UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	**CASE NUMBER**: 19-431 (PAD)

DEFENDANT JULIA BEATRICE KELEHER'S
MOTION TO DISMISS THE INDICTMENT AGAINST HER

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this motion to dismiss Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen of the *Indictment* (Docket No. 3), each of the counts against her, pursuant to Rules 12(b)(3) and 7(c)(1) of the Federal Rules of Criminal Procedure.

I. INTRODUCTION

The Indictment charges Ms. Keleher with various crimes related to the issuance by the Puerto Rico Department of Education ("DOE") of two distinct contracts, one to Colon and Ponce ("C&P") and one to BDO Puerto Rico, P.S.C. ("BDO"), during her time as Secretary of Education. The Indictment alleges that each contract was awarded through impermissible favoritism, rather than through a fair, transparent contracting process. Ms. Keleher did not commit any of the alleged offenses. Indeed, Counts One, Two, Three, and Ten (the counts related to the C&P contract) and Counts Twelve, Fifteen, and Sixteen (the counts related to the BDO contract) fail to state an offense. They allege no money or tangible property of which Ms. Keleher supposedly intended to deprive any victim. Nor do they allege that Ms. Keleher received, or intended to receive, any monetary benefit in return for her decisions with respect to either contract.

Rather, the allegations amount to a legally deficient theory of honest services fraud. The Indictment's effort to recast these deficient honest services allegations as traditional money or property wire fraud fails as a matter of First Circuit law.

Indeed, as the Supreme Court recently unanimously stated in *Kelly v. United States*, 590 U.S. __, 18-1059 (May 7, 2020), the wire fraud statute does not extend to all alleged acts of dishonesty by state or local officials, only to schemes where the object of the fraud is money or property. Where what is at issue is a public official making decisions about how the government's resources are allocated -- here, which contractor is going to be paid to perform services for the government -- allegations that the decision was corrupted by alleged undisclosed self-dealing do not constitute a scheme to defraud the government of money or property. Rather, such allegations are indistinguishable from those the Court analyzed in *Skilling v. United States*, 561 U.S. 358 (2010), and do not fall within the ambit of the wire fraud statute. *See Kelly* Slip. op. at 7; *see also United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988) (even prior to *Skilling*, the First Circuit had held: "we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front"). Each of the counts against Ms. Keleher must be dismissed.[1]

The Alleged Colon & Ponce Scheme

Counts One, Two, Three, and Ten charge Ms. Keleher with conspiring to commit, and committing, wire fraud under 18 U.S.C. §§ 1349 and 1343. The Indictment alleges that the purpose of that conspiracy "was to steer contracts between the Puerto Rico Department of Education and Colon & Ponce." (Docket No. 3 at 4.) The Indictment contends Ms. Keleher and the named

[1] The Government's improper joinder of Counts One, Two, Three, and Ten with other unrelated offenses is addressed in Ms. Keleher's motion to sever. (*See* Docket No. 295)

defendants "accomplished" that purpose "through a corrupted bidding process wherein Colon & Ponce was provided with a competitive advantage based in part, on the close relationship between" Ms. Keleher and the two named co-defendants, Glenda Ponce-Mendoza and Mayra Ponce-Mendoza. *Id*.

The Alleged BDO Scheme

Count Twelve of the Indictment charges Ms. Keleher and others with having conspired, in violation of § 371, to violate § 641 by committing theft and conversion, in connection with the award of professional services contracts to BDO. The Indictment does not charge any substantive theft or conversion counts. Rather, after incorporating the paragraphs of the Indictment setting forth the factual basis for Count Twelve, Counts Thirteen to Eighteen purport to charge substantive wire fraud violations. Each of the substantive counts specifies an interstate wire that allegedly was sent "for the purpose of executing the scheme described in Count Twelve." (Docket No. 3 at 22, ¶ 115). Ms. Keleher is named only in Counts Fifteen and Sixteen.

Count Twelve alleges that Ms. Keleher was involved in awarding a DOE contract or contract amendments to BDO. The Indictment alleges that: "[e]ntities seeking government contracts utilized individuals with government influence to seek and obtain government contracts" Indictment at ¶ 68; "Internal government information was disclosed to non-governmental individuals in order to aid companies and individuals in obtaining government contracts" *id.* at ¶ 67; and "Government officials acted based on the political affiliation of proposed contractors." *id.* at ¶ 71.

As with the C&P conspiracy, it is not alleged that Ms. Keleher personally benefitted in any way from the alleged BDO scheme. Further, unlike the C&P conspiracy, where Ms. Keleher is alleged to have acted to benefit the company on account of her relationship with her special

assistant and her special assistant's sister who was affiliated with C&P, the Indictment provides no explanation regarding Ms. Keleher's supposed motivation for participating in the BDO conspiracy alleged in Count Twelve. Putting aside the implausibility of Ms. Keleher entering an unlawful conspiracy from which she would not benefit and for which she had no motive to enter, Counts Twelve, Fifteen, and Sixteen, as with the C&P conspiracy, fail to specify the money or property Ms. Keleher schemed to obtain. There is no allegation that DOE did not require the services BDO was providing. In fact, these services had been provided to DOE for years by HLB Parissi P.S.C. ("Parissi"), BDO's predecessor, before Ms. Keleher became Secretary of DOE.[2]

Neither alleged scheme constitutes wire fraud.

As set forth below, Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen fail to plead an essential element of the offenses charged: that defendants intended to obtain money or property from any identifiable victim. Indeed, the relevant counts of the Indictment are completely silent concerning both ***who*** the defendants purportedly sought to defraud, and ***what thing of value*** defendants intended to take from them. Accordingly, the Indictment fails even to set forth "the essential facts constituting the offense charged," and therefore must be dismissed under Rule 7.

But even if the Indictment could be read to comply with Rule 7, from the facts alleged it is apparent that the only possible object of the schemes was to subvert Ms. Keleher's fiduciary duty to provide honest services. Yet, the Indictment does not purport to charge honest services fraud. Nor could it. The Supreme Court has limited the doctrine of honest services fraud to cases involving "offenders who, in violation of a fiduciary duty, participated in bribery or kickback

[2] The Indictment alleges that Parissi obtained a contract, 2017-AF0007, in July 2016 (Indictment at ¶ 57) and another, 2017-AF0159, in November 2016 (Indictment at ¶ 59). The Indictment alleges that the Parissi-BDO merger was executed on December 31, 2016, effective June 30, 2017. (Indictment at ¶ 58) Ms. Keleher did not become Secretary of the DOE until "in or about January 2017 (Indictment at ¶ 7) and the conspiracy alleged in Count Twelve is not alleged to have begun until "in or about January 2017." (Indictment at ¶ 63)

schemes." *Skilling v. United States*, 561 U.S. 358, 407 (2010). The Indictment contains no allegation that Ms. Keleher obtained, nor that she ever intended to receive, a bribe or kickback or any other pecuniary benefit.

As in *Kelly*, rather than allege honest services fraud, the Indictment in this case attempts to evade the holding in *Skilling* by alleging "traditional" wire fraud. But it fails in this regard as well. The Indictment fails to allege that competitors of C&P or BDO, who might otherwise have been awarded the DOE contract, were deprived of money or property, nor that the alleged conspirators intended to deprive competitors of money or property. It is well settled that the mere possibility of a contract award, as well as the right to participate in an honest bidding process, are not property rights within the context of the wire fraud statute. The Indictment also fails to allege that DOE was deprived of money or property, or that the scheme was intended to deprive DOE of any cognizable property right. For example, there is no allegation that Ms. Keleher lacked the authority to award the contracts to C&P or BDO, or that the conspirators intended that C&P or BDO would not actually provide DOE with the services for which the companies would be paid under each contract.

In *Kelly*, the Supreme Court unanimously and emphatically rejected an attempt to assert allegations that are insufficient under *Skilling* to constitute honest services wire fraud and recast them as money or property fraud, even where an incidental byproduct of the scheme was a monetary loss to the victim. *See Kelly*, slip op. at 10. Allegations of wrongdoing, including deception, corruption, and abuse of power by a public official do not suffice to state the offense of wire fraud. *Id.* at 2. As the Court has made clear, the wire fraud statute does not "criminaliz[e] all acts of dishonesty by state and local officials." *Id.* at 7. As the Court held in *McNally v. United States*, 483 U.S. 350 (1987), "[f]ederal prosecutors may not use property fraud statutes to 'set[]

standards of disclosure and good government for local and state officials.'" Slip op. at 12 (citing *McNally*, 483 U.S. at 360).

Skilling "specifically rejected a proposal to construe the statute as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests." *Kelly* Slip op. at 7. The Court held that what matters is what a public official is alleged to do – here, allocate government resources by determining which contractors would perform services for the government – not whether the public official allegedly did so "for bad reasons; and [she] did so by resorting to lies." *Id.* at 9-10. The allocation of government resources, a "run-of-the-mine exercise of regulatory power cannot count as the taking of property." *Id.* (citing *Cleveland v. United States*, 531 U.S. 12 (2000)).

Indeed, even the Third Circuit decision that was reversed in *Kelly* recognized that a state official cannot "deprive [a government agency] of its right to control its money or property if that right to control [was] committed to [the actor's] unilateral discretion." *United States v. Baroni*, 909 F.3d 550, 563 (3d Cir. 2018) *rev'd on other grounds, Kelly v. United States*, 590 U.S. ___ (2020) (No. 18-1059). Thus, in *Baroni*, the Third Circuit, even in defining "property" far more broadly than it is defined under the law of the First Circuit, and in a manner rejected by the Supreme Court, acknowledged that merely alleging that a state official exercised her discretion over a state agency's money or property with an improper motive is insufficient to meet the element of mail or wire fraud of depriving the state of "money or property."[3]

At most, then, Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen allege that the defendants interfered with the intangible right of DOE, together with the public, to a fair and open

[3] The proposition that a state official cannot deprive a government agency of its right to control its money or property if the control was committed to the official's discretion was accepted by the District Court, the Third Circuit, and the government, *see United States v. Baroni*, 909 F.3d 550, 563 (3d Cir. 2018), and was, therefore, not an issue in controversy in the *Petition for Writ of Certiorari* filed by Kelly with the Supreme Court.

procurement process not corrupted by improper motivations or influence. But such a right cannot serve as the predicate for the offenses charged, which require an intent to deprive a victim of money or property. The Indictment, having studiously avoided charging the defendants under an honest services theory of fraud, attempts to charge deficient honest services allegations as traditional wire fraud. The law in the First Circuit, confirmed by the Supreme Court in *Kelly*, however, makes clear that the government may not recast a fatally flawed allegation of honest services fraud as a traditional scheme to defraud money or property.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The Colon & Ponce Contract

Ms. Keleher became the Secretary of the Puerto Rico Department of Education ("DOE") in January 2017. (Docket No. 3 at 2.) Co-defendant Glenda Ponce-Mendoza was one of Ms. Keleher's several Special Assistants at the DOE. (*Id*. at 3.)

On March 29, 2017, while Ms. Keleher and Glenda Ponce-Mendoza were at the DOE, Mayra Ponce-Mendoza, Glenda Ponce-Mendoza's sister, submitted a proposal for services to the DOE through her company, Colon & Ponce, Inc. ("C&P"). (*Id*. at 5.) Several months later, on May 16, 2017, the DOE sent a request for proposal ("RFP") to Mayra Ponce-Mendoza, as the principal of C&P, and to several additional companies, requesting proposals to provide services to the DOE. (*Id*.)

On May 24, 2017, C&P submitted an amended proposal to the DOE, in response to the agency's request for amendments to the proposals that had been presented as part of the RFP process. (*Id*. at 6-7.) On June 8, 2017, C&P executed contract 2017-AF0220 with the DOE. The amount of the contract was $43,550.00. (*Id*. at 7.) On October 25, 2017, C&P executed an amended contract, 2017-AF0220-A, with DOE. (*Id*. at 9.) The total value of the amended contract was $95,000.00. (*Id*.)

The BDO Contract

BDO was a for profit corporation formed under the laws of the Commonwealth of Puerto Rico.[4] Fernando Scherrer-Caillet ("Scherrer-Caillet") was the managing partner of BDO and Alberto Velazquez-Piñol ("Velazquez-Piñol") was the president, vice president, treasurer, sub-treasurer, secretary, sub-secretary and owner of Azur, L.L.C. ("Azur") a for-profit limited liability company organized under the laws of Puerto Rico. (*Id*. at 12.)

On November 3, 2016, before Ms. Keleher became Secretary of DOE, BDO executed contract 2017-AF0159 with DOE to provide auditing services to the agency. (*Id.* at 13.) The total value of the contract was $199,500.00. (*Id.*) In March 2017, BDO executed an amendment to contract 2017-AF0159 thereby increasing the contract amount to $490,580.00. (*Id.* at 18). The following month, BDO executed another amendment to the contract which increased the total amount of the contract to $1,079,580.00. (*Id.* at 19).

On July 10, 2017, BDO executed contract 2018-AF0019 with the DOE. (*Id.*). The total value of the contract was $4,770,330.00. (*Id.*).

The Indictment

On July 9, 2019, Ms. Keleher was indicted, together with five co-defendants, and charged with eighteen felony counts. (*See generally* Docket No. 3.) The charges against Ms. Keleher were brought in the context of two distinct conspiracies, as described, respectively, in Counts One and Twelve of the indictment. (*Id*.) Count One charges a Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. §1349. (*Id*. at 1-10) Counts Two through Eleven are the substantive wire

[4] The company was the result of a merger between BDO and HLB Parissi P.S.C. ("Parissi"), a for-profit professional services corporation. (*Id.* at 12.)

fraud counts pertaining to this conspiracy, in violation of 18 U.S.C. §1341. (*Id*. at 10-12.) These counts involve the alleged "steering" by Ms. Keleher of a DOE contract to C&P. (*Id*. at 3-4.).[5]

Counts One through Eleven of the Indictment relate to the Colon & Ponce contract. These counts do not allege that any of the named co-conspirators intended for Ms. Keleher to receive any money or other consideration for her alleged efforts; nor do they allege she received any monetary benefit. (*Id*.) Nor does the Indictment allege that, as the Secretary of DOE, Ms. Keleher lacked the discretion to award the contract to C&P. (*Id.*) Instead, the Indictment merely alleges that Ms. Keleher's efforts to "steer" the contract in question were motivated in part by "the close relationship between [her], [5] GLENDA PONCE-MENDOZA, and [6] MAYRA PONCE-MENDOZA."

Count Twelve charges a Conspiracy to commit theft and conversion of government money and property, in violation of Title 18, U.S.C. §641. (*Id*. at 13-21) Counts Thirteen through Eighteen charge substantive wire fraud counts which are alleged to have "execute[d]" the conspiracy charged in Count Twelve, in violation of 18 U.S.C. §1341. Of these counts, Ms. Keleher is only charged in Counts Fifteen and Sixteen.

The Indictment makes a number of allegations about government contracts, generally, untethered to BDO or any of the defendants, that commissions are sometimes paid related to contracts that preclude the payment of commissions and that paying unauthorized commissions can inflate the contract price. *Id.* at ¶ 81 ("Despite express prohibitions on unauthorized subcontracting and the payment of lobbyists, government contracts were executed by government officials and contractors who intended to subcontract the services and pay commissions for the

[5] The adjective "steering" is not legally or otherwise defined in the context of the Indictment. The term is not subject to a statutory definition. The dictionary definition suggests that the terms refers to the directing of a course of action or the pursuit of a course of action. http://www.dictionary.com

contracts awarded through influence with government officials."); *Id.* at ¶ 83 ("By paying unauthorized commissions, the cost of government contracts was unnecessarily inflated and increased.") Whatever validity these observations might have with respect to a cost-plus contract where the commission is included in the cost charged to the government, the observation does not purport to apply to BDO or the contracts at issue here where the Indictment alleges BDO intended to pay the commissions from funds it received under the contract. *Id.* at ¶ 82 ("Members of the conspiracy and scheme failed to disclose that portions of the funds assigned under the contracts would be paid as commissions by the contractors to individuals with government influence in exchange for obtaining the government contract."); ¶ 97 ("In or about March 2017, [3] ALBERTO VELAZQUEZ-PINOL and [4] FERNANDO SCHERRER-CAILLET agreed that [3] ALBERTO VELAZQUEZ-PINOL would receive a 10% commission on any contracts he obtained for BDO.") Based on this allegation, the alleged intent was for commissions to come out of the money DOE paid to BDO under the contract, *i.e.*, from BDO's profit margin. There is no allegation that BDO artificially inflated the cost of the contract to DOE. In any event, the Indictment never alleges that the contracts at issue precluded the payment of commission by BDO or that Ms. Keleher knew BDO intended to pay commissions. These allegations plainly fall short of asserting that Ms. Keleher intended to deprive DOE of money.

Count Twelve alleges that unnamed defendants made unspecified false representations and took unspecified action in violation of unidentified federal and Puerto Rican laws. *Id.* at ¶ 86 ("Defendants made false representations and took action in violation of federal and Puerto Rico law in order to solicit, procure, and award government contracts paid with federal funds.") In describing the manner and means in of the conspiracy, Count Twelve relies on a number of allegations unrelated to BDO or any of the

defendants, about political motivations and influence. *See, e.g.*, Indictment at ¶ 67 ("Internal government information was disclosed to non-governmental individuals in order to aid companies and individuals in obtaining government contracts"); *id.* at ¶ 68 ("Entities seeking government contracts utilized individuals with government influence to seek and obtain government contracts"); and *id.* at ¶ 71 ("Government officials acted based on the political affiliation of proposed contractors.").

The allegations in Counts Twelve, Fifteen, and Sixteen are thus based on allegations that the contracting process was politically motivated and influenced and that it lacked the transparency of an open, competitive process. Glaringly absent, however, is any allegation that Ms. Keleher benefited, or intended to benefit, in any way from the award of the contracts to BDO.

III. APPLICABLE STANDARD

Rule 12

Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a pretrial motion, inter alia, to raise defects in instituting the prosecution and in the indictment, including failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The United States Supreme Court has interpreted Rule 12 to permit pretrial resolution of a motion to dismiss the indictment when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). Accordingly, "[i]t is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

Generally, "a motion to dismiss is 'capable of determination' before trial if it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v.*

Craft, 105 F.3d 1123, 1126 (6th Cir. 1997); *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) ("the district court did not err by considering the purely legal question at hand in Flores's pretrial motion"); *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977) ("'[t]he propriety of granting a motion to dismiss an indictment under [Fed. R. Crim. P.] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.'"); *United States v. Jones*, 542 F.2d 661, 664-65 (6th Cir. 1976) (Rule 12 and accompanying notes support decision to dismiss indictment on motion raising legal questions); *see also United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b) is "conservation of judicial resources by facilitating the disposition of cases without trial").

"District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *Craft*, 105 F.3d at 1126; see also Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); Fed. R. Crim. P. 12(b)(3) (noting that certain "defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits").

Rule 7

Under Rule 7(c)(1), "[w]hen a defendant seeks dismissal of an indictment, courts take the facts alleged in the indictment as true, mindful that '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.'" *United States v. Ngige*, 780 F.3d 497, 502 (1st Cir. 2015) (quoting *United States v. Savarese*, 686 F.3d 1, 7 (1st Cir. 2012)).

Where an indictment does not "contain[] the elements of the offense charged[,]" *United States v. Resendiz-Ponce*, 549 U.S. 102, 103 (2007), or otherwise fails to plead sufficient facts, it must be dismissed.

IV. ARGUMENT

1. Count One Must be Dismissed Under Rule 12 for Failure to State an Offense.

A. Count One Fails to Allege Ms. Keleher Intended to Deprive Anyone of Money or Property as Required by the Wire Fraud Statute.

> The elements of wire fraud are:
>
> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that for the purpose of executing the scheme or in furtherance of the scheme, [defendant] caused an interstate [or foreign] wire communication to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, an interstate [or foreign] wire communication would be used, on or about the date alleged.

First Circuit Pattern Criminal Jury Instructions (2010) §4.18.1341. Thus, the offense of conspiracy to commit wire fraud requires, among other things, that "two or more persons conspired, or agreed, to commit" the substantive crime of defrauding an identifiable victim of something of value. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."); *Cleveland v. United States*, 531 U.S. 12, 15, 18 (2000) ("§1341 requires the object of the fraud to be 'property' in the victim's hands."). As a result,

allegations of deceit or misrepresentations, standing alone, are insufficient to support the offense. Instead, proof of wire fraud requires a showing of an intent to defraud and deprive victims of money or property on the part of the defendants. *See Carpenter*, 484 U.S. at 26; *Cleveland*, 531 U.S. at 15. In order to establish a wire fraud offense, the government must therefore plead and ultimately "prove that defendants contemplated some actual harm or injury to their victims" in the form of money or property. *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

Here, Count One of the Indictment must be dismissed because it does not (and cannot) allege that Ms. Keleher intended to deprive any victim of money or property. Indeed, the Indictment is entirely silent concerning the ***thing of value*** Ms. Keleher intended to obtain from any victim through fraud.[6]

i. Count One Does Not Allege the Defendants Intended to Deprive Any Competitors of C&P of Money or Property.

Although not alleged in the Indictment, the Government may argue that C&P's competitors for the DOE contract were somehow deprived of money or property by the scheme alleged in the Indictment. But the law is clear that the possibility of a contract award, as well as the right to participate in a fair bidding process, are not property rights within the context of the wire fraud statute.

"[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property

[6] The fact that the Indictment does not set forth the money or property at issue requires dismissal, as "theories that were not advanced in the indictment. . . cannot save it[.]" *United States v. Henry*, 29 F.3d 112, 114 (3d Cir. 1994); *United States v. Alkaabi*, 223 F. Supp. 2d 583, 588–89 (D.N.J. 2002) (refusing to consider government's "alternative property theories" not included in the indictment because they were not presented to the Grand Jury); *see also United States v. Zauber*, 857 F.2d 137, 144 (3d Cir.1988) ("It is settled law that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found.") (citation omitted). As set forth below, however, based on the allegations in the Indictment, there is no money or cognizable property that was the object of the alleged fraud. The omission is not merely a technical pleading issue. It is because the facts alleged simply do not constitute a crime.

right." *Henry*, 29 F.3d at 15. "Two of the hallmarks of traditional property are exclusivity, and transferability." *United States v. Alsugair*, 256 F. Supp. 2d 306, 313 (D.N.J. 2003) (citations omitted). *See also Henry*, 29 F.3d at 115; *Carpenter*, 484 U.S. at 26–27, *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). Neither the possibility of a contract award nor the right to participate in a fair bidding process meets the requirements to be considered property.[7]

In *United States v. Henry*, for example, the Government charged two public officials with bank fraud and wire fraud for purportedly corrupting the process by which banks were chosen as depositories for funds from twenty-one toll bridges. 29 F.3d at 112, 115-118. The commission in charge of the funds conducted a competitive bidding process with various banks. *Id*. The defendants allegedly interfered with that process by notifying one bank of the bid information in advance, thus allowing that bank to outbid the other competitors. *Id*. In return, the defendants received favorable treatment on loans from the bank and, in the case of one of the defendants, campaign contributions. *Id*.

The government argued that the other banks which sought to become depositories had been deprived of "property" by defendants, because such banks had been denied a fair opportunity to participate in the bidding process. *Id*. On appeal, the case turned on "whether the competing banks'

[7] *See, e.g.*, *United States v. Turner*, 465 F.3d 667, 681 (6th Cir. 2006) (dismissing mail fraud counts based on loss of fair elections); *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Employees and Rest. Employees Union, AFL-CIO*, 215 F.3d 923, 926 (9th Cir. 2000) (dismissing mail and wire fraud charges based on damage to goodwill); *United States v. Walters*, 997 F.2d 1219, 1224-27 (7th Cir. 1993) (dismissing mail fraud charge based on university's loss of scholarship money); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist*., 940 F.2d 397, 406 (9th Cir. 1991) (dismissing mail fraud charge based on loss of market share); *United States v. Alkaabi*, 223 F. Supp. 2d 583, 590 (D.N.J. 2002) (dismissing mail fraud charges based on the loss of maintenance of the integrity of a testing process); *Zauber*, 857 F.2d at 147 (dismissing mail and wire fraud charges based on loss of control over spending of pension funds); *Roitman v. New York City Transit Auth*., 704 F. Supp. 346, 348-49 (E.D.N.Y. 1989) (dismissing mail fraud claims based on damage to reputation, good name, honor and integrity).

interest in having a fair opportunity to bid for something that would become their property if and when it was received is in itself property." *Id.* at 115.

The Third Circuit unambiguously held it was not. Specifically, the Court concluded:

> Clearly, each bidding bank's chance of receiving property – the deposits if its bid were accepted – was, at least in part, dependent on the condition that the bidding process would be fair. This condition, which is all that the bidding banks allegedly lost, was thus valuable to them, but it is not a traditionally recognized, enforceable property right. At most, the condition is a promise to the bidding banks from those in charge of the process that they would not interfere with it. It is not a grant of right of exclusion, which is an important aspect of traditional property. Violation of this condition may have affected each bidding bank's possible future receipt of property, but that does not make the condition property.

Id.

The same is true for the four competing companies that bid unsuccessfully for the DOE contract awarded to C&P, and who plainly were not deprived of money or property for purposes of the wire fraud statute. Any expectation of a competing bidder that it would be the recipient of a contract award, or that the award process itself would be fair, does not constitute cognizable property rights within the context of the wire fraud statute. As in *Henry*, "there is no way of knowing to which, if any, of [C&P's competitors]" the DOE contract might have gone absent the conduct alleged in the indictment. *Id*. Indeed, "[e]ven in a fair process, [C&P] might still have won the [the DOE contract]." *Id*. Whatever value C&P's competitors might have lost as a result of the conduct alleged in the Indictment, it is clear it was "not a traditionally recognized, enforceable property right" for purposes of the wire fraud statute.

ii. Count One Does Not Allege the Defendants Intended to Deprive DOE of Money or Property.

Alternatively, the Government may argue DOE was the victim of the defendants' alleged scheme to defraud. But the Indictment does not allege that the conspirators intended to deprive

DOE of money or property. The Indictment fails to allege, for example, that DOE did not require the services C&P provided under the contract or that the conspirators intended that C&P would not provide the services contemplated under the contract. At most, the Indictment suggests, without so stating, that DOE 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 on account of her special assistant's relationship with the company. But intangible rights to a fair and open bidding process and the alleged breach of a public official's fiduciary duties through undisclosed self-dealing are not money or property cognizable under the wire fraud statute. They cannot serve as the predicate for the offenses charged.

a. *Skilling v. United States* and is progeny

In *Skilling*, the Supreme Court limited honest services mail and wire fraud to bribery and kickback schemes furthered by use of the mail or wire communications. At issue was the conviction of Jeffrey Skilling on charges that grew out of the collapse of Enron, an energy-trading and utilities company based in Houston, Texas. The Supreme Court noted that "the Government never alleged that [Skilling] solicited or accepted side payments from a third party in exchange for making . . . misrepresentations." *Id. at* 366. *Skilling* held this failure to be fatal. "[H]onest services" in the mail or wire fraud context encompasses only "paradigmatic cases of bribes and kickbacks." *Id. at* 411.[8]

Only core conduct involving bribery of public officials can constitute honest services fraud as a result of the *Skilling* ruling. *See United States v. George*, 676 F.3d 249, 260 (1st Cir. 2012)("[T]to convict someone of honest-services fraud, a factual showing of bribery or kickbacks

[8] For example, the classic case of *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), was referenced by the Supreme Court in the *Skilling* opinion. *Shushan* made clear that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery but would also be a scheme to defraud the public" of the intangible right of honest services. *Id.* at 115.

is compulsory."); *United States v. Halloran*, 664 F. App'x 23, 26 (2d Cir. 2016)("§ 1346 criminalizes only the bribe-and-kickback core")(citing *Skilling* at 408-09); *United States v. Botti*, 711 F.3d 299, 310 (2d Cir. 2013) ("The Supreme Court held in *Skilling* that the honest services fraud encompassed by 18 U.S.C. § 1346 must be limited to schemes involving bribes or kickbacks in order to avoid due process concerns."). *See also United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (in a case prior to *Skilling*: "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services . . . [Defendant] was not bribed or otherwise influenced in any public decision-making capacity. Nor did he embezzle funds. He did not receive, nor can it be found that he intended to receive, any tangible benefit.")(citations omitted); *see also United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (in another case prior to *Skilling*: "The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, **resulting in personal gain**.") (emphasis added).

A case that illustrates the impact of the *Skilling* decision on honest services fraud is *Weyhrauch v. United States*, 548 F.3d 1237 (9th Cir. 2008). The case involved an attorney and Alaskan Congressman, Bruce Weyhrauch, who allegedly solicited a series of contacts with the representatives of an oil field services company seeking future legal work in exchange for favorable action in connection with pending oil tax legislation. The indictment alleged that Weyhrauch "'deprive[d] the State of Alaska of its intangible right to [his] 'honest services' . . . performed free from deceit, self-dealing, bias, and concealment.'" *Id*. at 1239. However, the indictment failed to allege that Weyhrauch had received any compensation or benefits from the oil company executives.

On appeal, the Ninth Circuit reversed the decision of the trial court and concluded that allegations that Weyhrauch "voted and took other official actions on legislation at the direction of [an oil field services company] while engaged in undisclosed negotiations for future legal work from [said company]," were sufficient in light of the applicable law. *Id. at 1236.* After *Skilling* was decided, however, the Supreme Court vacated the Ninth Circuit's judgment and remanded the case. *See Weyhrauch v. United States*, 561 U.S. 476 (2010). The Ninth Circuit reversed its prior holding and excluded the government's "honest services" offense evidence on the basis that, after *Skilling*, non-disclosure of a conflict of interest could no longer provide the basis for an "honest services" wire/mail fraud charge. *Id.*

The Indictment while it may attempt to allege a breach of fiduciary duty for non-disclosure of self-dealing, does not even purport to allege that Ms. Keleher intended to receive or did receive a pecuniary benefit in return for "steering" the contract to C&P. Accordingly, its allegations are deficient as an honest services fraud theory.[9]

[9] In the course of differentiating honest services fraud from traditional wire fraud, the Court in *Skilling* noted that the honest services fraud theory lacks the "symmetry" between the defendant's gain and the victim's loss that is present in traditional wire fraud, where "the victim's loss of money or property" necessarily "supplie[s] the defendant's gain." *Id.*

To illustrate this point, the Court articulated a hypothetical scenario:

> For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, **the city (the betrayed party)** would suffer no tangible loss.

Id. The Court's hypothetical in *Skilling* clearly confirms that a corrupted bidding process, of precisely the sort the Government may try to argue is alleged in this indictment, does not by itself deprive a governmental entity of money or property that could support a charge of traditional wire fraud.

b. Efforts to recast honest services fraud theories as traditional money or property fraud rejected prior to *Kelly*

Skilling has confined § 1346 honest services fraud to cases involving bribes, kickbacks, or other pecuniary gain being paid in return for the dereliction of honest services. Allegations that fall outside the scope of this definition of honest services cannot simply be recast as money or property fraud. In *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007), the district court granted a motion to dismiss in a case charging as money or property fraud an elected Parish official's scheme to conceal campaign finance violations, alleging that the scheme was intended to get the official re-elected and deprive the parish of money, his salary: "Unfortunately, because the government cannot invoke § 1346 in this case, it has attempted to use the salary theory as a way around its inability to charge the defendant with defrauding the citizens of Livingston Parish of their right to a fair election . . . the undersigned is not willing to permit the government to expand the reach of § 1341 by allowing it to utilize the questionable salary theory." *United States v. Ratcliff*, 381 F. Supp. 2d 537, 549 (M.D. La. 2005). The Fifth Circuit affirmed. "Although the charged scheme involves Ratcliff ultimately receiving money from the parish, it cannot be said that the parish would be deprived of this money by means of Ratcliff's misrepresentations, as the financial benefits budgeted for the parish president go to the winning candidate regardless of who that person is." *Ratcliff*, 488 F.3d at 645.[10]

That the allegations in the Indictment do not constitute honest services fraud -- because they allege no intended bribe, kickback, or other pecuniary benefit for Ms. Keleher -- forecloses the government's effort to charge the fraud as traditional wire fraud. The First Circuit has held the

[10] The Sixth Circuit reached the same result in a similar case, *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006)(holding that the district court should have dismissed the charges, observing, "the government and citizens have not been deprived of any money or property because the relevant salary would be paid to someone regardless of the fraud. In such a case, the citizens have simply lost the intangible right to elect the official who will receive the salary.").

government cannot perform an end run of the Supreme Court's limitations on honest services fraud by recasting a case as involving intangible property. Thus, after the Supreme Court held in *McNally v. United States*, 483 U.S. 350 (1987), that "money or property" did not include honest services fraud (and before the concept was reinstated by the enactment of § 1346), the First Circuit rejected the government's attempt to frame allegations of honest services fraud as traditional money or property fraud: "We understand that the intangible rights doctrine has become firmly entrenched in the federal courts and that old habits die hard. But we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). Similarly, the Eleven Circuit has ruled that a "'property interest' [that] is indistinguishable from the intangible right to good government described in McNally … cannot sustain [a] mail fraud count," even if reframed in property terms. *United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989).[11]

c. *Kelly v. United States*

Any doubt about the correctness of the approach in the First Circuit has (again) been put to rest by the Supreme Court decision in *Kelly*, in a resounding unanimous opinion. *Kelly* arose out of the so called "Bridgegate" scandal, in which two senior political officials at the Port Authority of New York and New Jersey were alleged to have engaged in a scheme to impose crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee's mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. The government claimed that, using the pretext of conducting a "traffic study," defendants and others conspired to limit Fort Lee

[11] The Supreme Court in *Skilling* emphasized that when Congress enacted § 1346, the honest services provision of the mail fraud statute, after *McNally* held that money or property did not include honest services, Congress was intending to reach only "core" or "paradigmatic" honest services cases, those involving kickback or bribery schemes.

motorists' access to the George Washington Bridge during the first week of the school year in September 2013, and in so doing, caused severe traffic jams. Slip op. 2-6.

The defendants were charged with various felony counts, including, as in this case, not with honest services fraud, but rather with conspiring to commit, and committing, "traditional" wire fraud.

> First, the Government claims that Baroni and Kelly sought to "commandeer[]" part of the Bridge itself—to "take control" of its "physical lanes." Tr. of Oral Arg. 58–59. Second, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment.

Slip op. at 8. Following a jury trial, defendants were convicted of all counts and appealed their convictions. The Third Circuit affirmed the defendants' wire fraud convictions, accepting the Government's contention that the defendants had defrauded the Port Authority of its *property*.

The Supreme Court rejected the Third Circuit's expansive view of "property" rights cognizable under the wire fraud statute and reversed the convictions. The Supreme Court concluded that "[t]he realignment of the toll lanes was an exercise of regulatory power" and did not meet the property requirement of the wire fraud statute. *Id.* at p. 2. The Court was unpersuaded by the Third Circuit's assessment that the payment of salaries to the employees of the Port Authority implicated a "property right", concluding that the "employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme." *Id*. In considering the concept of deprivation of property, the Supreme Court reflected on the fact that the defendants did not (of course) walk away with the lanes nor did they take the lanes from the government by converting them to a non-public use. *Id*. at 9. In contrast to an appropriation of the lanes, the Court held that the extent of the defendants' efforts was limited to exercising regulatory

rights of "allocation, exclusion, and control" of the lanes between different groups of drivers. *In accord, Cleveland v. United States*, 531 U.S. 12, 15 (2000).

The Supreme Court's unanimous decision in *Kelly* leaves no doubt that traditional wire fraud is not a mechanism for prosecution of acts of dishonesty by local officials, absent an allegation and proof that the object of the scheme is the deprivation of a cognizable property right. In *Kelly*, the Supreme Court acknowledged that the defendants had engaged in wrongdoing, but recognized that the wire fraud statutes did not fit the conduct alleged in the indictment: "[t]he evidence the jury heard no doubt shows wrongdoing–deception, corruption, abuse of power. But the federal statutes at issue [wire fraud and federal program fraud] do not criminalize all such conduct." *Kelly* at 2. The Court also made emphatically clear that a "property right" should be narrowly construed in order to derail ambitious attempts by the Federal government to recast as traditional money or property fraud what are in reality deficient honest services fraud offenses involving deceit and corrupt conduct by local officials that did not contemplate financial harm as an object of the scheme. *Id.* at 7, 8.

The Supreme Court's ruling in *Kelly* sends a message to both district and appellate courts that the High Court will not allow the ruling in *Skilling* to be undermined, and that the it will be vigilant in precluding the prosecution of schemes that, although they allegedly involve deceit and corruption, do not allege that the central aim of the defendant's conduct is to deprive a victim of money or property. The Supreme Court tightened the reigns of statutory construction as they pertain to the concept of a "property right" under the wire fraud statute, by requiring that such a property right must be central to the scheme and an "object of the fraud," not merely an incidental by-product of the scheme to defraud. *See Kelly* 590 U.S. at 10.[12]

[12] The Supreme Court noted that if one looks hard enough for an economic impact in a scenario involving acts of deception or corruption, a collateral financial impact will usually be found. In the wake of its decision in *Kelly*,

The allegations supporting Count One do not state the offense of honest services fraud after *Skilling*, and First Circuit law precludes recasting fatally flawed honest services allegations as traditional wire fraud. In *Kelly*, the Supreme Court powerfully and unequivocally seized an opportunity to reiterate the fundamental proposition that Federal prosecutors may not use property fraud statutes to "set[] standards of disclosure and good government for local and state officials." *McNally*, 483 U. S., at 360; *see supra*, at 7. Taking a pragmatic approach that integrates the realities of how government operates, the Supreme Court reminded the government that "[m]uch of governance involves … regulatory choice." If U. S. Attorneys could prosecute as property fraud every alleged lie a state or local official tells in making such a decision, the result would be—as *Cleveland* recognized—"a sweeping expansion of federal criminal jurisdiction." 531 U. S., at 24. The High Court also recognized that a contrary result, permitting an expansive reading of property rights, would result in an imposition of the Federal Government's view of integrity on state and local policymaking. The decision is a reminder that property fraud statutes, such as traditional wire fraud, do not contemplate such an outcome. *Id.*

Count One charges Ms. Keleher and her co-defendants of conspiring to commit traditional wire fraud in connection with the C&P contract. Such a charging decision obligates the government to allege and prove that the scheme and artifice allegedly orchestrated by the defendants had as its object obtaining money or property from the DOE. But the Indictment fails to make this fundamental allegation. Indeed, the Indictment states that the object of the wire fraud conspiracy was to steer contracts between the DOE and C&P, through a corrupted bidding process.

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however, it is now unequivocally clear that an incidental financial impact is insufficient to satisfy the requirement of the pecuniary harm required by the wire fraud statute. *See Kelly* at 10. ("We specifically rejected a proposal to construe the statute as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests. *Skilling* at 405, 410. The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Cf. N. J. Stat. Ann. §2C:30–2 (West 2016) (prohibiting the unauthorized exercise of official functions). Save for bribes or kickbacks (not at issue here), a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property." 18 U. S. C. §1343; see §666(a)(1)(A) (similar).

Neither the object nor the Overt Acts relating to the C&P conspiracy in the Indictment suggest that the defendants intended to deprive the DOE of any money or property. The Indictment, for example, does not allege that the defendants plotted to award a sham contract for the purpose of cheating the DOE out of money, nor does the Indictment allege the defendants intended that C&P would not perform the services required under the contract.

Instead, the Indictment premises its conspiracy to commit wire fraud allegation on Ms. Keleher's purported involvement in a less than transparent contract award process, alleging she was motivated to favor C&P over other competitive bidders on account of her relationship with Glenda Ponce, once of her assistants, and her sister, a principal of C&P. Even assuming, *arguendo*, the veracity of these allegations, any careful scrutiny of these allegations demonstrates they do not state an offense. Allegations that a contract was awarded through a tainted or corrupt bidding process do not allege a scheme to deprive the DOE of money or property. Rather, the Indictment is yet another attempt by prosecutors to "set[] standards of disclosure and good government for local and state officials." *Kelly*, 590 U.S. at 12 (quoting and citing to *McNally*, 483 U. S. at 360).

The Indictment does not allege DOE lost any money or property as a result of the award of the C&P contract, nor cannot it be said, with any degree of intellectual honesty, that the aim or objective of the scheme alleged was to deprive the DOE of a property right. Monies would ultimately be expended by DOE to fund the contract, whether the contract was awarded to C&P or to one of the other bidders. The selection of a contractor to provide services for a government agency is an exercise of regulatory power. It is simply a decision regarding the allocation of agency resources (between potential contractors). So, it cannot be said that DOE was deprived of any money as a result of the award of the contract to C&P. Because the wire fraud statute prohibits only deceptive "schemes to deprive [the victim of] money or property" the wire fraud counts in

the Indictment relating to C&P must be dismissed. *Id*. at 356. Just as the Supreme Court held in *Kelly* that the allocation of lanes on the George Washington bridge "was a quintessential exercise of regulatory power," slip op. at 8, the of awarding contracts by the head of an agency is a quintessential exercise of regulatory power, allocating the agency's resources between various vendors who could have performed the services at issue.

iii. Count One Does Not Allege that Ms. Keleher as Secretary of DOE Lacked Discretion to Award the Contract to C&P and Therefore Does Not Allege that By Doing So She Deprived DOE of Money or Property.

Even prior to the Supreme Court's decision in *Kelly*, under the law of the First Circuit, the DOE could not be viewed as a victim deprived of money or property, because there is no allegation that Ms. Keleher lacked the discretion to award the contract at issue to C&P. Indeed, even the Third Circuit in the decision reversed in *Kelly* acknowledged that where a government official has discretionary authority, a wire fraud allegation cannot rest on the manner in which that authority was exercised. This proposition was conceded by the Government in its opposition to the petition for *certiorari.*

While the Indictment attacks Ms. Keleher's motive for exercising her discretion, it does not contend that she lacked authority to award the contract. In *Baroni*, the Court of Appeals decision recently reversed on other grounds by the Supreme Court in *Kelly*, the Third Circuit acknowledged that "Baroni could not deprive the Port Authority of money and property he was authorized to use for any purpose. Nor could he deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion." *Baroni*, 909 F.3d at 563. In opposing Kelly's petition for certiorari, the government conceded that "[a]n official who allows political motives to influence a decision ***she unilaterally possesses the***

authority to make does not commit fraud, even if she conceals her true motives." Brief for the United States in Opposition at 15 (emphasis added).[13]

Count One against Ms. Keleher cannot stand because the Indictment does not allege (nor could it) that she did not have the discretion to award the contract at issue to C&P. Rather, the Indictment takes exception only with her motive for exercising that authority. As conceded by the Government to the United States Supreme Court in *Baroni*, this is insufficient to sustain a charge of wire fraud.

B. The Supreme Court's Decision in *Skilling* Specifically Prohibits Charging the Conduct Alleged in Count One as Wire Fraud Under an Honest Services Theory.

The Indictment does not purport to charge that the defendants conspired to commit honest services fraud. It does not use the words "honest services" or cite to §1346; nor do its allegations support such a charge. Yet, the Indictment's central allegation with respect to the conspiracy charged in Count One and the related substantive wire fraud charges is that Ms. Keleher violated her fiduciary duty to DOE in that she failed to disclose an alleged conflict of interest caused by the fact that Glenda Ponce-Mendoza, one of her Special Assistants, was related to the owner of C&P, Mayra Ponce-Mendoza, and that Ms. Keleher participated in the award of the contract and "steered" it to C&P as a result of the undisclosed conflict of interest. The thrust of the allegations in the Indictment, in their maximum expression, is that Ms. Keleher and her two co-defendants corrupted the bidding process in connection with the award of the contract to C&P, by giving the company some unfair competitive bidding advantage.[14]

[13] The Supreme Court did not address the issue of unilateral authority in its decision in *Kelly*, as the government, defendants, and the Third Circuit all agreed on this point.

[14] The Indictment alleges that Keleher was motivated "*in part* by the close relationship between [her], [5] GLENDA PONCE-MENDOZA, and [6] MAYRA PONCE-MENDOZA," (Docket No. 3 at 4) (emphasis ours), without alleging what other factors resulted in the contract being awarded to C&P. Of course, there may be perfectly legitimate reasons for favoring one potential contractor, C&P, over others, independent of the relationship between C&P and Ms. Keleher's special assistant. Nonetheless, operating on the assumption that the Court must assume, solely for purposes

Ms. Keleher is not alleged to have received *any* personal benefit, pecuniary or otherwise, as a result of the alleged wire fraud offenses. The Indictment instead is based entirely on the allegation that Ms. Keleher failed to disclose the alleged conflict of interest caused by her "relationship" with Glenda Ponce-Mendoza and her sister Mayra Ponce-Mendoza, and that her participation in the award of this contract corrupted the bidding process. However, these allegations, even if true, do not support an honest services wire fraud theory. The absence of allegations that Ms. Keleher received any bribe or kickback or other pecuniary benefit in exchange for her alleged "steering" of contracts to a company with which she allegedly had not disclosed a conflict of interest is fatal in light of *Skilling*.

2. Counts Two, Three, and Ten Must Be Dismissed for Failure to State an Offense.

For the same reasons set forth above in Arguments 1A and 1B, *infra*, that Count One fails to state the offense of Conspiracy to Commit Wire Fraud, Counts Two, Three, and Ten fail to state the substantive offense of wire fraud. Consequently, Counts Two, Three, and Ten must also be dismissed.

3. Counts Twelve, Fifteen, and Sixteen Must be Dismissed for Failure to State an Offense.

A. Counts Fifteen and Sixteen Do Not Allege that Ms. Keleher Devised a Scheme or Artifice to Defraud or Obtain Money or Property by False Pretenses.

As set forth above, the wire fraud statute is violated by devising or intending to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses. Counts Thirteen through Eighteen allege substantive wire fraud offenses. Counts

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of resolving this motion, that the allegations in the Indictment are true and that Ms. Keleher selected C&P "in part" because it had a relationship with her special assistant, that allegation, under *Skilling*, does not make out the offense of wire fraud.

Thirteen through Eighteen do not, however, allege a scheme or artifice to defraud or obtaining money or property through false pretenses.

Paragraph 115 of the Indictment states:

> On or about each of the dates set forth below in the District of Puerto Rico,
>
> [1] JULIA BEATRICE KELEHER
> [3] ALBERTO VELAZQUEZ-PINOL, and
> [4] FERNANDO SCHERRER-CAILLET,
>
> defendants in each count as named below, for the purpose of executing the scheme described in Count Twelve, and attempting to do so, caused to be transmitted by means by wire communication in interstate commerce the signal and sounds described below.

Thus, Counts Thirteen through Eighteen do not even parrot the statutory language of § 1343. They do not ever use the words "having devised or intending to devise," "artifice to defraud," or "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *See* 18 U.S.C. § 1343. Rather, Counts Thirteen to Eighteen adopt and incorporate the allegations supporting Count Twelve. *See* Indictment at ¶ 114 (incorporating Paragraphs 54-113). Those paragraphs, however, likewise fail to use any of the language from § 1343 quoted above. This is hardly surprising. Count Twelve alleges a conspiracy to commit theft or conversion. Accordingly, Counts Thirteen through Eighteen fail to allege the first and third elements of wire fraud, the existence of a scheme to defraud and knowing participation in a scheme to defraud.

But the failure of Counts Thirteen through Eighteen to state an offense is even greater than its omission of allegations of a scheme or artifice to defraud; by incorporating the allegations from Count Twelve, Counts Thirteen through Eighteen affirmatively allege something that is inconsistent with a scheme or artifice to defraud. Counts Thirteen through Eighteen, by incorporating Count Twelve, allege a scheme to commit theft or conversion. As set forth in "Mr. Scherrer's Motion to Dismiss the Indictment as Internally Inconsistent and for Failure to State a

Claim," which Ms. Keleher hereby adopts and incorporates by reference as it pertains to Counts Fifteen and Sixteen, a scheme or artifice to defraud and to obtain money or property through false pretenses is distinct from, and inconsistent with, a scheme to commit theft or conversion. If, as Count Twelve alleges, Ms. Keleher conspired to commit theft or conversion, *i.e.*, to take property without the owner's knowledge or authorization, then, by definition, she could not have participated in a scheme to deprive the owner of that property by obtaining the owner's authorization through false pretenses. Because Counts Fifteen and Sixteen allege a scheme to commit theft or conversion rather than a scheme to defraud, Counts Fifteen and Sixteen against her must be dismissed.

B. Counts Twelve, Fifteen and Sixteen Fail to Allege Ms. Keleher Intended to Deprive Anyone of Money or Property and *Skilling* Prohibits Charging the Alleged Conduct as Wire Fraud.

As set forth above in Arguments 1A and 1B, the alleged C&P scheme fails to allege a scheme to defraud anyone of money or property as required under the "traditional" wire fraud theory set forth in the Indictment. *See* Argument 1A (discussing, *inter alia*, *Kelly* and *Cleveland*). Furthermore, the allegations do not constitute honest services fraud as set forth in *Skilling*. *See* Argument 1B. Allegations of an improperly motivated procurement process that is not fair or transparent, without any allegation of a bribe or kickback, cannot be repackaged as traditional money or property fraud. For these same reasons, Counts Twelve, Fifteen and Sixteen must be dismissed.

Counts Twelve, Fifteen and Sixteen do not allege that Ms. Keleher intended to deprive any victim, either a BDO competitor or DOE, of money or cognizable property. There is no allegation in the Indictment that a competitor to BDO had a property interest in obtaining a contract for the work awarded to BDO, that Ms. Keleher believed that DOE did not require the services offered by

BDO, or that BDO would not provide those services. Thus, neither the conspiracy to commit theft or conversion nor the scheme to defraud alleges that its object was to deprive anyone of money or property. To the extent that the Indictment alleges any intended monetary loss as a result of the award of contracts or contract amendments to BDO, that loss would only be the incidental byproduct of the alleged scheme, not the alleged purpose of the scheme. *Kelly* Slip op. at 12. The awards of the contracts and amendments themselves were, as with the award of the C&P contract, simply a quintessential exercise of regulatory power, the allocation of agency resources between various vendors who could have performed the services at issue.

Nor, in any event, does the Indictment allege that Ms. Keleher, as the Secretary of Education, lacked the discretion to award the BDO contract or contract amendments. Rather, it is alleged that individuals with government influence sought to obtain government contracts, that government officials made decisions based on "political affiliation," that individuals were provided access to government facilities and information, and government contracts were awarded "without complying with applicable government regulations and competitive proposal processes." *See*, *e.g.*, Indictment at ¶¶ 65-86.

Decisions by the head of an agency to select contractors she believes best suited to perform services for the agency, as well as decisions regarding the service needs of the agency, are often part of the "governance" exercised as part of the management function of the agency. Disfavor by the Federal government in the manner in which those decisions were made, even where they affect (as they must in all contract award cases) an incidental economic interest of the agency, cannot justify attempts to regulate that conduct by asserting a scheme the object of which is to obtain property from the government. The Supreme Court was emphatic in proscribing such maneuvering

on the part of the Federal government in *Kelly*. 531 U. S., at 24 ("[m]uch of governance involves … regulatory choice).

The unequivocal language of the Supreme Court leaves no doubt that an allegedly corrupted and politically-motivated contracting process does not constitute a deprivation of pecuniary cognizable property. Rather, it is an allegation of what constituted honest services wire fraud prior to *Skilling* in some Circuits (although not the First Circuit). Such allegations after *Skilling* do not state an offense.

Counts Twelve, Fifteen and Sixteen must be dismissed as an improper Federal intrusion into local affairs, making allegations that, even if true, would fall outside the contours of what is proscribed, a scheme to obtain cognizable property. *See Kelly* slip op. at 14. The absence of an alleged scheme that had as its aim the deprivation of a cognizable property right is fatal to these counts.

4. Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen of The Indictment Must be Dismissed as a Matter of Law for Failure to Comply with Rule 7(c)(1).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ." VI Amendment, Constitution of the United States. Rule 7(c)(1) of the Federal Rules of Criminal Procedure therefore requires an indictment to deliver "a plain, concise and definite written statement of the essential facts constituting" the charged offenses. *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993). "An indictment 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. Parigian*, 824 F.3d 5, 9 (1st Cir. 2016) (citations omitted). "A well-pleaded indictment can parrot 'the statutory language to describe the offense, but it must also be accompanied by such a statement of facts and circumstances as to inform the accused of the

specific offense with which he is charged.'" *Id*. (quoting *United States v. Savarese*, 686 F.3d 1, 6 (1st Cir. 2012)). "[I]t is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition [of the crime,] it must state the specifics, -- it must descend to particulars." *Russell v. United States*, 369 U.S. 749, 765 (1962).

This requires more than a conclusory recitation of the relevant statutory language. *Yefsky*, 994 F.2d at 893 ("The indictment may incorporate the words of the statute to set forth the offense, but the statutory language must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."); *United States v. Curtis*, 506 F.2d 985, 990 (10th Cir. 1974) (citations omitted). The indictment must "sketch[ ] out the elements of the crime and the nature of the charge so that the defendant can prepare a defense and plead double jeopardy in any future prosecution for the same offense." *United States v. Guerrier*, 669 F.3d 1, 3 (1st Cir. 2011). To survive a motion to dismiss under Rule 7(c)(1), a wire fraud indictment must therefore contain a reasonably detailed description of the particular "scheme or artifice to defraud" that a defendant is charged with devising to ensure the defendant has sufficient notice of the nature of the offense. 18 U.S.C. § 1343.[15]

The Tenth Circuit's decision in *Curtis* sets forth the standard that the government must meet in order to sufficiently plead wire/mail fraud, and routinely is cited for that proposition. 506 F.2d 985. In *Curtis*, the defendant purportedly had established what he called a "Computer Matching Institute," which the defendant assured would use its algorithms to pair individuals

[15] The elements of mail and wire fraud are identical in substance and are often discussed interchangeably. *See generally United States v. Sawyer*, 85 F.3d 713, 722 (1st Cir. 1996); *see also United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) (*citing United States v. Ames Sintering Co.*, 927 F.2d 232, 234 (6th Cir. 1990) (*per curiam*)); *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (wire fraud is identical to mail fraud statute except that it speaks of communications transmitted by wire).

looking for companionship or marriage. *Id*. at 986–87. The government alleged the defendant's entire business was little more than a charade. *Id.*

Reviewing Curtis's mail fraud conviction on appeal, the Tenth Circuit found that the indictment "plead[ed] little more than the statutory language without any fair indication of the nature or character of the scheme or artifice relied upon, or the false pretenses, misrepresentations or promises forming a part of it." *Id.* at 992. The charges were so ambiguous, the Court found, that "the grand jury may have had a concept of the scheme essentially different from that relied upon by the government before the trial jury." *Id.* at 989. The court thus required dismissal of the indictment. *Id.* at 992; *see also United States v. Keuylian*, 23 F. Supp. 3d 1126, 1129 (C.D. Calif. 2014) (granting motion to dismiss where indictment never stated the alleged false statements, misrepresentations, or false pretenses that constituted the scheme to defraud).

A. Counts One, Two, Three, and Ten do not Properly Apprise Ms. Keleher of the Nature of the "Scheme and Artifice" to Defraud Alleged.

The skeletal language of Count One provides as follows:

> From in or about January 2017 through in or about April 2018, in the District of Puerto Rico and within the jurisdiction of this Honorable Court,
>
> [1] JULIA BEATRICE KELEHER,
> [5] GLENDA E. PONCE-MENDOZA, and
> [6] MAYRA PONCE-MENDOZA,
>
> the defendants herein, and others known and unknown to the Grand Jury, did knowingly and willfully conspire and agree with each other to commit an offense against the United States, that is, devising a scheme and artifice to defraud and obtain money and properties by means of false and fraudulent pretenses, and promises, and in doing so, transmitting and causing to be transmitted by means of wire communications in interstate or foreign commerce, writings, signals, and email communications for the purpose of executing such

> scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1343.

(Docket No. 3 at 3-4). The object of the Conspiracy to commit wire fraud, in turn, purportedly was "to steer contracts between the Puerto Rico Department of Education and Colon & Ponce. This was allegedly accomplished through a corrupted bidding process wherein Colon & Ponce was provided with a competitive advantage based in part, on the close relationship between [1] JULIA BEATRICE KELEHER, [5] GLENDA PONCE-MENDOZA, and [6] MAYRA PONCE-MENDOZA." *Id.* at 4. The substantive counts, Counts Two, Three, and Ten merely parrot the statutory language and identify specific wires, but add no clarity as to what misrepresentations are alleged, the identity of the victim or victims to whom the misrepresentations were allegedly made, or the property of which the defendants were allegedly scheming to obtain from the victims through fraud.

Aside from the Indictment's utterly conclusory allegation that Ms. Keleher and her co-defendants devised "a scheme and artifice to defraud and obtain money and properties by means of false and fraudulent pretenses," the charging document fails to describe *any* act of deception or material misrepresentations as required to sustain the allegation of a "scheme and artifice to defraud." Count One contains thirty-five paragraphs of what the government claims are "overt acts" performed in furtherance of the charged conspiracy. However, none of those alleged acts describes a misrepresentation, a false pretense, a false promise, or a material concealment, as required to support a wire fraud prosecution.

Instead, Count One simply tracks the statutory language of wire fraud and, in conclusory fashion, asserts that the defendants somehow corrupted the bidding process to provide C&P with a competitive advantage based in part on Glenda Ponce-Mendoza's close relationship to Ms. Keleher. There is no explanation in the Indictment of what the alleged "steering" consisted of or

how it was orchestrated. The Indictment does not even define the intended meaning of "steering" in the context of the offense.

Perfunctory allegations that contracts were "steered," and that some DOE employees disfavored C&P as a contractor, without any articulation of what misrepresentations were made, the identity of the victim to whom they were made, or specification of the property of which the scheme was designed fraudulently to obtain from the victim, as in *Curtis*, results in ambiguity that is a mortal defect in the Indictment. Counts One, Two, Three, and Ten must be dismissed.

B. Counts Twelve, Fifteen, and Sixteen of the Indictment Should be Dismissed as a Matter of Law for Failure to Comply with Rule 7(c).

Counts Fifteen and Sixteen of the Indictment charge substantive wire fraud counts in connection with the BDO contracts. These counts are even more deficient under Rule 7(c) than Counts One, Two, Three, and Ten. Counts Fifteen and Sixteen do not even parrot the statutory language or purport to describe a scheme or artifice to defraud, instead relying on the incorporation of the facts underlying the Conspiracy to Commit Theft and Conversion charged in Count Twelve. As discussed above, not only does Count Twelve fail to even parrot the statutory language of a Section 1343 scheme to commit wire fraud, additionally its allegations of a scheme to commit theft and conversion are mutually exclusive of a scheme to defraud. Accordingly, Counts Fifteen and Sixteen plainly fail to meet the requirements of Rule 7(c).

Furthermore, Counts Twelve, Fifteen, and Sixteen also fail under Rule 7(c) because reciting a litany of purported contractual, administrative, and ethical transgressions, without linking those allegations to the relevant contracts issued to BDO, do not provide the essential facts of the offense charged. For example, the Indictment provides that: "[i]nternal government information was disclosed to non-governmental individuals in order to aid companies and individuals in obtaining government contracts; [e]ntities seeking government contracts utilized

individuals with government influence to seek and obtain government contracts; [e]ntities seeking government contracts negotiated with and paid individuals with government influence to obtain government contracts; [o]n occasion, existing government contracts were cancelled or terminated in order to award replacement or substitute contracts to vendors endorsed and promoted by individuals with government influence". (*See* Docket No. 3 at pp. 14 – 16). While these allegations purport to define the conspiracy count, and by reference the scheme and artifice to defraud, they fail to provide any indication of how these allegations relate, if at all, to the BDO contracts. Moreover, even if the allegations were read to pertain to the BDO contract amendments at issue, the allegations do not articulate any falsity or misrepresentation made by any defendant, nor do they describe the manner in which these misrepresentation(s) were intended to deprive anyone of money or cognizable property.

These omissions highlight the variance between conduct and representations that can be characterized as unethical or dishonest and may cause incidental monetary harm, and misrepresentations that are principally intended to inflict a pecuniary harm. *Kelly* Slip op. at 7. Indeed, despite its voluminous nature, the Indictment does not provide an inkling to Ms. Keleher regarding any alleged misrepresentations she made or caused to be made in furtherance of the scheme and artifice to defraud, nor facts which would suggest an intent on the part of Ms. Keleher to cause pecuniary harm to the government. It is patently unfair for a defendant to face a conceptually abstract indictment, which provides an exaggerated amount of verbiage, perhaps for the purpose of shocking the reader and the public, but neglects to provide any intimation of information that is essential to the wire fraud counts. Accordingly, the absence of information regarding the essence of the wire fraud counts prevent Ms. Keleher from preparing an adequate defense to the charges, or the ability to protect herself against double jeopardy. Counts Twelve,

Fifteen, and Sixteen of the Indictment should be dismissed as a matter of law for failure to comply with Rule 7(c).

5. Alternatively, the Government Should Be Directed to File a Bill of Particulars.

Ms. Keleher requests the Court direct the government to provide a bill of particulars with respect to any portion of the charges against her survives this motion to dismiss. *See* Fed. R. Crim. P. 7(f) (*"*The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits."); *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989) (explaining that the drafters of Rule 7(f) intended to "encourage a more liberal attitude by the courts toward bills of particulars") (internal quotations omitted); *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987); *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976); *see also Coffin v. United States*, 156 U.S. 432 (1895) ("It is always open to the defendant to move the judge before whom trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid the danger of injustice.") (internal citations omitted). Any doubts as to whether a bill of particulars should issue should be resolved in favor of the defendant: "[s]since [a] defendant is presumed innocent . . . it cannot be assumed he knows the particulars sought. *United States v. Tucker*, 262 F. Supp. 305, 307 (S.D.N.Y. 1966); *see also United States v. Manetti*, 323 F. Supp. 683, 697 (D. Del. 1971) (giving the defendant the benefit of the doubt when deciding whether to order a bill of particulars). When the information requested is necessary to prepare a defense, refusal to order a bill of particulars constitutes reversible error. *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985).

Specifically, for any remaining count, the government should be required to provide information detailing any misrepresentations alleged, the property the government alleges Ms. Keleher conspired to obtain, and the identity of the victim from whom she conspired to obtain such property.

"[T]he government must provide particularization of allegedly false statements made by defendants." *United States v. Rogers*, 617 F. Supp. 1024, 1028-29 (D. Colo. 1985) (compelling the government to "reveal the substance, time, place, and date of each overt act as well as the identities of the participants in those acts . . . for trial preparation and to avoid prejudicial surprise at trial"); *United States v. Holmes*, 2020 U.S. Dist. LEXIS 24551 * 23 (N.D. Calif. Feb. 11, 2020) (ordering the government to provide a bill of particulars with: "(1) the specific implicit and explicit false and fraudulent misrepresentations in the advertisements and marketing materials, (2) what about them is false, (3) who made them, and (4) how Defendants caused them to be made."); *United States v. Murgio*, No. 15-769, 2016 WL 5107128 (S.D.N .Y. Sept. 19, 2016) (ordering a bill of particulars specifying the laws, regulations, or duties the defendant allegedly violated); *United States v. Jackson*, No. 16-31, 2016 WL 6495589, at *7 (N.D.W. Va. Nov. 2, 2016) (directing the Government, in the context of a multi-count indictment containing charges of mail fraud, to produce a bill of particulars identifying, *inter alia*, any alleged false material statements or assertions or documents containing false material statements or assertions that defendants made with intent to defraud; the actual or intended victims of the alleged scheme to defraud, and any documents reflecting the actual or intended victims of such a scheme); *United States v. Magalnik*, 160 F. Supp. 3d 909, 918 (W.D. Va. 2015) (directing the Government, in the context of a conspiracy related to visa and alien employment certification fraud, to produce a bill of particulars identifying "the specific visa and/or work applications that [the Government] intends to introduce

at trial and [that] explains, in general terms, how each application is believed to be false or fraudulent"); *United States v. Wharton*, No. ELH-13-43, 2014 WL 1430387 (D. Md. Apr. 10, 2014) (ordering the Government, in the context of a charge of conspiracy related to Social Security benefits fraud, to produce a bill of particulars identifying, *inter alia*, each and every false statement the defendants made to the agency); *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) (district court erred in denying bill of particulars to identify the specific false or misleading statements alleged); *United States v. Trie*, 21 F. Supp.2d 7, 22 (D.D.C. 1998) (ordering the government to provide bill of particulars he government "as to exactly what the false statements are, what about them is false, who made them, and how Mr. Trie caused them to be made"); *United States v. Holman*, 490 F. Supp. 755, 762 (E.D. Pa. 1980) (requiring the government to disclose "the exact date and place, if known to the Government, of each event alleged in the indictment"); *United States v. Kole*, 442 F. Supp. 852, 854 (S.D.N.Y. 1977) (bill of particulars ordered to identify persons the government will claim at trial received bribes or gratuities allegedly paid by defendants, the dates of payments, the places where payments were made, and the names of the individuals making the payment); *United States v. Crisona*, 271 F. Supp. 150, 157 (S.D.N.Y. 1967) (ordering the government to provide a bill of particulars including the substance of any false representations known by it); *United States v. Caine*, 270 F.Supp. 801 (S.D.N.Y. 1967) (holding bill of particulars required because indictment had no explanation about why the representations were false and misleading); *United States v. Pilnick*, 267 F. Supp. 791, 801 (S.D.N.Y. 1967) (bill of particulars ordered to provide the names of customers in scheme to defraud). .

This information is necessary "to allow the defense to prepare its case adequately [and] to avoid prejudicial surprise." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 1 FED. PRAC. & PROC. CRIM. § 130 (4th ed.). In the absence thereof, Ms. Keleher would be essentially

unable to prepare her defense and would be exposed to unjust surprise at trial. *See United States v. Sepulveda*, 15 F.3d 1161, 1192-93 (1st Cir. 1993).

V. CONCLUSION

Prosecutors have referred to the mail and wire fraud statutes as "our Stradivarius, our Colt 45, our Louisville Slugger … and our true love." Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 771 (1980). In this case, however, the Government's blind reliance on wire fraud as its catch-all statute is fatal to its case. Ms. Keleher anticipates that, faced with a tidal wave of precedent disfavoring its charging decision, the Government will rely on its tried and true manner of defeating motions under Rule 12—alleging that this is her attempt to test the sufficiency of the evidence against her. Although this is often the case when defendants file motions to dismiss under Rule 12, it is not the case here. This case involves a fatally flawed and legally insufficient indictment that cannot be cured at trial or otherwise.

Even assuming the truth of all its factual allegations, the Indictment does not state the charged offenses. With respect to the C&P contract, it does not allege traditional wire fraud, either a scheme to deprive C&P's competitors of money or property or a scheme to defraud DOE of money. There is no wire fraud when a public official with discretion to select a government contractor exercises that discretion based on allegedly improper motives. *Kelly* plainly forecloses reading the wire fraud statute so broadly. Allegations of a scheme the alleged object of which is to subvert a public agency's procurement process, *i.e.*, the allocation of government agency resource among potential contractors, is not a scheme to obtain money or property. *See Kelly*, slip op. at 8-9 ("The State's 'intangible rights of allocation, exclusion, and control'—its prerogatives over who should get a benefit and who should not—do 'not create a property interest.'" quoting *Cleveland v. United States*, 531 U. S. 12, 23 (2000)). Nor do the allegations in the Indictment support a charge

of honest services fraud, as there is no allegation Ms. Keleher intended to receive a bribe, kickback, or other pecuniary benefit. Under pre-existing First Circuit law, the government may not do an end run on *Skilling* by charging traditional wire fraud alleging a deprivation of an intangible property right not cognizable under *Skilling*. In *Kelly*, the Supreme Court reiterated its commitment to this principle and to ensuring restraint in the definition of a "property right" in property fraud offenses, to prevent the recasting of deficient honest services fraud offenses as traditional wire fraud. Because that is precisely what the Indictment attempts to do in Counts One, Two, Three, and Ten, these counts must be dismissed, as they do not state an offense.

Counts Twelve, Fifteen, and Sixteen are riddled with shortcomings, as the government has couched its theory of prosecution based on allegations of administrative and procedural deficiencies, poor business practices, potentially unethical conduct, and alleged contractual breaches untethered to Ms. Keleher or the BDO contracts and contract amendments at issue. These allegations do not identify any misrepresentations made by Ms. Keleher, nor any intent on her part to defraud the government of money or property. The Indictment, at most, alleges that the award of contracts and contract amendments to BDO were infected by political motivations and the improper disclosure of DOE information to BDO and that BDO intended to use a portion of the contract proceeds to pay commissions, allegedly in violation of contracting regulations. This does not constitute a scheme the object of which is to deprive anyone of money or property. Rather, it alleges the corruption of a fair and transparent contracting process, resulting in BDO obtaining contracts or contract amendments to perform services for DOE. Since the Indictment never alleges Ms. Keleher lacked the authority to award the contracts and contract amendments to BDO, she cannot be charged with having intended pecuniary harm to the government based on exercising her discretion as to how to allocate funds she had the discretion to commit.

Furthermore, each of the counts against Ms. Keleher must be dismissed under Rule 7(c). The lack of a clear statement of the offense undermines the right to a grand jury's determination of probable cause to believe that the offense occurred, as well as the Fifth Amendment's guarantee of due process of law and protection against being twice placed in jeopardy for the same offense. *Hamling v. United States*, 418 U.S. 87, 177 (1974). As described above, Counts One Two, Three, Ten, Twelve, Fifteen, and Sixteen fail properly to appraise Ms. Keleher of the victim allegedly deprived of money or property, fail to identify any alleged misrepresentations, and fail to identify the property that Ms. Keleher allegedly schemed to obtain. Indeed, with respect to Counts Fifteen and Sixteen, the Indictment fails even to parrot the statutory language of the alleged offense, wire fraud, and instead incorporates allegations from Count Twelve of an alleged scheme to commit conversion or theft, allegations that are wholly inconsistent with a scheme or artifice to defraud. Accordingly, the Court must dismiss Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen of the Indictment, as requested above.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests the Court GRANT this motion and dismiss Counts One, Two, Three, Ten, Twelve, Fifteen, and Sixteen of the *Indictment* (Docket No. 3) should be dismissed under Rule 12 and also under Rule 7(c). If any counts are not dismissed, a bill of particulars should be ordered for those counts to provide the information lacking in the Indictment – the alleged misrepresentations, the property the conspirators allegedly conspired to obtain, and the victims from whom they conspired to obtain the property.

Respectfully submitted on this 18th day of May 2020, 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