "loan", which Williams gave, in addition to a $15,000 gift to help pay for the wedding. Two additional loans for $50,000 and $20,000 were also later made by Williams to McDonnell. McDonnell and his wife visited Williams' residence and used Williams' Ferrari during their stay. McDonnell's wife asked Williams for a Rolex watch for McDonnell which she then gifted to her husband. In total, the McDonnell's received over $175,000 in gifts and loans from Williams. *McDonnell*, 136 S. Ct. at 2357-2362. These perquisites were received while the McDonnell's took action to favor Star Scientific and its business objectives. Despite these egregious interactions, the Court vacated the Governor's convictions because what he agreed to do in return for these benefits did not qualify at "official acts."

For all of the reasons set forth above, Ms. Keleher's lack of authority to cede land at the Padre Rufo School is relevant and admissible to the issues in the case. As a result, the Government's motion should be denied. At a minimum, however, the Government's request that the Court preclude Ms. Keleher from introducing such evidence at trial is premature and should be deferred until trial, at which time the Court can evaluate the Government's request with the benefit of a more fully developed record and against the backdrop of the parties' respective trial theories.

IV. CONCLUSION

"The rules of evidence are instituted not for the splendor of their being but rather to make courts administer fair and just trials." *Rosario-Perez*, 957 F.3d at 294. The Government, here, urges the Court to abandon its mission—the promotion of fairness and justice—and tie Ms. Keleher's hands in mounting her defense. Evidence of her lack of authority to cede the land in question (which would constitute official action), the fact that endorsing a letter related to that land was not official action or the business of her governmental agency, and that she did not believe that she had the authority to cede this land or that her letter was official action of the business of her government agency is not only relevant, but dispositive because it negates at least one element of each of the offenses charged. Even if the Government, contrary to the Indictment it brought, could pursue the theory at trial that Ms. Keleher did not agree to take an official act, but rather agreed to do something that she mistakenly thought was an official act, the evidence would be relevant and exculpatory. Thus, even if evidence of the scope of her authority and whether her letter was an official act, could possibly be an official act, and whether Ms. Keleher believed it to be an official act, were not dispositive, it would plainly be relevant and could not be excluded. The Court should not accept the Government's invitation for it, even before the trial has begun, to

preclude her from putting on evidence that goes to the heart of her defense to the charges against her. The Government's motion should be denied.

Respectfully submitted on this 29th day of March 2021, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

DMRA Law LLC
Centro Internacional de Mercadeo
Torre 1, Suite 402
Guaynabo, PR 00968
Tel. 787-331-9970

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

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

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