

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

UNITED STATES OF AMERICA,

Plaintiff,
v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-036 (PJB)

**UNITED STATES' CONSOLIDATED RESPONSE
TO THE MOTIONS TO DISMISS FILED BY DEFENDANTS ACEVEDO VILA,
INCLAN BIRD, GONZALEZ FREYRE, AND COLON RODRIGUEZ
AND INCORPORATED MEMORANDUM OF LAW**

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TABLE OF CONTENTS

Table of Authorities	i
PRELIMINARY STATEMENT	3
I. FACTUAL BACKGROUND	4
A. FECA Conspiracy Count: Three Mechanisms Concealed from the FEC	4
B. The Wire Fraud Counts: Gubernatorial Campaign Financing Fraud	11
C. Failure to Report and Conspiracy to Defraud the Internal Revenue Service	16
II. SUMMARY OF ARGUMENTS	18
A. Count One of the Indictment is not Duplicitous and Alleges a Single Overarching Conspiracy	18
B. The Puerto Rico Collaborator and Family and Staff Members Schemes Alleged in Count One are not Time-Barred	19
C. The Wire Fraud Counts are not Defective	20
1. The Wire Fraud Counts Properly Allege a Property Interest	20
2. The Wire Fraud Scheme Involved Material Misrepresentations to the PR Treasury Department	22

3.	The Wire Transmissions were made in Interstate Commerce, and Properly Support Federal Jurisdiction ..	23
D.	The Federal Program Fraud Statute is Properly Charged	24
1.	Acevedo Vila was an Agent of the Government of Puerto Rico at the Time the Fraud was Perpetrated	24
2.	The Payments made by the PR Treasury Department from the Voluntary Fund were not subject to the Exception noted in 18 USC 666(c), since they were Payments Induced by Fraud. Whether the payments were bona fide is a question of fact for the jury and not properly raised pre-trial	24
E.	The Tax Counts are Properly Charged	25
1.	Counts 26 and 27 Provide the Defendants with Adequate Notice of the Charges	25
2.	Counts 26 and 27 Properly Allege Material Falsehoods	26
3.	Counts 26 and 27 Sufficiently Charge Elements of Materiality	26
4.	Counts 26 and 27 Properly Allege Willful Conduct	27
5.	Count 25 Sufficiently Alleges a Klein Conspiracy, and an Unlawful Purpose	28
6.	Count 25 is Legally Sufficient as to Defendant Luisa Inclán Bird	29
III.	ARGUMENT	29

A.	Count One of the Superseding Indictment Is Not Duplicitous Because It Alleges One Overarching Conspiracy to Violate the Federal Election Campaign Act	29
B.	The PR Collaborator Contribution Scheme Is Not Time-Barred	42
C.	The Wire Fraud Counts Are Legally Sufficient	45
	1. The Commonwealth of Puerto Rico Had A Property Interest in the Voluntary Fund	45
	2. The Gubernatorial Campaign Made Material Misrepresentations Affecting Disbursements from the Voluntary Fund	51
	3. Counts 10-21 List Communications Transmitted in Interstate Commerce	52
	4. The Wire Fraud Counts meet the Statutory Requirement that the Use of the Wires be for the Purpose of Executing the Scheme to Defraud	57
D.	The Federal Program Fraud Count is Legally Sufficient ..	60
	1. Defendant Acevedo Vila was an Agent while the Fraudulent Scheme was Ongoing	62
	2. The Issue of Bona Fide Expenses is a Question of Fact	65
	3. The Expenses do not qualify for the § 666(c) Exception	65
E.	The Tax Counts are Factually and Legally Sufficient	71
	1. Counts 26 and 27 Constitutionally Provide Adequate Notice	74

2.	Counts 26 and 27 Allege Material Falsehoods in the Returns	75
	a.	
	Even if the indictment were read as charging the omission of only Puerto Rico-sourced income, the indictment sufficiently charges the element of materiality	76
	b.	
	Defendant erroneously assumes that the indictment charges only the omission of Puerto Rico-sourced income	77
3.	Counts 26 and 27 Involve Willful Conduct	77
4.	Count 25 Adequately Alleges A Conspiratorial Agreement or Unlawful Purpose	81
F.	Count 25 is Legally Sufficient as to Defendant Luisa Inclán Bird	84

FEDERAL CASES

Abney v. United States, 431 U.S. 651, 659 (1977).	80
Badders v. United States, 240 U.S. 391, 393 (1916).	52
Blumenthal v. United States, 322 U.S. 539 (1947).	32, 33
Brady v. Maryland, 373 U.S. 83 (1963).	10
Carpenter v. United States, 484 U.S. 19, 25 n. 6 (1987).	52
Cleveland v. United States, 531 U.S. 12 (2000).	47-50
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, (1949).	80
Costello v. United States, 350 U.S. 359, 363 (1956).	73, 85, 88,
Hamling v. United States, 418 U.S. 87, 117 (1974).	72
Howkins v. Commissioner, 48 T.C. 689 (1968).	77
Kotteakos v. United States, 328 U.S. 750 (1946).	30, 32, 33, 41
Manning v. Commissioner, T.C. Memo. 1979-146 (1979).	77
McNally v. United States, 483 U.S. 350 (1987).	48
Pasquantino v. United States, 544 U.S. 349 (2005).	49
Russell v. United States, 369 U.S. 749, 763-64 (1962).	85
Salinas v. United States, 522 U.S. 52, 57 (1997).	64
Schmuck v. United States, 489 U.S. 705, 710-711 (1989).	58
United States v. Abney, 1998 WL 246636.	66, 69, 70,
United States v. Abu-Shawish, 507 F.3d 550, 556 (7th Cir. 2007).	64
United States v. Alhalabi, 443 F.3d 605, 611 (7th Cir. 2006).	72
United States v. Alsobrook, 620 F.2d 139, 142 (6th Cir. 1980).	32

United States v. Ballard, 535 F.2d 400, 404 (8th Cir. 1976)..	75
United States v. Berardi, 675 F.2d 894, 897-98 (7th Cir. 1982).	31
United States v. Berger, 224 F.3d 107, 114-115 (2d Cir. 2000).	87
United States v. Berger, 473 F.3d 1080, 1104 (9th Cir 2007).	72, 73
United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970).	56
United States v. Boylan, 898 F.2d 230, 241 (1st Cir. 1990).	34
United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985).	56
United States v. Byars, 2006 WL 2366633.	53, 55, 56
United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993).	58
United States v. Chandler, 171 F.2d 921, 937 (1st Cir. 1949).	31
United States v. Cianci, 378 F.3d 71, 81 (1st Cir. 2004).	72
United States v. Cochrane, 985 F.2d 1027, 1031 (9th Cir. 1993).	75
United States v. Cornier-Ortiz, 361 F.3d 29, 33 (1st Cir. 2004).	65, 66, 69
United States v. Corum, 362 F.3d 489, 494 (8th Cir. 2004).	53
United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974).	78
United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992).	73
United States v. Cruzado-Laureano, 404 F.3d 470, 484-85 (1st Cir. 2005).	31, 64
United States v. Czubinski, 106 F.3d 1069, 1073 (1st Cir. 1997).	57
United States v. Dahlstrom, 713 F.2d 1423 (9th Cir 1983).	79
United States v. Daley, 454 F.2d 505, 509 (1st Cir. 1972).	31
United States v. David, 940 F.2d 722, 724 (1st Cir. 1991).	87
United States v. Derezinski, 945 F.2d 1006, 1010 n.4 (8th Cir. 1991).	83
United States v. Drougas, 748 F.2d 8, 17 (1st Cir. 1984).	31, 34

United States v. Dwyer, 238 Fed.Appx. 631, 647 (1st Cir. 2007) (unpublished opinion).	65, 66, 69
United States v. D’Amico, 496 F.3d 95, 99 (1st Cir. 2007).	30
United States v. Edgar, 304 F.3d 1320, 1328 (11th Cir. 2002).	69
United States v. Ervasti, 201 F.3d 1029, 1037-1038 (8th Cir. 2000).	81
United States v. Fermin Castillo, 829 F.2d 1194, 1199 (1st Cir.1987).	59
United States v. Flaherty, 668 F.2d 566, 580 (1st Cir. 1981).	86
United States v. Garib-Bazain, 222 F.3d 17 (1st Cir. 2000).	80
United States v. Gil, 297 F.3d 93, 100 (2nd Cir. 2002).	53
United States v. Gilbert, 181 F.3d 152, 158 (1st Cir. 1999).	53
United States v. Giordano, 442 F.3d 30, 40 (2d Cir. 2006).	53
United States v. Goldberg, 105 F.3d 770, 773 (1st Cir. 1999).	83
United States v. Griffin, 524 F.3d 71, 76 (1st Cir. 2008).	75, 76
United States v. Harloff, 815 F.Supp. 618, 619 (W.D.N.Y. 1993).	70
United States v. Harrington, 942 F.2d 751, 756-57 (10th Cir. 1991).	36
United States v. Helmsley, 941 F.2d 71, 90 (2d Cir. 1991).	81
United States v. Jaynes, 75 F.3d 1493, 1502 (10th Cir.1996).	32
United States v. Kammersell, 196 F.3d 1137 (10th Cir. 1999).	54, 55
United States v. Kelner, 534 F.2d 1020, 1024 (2d 1976).	55
United States v. Kenrick, 221 F.3d 19, 29 (1st Cir. 2000).	63
United States v. Klat, 156 F.3d 1258, 1266 (D.C. Cir. 1998).	32
United States v. Klein, 247 F.2d 908 (2d Cir. 1957).	28, 81, 83, 84
United States v. Kouri-Perez, 187 F.3d 1, 5 (1st Cir.1999).	80
United States v. LiCausi, 167 F.3d 36, 45 (1st Cir. 1999).	31

United States v. Lindemann, 85 F.3d 1232, 1241 (7th Cir. 1996).....	56
United States v. Mallas, 762 F. 2d 361 (4th Cir. 1985).....	77, 78
United States v. Manarite, 448 F.2d 583 (2d Cir. 1971).	36
United States v. Marbelt, 129 F.Supp. 2d 49, 56 (D.Mass., 2000).	58, 59
United States v. Marek, 238 F.3d 310, 320 (5th Cir. 2001).....	53
United States v. Maze, 414 U.S. 395, 399 (1974).	58
United States v. Middleton, 246 F.3d 825, 842 (6th Cir. 2001).	72
United States v. Mills, 140 F.3d 630 (6th Cir. 1998).....	67-69
United States v. Moloney, 287 F.3d 236, 240 (2d Cir. 2002).	32
United States v. Morris, 46 F.3d 410, 416 (5th Cir. 1995).	36
United States v. Muñoz Franco, 986 F.Supp. 70 (D.P.R. 1997).	30, 39, 41
United States v. Muñoz-Franco, et. al., 487 F.3d 25, 30-32 (1st Cir. 2007).	40, 81, 85
United States v. Nat’l Dairy Prods. Corp., 372 U.S. 29, 33 n. 2 (1963).	73
United States v. O’Malley, 535 F.2d 589, 592 (10th Cir.1976).....	57
United States v. Paredes, 950 F.Supp. 584 (S.D.N.Y. 1996).....	53
United States v. Perez, 414 F.3d 302, 304-05 (2d Cir. 2005).	53
United States v Phillips, 376 F.Supp. 2d 6, 9 (D.Mass 2005).....	54
United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 249-52 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002).....	54
United States v. Pirro, 212 F.3d 86, 93 (2d Cir. 2000).	73
United States v. Portela, 167 F.3d 687 (1st Cir. 1999).....	34-36
United States v. Ratcliff, 488 F.3d 639, 643 (5th Cir. 2007).....	72
United States v. Resendiz-Ponce, ___ U.S. ___, 127 S. Ct. 782 (2007).	71
United States v. Richards, 204 F.3d 177, 207 (5th Cir. 2000), overruled on other grounds by United States v. Longoria, 298 F.3d 367, 372 n. 6 (5th Cir. 2002).	56

United States v. Robin, 693 F.2d 376, 378 (5th Cir. 1982).....	32
United States v. Runyan, 290 F.3d 223, 239 (5th Cir.), cert. denied, 537 U.S. 888 (2002). . . .	55
United States v. Sampson, 371 U.S. 75, 78-79 (1962).	73
United States v. Sans, 731 F.2d 1521, 1534 (11th Cir. 1984).....	82
United States v. Sawyer, 85 F.3d 713, 730 (1st Cir.1996)..	32, 58
United States v. Schulman, 817 F.2d 1355 (9th Cir. 1987).....	79
United States v. Shelton, 816 F.Supp. 1132, 1137 (W.D.Tex.1993).....	66
United States v. Silvano, 812 F.2d 754, 758 (1st Cir. 1987).....	52, 59, 60
United States v. Siravo, 377 F.2d 469, (1st Cir. 1967).	74, 75
United States v. Smith, 373 F.3d 561, 564 (4th Cir. 2004).....	32
United States v. Stout, Crim. No. 89-317, 1994 WL 90025 (E.D.Pa. Mar. 24, 1994) (unpublished opinion).	69
United States v. Taylor, 574 F.2d 232 (5th Cir. 1978).	75
United States v. Tedesco, 441 F. Supp. 1336, 1340 (M.D. Pa. 1977).....	86
United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987)..	73
United States v. Trainor, 477 F.3d 24, 32 (1st Cir. 2007).....	31
United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir. 1975)..	85
United States v. Veliz, 2004 WL 964005	54
United States v. Verrecchia, 196 F.3d 294, 297 (1st Cir. 1999).	31, 32
United States v. Vitillo, 490 F.3d 314, 320 (3rd Cir. 2007).	87
United States v. Vitillo, Crim. No. 03-555, 2005 WL 2452159, at *5 (E.D.Pa. Oct. 4, 2005) (unpublished opinion).	66, 69
United States v. Vitillo, Crim. No. 03-555, 2005 WL 2496877, at *8 (E.D.Pa. Nov. 2, 2004) (unpublished opinion).	70

United States v. Weiss, 491 F.2d 460, 466 (2d Cir. 1974).	84
United States v. White, 241 F.3d 1015 (8th Cir. 2001).	84, 87
United States v. Williams, 507 F.3d 905, 909 (5th Cir. 2007).	66, 70
United States v. Zabare, 871 F.2d 282 (2d Cir. 1989).	37
United v. Lopez, 514 U.S. 549 (1995).	53, 55
Valentine v. Konteh, 395 F.3d 626, 632 (6th Cir. 2005).	86

FEDERAL STATUTES

18 U.S.C. § 371.	27, 28, 84, 85, 86, 87
18 U.S.C. § 1343.	57, 59, 63
18 U.S.C. § 666.	2, 24, 25, 31, 60, 62, 64, 65, 66, 68, 69, 70
18 U.S.C. §844(e).	53, 54
18 U.S.C. §875(c).	54
1986 U.S.C.C.A.N. 6138.	65
21 U.S.C. §§ 841 and 846.	87
26 U.S.C. § 7206(1).	26, 74, 75
28 U.S.C. § 1292.	79, 80
5 U.S.C. App. 4 § 101.	17
I.R.C. § 933(1).	26, 27, 75, 76

STATE STATUTES

P.R. Laws Ann. tit. 16 §§ 3117.	13, 21, 50, 64
P.R. Laws Ann. tit. 16 §§ 3366.	47

FEDERAL RULES

Fed. R. Crim. P. 12(b)(1).. 72

Fed. R. Crim. P. 7(c)(1).. 31, 71

First Cir. Pattern Crim. Jury Instr. §§ 4.13 (1998).. 63

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AND INCORPORATED MEMORANDUM OF LAW**

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through its undersigned attorneys Rosa Emilia Rodríguez-Vélez, United States Attorney, María A. Domínguez, First Assistant United States Attorney, Ernesto López Soltero, Assistant United States Attorney, and Daniel Schwager, Trial Attorney, Public Integrity Section, U.S. Department of Justice, and files this combined response¹ to Defendant Aníbal Acevedo Vilá's Motion to Dismiss the Superseding Indictment as follows:

¹ Defendants in this case have filed numerous pre-trial motions to dismiss various counts of the Superseding Indictment. Specifically, defendant Luisa Inclán Bird filed a motion to dismiss the tax conspiracy (Count 25), D.E. 171, and a motion to dismiss the wire fraud counts (Counts 10-21), D.E. 172 ; defendant Edwin Colón Rodríguez filed a motion to dismiss the FECA conspiracy (Count One) as duplicitous and time barred, D.E. 176; and José González Freyre filed a motion to dismiss the wire fraud counts (Counts 10 - 21) as defective, D.E. 190. In addition to these motions, the defendant, Aníbal Acevedo Vilá filed a motion to dismiss the FECA conspiracy (Count One), the wire fraud counts (Counts 10 - 21), the program fraud count (Count 22), the tax conspiracy (Count 25) and substantive tax counts (Counts 26 and 27), as defective, D.E. 182. In order to respond to the defendants motions in an efficient and structured manner, the United States will consolidate its response to the extent commonality of issues exist.

On July 8, 2008, the defendant Aníbal Acevedo Vilá filed a motion to dismiss various counts of the Superseding Indictment. The general nature of Acevedo Vilá's challenges are identified as follows:

- (a) Count 1 ("the FECA conspiracy count") is duplicitous because it charges more than one offense, and two of the schemes contained in the conspiracy are time-barred. These arguments were joined by co-defendants Cándido Negrón Mella, Jorge Velasco Mella, Edwin Colón Rodríguez, Eneidy Coreano Salgado, and Luisa Inclán Bird. Co-defendants Marvin I. Block and Robert M. Feldman joined only the duplicity aspect of the argument.
- (b) Counts 10 through 21 ("the wire fraud counts") are defective because: (1) the Commonwealth of Puerto Rico did not have a property interest over the moneys allocated to the Voluntary Fund; (2) there are no misrepresentations material to the disbursements from the Voluntary Fund; and (3) there are no interstate wires involved in the scheme to defraud supporting federal jurisdiction. This argument was joined by co-defendants Luisa Inclán Bird, Ramón Velasco Escardille, Ricardo Colón Padilla, José González Freyre, and Miguel Nazario Franco. Surprisingly, defendants Eneidy Coreano Salgado and Jorge Velasco Mella also joined in this argument notwithstanding the fact that they are not charged in the wire fraud counts.
- (c) Count 22 ("the federal program fraud count") is defective because Acevedo Vilá was not acting as an agent of the Commonwealth of Puerto Rico when the alleged fraud occurred; and because the expenses paid or reimbursed fall within the "usual course of business" exception in Section 666(c). This argument was joined by co-defendants Ricardo Colón Padilla, Luisa Inclán Bird, and Miguel Nazario Franco. Defendant Eneidy Coreano Salgado also joins this argument even though she is not charged in the program fraud count.
- (d) Counts 26 and 27 ("the tax counts") fail to give adequate notice, and do not allege any material falsehoods nor willful misconduct. This argument is joined by defendant Eneidy Coreano Salgado, although she is likewise not charged in the tax counts.
- (e) Count 25 ("the tax conspiracy count") fails to allege an agreement and an unlawful purpose. This argument is joined by co-defendant Luisa Inclán Bird, and again by defendant Eneidy Coreano Salgado, who is not charged in the tax conspiracy.

The United States respectfully requests that this Honorable Court deny the defendants' motions to dismiss for the reasons more fully set forth below.

Preliminary Statement

In a motion laced with self-serving political innuendo and rhetoric, and lacking in sound legal reasoning, Acevedo Vilá continues his unabated smear publicity campaign against the United States government, and fails to address the merits of this public corruption case.² The motion conveniently glosses over the specific allegations contained in the Superseding Indictment which detail a pattern of conduct on the part of Acevedo Vilá and his co-conspirators that corrupted the electoral process during the seven-year period between 1999 and 2006. The common purpose of this course of conduct, which in its various stages violated both federal and state campaign financing laws, was to ensure the viability of Acevedo Vilá's political career and the payment of his campaign debts. The illegal fund-raising schemes implemented during Acevedo Vilá's Resident Commissioner and gubernatorial campaigns were aimed at retiring the substantial debt accumulated during his bids

² It is very telling that on July 10, 2008, the day after the motion to dismiss was filed, Acevedo Vilá urged the public to go online and read the motion during a press conference held as part of his "Aníbal en tu Pueblo" re-election campaign visit to Aibonito. In his own words: "What was filed yesterday (Tuesday) is the work product of the attorneys. I invite everyone to read the motions, and whoever reads those motions, if done objectively, will have to reach that conclusion. That this is not in the least a case of corruption and that everything stems from a politically motivated investigation," Acevedo Vilá stated during a press conference in Aibonito. (Emphasis added). "The attorneys have done their job. Obviously, this is an issue of interest to the country. So I invite the people, when in the age of the internet it is already everywhere (the motions), to access the document, (to) read it. These are intelligent people. I trust in the intelligence of these people, well let them read it (the motions) and reach their own conclusions," he stated. (El Nuevo Dia, July 10, 2008)(translation ours).

to become Puerto Rico's Resident Commissioner and then governor. These schemes were effectively concealed from the FEC and PR regulatory agencies through a pattern of deceptive conduct, which included the filing of materially false campaign reports by the campaigns with the corresponding authorities, and efforts to derail an FEC investigation into alleged improprieties inherent in the payment of publicity expenses owed by the Resident Commissioner campaign.

Similar schemes were also operated to corruptly finance Acevedo Vilá's gubernatorial campaign. These schemes fraudulently concealed illegal off-the-books contributions and expenses from the pertinent state regulatory agencies, thereby inducing the disbursement of public funds.³ Notably, the same publicity firm was used to funnel the illegal campaign contributions for both the Resident Commissioner and gubernatorial campaigns. This corrupt pattern of conduct continued after Acevedo Vilá's election as governor, through the illegal supplementation of his income from various sources, and his failure to report the same in his income tax returns.

I. Factual Background

A. FECA Conspiracy Count: Three Mechanisms Concealed from the FEC

As early as 1999, when Aníbal Acevedo Vilá was a candidate for Resident Commissioner, through the end of his tenure as Resident Commissioner in 2004, and the beginning of his term as Governor of the Commonwealth of Puerto Rico in 2005, Acevedo Vilá, and high level officials from his Resident Commissioner and gubernatorial campaigns engaged in a sustained pattern of conduct which corrupted the electoral process. Together with conduit contributors and others, Acevedo Vilá

³ These are the fund raising mechanisms detailed in Counts 10-21 of the Superseding Indictment.

campaign flouted campaign contributions limits, and “cooked the books” in order to conceal illegal campaign contributions streaming into its coffers. With respect to the Resident Commissioner campaign, three illegal mechanisms were devised and implemented between the years 1999 and 2003, to retire Acevedo Vilá’s Resident Commissioner campaign debt. The three schemes shared the unified purpose of the solicitation and receipt of illegal campaign contributions. The illegality stemmed from the fact that the contributions were prohibitive source (corporate) contributions, beyond the quantitative limits allowed by law, or paid through straw or conduit contributors. The three schemes also shared the common objective of retiring a \$545,000 reported debt to the campaign’s principal publicity firm, Lopito Ileana & Howie (“LIH”), which had carried over from the Resident Commissioner primary campaign. Each scheme was actively concealed from the FEC by campaign officials between the years 1999 through 2004.

The first scheme involved the solicitation and receipt of illegal campaign contributions from wealthy businessmen in Puerto Rico (“the PR collaborators”), which were paid to the campaign between the years 1999 and 2000. Due to the illegal nature of the payments, and in an effort to keep these transactions off the books of the campaign, the payments were made directly to LIH, and credited to the campaign’s debt with the firm. These payments totaled approximately \$182,000 and were in direct contravention to the prohibitive source and quantitative limitations imposed by federal law. The reported debt owed by the campaign to LIH was the subject of two FEC complaints, filed in August and October 2000, just two months after the last collaborator payment had been made to the campaign.

In early 2001 the FEC initiated an enforcement action to determine whether the campaign's failure to satisfy the LIH debt, and the latter's failure to take any action to collect the money owed, amounted to an illegal corporate contribution. The FEC began to focus attention on the commercial relationship between LIH and the campaign, in order to assess whether the payment and collection of the debt to LIH was commercially reasonable. During this same period of time, Acevedo Vilá's campaign officials, defendants Ramón Velasco Escardille (Velasco Escardille) and Edwin Colón Rodríguez (Colón Rodríguez), filed numerous false reports with the FEC concealing the existence of these schemes. (Superseding Indictment, pp. 15-16). Moreover, Velasco Escardille and Colón Rodríguez executed false sworn statements in April 2003, which were filed by the campaign with the FEC, in response to the FEC enforcement action. The sworn statements to the FEC omitted material information regarding the PR collaborator scheme, and were calculated to create the false impression that the campaign's relationship with LIH was legitimate and commercially reasonable. The campaign's response eventually resulted in the FEC's decision to close the enforcement action in October 2003. That response not only involved deception as to the size of the LIH debt, because it concealed the existence of the unreported debt, but it also misrepresented the essence of the campaign's commercial relationship with the firm, by concealing the "off -the-books" payments made by several contributors directly to the publicity firm.

The second scheme was implemented between September 2001 through December 2002. It involved the solicitation and receipt of illegal conduit contributions from family members of the defendant, Acevedo Vilá, and staff members of the Resident Commissioner's Office in Puerto Rico.

The purpose was consistent with the first scheme -- to retire Acevedo Vilá's Resident Commissioner campaign debt. (Superseding Indictment, pp. 16-18). Acevedo Vilá and Luisa Inclán Bird (Inclán Bird), a person closely connected with the finances of both the Resident Commissioner and gubernatorial campaigns of Acevedo Vilá, solicited the contributions. The donors were then reimbursed for their contributions. Through these contributions, unreported cash from unknown sources was illegally funneled to the campaign coffers, free from FEC scrutiny. The conduit contributions were falsely reported to the FEC by the campaign as legitimate contributions made by the conduits.

The third mechanism to raise funds and liquidate the campaign's existing debt involved illegal conduit contributions from Philadelphia and New Jersey residents to Acevedo Vilá's Resident Commissioner campaign, between the years 2002 and 2003. (Superseding Indictment, pp. 18-26). The conduit contribution scheme involved several individuals based in Philadelphia: Cándido Negrón (a Philadelphia dentist), Salvatore Avanzato (a Philadelphia businessman in the dental administration business), and Robert M. Feldman (a businessman and recognized political fundraiser). Avanzato and Negrón were business partners. Negrón looked for business opportunities for their business, and considered that the Puerto Rico medicare market was attractive for a potential dental carve out due to its inordinately high constituency. Negrón and Avanzato's business maintained a corporate bank account which they used to fund the conduit contributions to Acevedo Vilá's Resident Commissioner Campaign, and to pay a corporate credit card used by Negrón to dine Acevedo Vilá and his Administrative Assistant, Eneidy Coreano, at upscale restaurants in Washington D.C. and other cities. Though Coreano was an employee of the Resident Commissioner's Washington D.C. office, and not an employee of Acevedo Vilá's campaign, she was

closely involved with the Philadelphia conduit contributions, and shared Acevedo Vilá's relationship with Negrón. For example, Coreano accompanied Acevedo Vilá to the fund raiser that Negrón, Avanzato and Feldman organized for him in Philadelphia. While in Washington D.C. Coreano took custody of campaign checks signed in blank by Colón Rodríguez in Puerto Rico, and hand-delivered to her by Acevedo Vilá. Coreano then wrote out refund checks for conduit donors which were later hand-delivered to Negrón at one of the expensive dinners that she and Acevedo Vilá shared with him. Coreano regularly joined Acevedo Vilá and Negrón for dinners at upscale restaurants in Washington D.C. and Philadelphia, to which they were treated by Negrón. Coreano was also called upon by the campaign to obtain information required for the preparation of FEC reports with respect to the Philadelphia and New Jersey conduit contributors. Coreano obtained this information not from the conduit contributors, but from Negrón, who was the true source of the contribution.

Negrón and Feldman, who eventually became a business associates, were consultants for the largest multi-state administrator of medicaid dental programs in the United States. Between the years 2002 and 2003, the Resident Commissioner campaign received approximately \$133,000, in conduit campaign contributions from individuals residing in Pennsylvania and New Jersey, most of whom were employees of Negrón's and Avanzato's dental companies. Other conduit contributors were relatives and/or friends of Negrón and Avanzato. Negrón and Feldman were favored by Acevedo Vilá who personally made, or directed staff members, to make business referrals on their behalf to government of Puerto Rico agencies.

The illegal conduit contributions in Philadelphia were made at the behest of either Negrón or Avanzato, who later reimbursed the conduit contributors with funds belonging to their corporations. Negrón's cousin, defendant Jorge Velasco Mella, also assisted in the collection of

conduit checks, and sometimes filled out the payee section. Approximately 35 individuals were used as campaign conduit contributors. The FEC ordered the reimbursement of some of these illegal contributions, but only a fraction of the reported refunds were ever made. The money refunded was immediately “flipped” by the conduits to a Philadelphia politician with whom Feldman was associated. False statements regarding the conduit contributions and the refunds were filed with the FEC by Velasco Escardille and Colón Rodríguez. (Superseding Indictment, p. 25).

As part of their involvement in the conduit contribution scheme, Feldman, Negrón and Avanzato hosted a campaign fund-raiser in Philadelphia for Acevedo Vilá on February 7, 2002. The fund raiser was attended by Avanzato’s and Negrón’s employees and family members, and business people connected to Feldman. The week prior to the February 2002 Philadelphia fund raiser, Negrón and Avanzato had solicited and received contribution checks in excess of \$ 41,000 from their employees, which they fully reimbursed. At the conclusion of the event, Negrón and Feldman hand-delivered the conduit contribution checks to Acevedo Vilá and Eneidy Coreano.

Most of the conduit donors made contributions to the Acevedo Vilá campaign on at least two or three occasions. These individuals were primarily residents of Philadelphia and New Jersey, and therefore, not constituents of Acevedo Vilá. They were also predominately of non-Hispanic descent, held clerical or managerial office positions, and many contributed amounts which exceeded their financial ability.⁴ None of the conduit contributors had a genuine desire to contribute to the campaign of a non-voting member of Congress from Puerto Rico. Most of the conduits were

⁴ The minimum amount of any conduit contribution to Acevedo Vilá’s Resident Commissioner campaign was \$1,000.

unfamiliar with Puerto Rico politics, had no interest in the Island, and had no understanding of Acevedo Vilá's political platform. In essence, none of the conduit donors would have made any financial contribution to Acevedo Vilá's campaign absent the request by Negrón or Avanzato, and the full reimbursement paid to them. Notable examples of this scenario are the contributions made to the Resident Commissioner campaign of Acevedo Vilá by a maintenance worker who was his designated driver during his various visits to Philadelphia. This individual, of modest means, contributed a total of \$ 5,000.00 to Acevedo Vilá's resident commissioner campaign, (one payment of \$3,000 and two successive payments of \$1,000 a piece), while his mother made a one time contribution of \$3,000.⁵ Both the driver and his mother were predictably reimbursed for the full

⁵ The defendant suggests that the only surviving aspect of the FECA conspiracy would be the Philadelphia scheme, for which there is allegedly no evidence of Acevedo Vilá's knowledge. (AAV Motion to Dismiss, p. 7, n.7). Acevedo Vilá alleges that co-defendant Cándido Negrón advised the Federal Bureau of Investigation that Acevedo Vilá was unaware of the conduit nature of the Philadelphia contributions, and that Acevedo Vilá never asked any questions in this regard. Subsequently, an affidavit was apparently provided by Negrón and filed by Acevedo Vilá's attorneys. Notably, such filing was not under seal. The United States will formally respond to that motion in a separate response specifically addressing the issue of Acevedo Vilá's request for severance. Clearly, to the extent any potentially exculpatory information was uncovered during the investigation, it was provided to the defendants, consistent with the government's obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. However, the statement provided by Negrón, and characterized as "exculpatory" in Acevedo Vilá's submission, is a gross distortion of the information provided by Negrón during his numerous debriefings. In fact, these claims of lack of knowledge are undermined by the circumstances surrounding the payment of the conduit contributions, including the excessive campaign contributions made by the driver. The absurdity of that scenario is highlighted by a recent article in the New York Times, Sunday Magazine, that thought it newsworthy to publish the fact that Mike Huckabee, former Republican Presidential hopeful, had received a \$50 contribution from his driver. Specifically the article states: "On the road to Pella, Huckabee talked about the enthusiasm he now encounters everywhere he goes. For example, he said, his driver in California not only declined payment but also wrote the governor a \$50 personal check right on the spot." *The Huckabee Factor*, *The New York Times Magazine*, by Zev Chafete, December 16, 2007.

amount of their contributions by Negrón and his associates. These were among the checks hand-delivered to Acevedo Vilá at the conclusion of the Fund-raiser in Philadelphia. The remaining conduit contributions were hand delivered by Negrón to Acevedo Vilá during their dinner meetings in Washington D.C. The conduit contributions were subsequently mailed or hand-delivered to Puerto Rico, on occasions personally by Acevedo Vilá, and Acevedo Vilá imparted instructions on the manner in which these checks should be handled within the campaign. The funds were ultimately deposited into the campaign's bank accounts in Puerto Rico.

Between February 8, 2002 through April 29, 2003, Negrón and Avanzato obtained additional conduit contributions for Acevedo Vilá in excess of \$92,000, from the same employees, family members and friends who had been original conduit contributors and who continued to be fully reimbursed. Additional contributions from prominent businessmen who had expectations of developing business interests in Puerto Rico, and who were connected with Feldman and Negrón, were also received. In an effort to conceal these illegal contributions from the FEC, and as part of a scheme to pay-off unreported campaign debts, numerous false statements were made by campaign officials to the FEC.

B. The Wire Fraud Counts: Gubernatorial Campaign Financing Fraud

In 2003, while Acevedo Vilá was Resident Commissioner, he filed his gubernatorial candidacy in Puerto Rico and kicked-off his campaign for Governor. That year, Acevedo Vilá and other senior officials in his campaign, devised a scheme to steal \$7 million from the people of Puerto Rico. The mechanism of the scheme was almost identical to the one implemented in 1999, during the time that Acevedo Vilá had been a candidate for Resident Commissioner. (Superseding

Indictment, pp. 34-42). The same public relations firm was used for both schemes, although under a different corporate name, Marketing and Media Motivation (MMM). Predictably, the illegal contributions for the gubernatorial campaign were significantly higher than those received during the Resident Commissioner campaign. Between March 2004 through February 2005, approximately \$720,000 in illegal “off the book” contributions were paid by prominent businessmen in Puerto Rico for the benefit of Acevedo Vilá’s gubernatorial campaign. Many of the payments were made through corporations which were owned or controlled by the businessmen. These corporations had substantial financial and business interests in Puerto Rico. One such collaborator was defendant, José González Freyre, who made two illegal campaign contributions to the gubernatorial campaign of Acevedo Vilá on October 4, 2004⁶, for a total of \$50,000. These payments were part of the \$720,000 paid collectively by the gubernatorial campaign collaborators in Puerto Rico.

The payment mechanisms employed were similar in many respects, but different in others. The illegal contributions were paid directly to the publicity firm, and not to the campaign, as had been the case with the Resident Commissioner campaign. However, the collaborator payments made during the gubernatorial campaign were not only used to pay down the campaign debt, but also to route payments to other vendors of the campaign. In this manner, the publicity firm was used as a clearinghouse for expenses that the campaign wanted to keep off its books. In addition, illegal cash contributions and other third party accounts were used to pay service providers. The total

⁶ González Freyre was the only gubernatorial campaign contributor charged in the Superseding Indictment. When questioned by federal agents regarding the nature of the illegal contribution, he gave a statement suggesting that the payment was a *bona fide* business expense of his corporation, for the preparation of a market study prepared by the publicity firm. In fact, the payment was an illegal campaign contribution for the Acevedo Vilá gubernatorial campaign.

amount of money paid by Acevedo Vilá's gubernatorial campaign in these "off the book" transactions was approximately \$3.4 million. These various financing mechanisms had the common object of circumventing Puerto Rico's electoral law.

Public Law 115 was passed by the Puerto Rico Legislature in April 2003. P.R. Laws Ann. tit. 16, § 3117. For candidates who certified that they would abide by its rules, in exchange for up to \$7 million of public money, the law set an \$11 million limit on campaign spending in an election year. The law further provided that political campaigns could raise a maximum of \$4 million which would be progressively matched by the PR Treasury Department with public funds, in addition to an initial \$3 million base assignment paid to each political party, regardless of its private fund raising efforts. In order to ensure compliance with the financing limits imposed by Law 115, the political parties would be required to sign an affidavit certifying compliance with the rules and regulations applicable to the Voluntary Fund, deposit their private contributions with the PR Treasury Department, and file periodic reports of accrued debts, which operated as requests for payment to the vendors itemized in the reports.

The mechanisms used to implement the scheme to circumvent the provisions of the state election financing law, and to defraud the State Election Commission (SEC) and the PR Treasury Department had four modalities:

- (1) Approximately \$720,000 in payments made by "collaborators" at the behest of Acevedo Vilá, Ramón Velasco and Miguel Nazario, and others. The illegal contributions were used to pay an outstanding (unreported) debt Acevedo Vilá's gubernatorial campaign owed to LIH, and its subsidiary

MMM. LIH contacted the contributors at the request of defendant, Miguel Nazario Franco. One of the contractors was directly contacted by Acevedo Vilá, while others were contacted by Nazario and Velasco Escardille. False invoices were created by MMM to give the payments the appearance of legitimacy. The contributions from the collaborators ranged in amounts between \$10,000 and \$200,000. These monies would also be used by MMM (on behalf of the campaign) as a means of paying campaign debts owed by the Committee to other vendors. Neither the payments nor the campaign expenditures were included in the required reports filed by campaign officials with the SEC and PR Treasury Department.

- (2) The gubernatorial campaign also made cash payments of unreported expenses to various service providers in amounts aggregating approximately \$431,000. Cash contributions were received by Luisa Inclán Bird from contributors to the Committee. These cash contributions were maintained in a safety deposit box kept in the office of Inclán at the Popular Democratic Party Headquarters in Puerta de Tierra. After the 2004 elections, Luisa Inclán continued to maintain control of the cash kept in the box. Monies from this safety deposit box were periodically removed in order to make cash payments to vendors of the Committee, who had rendered *bona fide* services. In this manner, the payment of these campaign expenses was also kept “off the books” of the

Committee, and omitted from the reports to the SEC and PR Treasury Department.

- (3) Monies from “Store A” were used to pay employees and vendors of the Committee, who had rendered *bona fide* services. In this manner, the payment of these campaign expenses was also kept “off the books” of the Committee, and omitted from the reports filed with the SEC and PR Treasury Department. Approximately one hundred sixty seven thousand three hundred forty two (\$167,342) dollars were paid from funds of “Store A” to employees, vendors and suppliers of the Committee.
- (4) Payments to employees and vendors of the Committee were also made directly from the campaign’s bank accounts. These payments were also omitted from reports to the PR Treasury Department, and most were not certified to the PR Treasury Department as a campaign expense, as required by Public Law 115. In this manner, the Committee paid campaign debts in the approximate amount of \$2 million and was able to spend monies in excess of the \$11 million cap imposed by law.

The various financing mechanisms had the common object of concealing from the PR Treasury Department and the SEC the fact that the campaign had exceeded the \$11 million spending limit. As a result of this scheme the gubernatorial campaign received more public funds from the PR Treasury Department than it was entitled to, fraudulently induced the payment of invoices submitted to the PR Treasury Department, and avoided the payment of a potential penalty for having

spent more on the campaign than allowed by law. Approximately \$2.2 million of these excessive expenses were paid after January 2005, after Acevedo Vilá had been elected Governor.

C. Failure to Report and Conspiracy to Defraud the Internal Revenue Service

As Resident Commissioner, Acevedo Vilá held a federally elected position, and had an obligation to file federal income tax returns for the years 2001 through 2004, in addition to his obligation to file Puerto Rico returns.

During the years that Acevedo Vilá was Resident Commissioner and Governor of the Commonwealth of Puerto Rico, he had two personal American Express credit cards. Notably, the credit card statements were mailed to his home address in Guaynabo. The credit cards were used by Acevedo Vilá for the payment of his personal expenses, and, at times, the credit cards were also used for purposes connected with Acevedo Vilá's campaigns. The credit card statements were personally reviewed by Acevedo Vilá, who identified personal and campaign related expenses periodically, in order to secure corresponding reimbursement for himself.

Payments to Acevedo Vilá's personal American Express credit cards were made with monies from the Resident Commissioner and gubernatorial campaigns, monies from Store A, and cash of an unknown origin. The cash would usually be removed from a safety deposit box maintained at the gubernatorial campaign headquarters pursuant to instructions given by defendant Inclán Bird. This cash would be converted into manager's checks or used to purchase money orders payable to American Express. The payments would be for the precise amount owing on Acevedo Vilá's credit cards for the particular month in which the payment was made. The defendant Inclán Bird would

advise campaign officials that the payments were necessary because “the boss’ credit card was delinquent” or was on the verge of being cancelled.

In addition to the foregoing, campaign monies were also used to pay Acevedo Vilá for transactions that were wholly personal in nature. These payments were ordered by Acevedo Vilá, and those instructions were unquestioned by his subordinates at the campaign. The personal expenses charged to Acevedo Vilá’s credit cards, paid by third parties for his benefit, included family vacations to Costa Rica, Argentina, Disney World, and payment for his children to travel to China with him. The approximate amount of the credit card payments made for Acevedo Vilá’s personal benefit during 2003 and 2004 was approximately \$13,000.

In addition to failing to disclose this income in his federal or Puerto Rico tax returns, Vilá also failed to disclose the funded travel pursuant to U.S. House of Representatives gift rules, which require disclosure for privately funded travel. Within 30 days of the conclusion of a privately funded trip, each sponsored Member or employee must file a travel disclosure form detailing the expenses incurred for travel, lodging, meals, and other related expenses. Similarly, the Ethics in Government Act of 1978 required Acevedo Vilá to report gifts from any source totaling more than \$285 during a calendar year. 5 U.S.C. App. 4 § 101 *et seq.*

Also during the years 2003 and 2004, Acevedo Vilá received cash payments from defendant Luisa Inclán Bird. Inclán Bird ordered third parties within the campaign to provide the cash, or removed the cash herself from the safety deposit box held in her office at the campaign headquarters, claiming that “the boss was broke.” At least one of these payments was for \$5,000.

Other perquisites received by Acevedo Vilá while he was a federally elected official, included approximately \$57,000 worth of business suits and other upscale clothing purchased for him with cash of an unknown origin, on occasions taken from the safety deposit box maintained by Inclán Bird. These articles of clothing were purchased by representatives of the publicity firm, and by third parties closely connected with Acevedo Vilá. The publicity firm invoiced the expenses for the clothing purchased through their representatives to the campaign in the regular course of business. However, the amounts attributed to these purchases were singled out from the invoices by the campaign, and paid with cash provided by Inclán Bird.

During 2006, a meeting was held at the Popular Democratic Party headquarters, to discuss a pending audit to be conducted by the SEC regarding the purchase of clothing for Acevedo Vilá. In attendance were close Acevedo Vilá advisors, including Inclán Bird. During that meeting a decision was made to under-report the clothing expenditures, and to post-date the transactions in order to create the appearance that they were *bona fide* representational expenses for the party, which had been duly reported to the SEC.

It is estimated that Acevedo Vilá failed to report approximately \$60,000 in his Puerto Rico tax returns, which were attached to the federal returns filed for the same years. Consequently, Acevedo Vilá's total income was under-reported in his federal tax returns as well.

II. Summary of Arguments

A. Count One of the Superseding Indictment is not Duplicitous and Alleges a Single Overarching Conspiracy.

Count One of the Superseding Indictment alleges a single overarching conspiracy to violate the Federal Election Campaign Act. 2 *United States Code* §441 *et seq.* During the years 1999

through 2003, three schemes were employed by the conspirators to solicit and receive illegal campaign contributions to pay off Acevedo Vilá's Resident Commissioner campaign committee's outstanding debt. A large part of this debt was owed to the campaign's public relations firm, Lopito Ileana & Howie (LIH). The three schemes were devised to achieve a common goal, and were actively concealed from the Federal Election Commission (FEC) through the filing of false reports and sworn statements. A core group of co-conspirators, mainly Acevedo Vilá, Inclán Bird, Velasco Escardille and Colón Rodríguez, orchestrated the three schemes and successfully paid off the campaign's debts with the illegal contributions, paving the way for Acevedo Vilá's 2004 gubernatorial campaign. The campaign's submissions to the FEC concealed the illegal contributions and the true nature of the relationship between the campaign and LIH, and avoided further scrutiny of the campaign's corrupt finances, thereby ensuring the success of the conspiracy.

B. The Puerto Rico Collaborator and Family and Staff Members Schemes Alleged in Count One are not Time-Barred.

The false submissions to the FEC filed by Ramón Velasco Escardille and Edwin Colón Rodríguez on behalf of the Resident Commissioner Campaign Committee, were made in furtherance of the conspiracy's common goal. As a result of two complaints filed in August and October 2000, the FEC initiated an enforcement action to investigate the relationship between the campaign and LIH. The FEC enforcement action in which the April 8, 2003 sworn statements were filed, was integrally related to the PR collaborator scheme, because it focused on the commercial relationship between LIH and the Resident Commissioner Campaign Committee. At issue before the FEC was the fact that the campaign committee had a sizeable debt with LIH, which had remained unpaid for

a significant period of time. The FEC had to decide whether these circumstances suggested that LIH was subsidizing the campaign and the debt was an illegal corporate contribution.

The sworn statements of Colón Rodríguez and Velasco Escardille were submitted by the campaign in an attempt to lull the FEC into believing that the relationship with LIH was commercially reasonable and that the debt had been paid. However, the payment resolutions with LIH, as described in the sworn statements, only addressed the reported debt, and concealed the existence of the off-the-books debt which was still outstanding. This fact was relevant to the FEC's inquiry, and would have given rise to suspicion regarding the nature of the campaign's relationship with LIH, and invited further scrutiny by the FEC into the campaign's finances. The failure to disclose this information materially mislead the FEC and affected the enforcement action because the FEC was kept in the dark concerning the true amount of the LIH debt, the manner in which the reported debt had been satisfied (with illegal collaborator contributions), and the fact that an unreported debt remained outstanding. Had the FEC been aware of these omissions, the enforcement action would not have been closed. Therefore, the April 8, 2003 sworn statements continued the pattern of conduct promulgated by the campaign's officials, and promoted the object of the conspiracy by concealing the significant violations of the FECA.

C. The Wire Fraud Counts are not Defective

1. The Wire Fraud Counts Properly Allege a Property Interest

The schemes implemented by Acevedo Vilá's gubernatorial campaign to avoid the electoral financing law's spending limitations deprived the PR Treasury Department of a property interest. The Treasury Department was fraudulently induced to pay monies in favor of the campaign to which

the campaign was not entitled, in contravention of the \$11 million cap imposed by law. Under the legal scheme created by Law 115, the political contributions which the candidates and the parties deposit in the Voluntary Fund become public funds and are entrusted to the Treasury Department, and commingled with funds held in the PR Treasury Department account at the Government Development Bank. The scheme to defraud detailed in Counts 10 through 21 caused the expenditure of public funds for unauthorized purposes, beyond the parameters permitted by the electoral law. The defendants' corrupt conduct benefitted the gubernatorial campaign by allowing it to receive and spend more money than permitted by law. In fact, this failure to comply with the provisions of the electoral law should have disqualified the campaign committee from participating in the Voluntary Fund altogether, and receiving any of those public monies. P.R. Laws Ann. tit. 16, § 3117.

The monetary penalty contemplated by Puerto Rico's electoral law is more than a regulatory penalty, since the law establishes criminal sanctions for violating the law's spending limits. The money illegally paid out by the Treasury Department at the behest of the campaign constituted a fraud involving public funds. The campaign induced the PR Treasury Department to pay invoices with public funds which the campaign would not have received but for the false representations and material omissions made by the campaign and its officials to the PR Treasury Department. In sum, the campaign and its candidate deprived the Commonwealth of approximately \$3 million of public funds through an elaborate scheme intended to corrupt the electoral process. The Commonwealth's entitlement to these public funds is a straight forward economic interest.

2. The Wire Fraud Scheme Involved Material Misrepresentations to the PR Treasury Department.

Pursuant to the provisions of Law 115, the campaign was required to submit separate sets of reports to the SEC and to the PR Treasury Department. Despite defendants' assertions to the contrary, the payment vouchers submitted by the campaign to the PR Treasury Department also contained material misrepresentations, which induced the disbursement of public funds to third parties. There is no dispute that the SEC reports submitted by the campaign were false. The SEC reports omitted significant contributions and disbursements, which the campaign kept off its books, in the amount of approximately \$1 million.

Once the \$11 million limit was reached, the campaign would not have been able to submit the vouchers to the PR Treasury Department for payment. Due to material omissions in the campaign's expense reports, the PR Treasury Department would be unable to detect that the campaign had reached the \$11 million limit. The false expense reports submitted by the campaign to the PR Treasury Department omitted the campaign's off-the-books expenses which had been paid through various mechanisms designed to circumvent the provisions of Law 115. These omissions were nothing short of intentional material misrepresentations. As a direct result of this fraudulent scheme, approximately \$7 million in public funds were disbursed for the benefit of the campaign, which would have resulted in the assessment of a monetary penalty of twice the amount of the excess, or \$6 million.

3. The Wire Transmissions were made in Interstate Commerce, and Properly Support Federal Jurisdiction

The wire transmissions listed in Counts 10 through 21 were all routed through out-of-state servers, thereby meeting the interstate jurisdictional requirement. The fact that the wires (emails) were sent from a computer in Puerto Rico and received by conspirators in Puerto Rico, does not deprive the wires of their interstate nature. The interstate nature of the emails, regardless of the defendant's awareness that the communications would be routed through national servers, is sufficient to support the wire fraud charges in counts 10 through 21. The interstate nature of the wire communication need not have been reasonably foreseeable.

Inclán Bird and Gonzalez Freyre also raise related issues regarding the nexus between the wire transmissions and the overall scheme to defraud. The case law clearly establishes that the use of mails or wires need not be an essential element of the scheme. It is sufficient for the wires to be incident to an essential part of the scheme or a step in the plot. The Superseding Indictment properly tracks the statutory language and alleges that the use of the wires was for the purpose of executing the scheme to defraud the Puerto Rico Treasury Department and the State Electoral Commission. The Superseding Indictment contains all of the essential elements of the offense and apprises the defendants of the nature of the charges against them. The issues of the defendants' specific roles in the scheme or the question of whether the use of wires was closely related to the execution of the fraud are factual issues that are premature at this stage of the proceedings.

D. The Federal Program Fraud Statute is Properly Charged

1. Acevedo Vilá was an Agent of the Government of Puerto Rico at the Time the Fraud was Perpetrated

Acevedo Vilá argues that the fraud alleged in Count 22 of the Superseding Indictment ended in October 2004, prior to his being sworn in as Governor in January 2005. The documentary evidence suggests otherwise. Payments from the Voluntary Fund continued to be made after Acevedo Vilá had been elected Governor. Having become Governor while these payments were outstanding, defendant Acevedo Vilá became a governmental “insider”. As such, he had the responsibility to ensure that the funds of the PR Treasury Department were disbursed in accordance with the law and, in failing to do so, he abused a trust and became accountable under this statute. Furthermore, there is no requirement under the statute that the defendant have used his position to facilitate the fraud; it is sufficient that the defendant be an agent and obtained the property by fraud, regardless of whether the defendant used his particular governmental position to further the fraud.

Accordingly, since the defendant, as Governor of the Commonwealth of Puerto Rico, was an agent responsible for the accounting of these funds while the fraudulent scheme continued, his status as an agent was contemporaneous with the criminal conduct alleged and there is no basis to dismiss Count 22 of the Superseding Indictment on these grounds.

2. The Payments made by the PR Treasury Department from the Voluntary Fund were not subject to the Exception noted in 18 USC 666(c), since they were Payments Induced by Fraud. Whether the payments were *bona fide* is a question of fact for the jury and not properly raised pre-trial.

Defendant Acevedo Vilá also moves to dismiss Count 22 of the Superseding Indictment on the grounds that the expenses paid by the PR Treasury Department are covered by 18 U.S.C. §

666(c), which exempts “*bona fide* . . . expenses paid or reimbursed, in the usual course of business” from coverage by the statute. However, the issue of whether expenses were *bona fide* is a question of fact for the jury, and defendant’s argument that the expenses were ‘*bona fide*’ is therefore only a trial argument, and not appropriately raised in the context of a motion to dismiss.

In any event, fraudulently induced payments are not the type of “acceptable commercial and business practices” which the statute was intended to exempt. Since the defendant failed to comply with the terms and conditions of the financing program, there was simply no reason, obligation, or lawful authority for the PR Treasury Department to reimburse or to pay the campaign’s expenses; put another way, the defendant did not legitimately ‘earn’ the reimbursement or payment by complying with the terms and conditions of the program, and his methods of accessing that money did not comport with “acceptable business practices.” Accordingly, though these payments may be termed either “payments” or “reimbursements,” since they were obtained by fraudulent means and would not have been otherwise paid, they are neither “*bona fide*” nor paid in the “usual course of business.”

E. The Tax Counts are Properly Charged

1. Counts 26 and 27 Provide the Defendants with Adequate Notice of the Charges

Defendant Acevedo Vilá alleges that Counts 26 and 27 of the Superseding Indictment are so devoid of specifics that they fail to serve essential constitutional purposes. However, the Superseding Indictment specifically alleges that line 22 of defendant's 2003 and 2004 federal individual income tax returns are respectively false in that they under-report his total income. The Superseding Indictment further alleges that Acevedo Vilá attached copies of his 2003 and 2004

Department of Treasury of The Commonwealth of Puerto Rico (“Commonwealth”) Tax Returns which contained material omissions of unreported income. These allegations are constitutionally sufficient.

2. Counts 26 and 27 Properly Allege Material Falsehoods

Acevedo Vilá asserts that the income charged as having been omitted from his 2003 and 2004 federal income tax returns cannot be material because the income was sourced to Puerto Rico and therefore, not federally taxable. Defendant's argument is predicated on two incorrect premises. First, contrary to defendant's position, omissions of income may be material even if they do not affect the tax due. Second, defendant erroneously assumes that the Superseding Indictment charges only the omission of Puerto Rico-sourced income.

To prove a violation under Section 7206, the government need not prove either intent to evade payment of taxes nor even the existence of any taxable income, merely that the person who signed the form lied about the matters it contained. Any return that omits material items necessary to the computation of income is not true and correct within the meaning of section 7206. A “material” matter is one that affects or influences the IRS in carrying out the functions committed to it by law or one likely to affect the calculation of the tax due.

3. Counts 26 and 27 Sufficiently Charge Elements of Materiality

In spite of the fact that unreported income attributed to Acevedo Vilá is Puerto Rico-sourced, the element of materiality is sufficiently charged in Counts 26 and 27 of the Superseding Indictment. The defendant correctly notes that I.R.C. § 933(1) provides that, in the case of a resident of Puerto Rico, income that is Puerto Rico-sourced (except compensation paid by the U.S. government) is

exempt from U.S. taxation. However, the defendant fails to acknowledge that Section 933(1) also provides that no deduction or exclusion from gross income or credit against tax is allowed to the extent that the deduction, exclusion or credit is properly allocated to or charged against amounts excluded from income.

On his 2003 and 2004 Forms 1040, defendant reported his Resident Commissioner's salary, which is U.S.-sourced. He did not report any Puerto Rico-sourced income, and therefore, the deductions and credits he claimed on his Forms 1040 were not reduced by Section 933(1). However, if defendant had additional but unreported Puerto Rico-sourced income that was not reportable as taxable income on a Form 1040, Section 933(1) would require that some of the deductions claimed in full on his Forms 1040 be reduced. Furthermore, Acevedo Vilá's attachment of false Commonwealth tax returns which under-reported his Puerto Rico-sourced income would have the tendency to impede the IRS in verifying the correctness of the calculation of the allocation between U.S. and Puerto Rico-sourced income, and ultimately the correctness of the deductions, credits and tax due.

4. Counts 26 and 27 Properly Allege Willful Conduct

Acevedo Vilá contends that even if his unreported PR-sourced income were required to be reported on his federal tax returns, Counts 26 and 27 nevertheless have to be dismissed because the complexity of the underlying legal questions would preclude willfulness as a matter of law. This case is inapposite to the cases on which the defendant places mistaken reliance, since it does not involve a dispute over the meaning of any provision of the tax laws. The dispute here is entirely factual. The question for the jury is whether the defendant filed false 2003 and 2004 federal income

tax returns. The jury's determination of fact in this case will refute defendant Acevedo Vilá's assertion that he was a victim of uncertainties in the law.

Furthermore, the denial of defendant's pre-trial motions to dismiss Counts 25 through 27 of the Superseding Indictment is not an appealable order. Acevedo Vilá cannot establish that the denial of such motions falls within the class of cases exempt from the collateral order doctrine.

5. Count 25 Sufficiently Alleges a Klein Conspiracy, and an Unlawful Purpose

Defendant Luisa Inclán Bird challenges the sufficiency of Count 25 of the Superseding Indictment which alleges her participation in a *Klein*-type conspiracy⁷ with defendant Acevedo Vilá. Inclán Bird argues that Count 25 does not allege a nexus between her actions and the actions of defendant Acevedo Vilá. The Superseding Indictment is sufficient, however, because it contains all the essential elements of a *Klein* conspiracy; it tracks the language of the statute, and it states the approximate time and place of the crime. The *Klein*-conspiracy charged in Count 25, properly pleads a conspiracy to impede and impair the Internal Revenue Service in the ascertainment, computation, assessment, and collection of defendant Acevedo Vilá's individual income taxes.

⁷A conspiracy to defraud the Internal Revenue Service ("IRS") generally charged under Section 371's defraud clause is commonly referred to as a "*Klein* conspiracy." See, e.g., *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957). In *Klein*, the Second Circuit upheld the government's use of the defraud clause to charge conduct that impeded the functions of the IRS and upheld the conspiracy conviction, finding sufficient evidence to make out the crime. *Id.* at 916. The Court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS.

6. Count 25 is Legally Sufficient as to Defendant Luisa Inclán Bird.

To be sufficient, an indictment must contain the elements of the charged offense, fairly inform the defendant of the charge against which he must defend and enable the defendant to plead double jeopardy, if applicable. Specific details of the crime are generally not constitutionally required. The Superseding Indictment in this case is legally sufficient because it contains the essential elements of the crime. Count 25 alleges that defendant Acevedo Vilá and defendant Inclán Bird “did knowingly, willfully, and unlawfully, combine, conspire, confederate, and agree to defraud the United States . . . by impeding, impairing, obstructing and defeating the lawful government functions of the [IRS] in the ascertainment, computation, assessment, and collection of federal income taxes.” Superseding Indictment, Count 25, p. 50. The Superseding Indictment goes on to allege several overt actions taken by defendants Acevedo Vilá and Inclán Bird pursuant to the agreement. These are the essential elements of a *Klein* conspiracy.

III. Argument

A. Count One of the Superseding Indictment Is Not Duplicitous Because It Alleges One Overarching Conspiracy to Violate the Federal Election Campaign Act.

Defendants Acevedo Vilá and Edwin Colón Rodríguez, raise similar legal arguments to sustain the proposition that Count One of the Superseding Indictment is duplicitous, in that the conspiracy to violate the Federal Election Campaign Act (“FECA”) consists of not one, but three separate conspiracies, two of which are allegedly time-barred. (AAV Motion to Dismiss, pp. 5-16; ECR Motion to Dismiss, pp. 7-14). The defendants’ theory suggests a myopic view of the collective conduct alleged in Count One, and attempts to artificially dissect a course of conduct undertaken by the co-conspirators for the unified purpose of paying the campaign committee’s media and public

relations expenses, a debt which remained unpaid even after Acevedo Vilá was elected to the position of Resident Commissioner. The three illegal fund raising mechanisms, implemented and actively concealed from the FEC by the co-conspirators through the filing of false statements and reports, benefitted Acevedo Vilá's political aspirations.

In an effort to compartmentalize the conspiracy, the defendants' contend that the time, place and conduct encompassing each of the three illegal fund raising schemes are separate and distinct, and that there is no interdependence between the co-conspirators. In particular, the defendants' argue that the co-conspirators did not share a common criminal objective because each scheme served a different purpose. This proposed factual scenario is specious, at best. The transactions alleged in Count One of the Superseding Indictment are plainly connected by the commonality of goal, that is, the co-conspirators through various mechanisms, obtained illegal campaign contributions which would be applied to pay debts of Acevedo Vilá's Resident Commissioner Campaign Committee, and took affirmative steps to conceal from the FEC the true identity of the contributors and the nature and extent of the Resident Commissioner campaign's reported debt. The legal underpinning of Acevedo Vilá's duplicity argument is also flawed because the cases relied upon, mainly, *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Muñoz Franco*, 986 F.Supp. 70 (D.P.R. 1997), are wholly inapposite. Colón Rodríguez also places misguided reliance on *Muñoz Franco*.

A determination of whether a conspiracy count properly charges one or multiple conspiracies is highly dependent on the particular facts of a case, and "is often a difficult and subtle question." *United States v. D'Amico*, 496 F.3d 95, 99 (1st Cir. 2007)(quoting 1A Charles Alan Wright, *Federal Practice & Procedure* (Criminal) § 142 (3d ed. 1999)). Whether a single conspiracy or a multiple

conspiracy exists is a question of fact for the jury. *United States v. LiCausi*, 167 F.3d 36, 45 (1st Cir. 1999)(citing *United States v. Drougas*, 748 F.2d 8, 17 (1st Cir. 1984)).

An indictment is duplicitous if it joins two or more distinct and separate offenses in a single count. *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999). The Federal Rules of Criminal Procedure provide that “[a] count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.” Fed. R. Crim. P. 7(c)(1). “This rule necessarily contemplates that two or more acts, each one of which would constitute an offense standing alone, may be joined in a single count without offending the rule against duplicity.” *United States v. Berardi*, 675 F.2d 894, 897-98 (7th Cir. 1982).

It is well established in the First Circuit that multiple acts may be charged in a single count where those acts legitimately can be construed to be part of a single criminal scheme or course of conduct. *United States v. Trainor*, 477 F.3d 24, 32 (1st Cir. 2007) (single count allegedly charging two conspiracies not duplicitous, recognizing that “the question for review is simply whether the indictment may be read to allege a single unified scheme in each count.” (citation omitted)); *United States v. Cruzado-Laureano*, 404 F.3d 470, 484-85 (1st Cir. 2005) (multiple acts of Section 666 embezzlement from a program receiving federal funds charged in single count were properly aggregated); *United States v. Daley*, 454 F.2d 505, 509 (1st Cir. 1972) (single count charging multiple acts of embezzlement not duplicitous because “several separate transactions may form a single, continuing scheme, and may therefore be charged in a single count”); *United States v. Chandler*, 171 F.2d 921, 937 (1st Cir. 1949) (single count charging multiple acts of treason not

duplicitous because they were in furtherance of single treasonous scheme).⁸ Likewise, in a case involving similar allegations, the First Circuit acknowledged that a course of conduct involving a series of payments and activities may demonstrate the *quid pro quo* theory for proving a criminal violation of the honest services mail fraud statute. *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir.1996) (recognizing that “a person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action in derogation of the public’s right to impartial official services”).⁹

Among the leading United States Supreme Court cases on the issue of duplicity are *Kotteakos*, *supra*, and *Blumenthal v. United States*, 322 U.S. 539 (1947). Acevedo Vilá’s reliance on *Kotteakos* is to be expected, yet it is hopelessly misplaced. The complete absence of *Blumenthal*

⁸*Cf. United States v. Verrecchia*, 196 F.3d 294, 297-98 (1st Cir. 1999) (single count alleging possession of 22 different firearms not duplicitous, noting court’s unwillingness to turn “a single transaction into multiple offenses”).

⁹ Other courts routinely reject challenges to indictments charging multiple criminal acts in a single count where the allegations consist of a related course of conduct in pursuit of a single criminal scheme. *E.g.*, *United States v. Moloney*, 287 F.3d 236, 240 (2d Cir. 2002) (noting that Second Circuit has adopted a “general presumption in favor of allowing a common scheme to be treated as part of a single offense.”); *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (single count charging multiple acts of embezzlement appropriate because acts were part of a single plan or scheme); *United States v. Robin*, 693 F.2d 376, 378 (5th Cir. 1982) (holding that “threatening statements could be consolidated in a single count because they were part of a single, continuing scheme”); *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980) (single count alleging six separate acts of interstate travel with intent to carry on gambling activity not duplicitous, and affirming government’s election “to characterize the actions of [the defendant] as a continuing course of conduct that represented only a single offense”); *United States v. Jaynes*, 75 F.3d 1493, 1502 (10th Cir.1996) (allegations in single counts charging defendant with forging and passing 64 Treasury checks over five-year period were each part of a single scheme and thus properly contained in single counts); *United States v. Klat*, 156 F.3d 1258, 1266 (D.C. Cir. 1998) (single count charging multiple threats appropriate where acts represent a single course of conduct).

in defendant's discussion of this issue is conspicuous, particularly when the U.S. Supreme Court expressly granted *certiorari* in *Blumenthal* to analyze the applicability of its *Kotteakos* opinion, which had been issued a few months earlier. In *Kotteakos*, defendants' convictions of conspiracy to violate the National Housing Act were reversed because the **only** connection between the thirty-two defendants involved in the scheme was that each of them, grouped in eight different transactions, had made fraudulent applications through the same broker. The Supreme Court concluded that these were eight "separate spokes meeting at a common center...without the rim of the wheel to enclose the spokes." *Kotteakos*, 328 U.S. at 755.

In *Blumenthal*, the Supreme Court affirmed the convictions of salesmen involved in the illegal sale of liquor and stated that "it would be a **perversion of justice** to regard the salesmen's ignorance of the unknown [co-conspirator's] participation as furnishing adequate ground for reversal of their conviction." *Id.* at 558. (Emphasis ours). The Court's reasoning was based on a practical view of the facts:

"The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them if they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

Id.

As in *Blumenthal*, the facts alleged in Count One of the Superseding Indictment reveal a single conspiracy consisting of several agreements tied together as stages in a large all-inclusive

combination, directed to achieving a common unlawful end or result. From 1999 until mid-2003 Acevedo Vilá, his campaign officials and administrative assistants¹⁰, devised numerous illegal schemes to retire a debt of \$545,000, reported to the FEC, as well as an unreported debt which exceeded \$200,000. The debt was primarily owed to LIH, the publicity firm for Acevedo Vilá's Resident Commissioner campaign. The three mechanisms devised to retire the debt, which are fully detailed in the Superseding Indictment, were the means used to achieve this common unlawful end. Although different co-conspirators solicited and received the illegal campaign contributions, all the monies collected served the same purpose. The purpose of the conspiracy was further promoted by the filing of false FEC reports concealing the schemes and the amount of the LIH debt being paid off through the various mechanisms. The defendants' futile attempts to reshape this course of conduct into three separate offenses is counter-intuitive and defies logic.

A determination of whether a single conspiracy is alleged depends on the commonality of the nature, motive, design, implementation and logistics of the illegal activities, as well as the co-conspirators' involvement. *See United States v. Boylan*, 898 F.2d 230, 241 (1st Cir. 1990); *United States v. Drougas*, 748 F.2d 8, 17 (1st Cir. 1984). In *United States v. Portela*, 167 F.3d 687 (1st Cir. 1999), the First Circuit recognized that in making this determination, courts have often focused on three factors: (1) the common goal, (2) the interdependence among the participants, and (3) an overlap among the participants. *Id.* at 695.

“The analysis [used] to determine ‘interdependence’ is often characterized in the case law as an analysis of the ‘nature of the scheme,’ but there is no conceptual difference between the tests.”

¹⁰ Luisa Inclán Bird, Ramón Velasco Escardille, Edwin Colón and Eneidy Coreano.

United States v. Portela, supra, 167 F.3d at 695 (internal citations omitted). “Interdependence” in the *Portela* case was determined on the basis of “whether the activities of one aspect of the scheme were necessary or advantageous to the success of another aspect of the scheme.” *Id.* Thus, contrary to Acevedo Vilá’s argument, a finding of “interdependence” does **not** require that the individual participation of each co-conspirator be advantageous to the success of the conspiracy. In this case, the success of all the schemes would result in prolonging Acevedo Vilá’s political career, as it would enable him to eliminate his Resident Commissioner campaign debt with LIH, and focus on his gubernatorial campaign for the 2004 election. In order to retire the \$545,000 debt, all three illegal contribution schemes, and their concealment from the FEC, had to be successful. Without the donations received through the three mechanisms, the campaign’s debt would not have been fully satisfied. The concealment of the illegal schemes from the FEC was also a necessary element for the success of the conspiracy.

The “overlap” requirement is satisfied by the sustained involvement of a central or “core” conspirator in the conspiracy. *Id.* A core group of co-conspirators participated in each of the three schemes - namely, Acevedo Vilá, Luisa Inclán Bird, Edwin Colón, and Ramón Velasco Escardille. Acevedo Vilá’s and Inclán Bird’s involvement in the fund raising schemes, in particular with the Philadelphia businessmen and the “donors” in the family and staff scheme, is fully detailed in the Superseding Indictment. Velasco Escardille’s and Colón’s involvement with the filing of false FEC reports and statements which effectively concealed each of the schemes from the FEC, is also fully outlined in the Superseding Indictment.

The First Circuit’s holding in *Portela*, sets forth a pragmatic framework to analyze the single conspiracy alleged in Count One of the Superseding Indictment. Although in the context of a drug conspiracy, the First Circuit wisely reasoned, that the fact that a drug distributor is indifferent to the purposes of others in the enterprise, will not defeat a finding of a unified conspiracy, if the “evidence permit[s] the inference that each group of retailers must have known the operation to be so large as to require the other as an outlet.” *Id.* at 697. (internal citations omitted). The fact that the Philadelphia conspirators may have been indifferent to the efforts of the LIH-PR collaborators, and the family and staff conspirators, does not defeat the finding of a single conspiracy. Each group required the success of the other in order to accomplish the objective, since each of the schemes, operating alone, would not have satisfied the outstanding debt.¹¹ Other circuits have followed this approach, concluding that “the continued health of the trafficking and distribution network necessarily depends on the continued effort of multiple suppliers.” *Id.*, see also, *United States v. Morris*, 46 F.3d 410, 416 (5th Cir. 1995) (competing multiple suppliers part of common plan); *United States v. Harrington*, 942 F.2d 751, 756-57 (10th Cir. 1991) (multiple suppliers competing with each other part of one conspiracy).¹²

¹¹ The various reports filed by the campaign committee with the FEC disclose that, by far, the greatest single expense of the campaign was the debt owed to the media and public relations firm of LIH for the 1999 primary election of Aníbal Acevedo Vilá. This debt was never fully repaid. In fact, even in 2003, when the reported debt had been paid by the campaign, a substantial “unreported” debt was still delinquent, although it was concealed from the FEC and omitted from periodic reports filed by the campaign.

¹² The Second Circuit has also considered the issue of single versus multiple conspiracies. The Second Circuit defined wheel conspiracies in the case of *United States v. Manarite*, 448 F.2d 583 (2d Cir. 1971), as those in which “members of a ‘core’ group deal with a number of contacts who are analogized to the spokes of a wheel and are connected with each other only through the core

Acevedo Vilá points to five “differences” in the three illegal fund raising schemes charged in Count One which should result in a finding of multiple conspiracies and dismissal of said count. In a more general sense, defendant Colón Rodríguez’ motion captures the essence of these arguments. (ECR Motion to Dismiss at p. 10). The first “difference” consists of a fictitious fragmented view of the time periods during which the conduct was committed. (Motion to Dismiss, p. 7). Defendant Acevedo Vilá points out three distinct periods: 1999-2000, 2001-2002 and 2002-2003. Even the defendant’s self-serving compartmentalization reveals that there is a temporal overlap between the last two schemes. In any event, the premise underlying the legal argument is fatally flawed because the separate schemes devised to violate the FECA were stages of the larger common plan - the payment of the campaign’s debt to LIH. The implementation of the plan required the submission of false reports to the FEC which had the effect of concealing the illegal contributions and masking the true nature of the campaign’s commercial relationship with LIH.

The second “difference” in the course of conduct proposed by Acevedo Vilá is geographical. It is uncontested that the LIH-PR collaborator scheme, and the family and staff member scheme

conspirators. In such conspiracies, whether the spoke participants may be found to be members along with the core conspirators depends on whether or not the ‘spokes’ knew or had reason to know of the existence, but not necessarily the identity, of one or more of the other spoke participants in the wheel conspiracy.” A contrary result would create manifest injustice, and would cloak those who knowingly and willfully involve themselves in this pervasive conduct involving other co-conspirators perhaps unknown to them, but whose existence is apparent from the nature of the scheme. The Second Circuit expanded its analysis in the case of *United States v. Zabare*, 871 F.2d 282 (2d Cir. 1989), where the Court concluded in the context of a wheel conspiracy, that the focus of the judicial inquiry should be on “whether the government had proved that each of the charged purchasers had sufficient awareness of the existence of other members of the alleged conspiracy to render them part of the ‘rim of the wheel to enclose the spokes.’ ” *Id.* at 288 (internal citations omitted).

were perpetrated in Puerto Rico. The fact that the Philadelphia businessmen concentrated their illegal fund raising for Acevedo Vilá outside of Puerto Rico, albeit accurate, reveals only half of the story. The handling and accounting of the Philadelphia contributions, after they were delivered to Acevedo Vilá during the lavish dinners with Coreano and Negrón, occurred in Puerto Rico. The conduit contributions were ultimately deposited in Puerto Rico, and applied against the debt the campaign owed to LIH in Puerto Rico. The defendant's proposition that geographical limitations for the commission of certain overt acts connected to a particular scheme are legally significant in the multiple conspiracy analysis, is superficial and misses the mark. The commonality of purpose and interdependence amongst the schemes are the more substantial issues on which the courts focus.

Defendant's third distinction focuses on the participants in each of the schemes. As discussed above, there can be no denying that there are overlapping co-conspirators, to wit, Acevedo Vilá and Luisa Inclán Bird. The motion to dismiss concedes as much. (Motion to Dismiss, p. 8). To these two one must add defendants Velasco Escardille and Colón Rodríguez, who played a key role in the cover up of the illegal schemes through the submission of false reports and statements to the FEC. The commonality of these core participants is sufficient to hold together the remaining co-conspirators who were involved in various stages of the illegal fund raising and reporting activities orchestrated to benefit Acevedo Vilá's Resident Commissioner Campaign Committee.

The fourth distinction raised by Acevedo Vilá is allegedly in the nature, design, implementation and logistics of the three fund raising mechanisms. This proposition is ludicrous if one examines the common plan. All three fund raising mechanisms implemented to reduce the accumulated Resident Commissioner campaign debt required the concealment of the true identity

of the campaign donors. Whether it was the conduit contributions from Philadelphia or the conduits from family and staff members, the *modus operandi* and result was the same: to conceal the true identity of the donors, because they were all reimbursed by the co-conspirators for their “contributions”. The same result occurred with the LIH-PR collaborator scheme, whose off-the-books contributions were not reported to the FEC, thus there was never a record of the identity of the collaborators. Moreover, the true amount of the LIH debt, which was paid down with the illegal contributions from the three schemes, was the subject of material misrepresentations in submissions to the FEC by co-conspirators Velasco Escardille and Colón Rodríguez. The false FEC reports filed between 1999 through 2004, had the effect of concealing each of the three schemes, and the false statements submitted to the FEC regarding the nature and size of the LIH debt, were all an integral part of the implementation of the larger common plan.

The fifth distinction propounded by Acevedo Vilá borders on the frivolous. He claims that the co-conspirators did not share a common purpose to commit the same crime. (Motion to Dismiss, p. 9). Acevedo Vilá complains that the objects of the FECA conspiracy (Superseding Indictment, pp. 7 - 8) carry a “high level of abstraction.” (Motion to Dismiss, p. 10). However, as to the overt acts detailed at length in Count One, there seems to be no difficulty in grasping the concrete specific conduct used by the co-conspirators to violate the FECA. In any event, it is clear that all the co-conspirators, at one time or another during the period between 1999 and 2003, knew or had reason to know that they were involved in a scheme to solicit and receive illegal campaign contributions to retire Acevedo Vilá’s Resident Commissioner Campaign debt, which was substantial. That this effort was also being carried out by others, is something that can be reasonably inferred from the

substantial amount of the campaign's debt. Moreover, throughout the various stages of this overall scheme, a core group of conspirators actively concealed from the FEC the illegal means being used by the campaign to reduce the under-reported debt (most of which was owed to LIH). Finally, the fact that the Philadelphia conspirators may not have been aware of, for instance, the details of the LIH collaborator scheme, does not render their conduct separate nor unrelated from the larger common plan. *See Blumenthal*, 332 U.S. at 558.

Both Acevedo Vilá and Colón Rodríguez rely heavily on the reasoning in *United States v. Muñoz-Franco*, 986 F.Supp. 70 (D.P.R. 1997). The defendants' attempt to juxtapose the three schemes alleged in Count One with two distinct bank fraud conspiracies. The facts in *Muñoz-Franco* are readily distinguishable from the facts alleged in the FECA conspiracy count in this case. *See United States v. Muñoz-Franco, et. al.*, 487 F.3d 25, 30-32 (1st Cir. 2007), for a detailed account of the facts.¹³ Of extreme relevance to our evaluation is the fact that the two groups of conspirators in *Muñoz Franco* were wholly independent of one another. Each group of conspirators reaped distinct financial benefits from the schemes to defraud the Caguas Federal Bank, independently of the other. The commercial interests nurtured by the schemes were distinct, and there was no reliance on the success of one scheme for the success of its counterpart to achieve a common purpose. The only common fact that linked the schemes was that the loans originated with the same bank. The core conspirators (bank president and Chief Executive Officer, Lorenzo Muñoz Franco and Executive Vice President and Chief Financial Officer Francisco Sánchez Arán) engaged in two

¹³ In a similar vein, Acevedo Vilá relies on the unpublished Report and Recommendation issued in the case of *United States v. Rodríguez Torres*, Cr. No. 07-302 (D.P.R. June 20, 2008), to support a finding of a multiple conspiracy with regards to Count One.

separate conspiracies which benefitted two separate corporate groups. Funds were disbursed by the thrift institution, into the pockets of two distinctive sets of corporate entities, under circumstances which suggested that the two corporate groups had no knowledge of the other's involvement with the bank. In other words, in *Muñoz Franco*, there was no "rim" connecting the "spokes" of the wheel.¹⁴ In our case, funds from the co-conspirators were illegally flowing into the coffer of Acevedo Vilá's campaign through various mechanisms, for a common purpose.

The facts of this case, as alleged in the Superseding Indictment are sufficient to establish the existence of a single conspiracy: common goal, interdependence and overlap of core conspirators. The co-conspirators were involved in illegally raising funds to eliminate Acevedo Vilá's substantial Resident Commissioner Committee campaign debt, while simultaneously submitting false information regarding the debt to avoid FEC detection of the various schemes. It defies common sense to suggest that this single conspiracy should be divided into three separate and unrelated time frames when in reality the three schemes were simply stages of a common effort.

The ultimate goal in this conspiracy, that of receiving and providing illegal campaign contributions to pay-off the outstanding Resident Commissioner campaign debt, and the concealment of the schemes from the FEC, cannot fairly be compared with the ultimate goal of the individual conspirators in *Kotteakos*, *Muñoz Franco*, and *Rodríguez Torres*, whose illegal actions resulted in separate and independent benefits. The instant case had the unified goal of the successful retirement

¹⁴ The same reasoning was applied in *Rodríguez Torres* where the magistrate judge found that the individuals who benefitted from the medical license scheme were not connected by the required "rim." None of the "spokes" was working towards a common goal, each wanted to obtain a passing grade in order to obtain a medical license. Again, those facts do not comport to the FECA conspiracy alleged in Count One of the Superseding Indictment.

of the Resident Commissioner campaign committee's debt through the separate illegal schemes developed by the core defendants, while avoiding scrutiny and detection from the FEC. This is the common thread ("rim") that ties together the spokes in the FECA conspiracy. There was a common goal and all those who orchestrated the schemes - the LIH-PR collaborator scheme, the Philadelphia conduit scheme, and the family and office staff conduit scheme - were working towards accomplishing this result. The means may not have been the same, but the end certainly was.

B. The PR Collaborator Contribution Scheme Is Not Time-Barred

The motions to dismiss filed by Acevedo Vilá and Colón Rodríguez also raise a statute of limitations argument, based on the premise that the government has bundled multiple conspiracies into one count, thereby attempting to revive two of the three conspiracies, which are time-barred. (Motion to Dismiss, pp. 11-16). As fully explained in the foregoing discussion, the schemes were part of a larger common plan, a key element of which was the concealment of the illegal fund raising activities from the FEC. Defendant asserts that the sworn affidavits filed by Edwin Colón and Ramón Velasco Escardille, as part of the FEC enforcement proceeding (which was initiated in January 2001 and concluded in December 2003), is the only overt act in the LIH-PR Collaborator contribution scheme which occurred after March 24, 2003, the five-year statute of limitations cut-off date. This assertion, coupled with a complete mis-characterization of the context in which this submission was made to the FEC, forms the basis for the defendants' argument that this overt act could not possibly have furthered the conspiracy because "it is totally unrelated to the conduct otherwise alleged in Count 1." (AAV Motion to Dismiss, p. 13).

The FEC enforcement action in which the false sworn statements were filed was integrally related to the PR collaborator scheme, because it focused on the commercial relationship between LIH and the Resident Commissioner Campaign Committee. At issue before the FEC was the fact that the campaign committee had a sizeable debt with LIH, which had remained unpaid for a significant period of time. Ultimately, the FEC would have to decide whether the circumstances suggested that this debt was in fact an illegal corporate contribution. The enforcement action started in August 2000 with the filing of a complaint (followed by a second complaint in October 2000), and was not resolved until October 2003, after the campaign's submission of the sworn statements of Velasco Escardille and Colón Rodríguez in April 2003. During this time frame, Velasco Escardille and Colón Rodríguez repetitively filed false campaign reports with the FEC, which failed to disclose the payments obtained through the various schemes for the payment of the campaign's debt with LIH. Ultimately, given the campaign's misrepresentation that the debt to LIH had been satisfied, including the payment of interest, the FEC enforcement proceeding was closed in October 2003.

Notably, the fact that the reported debt had been paid down with funds which were the product of illegal campaign contributions, was concealed from the FEC, as well as the fact that a sizeable debt to LIH remained unpaid. The sworn statements of Colón Rodríguez and Velasco Escardille were submitted by the campaign in an attempt to lull the FEC into believing that the relationship with LIH was commercially reasonable and that the debt had been paid. In fact, the terms of the negotiation between the campaign and LIH only addressed the reported debt, and concealed the existence of the off-the-books debt which was still outstanding. This fact directly

impacted upon the essence of the FEC's inquiry, and would certainly have given rise to suspicion regarding the nature of the campaign's relationship with LIH, and invited further scrutiny by the FEC into the campaign's finances. The failure to disclose this information materially misled the FEC and affected the enforcement action because the FEC was kept in the dark concerning the true amount of the LIH debt, the manner in which the reported debt had been satisfied, and the fact that an unreported debt remained outstanding. Had the FEC been aware of these omissions, the enforcement action would not have been concluded.¹⁵ The sworn statements continued the pattern of conduct promulgated by the campaign's officials, and promoted the object of the conspiracy by concealing the significant violations of the FECA.

The April 2003 sworn statements incorporated in overt act number 13 of the Puerto Rico collaborator contribution scheme (Superseding Indictment, p. 16), show that there was "continuous cooperation of the co-conspirators to keep up" their pattern of conduct by concealing from the FEC their illegal fund raising activities. The sworn statements withhold from the FEC the fact that, to pay off LIH, the campaign resorted to illegal fund raising mechanisms. This is by all accounts a material omission, and it is certainly not a "mere passive failure to disclose something which there is no clear legal duty to disclose." (Motion to Dismiss, p. 14). In conclusion, the relation between this overt act and the conspiracy cannot be any clearer, since the conduct actively promoted the conspirators' common goal of continuing to conceal the illegal fund raising schemes (in particular the LIH-PR Collaborator Contributions scheme) used by the campaign to eliminate the LIH debt.

¹⁵ Mark D. Shonkweiler, Assistant General Counsel FEC, will testify as an expert in the trial regarding the materiality of the omissions and misrepresentations made by the campaign.

C. The Wire Fraud Counts Are Legally Sufficient

Defendants Acevedo Vilá, Inclán Bird, and González Freyre submitted individual motions to dismiss the wire fraud counts. Inclán Bird and González Freyre also joined in the motion filed by Acevedo Vilá. Acevedo Vilá raised the absence of a property interest, the lack of material misrepresentations, and the intrastate nature of the wire transmissions as a basis for dismissal of these counts. Inclán Bird and González Freyre raise additional grounds for dismissal, namely, the alleged incidental nature of the wire transmissions. These arguments will be independently addressed.

1. The Commonwealth of Puerto Rico Had A Property Interest in the Voluntary Fund

Defendant Acevedo Vilá proposes that the wire fraud charges are defective because the government cannot show that the Puerto Rico Treasury Department was deprived of the requisite interest in property. (Motion to Dismiss, pp. 17-22). In support of his argument, he characterizes Puerto Rico's interest in the proper administration of the Voluntary Fund as purely regulatory. This characterization is wholly misleading and suggests a fundamental misapprehension of Puerto Rico's electoral law.

The Superseding Indictment provides a comprehensive explanation of the manner in which the Voluntary Fund operates and of the campaign spending limitations inherent in the law. (Superseding Indictment, pp. 36-37). Essentially, Puerto Rico's electoral law gave the three political parties on the Island the choice of participating in the Voluntary Fund. A decision to participate would be irrevocable. Participation in the Voluntary Fund would entitle the party to an assignment of campaign financing funds, which had a cap of \$11 million, to wit:

- a. The party would receive a base assignment of \$3 million;
- b. The party could privately raise a maximum of \$4 million;
- c. Matching funds would be paid by the Voluntary Fund for every dollar privately raised by the campaign.

Therefore, if a party raised the maximum amount of \$4 million, it would progressively receive matching funds for the same amount, which, when added to the initial assignment of \$3 million, would yield a total of \$11 million. This money was to be deposited in the Voluntary Fund maintained at the Government Development Bank, and administered by the Puerto Rico Treasury Department. The base assignment and matching funds are public funds belonging to the Commonwealth of Puerto Rico. These monies include tax revenues paid by Commonwealth taxpayers.

Periodically, requests for payment to campaign vendors were deposited with the Treasury Department. These requests were treated by the Treasury Department as requests for payment. Amounts paid from the voluntary fund for these vendors would be deducted by the Treasury Department from the available funds remaining for use in the campaign. Although Acevedo Vilá focuses his argument on the penalty aspect of the law, there is a further fraud involved in the scheme. The Treasury Department was induced to pay monies in favor of the campaign to which the campaign was not entitled, in contravention of the \$11 million cap imposed by law.

Acevedo Vilá's attempts to couch the penalty as "regulatory" are unconvincing. Such a characterization is at odds with the text of the electoral law, and the interpretation of the SEC. A Resolution of the SEC regarding the electoral law provides, *inter alia*: "Under this legal scheme the

political contributions which the candidates and the parties deposit in the Voluntary Fund become integrated in the same, in such a way that it is irrevocable. Any amount remaining is available for future elections. Considering this, in addition to the fact that the contributions of the parties and the candidates are made with the purpose that the state match an equal amount, it is obligatory to conclude that said contributions, once they are deposited in the qualifying account become **public funds and they will be handled as such by the Treasury Department. A contrary interpretation would be contrary to entire legal scheme that we have explained.**” Resolution of the SEC dated December 24, 2003 at p. 11 (emphasis supplied). It is clear that the letter and intent of the electoral law is to treat the monies deposited in the Voluntary Fund, much of which come from the public treasury, as public funds. Defendant’s argument that the funds are divested of their public character once the monies are transferred to the campaign, is contrary to law.

The electoral law also establishes criminal penalties for exceeding the spending limits established therein. Specifically Law 4 of 1977, P.R. Laws Ann. Tit. 16, §3366, which remains in effect, provides for criminal penalties for violation of the electoral spending limits, to wit: “It shall be illegal for any person to pay or incur in campaign expenses or in publicity expenses in favor of any candidate, political party or alternative, or who solicits or receives any payment or disbursement for this purpose, in excess of the limits established by this law.” Law 4, Article 8.016 - Illegal Campaign Expenses. The law provides for a maximum term of imprisonment of six (6) months and a fine of \$500.00 for violation of the law.

The defense cites the Supreme Court case of *Cleveland v. United States*, 531 U.S. 12 (2000), as alleged support for the proposition that the facts of this case are inadequate to demonstrate that

Acevedo Vilá defrauded the Puerto Rico Treasury Department of an interest in property. In fact, *Cleveland* is not controlling in this case and the facts of the case are completely inapposite. In *Cleveland*, the District Court denied a motion to dismiss mail fraud counts and other counts predicated on the mail fraud counts, concluding that the video poker licenses constituted “property” in the State’s hands. *Id.* at 12. The decision was affirmed by the Fifth Circuit.

On appeal, the Supreme Court struggled with the issue of whether Louisiana’s video poker license constituted property in the hands of the official licensor, within the purview of the mail fraud statute. It is fundamental that Section 1341 is confined to the protection of money and property, *McNally v. United States*, 483 U.S. 350 (1987), unless the right is an intangible right of honest services. Title 18, *United States Code*, Section 1346. The Supreme Court concluded that “[s]ection 1341 does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not ‘property’ in the government regulator’s hands.” *Id.* at 13. The Supreme Court further reasoned that the Louisiana licensing statute was evidence that the core concern of the state was regulatory. *Id.* The Supreme Court, in rejecting the government’s contention that the revenue producing character of the license was evidence of the state’s property interest, suggested that the revenue would be expected and received only after the license had been issued. This dicta foreshadows a different result had the license been in the hands of the defendant. In contrast, licenses that have not yet been issued only entitle the state to collect a processing fee. *Id.* The Supreme Court explained that “tellingly, as to the character of Louisiana’s stake in its video poker licenses, the Government nowhere allege[d] that Cleveland defrauded the state of any money to which the state was entitled by law.” *Id.* at 22. This fact, standing alone, is a compelling

distinction between *Cleveland* and the instant case, since the money disbursed for the benefit of the campaign from the Voluntary Fund was public money which was yielded to the campaign under some specific statutory limitations and conditions.

_____ In this case, after and because of the Acevedo Vilá's fraudulent certification that he would participate under the legal requirements, the money in the Voluntary Fund was then earmarked for the political party, and held in a strictly fiduciary capacity, since its disbursement was solely at the direction of and for the benefit of campaign. These facts are dissimilar to the expectation of the receipt of future revenue, as discussed in *Cleveland*. Defendant argues that the payments made by Treasury to the vendors were for legitimate purposes, and that the Treasury Department could not have had a property interest in the funds. If this were true, the campaign could have spent these funds without any limitation or restriction. This was simply not the case. The campaign had to comply with the provisions of Law 115 in order to continue their entitlement to the funds. However, there are a significant number of payments made by the Treasury Department pursuant to the campaign's request after the \$11 million spending cap had been exceeded. Therefore, the Treasury Department was making payments from public funds at the request of and for the benefit of the campaign, to which the campaign was not entitled. The disentitlement is contemporaneous with the disbursement, since only those payments made after the spending cap had been violated are identified in the Superseding Indictment.

The Supreme Court further distinguished their decision in *Cleveland* in the case of *Pasquantino v. United States*, 544 U.S. 349 (2005). In *Pasquantino* the Supreme Court held Canada's right to collect excise taxes on imported liquor was "property" within the meaning of the

wire fraud statute. The Court in distinguishing *Cleveland* stated, in pertinent part: “Unlike a State’s interest in allocating a video poker license to particular applicants, Canada’s entitlement to tax revenue is a straightforward ‘economic’ interest. There was no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license...(citation omitted). Here, by contrast, the Government alleged and proved that petitioners’ scheme aimed at depriving Canada of money to which it was entitled by law. Canada could hardly have a more ‘economic’ interest than in the receipt of tax revenue.” *Id.* at 357. In the instant case, the scheme to defraud had the inevitable effect of causing the expenditure of public funds for unauthorized purposes, beyond the parameters permitted by the electoral law. The natural consequence of the defendants’ corrupt conduct was to benefit the gubernatorial campaign by allowing it to receive more money than it was entitled to. In fact, failure to comply with the provisions of the electoral law would have disqualified the campaign committee from participating in the Voluntary Fund, and receiving any of those public monies. P.R. Laws Ann. tit. 16, § 3117.

It is evident that the monetary penalty contemplated by Puerto Rico’s electoral law is more than a regulatory penalty, since the law establishes criminal sanctions for violating the law’s spending limits. Furthermore, the money illegally paid out by the Treasury Department at the behest of the campaign constituted a fraud involving public funds. The campaign induced the PR Treasury Department to pay invoices with public funds which the campaign would not have received but for the false representations and material omissions made by the campaign and its officials to the Treasury Department. In sum, the campaign and its candidate deprived the Commonwealth of \$7 million of public funds through an elaborate scheme intended to corrupt the electoral process.

2. The Gubernatorial Campaign Made Material Misrepresentations Affecting Disbursements from the Voluntary Fund.

Defendant Acevedo Vilá argues that the vouchers submitted by the campaign to the PR Treasury Department did not contain any material misrepresentations, and that disbursements made by Treasury pursuant to these vouchers were therefore legitimate. As defendant correctly points out, the campaign was also required to submit reports to the SEC pursuant to Law 115. These reports omitted significant contributions and disbursements, which the campaign kept off-the-books, in the amount of approximately \$1 million. Defendant mistakenly relies on this dichotomy to argue that PR Treasury was obligated to disburse funds and that any material omissions in the SEC reports could not have affected PR Treasury's duty to pay the campaign vendors for their legitimate services. In other words, because the left hand was unaware of what the right hand was doing, the campaign should be allowed to get away with violating the very essence of the election financing scheme which Acevedo Vilá had sworn would be complied with.

If the SEC reports had not concealed the off-the-books contributions and expenses, on or about October 2004, the campaign would have been notified by the SEC that it had reached the limits established by Law 115. Once the \$11 million limit was reached, the campaign would not have been able to submit the vouchers to the PR Treasury Department for payment. Moreover, contrary to defendant's assertions, the campaign submitted false expense reports to the PR Treasury Department. These reports did not include the expenses which the campaign had paid off-the-books through the various mechanisms designed to circumvent the provisions of Law 115, and were therefore material misrepresentations. The campaign concealed material information from two state agencies in its efforts to corrupt the electoral process. As a result of this fraudulent scheme the campaign was able

to spend approximately \$3 million, beyond the \$11 million electoral limit. The campaign was not legally permitted to spend these monies pursuant to the provisions of Law 115, and as alleged, because the defendants never intended to abide by the rules, there original certification was a material misrepresentation. Therefore, the entire \$7 million of public funds were monies to which the campaign was not entitled.

Acevedo Vilá implies that, in addition to the various other defects he claims are inherent in the wire fraud counts, that the underlying facts do not give rise to a cognizable federal interest. (AAV Motion to Dismiss, p. 16). The defendant is unconvincing in his factual characterization of evidence, and the law lends no support to his suggestion that this case involves the federalization of state crimes. The fact that a scheme may have been devised to conceal state election law violations is irrelevant to the exercise of federal jurisdiction. *See, United States v. Silvano*, 812 F.2d 754, 758 (1st Cir. 1987)(quoting *Badders v. United States*, 240 U.S. 391, 393 (1916) (“Whatever the limits to its power Congress may forbid putting letters into the post office, when such acts are done in furtherance of a scheme that it regards contrary to public policy, whether it can forbid the scheme or not.”). The reasoning is equally applicable in the context of wire transmissions. *See, Carpenter v. United States*, 484 U.S. 19, 25 n. 6 (1987)(“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses...”).

3. Counts 10-21 List Communications Transmitted in Interstate Commerce.

Defendants Acevedo Vilá and González Freyre move to dismiss the wire fraud charges on the ground that this Court lacks jurisdiction over the offense (AAV Motion to Dismiss, pp. 24-26; JGF Motion to Dismiss, at pp. 3-4). The defendants’ argument is predicated on the fact that the wire

transmissions listed in Counts 10 through 21 of the Superseding Indictment were allegedly intrastate emails, and therefore, inadequate to support federal jurisdiction. In other words, the defendants contend that it would not have been reasonably foreseeable that those emails, sent from a computer in Puerto Rico and presumably received by co-conspirators in Puerto Rico, were actually routed through an out-of-state server. This, of course, is an issue of fact to be decided by the jury. *See United States v. Byars*, 2006 WL 2366633 (E.D.Ky.).

Acevedo Vilá's argument is largely based on the case of *United States v. Paredes*, 950 F.Supp. 584 (S.D.N.Y. 1996), a case which is no longer good law. *See, United States v. Giordano*, 442 F.3d 30, 40 (2d Cir. 2006)(recognizing that *Paredes* has been overruled). The First Circuit, in the case of *United States v. Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999) held that an intrastate communication (telephone call) used to make a bomb-threat was sufficient basis for jurisdiction under 18 U.S.C. §844(e). The *Gilbert* case is regularly cited as authority for the proposition that intrastate communications, including mailings, placed with carriers in interstate commerce, are sufficient to support convictions. *See United States v. Gil*, 297 F.3d 93, 100 (2nd Cir. 2002)(private and commercial interstate carriers are instrumentalities of interstate commerce notwithstanding the fact that they also deliver mailings intrastate); *United States v. Corum*, 362 F.3d 489, 494 (8th Cir. 2004)(“Congress has the power to regulate instrumentalities of interstate commerce.”)(citing *United States v. Lopez*, 514 U.S. 549, 558 (1995)). “Purely intrastate activity falls within this power when an instrumentality of interstate commerce is used.”). *See also, United States v. Marek*, 238 F.3d 310, 320 (5th Cir. 2001)(upholding murder-for-hire conviction based on intrastate wire payment to a hit man via Western Union); *United States v. Perez*, 414 F.3d 302, 304-05 (2d Cir. 2005)(same); *United*

States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 249-52 (4th Cir. 2001), *cert. denied*, 535 U.S. 926 (2002)(upholding constitutionality of mail fraud statute as applied to intra state mailing).

Defendant argues that the cases cited above are not controlling in wire fraud statute cases. Under the wire fraud statute, Congress specifically opted to make criminal only actual transmissions that occur in interstate commerce, while the broader language used in other statutes (such as 18 U.S.C. §§ 844(e) and 875(c)) forbids the mere use of an instrumentality of interstate commerce. *United States v Phillips*, 376 F.Supp. 2d 6, 9 (D.Mass 2005). The position taken by the government in the *Phillips* trial, (i.e., that it was not necessary to present evidence that the pertinent wire communications themselves actually crossed state lines), is not the position that the government intends to take in this case. Evidence will be presented at trial that the wires listed in counts 10 through 21 actually crossed state lines.

The wires (emails) detailed in counts 10 through 21 were transmitted in interstate commerce and are legally sufficient to support federal jurisdiction. The government has found three cases involving jurisdictional challenges based on the intrastate nature of emails, which collectively conclude that a federal violation was established. Two of the cases are based on prosecutions for transmitting in interstate commerce a threat to injure another, pursuant to 18 U.S.C. §875(c). *United States v. Kammersell*, 196 F.3d 1137 (10th Cir. 1999)(transmission of instant message via “America On Line” from defendant’s computer to recipient’s computer in same state was sufficient to satisfy jurisdictional element of offense); *United States v. Veliz*, 2004 WL 964005 (S.D.N.Y.)(motion to dismiss for lack of federal jurisdiction, based on intrastate phone call, denied). The third case is strictly on point, as it is based on a wire fraud prosecution where the wire transmission (email) was

sent and received in the same state. *See, Byars, supra*, at *3 (where the government successfully argued that “it [was] reasonably foreseeable that an e-mail over the world wide web would cross interstate lines.”).¹⁶

Acevedo Vilá and González Freyre echo the argument proposed by the defendant in *Kammersell*, that the jurisdictional element cannot be met if based solely on the route of the transmission, where the sender and the recipient are both in the same state. The court found that the will of Congress was expressed in reasonably plain terms and held that: “A threat that was unquestionably transmitted over interstate telephone lines falls within the literal scope of the statute and gives rise to federal jurisdiction.” *Id.* at 1139. As part of its analysis, the court also dismissed defendant’s argument, based on *United v. Lopez*, 514 U.S. 549 (1995), to the effect that such interpretation would “immeasurably broaden federal criminal jurisdiction” over local crimes. The court quoted a relevant passage from *United States v. Kelner*, 534 F.2d 1020, 1024 (2d 1976)(defendant convicted of threatening to kill Yasser Arafat during a television interview):

However much we might agree as a matter of principle that the congressional reach should not be overextended...we do not feel that Congress is powerless to regulate matters in commerce when the interstate features of the activity represent a relatively small, or in a sense unimportant, portion of the overall criminal scheme. Our problem is not whether the nexus of the activity is “local” or interstate”, rather, under the standards which we are to apply, so long as the crime involves a necessary interstate element, the statute must be treated as valid.

¹⁶ *See, e.g., United States v. Runyan*, 290 F.3d 223, 239 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002)(where the Fifth Circuit held that “...transmission of photographs by means of internet is tantamount to moving photographs across state lines, and, thus, constitutes transportation in interstate commerce, for purposes of child pornography statute.”).

Kammersell, 196 F.3d at 1139-40.

In the *Byars* case, the defendant moved to dismiss the indictment for lack of jurisdiction over the wire fraud offense charged. The defendants in *Byars* had devised a scheme to embezzle funds from home owner associations. The wire fraud charge was based on emails between the defendants in which they discussed their plans and actions. The wire transmission relied upon in the indictment was “from Georgetown, Kentucky, to Florence, Kentucky.” *Id.* at *1. Defendant argued that it was not foreseeable for her to know that the email passed through a server in Tennessee, and therefore, a jurisdictional element of the wire fraud charge was not met. The court was not impressed. First, the court decided that the issue raised by the defendant was a question of fact, similar to questions of motive and intent, and were therefore proper for the jury to decide. The court also held that, “for a defendant to be convicted of wire fraud, it is sufficient that the defendant could reasonably have foreseen the use of the wires; the interstate nature of the wire communication need not have been reasonably foreseeable.” *Id.* at *3 (citing *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2000), overruled on other grounds by *United States v. Longoria*, 298 F.3d 367, 372 n. 6 (5th Cir. 2002)). The *Byars* court also cited to other jurisdictions which have held that there is no requirement that a defendant reasonably foresee that the wire communications would travel interstate. *See United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970); *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985); *United States v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir. 1996).

Both Acevedo Vilá and González Freyre neglect to mention these three cases in their respective motions to dismiss. These precedents are clearly on point and provide a compelling analysis of the jurisdictional issue posed by the intrastate emails routed through out-of-state servers.

It is respectfully submitted that the interstate nature of the emails, regardless of the defendant's awareness that the communications would be routed through national servers, is sufficient to support the wire fraud charges in counts 10 through 21. Even if the Court were to depart from established precedent and decided that a jury must find that the interstate travel was foreseeable, that would still be a question of fact for the jury, not appropriately raised through a motion to dismiss.

4. The Wire Fraud Counts meet the Statutory Requirement that the Use of the Wires be for the Purpose of Executing the Scheme to Defraud.

Defendants Inclán Bird and González Freyre suggest that the wire fraud counts “fail to meet the statutory requirement that the use of wires be “for the purpose of executing the alleged scheme or artifice to defraud.”” (LIB Motion to Dismiss p. 1; JGF Motion to Dismiss, pp. 2-4).

Counts 10-21 charge violations of 18 U.S.C. §§ 1343 and 2. Section 1343 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire...any writings...for the purpose of executing such a scheme or artifice, shall be fined under this title or imprisoned not more than 20 years or both.

18 U.S.C. § 1343. In describing violations of 18 U.S.C. §1343, the Tenth Circuit has noted the “gist of the offense is a scheme to defraud and the use of interstate communications to further that scheme.” *United States v. O'Malley*, 535 F.2d 589, 592 (10th Cir.1976). To sustain a conviction for wire fraud, the government must prove “(1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud and (2) the use of interstate wire communications in furtherance of the scheme.” *United States v. Czubinski*, 106 F.3d 1069, 1073

(1st Cir. 1997); *see also*, *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993). Furthermore, the Supreme Court has stated that the use of mails or wires need not be an essential element of the scheme. *Schmuck v. United States*, 489 U.S. 705, 710-711 (1989). To the contrary, it is sufficient for the wires to be “incident to an essential part of the scheme or a step in the plot.” *Id.* (internal citations and quotations omitted). Here, the Superseding Indictment properly tracks the statutory language and alleges that the use of the wires was for the purpose of executing the scheme to defraud the Puerto Rico Treasury Department and the State Electoral Commission. (Superseding Indictment, p. 39).

Inclán Bird claims that the Superseding Indictment is silent as to her connection with the wire transmissions. (LIB, Motion to Dismiss, pp. 2-3). She further argues the e-mails listed in the Superseding Indictment do not involve her and have no direct relation to any reports submitted to the State Electoral Commission or the Puerto Rico Treasury Department. (LIB, Motion to Dismiss, p. 3). Defendant González Freyre likewise argues that only one of the wire transmissions is attributed to him, and that its transmission was of an incidental nature, and not in furtherance of the scheme. (JGF Motion to Dismiss, p. 4). The thrust of the defendants’ arguments touches upon the factual merits of the case, making them inappropriate at the motion to dismiss stage. *United States v. Marbelt*, 129 F.Supp. 2d 49, 56 (D.Mass., 2000)(when a motion to dismiss the indictment involves mixed questions of law and fact that are properly decided at trial, the motion to dismiss the indictment must be denied). In any event, Inclán Bird need not have been a recipient or a sender of the wire to be charged with fraud. *United States v. Maze*, 414 U.S. 395, 399 (1974); *United States v. Sawyer*, 85 F.3d 713, 723 n.6 (1st Cir. 1996). Nor is it of consequence that the e-mails do not

personally mention her. Furthermore, the Superseding Indictment specifically states that Inclán Bird aided and abetted the co-defendants who sent the wires. (Superseding Indictment, p. 42). The Superseding Indictment also outlines Inclán Bird's involvement in the scheme to avoid disclosure of payments in the reports with the PR Treasury Department and the SEC. (Superseding Indictment, pp. 39-42).

Neither Inclán Bird nor González Freyre has presented any legal argument undermining the sufficiency of the wire fraud counts nor cited any case law suggesting that the counts should be dismissed at this stage of the proceedings. The Superseding Indictment contains all of the essential elements of the offense and apprises the defendants of the nature of the charges against them. The issues of the defendants' specific roles in the scheme or the question of whether the use of wires was closely related to the execution of the fraud are factual issues that are premature at this stage of the proceedings. *See, Marbelt*, 129 F.Supp. 2d at 56. As the First Circuit has noted, "each case must be judged on its own facts to ascertain whether the predicate message was 'closely related to the scheme.'" *United States v. Fermin Castillo*, 829 F.2d 1194, 1199 (1st Cir.1987) (citing *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987)). Moreover, the cases cited by Inclán Bird in her motion are either Supreme Court or Court of Appeals cases that determine the strength of the evidence post trial and do not address the validity of the indictment charging violations of 18 U.S.C. §1343. (LIB Motion to Dismiss, pp. 3-4). González Freyre's motion reveals a striking absence of applicable authority.¹⁷ Since evidence has not yet been presented by the government in the instant case, such

¹⁷ González Freyre further alleges that the false statement attributed to him in Count 21 of the Superseding Indictment is not actionable because it related to a state law violation. (JGF Motion to Dismiss, p. 7). The defendant mis-characterizes the nature of the charges alleged in

arguments should not be considered by the Court. Consequently, the defendants' motions to dismiss the wire fraud counts should be denied.

D. The Federal Program Fraud Count is Legally Sufficient.

Acevedo Vilá moves to dismiss Count 22 of the Superseding Indictment. This Count charges Acevedo Vilá and defendants Ricardo Colón Padilla, Luisa Inclán Bird, and Miguel Nazario Franco, with Federal Program Fraud, pursuant to 18 U.S.C. §§ 666(a)(1)(A) and 2.¹⁸ As set forth in the Superseding Indictment, the government intends to prove at trial that between February 2005 and November 2005, defendant Acevedo Vilá, who was then Governor of the Commonwealth of

Counts 10 -21. Although the purpose of the wire fraud scheme was to violate state electoral laws, the use of interstate wire transmissions to perpetrate the scheme affords federal jurisdiction over the conduct. *See, United States v. Silvano*, 812 F.2d 754, 758 (1st Cir. 1987). The defendant also raises what appears to be an issue facially appropriate for a motion to suppress. Specifically, he claims that the statements he provided to special agents of the Internal Revenue Service and the Federal Bureau of Investigation were obtained in contravention of IRS regulations, which require that in tax cases the target of the investigation be advised of his target status and of his constitutional rights. (JGF Motion to Dismiss, pp. 8-10). However, González Freyre was never the target of any federal tax investigation, and in fact, was not charged in any of the tax counts (Counts 25-27) in the Superseding Indictment.

¹⁸ In relevant part, the statute criminalizes the following activity:

- (a) Whoever, if the circumstance described in subsection (b) of this section exists -
 - (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof -
 - (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that -
 - (i) is valued at \$5,000 or more, and
 - (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency

18 U.S.C. §§ 666(a).

Puerto Rico, obtained by fraud or stole approximately \$2,241,551¹⁹ from the citizens of Puerto Rico, which money was under the custody and control of the PR Treasury Department, an agency which received approximately \$331,523 from the United States Department of Justice during the calendar year 2005. Specifically, Acevedo Vilá, together with his co-defendants, participated in the fraudulent scheme described in the Superseding Indictment in the General Allegations of Counts 10 through 25 and further in Counts 10 through 21 themselves, to obtain public financing from the Commonwealth of Puerto Rico for his gubernatorial campaign. Acevedo Vilá's campaign committee was not entitled to these public funds, but was able to induce the PR Treasury Department to disburse these monies by concealing the fact that he never intended to comply with the law governing the public financing system, and in particular with the \$11,000,000 cap on campaign expenditures. As part of this scheme to defraud the Commonwealth and citizens of Puerto Rico, defendant Acevedo Vilá, and officials from his campaign, submitted receipts to the PR Treasury Department for expenses incurred by the campaign. These receipts failed to include a substantial number of payments made by the campaign, and others on its behalf, for the payment of campaign expenses. The incomplete receipts induced the PR Treasury Department to pay approximately \$7 million in campaign expenses for the benefit of defendant Acevedo Vilá, without the knowledge that additional expenses were being paid "under the table" by the campaign, causing

¹⁹ Although Count 22 of the Superseding Indictment refers to the entire \$7,000,000 obtained by the defendant from the Puerto Rico Treasury Department, the Superseding Indictment only charges the defendant with Program Fraud for the period of February 2005 through November 2005, while defendant Acevedo Vilá was an "agent" (see *infra*), during which time only approximately \$2,241,551 was obtained from the Puerto Rico Treasury Department. Accordingly, contrary to defendant Acevedo Vilá's contention, the Superseding Indictment does not shoehorn the entire \$7,000,000 into Count 22 but rather only charges the defendant with obtaining the relevant \$2,241,551 through the Program Fraud.

the \$11 million spending cap imposed by law to be substantially exceeded. The non-reporting of these additional campaign expenses impeded the PR Treasury Department's accounting functions, since it was unable to track the correct amount of money actually raised and spent by the campaign committee, as required by law. Approximately \$2,241,551 of the expenses reimbursed by the PR Treasury Department were paid after defendant Acevedo Vilá became Governor of the Commonwealth of Puerto Rico in January 2005.

1. Defendant Acevedo Vilá was an Agent while the Fraudulent Scheme was Ongoing

In his Motion to Dismiss, defendant Acevedo Vilá²⁰ argues that Count 22 must be dismissed because the charged conduct took place during his candidacy for Governor, prior to his having become an "agent" under Section 666.²¹ Specifically, defendant Acevedo Vilá argues that the fraud alleged in Count 22 of the Superseding Indictment ended in October 2004, prior to his being sworn in as Governor in January 2005.

The "fraud" alleged in Count 22 is, in substance, the wire fraud set forth in Counts 10 through 21. However, in arguing that the fraud was concluded on the date when the last request for

²⁰ Though the government herein refers to defendant Acevedo Vilá's Motion to Dismiss Count 22, the government notes that defendants Colón Padilla, Coreano Salgado, Inclán Bird, and Nazario Franco join in the arguments made in that section of defendant Acevedo Vilá's motion. To the extent that it is relevant, the government's arguments apply with equal force to these other defendants.

²¹ In his Motion to Dismiss, defendant Acevedo Vilá does not dispute the fact that he would be considered an "agent" with regards dates after he was sworn in as Governor. Indeed, any such argument would have no merit, as Section 666(d)(1) defines the term "agent" as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative," and the Constitution of Puerto Rico makes clear that the executive power of the Commonwealth of Puerto Rico is vested in the Governor. *Puerto Rico Const. Art. IV, § 1* ("The executive power shall be vested in a Governor, who shall be elected by direct vote in each general election.").

reimbursement to the PR Treasury Department was submitted, the defendant mis-characterizes the nature and extent of the fraud alleged in Count 22. Pursuant to the wire fraud statute, 18 U.S.C. § 1343, to be guilty of wire fraud the defendant must have been engaged in a “scheme . . . to defraud,” which the First Circuit has defined as a scheme to deceive another in order to obtain money or property. *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (defining the term ‘scheme to defraud’ in the context of the bank fraud statute, 18 U.S.C. § 1344); *see also First Cir. Pattern Crim. Jury Instr.* §§ 4.13 (1998) (“A scheme includes any plan, pattern or course of action.”). Contrary to the defendant’s suggestion, the charged wire fraud scheme to deprive the Commonwealth and citizens of Puerto Rico of their money and property did not reach its conclusion on the date on which the defendant submitted his final receipt; indeed, had the defendant merely submitted the receipts and the PR Treasury Department never made payment, the scheme would have been deemed incomplete and a failure. Rather, the actual scheme continued through in or about November 2005²² when the PR Treasury Department completed its pay-out of the funds which were the object of that scheme. It was only at that point, when defendant Acevedo Vilá was finally able to obtain the benefit of the entire \$7,000,000 of public monies (\$2,241,551 of which were received after he became Governor), that the scheme achieved its goals and thus came to its conclusion.

²² While the Government, in its discretion, alleged that the wire fraud in Counts 10 through 21 continued only through February 2005, that decision to charge a more limited scheme of conduct in the earlier counts does not alter the reality that the scheme continued through November 2005, as charged in Count 22, and nothing in the law limits Count 22 to the dates charged in separate counts or even requires that the Superseding Indictment include a separate fraud count.

Although the electoral law in Puerto Rico may have required that PR Treasury Department pay the expenses sooner than it did, see P.R. Laws Ann. tit. 16, § 3117(d) (2005),²³ the fact remains that it had not yet done so at the point where the defendant became an agent. Having thus become Governor while these payments were outstanding, defendant Acevedo Vilá became a governmental “insider”. As such, he had the responsibility to ensure that the funds of the PR Treasury Department were disbursed in accordance with the law and, in failing to do so as the scheme continued, he abused a trust and became accountable under this statute. *United States v. Abu-Shawish*, 507 F.3d 550, 556 (7th Cir. 2007). Furthermore, there is no requirement under the statute that the defendant have used his position to facilitate the fraud; it is sufficient that the defendant be an agent and obtained the property by fraud, regardless of whether the defendant used his particular governmental position to further the fraud. See *United States v. Cruzado-Laureano*, 404 F.3d 470, 483-84 (1st Cir. 2005)(To convict under Section 666, “the government had to prove three elements beyond a reasonable doubt: (i) that Cruzado was an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof; (ii) that Cruzado embezzled, stole, obtained by fraud, or converted or intentionally misapplied property valued at \$5,000 or more from such organization, government, or agency; and (iii) that such organization, government, or agency receives, in any one year period federal funds in excess of \$10,000.”) (internal quotations omitted); *Salinas v. United*

²³ It should be noted that the defendant’s argument that the PR Treasury Department was required to reimburse expenses within five days of receiving documentation is of dubious relevance where the defendant was not actually entitled to any funds in the first place; having made himself ineligible for the program by violating its rules, it is hard to comprehend how the defendant can then rely on the program’s rules in his defense.

States, 522 U.S. 52, 57 (1997) (noting, in the context of 18 U.S.C. § 666, that courts are bound to follow the plain and unambiguous meaning of the statutory language).

Accordingly, since the defendant, as Governor of the Commonwealth of Puerto Rico, was an agent responsible for the accounting of these funds while the fraudulent scheme continued, his status as an agent was contemporaneous with the criminal conduct alleged and there is no basis to dismiss Count 22 of the Superseding Indictment on these grounds.

2. The Issue of *Bona Fide* Expenses is a Question of Fact

Defendant Acevedo Vilá also moves to dismiss Count 22 of the Superseding Indictment on the grounds that the expenses paid by the PR Treasury Department are covered by 18 U.S.C. § 666(c), which exempts “*bona fide* . . . expenses paid or reimbursed, in the usual course of business” from coverage by the statute. *See United States v. Cornier-Ortiz*, 361 F.3d 29, 33 (1st Cir. 2004). However, “[w]hether wages were *bona fide* is a question of fact for the jury,” and defendant’s argument that the expenses were indeed ‘*bona fide*’ is thus only a trial argument, not grounds for dismissal of the Superseding Indictment. *United States v. Dwyer*, 238 Fed.Appx. 631, 647 (1st Cir. 2007) (unpublished opinion) (citing *Cornier-Ortiz*, 361 F.3d at 36).

3. The Expenses do not qualify for the § 666(c) Exception

Should this Court choose to evaluate the applicability of § 666(c) at this stage, it is clear that the payments which were fraudulently obtained by the defendant in this case do not qualify for the § 666(c) exception.

Fraudulently induced payments are not the type of “acceptable commercial and business practices” which the statute was intended to exempt. H.R.Rep. No. 99-797, at 30 (1986), reprinted in 1986 U.S.C.C.A.N. 6138, 6153 (amending 18 U.S.C. § 666 by adding subsection (c) to avoid [§

666's] “possible application to acceptable commercial and business practices.”). Rather, even when funds are used to pay a ‘salary’ or ‘reimbursement’, where individuals “‘obtain[] money through fraudulent means, which essentially amounts to stealing or misappropriation of funds . . . their compensation [is] neither “*bona fide*” nor received “in the ordinary [sic] course of business.”” *United States v. Williams*, 507 F.3d 905, 909 (5th Cir. 2007) (quoting *United States v. Abney*, Crim. No. 3-97-260, 1998 WL 246636, at *2 (N.D.Tex. Jan 5, 1998) (unpublished opinion)); *see also United States v. Shelton*, 816 F.Supp. 1132, 1137 (W.D.Tex.1993) (“Subsection (c) of Section 666 does not serve to absolve the Defendant of wrongdoing merely because the funds were used to pay a ‘salary,’ especially where that ‘salary’ is not *bona fide*.”); *United States v. Vitillo*,² Crim. No. 03-555, 2005 WL 2452159, at *5 (E.D.Pa. Oct. 4, 2005) (unpublished opinion) (“[C]ases that have interpreted § 666(c) have consistently held that acts of fraud are not *bona fide* payments made in the usual course of business.”). In *Dwyer*, the First Circuit endorsed this view of subsection (c), holding that a reasonable jury could find wages to be neither *bona fide* nor in the usual course of business where an individual was paid for hours that he did not work on the basis of fraudulent time sheets. 238 Fed.Appx. at 647-48; *see also Cornier-Ortiz*, 361 F.3d at 36 (noting for the purposes of subsection (c) that “[a] scheme designed to evade . . . rules is hardly legitimate or acceptable.”). Further, the *Dwyer* court noted that “unauthorized” payment of wages or the like are also not “*bona fide*.” *Id.* at 648 (“informal and unauthorized compensatory time reimbursement . . . [are] also not *bona fide* wages.”).

In this case, in order to participate in the PR Treasury Department’s campaign financing program and receive funding and reimbursement, the defendant was required to agree to the \$11,000,000 cap imposed by law, and to submit financial information regarding compliance with

that limit. In order to avail himself of these monies, defendant Acevedo Vilá and others made representations that they would adhere to the \$11,000,000 cap. In fact, the defendant never intended to do so²⁴ and his campaign substantially exceeded that cap. It was solely and directly a result of these misrepresentations that the PR Treasury Department was fraudulently induced to make payments which, in actuality, it had no obligation to disburse.²⁵ Since the defendant failed to comply with the terms and conditions of the financing program, there was simply no reason, obligation, or lawful authority for the PR Treasury Department to reimburse or to pay the campaign's expenses; put another way, the defendant did not legitimately 'earn' the reimbursement or payment by complying with the terms and conditions of the program, and his methods of accessing that money did not comport with "acceptable business practices." Accordingly, though these payments may be termed either "payments" or "reimbursements," since they were obtained by fraudulent means and would not have been otherwise paid, they are neither "*bona fide*" nor paid in the "usual course of business."²⁶

In support of the motion to dismiss, defendant Acevedo Vilá relies on a single case, *United States v. Mills*, 140 F.3d 630 (6th Cir. 1998), in which certain individuals bribed the defendants who

²⁴ In fact, the government's evidence suggests that even before the start of the electoral year (2004) the plan to solicit and receive illegal off the books contributions was already being hatched.

²⁵ The mere fact that the vendors provided actual services to the campaign, for which the *campaign* owed them money, did not obligate or authorize the government of Puerto Rico to make payments under the law. These are the debts of the campaign, not the debts of the Commonwealth and citizens of Puerto Rico.

²⁶ Indeed, as the government of Puerto Rico established a system for the campaign financing program which required and relied on representations by candidates, payments induced by fraudulent statements would appear to be *de facto* not in the usual course of business.

in turn hired them to fill open positions in the Sheriff's Department. There, the Sixth Circuit rejected the argument that the salaries of the individuals hired for these jobs constituted the thing of value required by § 666(a)(1)(B), and instead held that the salaries were covered by the § 666(c) exception since the individuals in question actually went to work for the Sheriff's Department and were paid for "actual performance of necessary governmental duties." *Id.* at 633. The *Mills* court noted that even though the jobs were obtained improperly, subsection (c) still applied because the government failed to allege "that the jobs in question were unnecessary or that the individuals who obtained those employment positions did not responsibly fulfill the duties associated with their employment," or that the salaries were "unjustified." Accordingly, there was no support for that argument that the salaries were not earned in the usual course of business. *Id.* at 633-34.

However, the defendant's reliance on *Mills* is misplaced, as it is clearly distinguished on its facts. The individuals in *Mills* were owed money for properly performing the responsibilities and duties of their employment; while they may have obtained their jobs by fraud, they complied with the conditions of employment and were thus entitled to the salary received. Further, as the court noted, the jobs which these individuals obtained were open positions and were necessary jobs which presumably would have been filled by someone (and the salaries paid), regardless of the fraud. By contrast, the money paid out in the present case was not properly 'earned' since the defendant violated the terms and conditions of the program; the defendant did not "fulfill the duties associated" with the program's requirements, and any payments made pursuant to the Voluntary Fund were therefore "unjustified" as far as the campaign financing program was concerned. Moreover, the payments were certainly not necessary expenditures by the PR Treasury Department which would have been made regardless of the fraud -- barring the fraudulent representations of the defendant,

there was no reason for the government of Puerto Rico to pay off the private debts of the campaign. The PR Treasury Department established the conditions under which a campaign qualified for the financing program and if a campaign did not comply with those conditions, the PR Treasury Department had no reason, obligation or lawful authority to provide the campaign with funds.²⁷

Instead, the instant case is analogous to the series of cases in this Circuit and others which conclude that when a defendant provides false information which induces excessive payment of salary or other expenses, the resulting payments are not covered by the § 666(c) exception. *See, e.g. Dwyer*, 238 Fed.Appx; *Abney*, 1998 WL 246636 (subsection (c) does not apply where wages were received on the basis of fraudulently altered time-sheets which included overtime hours not actually worked); *Vitillo*, 2005 WL 2452159, at *5 (finding that “any reasonable person would understand” that income received on the basis of false invoices which over-reported the number of hours spent on a project “cannot be construed as lawful payments” covered by subsection (c)); *United States v. Stout*, Crim. No. 89-317, 1994 WL 90025 (E.D.Pa. Mar. 24, 1994) (unpublished opinion) (section 666(c) does not apply where defendant created “ghost” employees and sought payment for services which they never performed); *see also United States v. Edgar*, 304 F.3d 1320, 1328 (11th Cir. 2002) (Executive’s conversion of hospital money for his personal benefit by, among other things, profiting

²⁷ It should be noted that although the defendant states that the First Circuit “relied” upon the *Mills* case in its decision in *Cornier-Ortiz*, the court in *Cornier-Ortiz* in fact held that the ‘salary’ in that case was *not* covered by subsection (c) because it had been “intentionally misapplied to undermine a conflict of interest prohibition.” *Cornier-Ortiz*, 361 F.3d at 36. In fact, the reference to *Mills* is limited to the suggestion “that the § 666(c) exception would not apply if the government proved that salaries were paid for jobs that were unnecessary or unjustified,” *Id.* at 35 (citing *Mills*, 140 F.3d at 633-34) and for the proposition that “[B]ona fide salaries, wages, fees, and other compensation either *received by or promised by* § 666 defendants fall within the scope of the subsection (c) exception,” which is not at issue in this matter. *Id.* at 33 (quoting *Mills*, 140 F.3d at 633) (emphasis in original).

from the sale of property he sold to the hospital, diverting hospital funds to himself through false invoices, and profiting from hospital's purchase of a real estate option from a partnership in which held an undisclosed interest, could not be understood by "[a]ny reasonable person" to be lawful payments or reimbursements made in the "usual course of business."); *cf. United States v. Harloff*, 815 F.Supp. 618, 619 (W.D.N.Y. 1993) ("While the exception stated at subsection (c) would not preclude a prosecution involving wages which are clearly not "*bona fide*", its plain language would prevent making a federal crime out of an employee's working fewer hours than he or she is supposed to work.").²⁸ Accordingly, since the payments in the present case were made as a direct result of the defendant's intentionally fraudulent representations, in violation of the campaign financing program's terms, they cannot be *bona fide* reimbursements covered by the § 666(c) exception and the motion to dismiss must be denied.

E. The Tax Counts are Factually and Legally Sufficient.

Defendant Acevedo Vilá has moved to dismiss the tax conspiracy (Count 25) and the two substantive tax counts (Counts 26 and 27) on the basis that they are factually and legally flawed. Co-defendant Luisa Inclán Bird has also filed a motion to dismiss the tax conspiracy count (D.E. 171).

²⁸ Courts have repeatedly distinguished *Harloff* on the grounds that *Harloff* involved an 'ordinary' practice of leaving work early. *See, e.g., Abney*, 1998 WL 246636, at * 2 (a case where defendants simply left work early and thus failed to complete their hours is within the range of "legitimate" or "ordinary" practice which the statute did not intend to criminalize, as opposed to cases where there is affirmative fraud, such as where time cards have been altered); *Williams*, 507 F.3d at 909 ("An employee who receives three years of additional compensation amounting to over \$30,000 [for work not performed] -- which represents more than twice [the employee's] regular annual salary -- is more culpable than an employee who simply works fewer hours than her regular paycheck requires."); *United States v. Vitillo*,₂ Crim. No. 03-555, 2005 WL 2496877, at *8 (E.D.Pa. Nov. 2, 2004) (unpublished opinion) (money received through acts of fraud is distinct from the payments received in *Harloff*).

Specifically, Acevedo Vilá contends that the tax counts in the Superseding Indictment, Counts 25, 26 and 27, “seriously overreach as a factual matter,” and are “legally defective on their face and must be dismissed.” (AAV Motion to Dismiss at 35). According to defendant, Counts 26 and 27 fail to “identify or describe in any way the items or categories of [unreported] income.” *Id.* Defendant further contends that the Superseding Indictment fails to allege any material omission. *Id.* Finally, defendant suggests that a dispute concerning the relevant reporting rules precludes a finding of willfulness. *Id.*

Standards Governing Indictments

A useful place to begin is the law governing the sufficiency of indictments. The Supreme Court described the general standard governing the sufficiency of indictments in *United States v. Resendiz-Ponce*, ___ U.S. ___, 127 S. Ct. 782 (2007):

As we have said, the Federal Rules “were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure.” [Citation omitted]. While detailed allegations might well have been required under common-law pleading rules, [citation omitted], they surely are not contemplated by Rule 7(c)(1), which provides that an indictment “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

Id. at 789. The movement away from the technical and formalized pleading standards defendant Acevedo Vilá imagines the law requires occurred federally as far back as 1872, according to the Court. *See Id.* The First Circuit’s test for the sufficiency of indictments is as follows:

[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

United States v. Cianci, 378 F.3d 71, 81 (1st Cir. 2004), quoting from *Hamling v. United States*, 418 U.S. 87, 117 (1974).

While an indictment must charge the elements of the offense, “it is not necessary to spell out each element if each is present in context.” *United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006). An indictment “should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied.” *United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir 2007) (citing *United States v. King*, 200 F.3d 1207, 1217 (9th Cir 1999)).

There is no particular formula that the government must follow in drafting indictments: “[w]hen reviewing the indictment, we must keep in mind that ‘*the law does not compel a ritual of words*’ and that an indictment’s validity depends on practical, not technical, considerations.” *United States v. Ratcliff*, 488 F.3d 639, 643 (5th Cir. 2007) (emphasis in original). Intent and materiality need only be *inferred* from the language in the indictment:

[w]hile specific intent is also an essential element of mail fraud, it need not be specifically charged in the indictment. [citation omitted]. Additionally, materiality need not be specifically charged “if the facts alleged in the indictment warrant an inference of materiality.

Id at 644, n. 4. See also *United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir 2007) (indictment did not allege to whom the misstatements were material, but “such lack of specificity was not fatal in this case.”). In prosecutions for income tax violations, the government is not required to identify in the indictment the relevant Internal Revenue Code provisions that made the taxpayer liable for the tax he evaded. *United States v. Middleton*, 246 F.3d 825, 842 (6th Cir. 2001).

Whether the indictment sufficiently alleges a crime is an issue of law, not of fact. Fed. R. Crim. P. 12(b)(1). The indictment is to be tested not by the truth of its allegations but “by its

sufficiency to charge an offense,” *United States v. Sampson*, 371 U.S. 75, 78-79 (1962), as the allegations in the indictment must be taken as true. *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 33 n. 2 (1963). Defendant may not challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence because an indictment returned by the grand jury, if valid on its face, is sufficient to call for trial of the charge on the merits. *Costello v. United States*, 350 U.S. 359, 363 (1956).

Accordingly, in a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and, more specifically, the language used to charge the crimes. *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). It is well-settled that “a court may not dismiss an indictment . . . on a determination of facts that should have been developed at trial.” *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987).

1. Counts 26 and 27 Constitutionally Provide Adequate Notice.

Defendant Acevedo Vilá’s fundamental complaint is that Counts 26 and 27 of the Superseding Indictment “. . . are so devoid of specifics that they fail to serve essential constitutional purposes.” (Defendant’s Motion to Dismiss at 36). Specifically, defendant contends that the counts are constitutionally deficient on the ground that they “provide no clue as to what items of income the grand jury believed [he] failed to report on his tax returns, or why he was obligated by law to report them.” *Id.* Defendant argues that *United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000), supports his position. *Id.*

Defendant’s reliance on *Pirro* is unavailing. In *Pirro*, the majority of a Second Circuit panel held that the indictment failed to allege an essential element. Specifically, the Second Circuit

affirmed the dismissal of a portion of the indictment where the charge did not rest on a clear violation of the law, and where it "failed to sufficiently allege the second element of a section 7206(1) violation, namely a material falsehood or an omission that amounted to a material falsehood." *Id.* at 93. In contrast, the Superseding Indictment here specifically alleges that line 22 of defendant's 2003 and 2004 federal individual income tax returns are respectively false in that they under-report his total income. The Superseding Indictment further alleges that defendant Acevedo Vilá attached copies of his 2003 and 2004 Department of Treasury of The Commonwealth of Puerto Rico ("Commonwealth") Tax Returns which contained material omissions of unreported income. That is constitutionally sufficient. *Cf. United States v. Siravo*, 377 F.2d 469, (1st Cir. 1967) ("The first three counts charged that defendant 'did wilfully . . . make and subscribe ... a ... tax return ... which was verified by a written declaration that it was made under the penalties of perjury, and which ... he did not believe to be true and correct as to every material matter in that ... he failed and omitted to disclose ... substantial gross receipts from a business activity...'" The Superseding Indictment provides constitutionally sufficient notice

2. Counts 26 and 27 Allege Material Falsehoods in the Returns.

Defendant asserts that the income charged as having been omitted from his 2003 and 2004 federal income tax returns cannot be material. He maintains that his omissions were not material because ". . . none of the income at issue was federally taxable; all of it was sourced to Puerto Rico and therefore was not reportable on line 22 of the [2003-04] Form[s] 1040." *Id.* at 38. Defendant's argument is predicated on two incorrect premises. First, contrary to defendant's position, omissions of income may be material even if they do not affect the tax due. Second, defendant erroneously assumes that the Superseding Indictment charges only the omission of Puerto Rico-sourced income.

Section 7206(1) provides that “[a]ny person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be guilty of a felony...” 26 U.S.C. § 7206(1). “Section 7206 prohibits making or assisting the making of any materially false return, statement, claim or other document under the internal revenue laws.” *United States v. Cochrane*, 985 F.2d 1027, 1031 (9th Cir. 1993).

To prove a Section 7206 offense, the government need not prove either intent to evade payment of taxes nor even the existence of any taxable income, merely that the person who signed the form lied about the matters it contained. *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978); *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir. 1976). Any return that omits material items necessary to the computation of income is not true and correct within the meaning of section 7206. *Siravo*, 377 F.2d at 472. A “material” matter is one that affects or influences the IRS in carrying out the functions committed to it by law or “one that is likely to affect the calculation of tax due and payable.” *United States v. Griffin*, 524 F.3d 71, 76 (1st Cir. 2008).

a. Even if the Superseding Indictment were Read as Charging the Omission of Only Puerto Rico-sourced Income, it sufficiently charges the element of materiality

Defendant correctly notes that I.R.C. § 933(1) provides that, in the case of a resident of Puerto Rico, income derived from Puerto Rico-sourced income (except compensation paid by the U.S. government) is exempt from U.S. taxation. But defendant fails to acknowledge that Section 933(1) also provides that no deduction or exclusion from gross income or credit against tax is allowed to the extent that the deduction, exclusion or credit is properly allocated to or charged against amounts excluded from income. For example, if a Puerto Rico resident who was a U.S.

Government employee was paid \$10,000 in compensation and had \$10,000 in Puerto Rico-sourced income, Section 933(1) would deny deductions and credits attributable to the Puerto Rico-sourced income and limit to 50% deductions and credits not directly attributable to either U.S. or Puerto Rico sourced income (e.g., mortgage interest, standard deduction). *See, e.g.*, Publication 570, Tax Guide For Individuals with Income from U.S. Possessions, available at <http://www.irs.gov/pub/irs-prior/p570-2003.pdf>.

On his 2003 and 2004 Forms 1040, defendant reported his Resident Commissioner's salary, which is U.S.-sourced. Defendant did not report any Puerto Rico-sourced income. Because defendant did not report any Puerto Rico-sourced income, the deductions and credits he claimed on his Forms 1040 were not reduced by Section 933(1). However, if defendant had additional but unreported Puerto Rico-sourced income that was not reportable as taxable income on a Form 1040, Section 933(1) would require that some of the deductions claimed in full on his Forms 1040 be reduced. Defendant's attachment of false Commonwealth tax returns which under-report Puerto Rico-sourced income would have the tendency to impede the IRS in verifying the correctness of the calculation of the allocation between U.S. and Puerto Rico-sourced income, and ultimately the correctness of the deductions, credits and tax due. Whether defendant was required to attach the Commonwealth return to the Form 1040 is irrelevant. It was false and, no different from a false explanatory statement, had the tendency to mislead the IRS in carrying out a function committed to it by law. *Griffin*, 524 F.3d at 76.

b. Defendant Erroneously assumes that the Superseding Indictment Charges Only the Omission of Puerto Rico-sourced Income

In addition to incorrectly assuming that omissions of income cannot be material unless they affect the tax due, defendant also erroneously assumes that the Superseding Indictment would not allow proof that the omitted income was U.S. sourced income. Contrary to defendant's apparent position, whether income is sourced within or without the United States, is not determined by the physical location of the funds. Thus, U.S. sourced income does not lose its status as U.S. sourced income merely because the funds are transported to Puerto Rico. *Howkins v. Commissioner*, 48 T.C. 689 (1968) (the Tax Court held that alimony payments made by a resident alien from his London bank account to his ex-wife who resided in England, were sourced in the United States); *Manning v. Commissioner*, T.C. Memo. 1979-146 (1979) (held that alimony payments received by a resident of Puerto Rico from a resident of New York were taxable as U.S.-source income regardless of the source of the funds from which the payments were made). To the extent that the omitted income was U.S. sourced, that omission was clearly material.

3. Counts 26 and 27 Involve Willful Conduct

Defendant contends that even if his unreported Puerto Rico income were required to be reported on his federal tax returns, Counts 26 and 27 nevertheless “. . . have to be dismissed because the complexity of the underlying legal questions would preclude willfulness as a matter of law.” (Defendant’s Motion to Dismiss at 43). In support of his proposition that the sourcing rules and the interaction between the Federal and Puerto Rico tax laws forecloses willfulness, defendant cites several cases, *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974), and *United States v. Mallas*, 762 F. 2d 361 (4th Cir. 1985). *Id.* at 44-45.

In *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974), defendant was an Eastern Cherokee Indian who was convicted of tax evasion as a result of her failure to report income earned on the reservation. Evidence established that she had been told by a local official of the Bureau of Indian Affairs of the Department of Interior that she could not be taxed on income earned from property owned by the tribe, a position that Interior had maintained apparently based upon their interpretation of a treaty with the Cherokee. The Fourth Circuit reversed her conviction, holding:

As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even coordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant.

Id. at 1162.

In *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), the Fourth Circuit reversed convictions arising out of the promotion of a tax shelter program. The court determined that the defendants' contested business practices raised novel questions of law to which governing law offered no clear guidance and that "(b)ecause the defendants therefore could not have ascertained the legal standards applicable to their conduct, criminal proceedings may not be used to define and punish an alleged failure to conform to those standards." *Id.* at 361

This case, however, unlike *Critzer* and *Mallas*, does not involve a dispute over the meaning of any provision of the tax laws; the dispute here is entirely factual. The question for the jury is whether the defendant filed false 2003 and 2004 federal income tax returns. The jury's determination of fact in this case will refute defendant Acevedo Vilá's assertion that he was a victim of uncertainties in the law.

In *United States v. Schulman*, 817 F.2d 1355 (9th Cir. 1987), the District Court dismissed the indictment charging conspiracy and tax fraud based upon its application of the Ninth Circuit's holding in *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir 1983). The District Court also had dismissed the indictment because of its view, going outside the indictment, that the defendant lacked the intent to violate the law. After distinguishing its own decision in *Dahlstrom*, the Court held that the district court improperly dismissed the indictment holding that defendant's knowledge and intent were *factual* questions to be determined by a jury: "...dismissal of the indictment was improper since an intent to violate the law cannot be ruled out as a matter of law. *Schulman*, 817 F.2d at 1360. Accordingly, defendant Acevedo Vilá's state of mind is a question of fact which must be determined by a trier of fact and is not the proper subject of a pre-trial motion to dismiss the indictment.

In Footnote 27, defendant Acevedo Vilá attempts to hedge his bets by seeking immediate appellate review of this Court's decision in the event that it denies his motion to dismiss Counts 25 through 27 pursuant to 28 U.S.C. § 1292(b). (AAV Motion to Dismiss, p. 45, n. 27). However, under the collateral order doctrine, federal appellate courts generally have jurisdiction only over final orders and judgments of district courts, and not over interlocutory decisions. *Abney v. United States*, 431 U.S. 651, 659 (1977). The Supreme Court has carved out an exception to this rule to a "small class ... [of] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." involving pretrial refusals to dismiss criminal charges on double jeopardy grounds. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, (1949). But that limited exception does not apply here.

To qualify for review under the collateral order doctrine, the collateral issue must satisfy four criteria that it: (1) [be] so conceptually distinct from other issues being litigated in the underlying action that an immediate appeal would neither disrupt the main action, nor threaten to deprive the appellate court of useful context which might be derived from subsequent developments in the litigation; (2) completely and conclusively resolve the collateral issue; (3) infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case; and (4) involve an important or unsettled legal issue, rather than merely challenge discretionary trial court rulings. *United States v. Kouri-Perez*, 187 F.3d 1, 5 (1st Cir.1999).

Defendant Acevedo Vilá cannot satisfy any of the above-listed criteria in order to establish jurisdiction under Section 1291. Consequently, the denial of defendant's pre-trial motions to dismiss Counts 25 through 27 of the Superseding Indictment is not an appealable order. Defendant Acevedo Vilá cannot establish that the denial of such motions falls within the class of cases exempt from the collateral order doctrine. *See United States v. Garib-Bazain*, 222 F.3d 17 (1st Cir. 2000) (denial of a motion to dismiss on statute-of-limitations grounds is not immediately appealable under the collateral order doctrine.). Therefore, the Court should deny any such request for a certificate of appealability pursuant to 28 U.S.C. § 1292.

4. Count 25 Adequately Alleges A Conspiratorial Agreement or Unlawful Purpose

Defendant contends that Count 25, the conspiracy count, fails to properly allege an agreement or an unlawful purpose. (Defendant's Motion to Dismiss at 46-49). He alleges that there is no "...meaningful allegation that [he] . . . knowingly participated in any conspiracy to conceal income from the IRS." *Id.* at 47. Defendant also argues that the Superseding Indictment is facially deficient because it fails to allege facts ". . . to support or explain the boilerplate tracking of the statute." *Id.*

In essence, defendant is putting the proverbial cart before the horse. Ultimately, defendant claims that Count 25 must fail because it is wholly duplicative of Counts 26 and 27 and fails for the same reasons.

Count 25 of the Superseding Indictment charges what is known as a *Klein* conspiracy -- a conspiracy to defraud the IRS for the purpose of impeding its functions. *See United States v. Klein*, 247 F.2d 908 (2d Cir. 1957). To charge a conspiracy to defraud under 18 U.S.C. 371, the indictment must allege an agreement between two or more persons to defraud the United States or an agency thereof, the defendant's knowing and voluntary participation in the conspiracy, and an overt act committed by one of the coconspirators in furtherance of the conspiracy. *See United States v. Muñoz-Franco*, 487 F.3d 25, 45 (1st Cir. 2007) (citation omitted). The indictment is sufficient if it sets forth with precision "the essential nature of the alleged fraud." *United States v. Helmsley*, 941 F.2d 71, 90 (2d Cir. 1991) (quoting *United States v. Rosenblatt*, 554 F.2d 36, 42 (2d Cir. 1977)).

Count 25 meets these requirements. First, it alleged the existence of an agreement to defraud the IRS and defendants' voluntary and intentional participation in the conspiracy: "[Defendants Acevedo Vilá, Luisa Inclán Bird, and others] did knowingly, willfully, and unlawfully combine, conspire, confederate and agree to defraud the United States . . . by impeding, impairing, obstructing and defeating the lawful government functions of the . . . Internal Revenue Service . . . in the ascertainment, computation, assessment and collection of federal income taxes." Superseding Indictment, Count 25 at ¶ 2., p. 50). *See United States v. Ervasti*, 201 F.3d 1029, 1037-1038 (8th Cir. 2000) (upholding sufficiency of indictment containing similar language).

In addition, Count 25 sets out particulars of the offense, including the commission of 10 overt acts in furtherance of the conspiracy. (*Id.* at ¶¶ 5-13b, pp. 51-53). In describing the manner and

means by which the conspiracy was carried out, the Superseding Indictment alleged that defendant Acevedo Vilá paid his American Express credit card accounts with funds from Store A and from his campaign account. (*Id.* at 4a and b, pp. 50-51). In addition defendant Acevedo Vilá obtained cash payments which supplemented his income and paid for family vacations. (*Id.* at 4c, p. 51). Finally, the defendant received approximately \$57,000 worth of clothing purchased by others. *Id.* at 4d. The Superseding Indictment further alleges that defendant Acevedo Vilá filed false federal income tax returns and false Ethics in Government Act Reports which concealed the payments of his credit card expenses, the various payments of cash and the personal goods and services furnished to him. *Id.* at 4e.

Following the manner and means section, the Superseding Indictment lists 10 overt acts committed by the defendant and others to attempt to succeed in obstructing the lawful governmental functions of the IRS. The overt acts include the filing of false 2003 and 2004 federal income tax returns by Acevedo Vilá.. (*Id.* at 13a-b, p. 53). In sum, Count 25 sets forth the elements of the offense, puts the defendant on notice of the nature of the crime with which he was being charged, and afforded him protection against a future prosecution for the same conspiracy. Count 25 thus is sufficient.

Defendant Acevedo Vilá also contends that the Superseding Indictment failed to allege an unlawful purpose. But the concealment of information to which the defendant and his co-conspirators were alleged to have agreed, including defendant Acevedo Vilá's filing of false 2003 and 2004 income tax returns which omitted unreported income, was a deceitful or dishonest means of interfering with IRS functions. *See, e.g., United States v. Sans*, 731 F.2d 1521, 1534 (11th Cir. 1984) (conspiracy to fail to file CTRs involves dishonest impeding of a lawful function of

government and can amount to a conspiracy to defraud the United States); *United States v. Derezhinski*, 945 F.2d 1006, 1010 n.4 (8th Cir. 1991) ("A *Klein* conspiracy is a conspiracy to defraud the United States in the function of assessing and collecting taxes by concealing business activities and the source and nature of income."); *Klein*, 247 F.2d at 915-16.

As previously discussed, the Government does not concede that proof of the unreported U.S.-sourced income is foreclosed by the charging language. Nonetheless, even assuming, *arguendo*, that all unreported income was Puerto Rico-sourced, defendant's argument misses the mark rather widely. The defraud clause criminalizes any conspiracy "to defraud the U.S. or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371. "Such conspiracies to defraud are not limited to those aiming to deprive the government of money or property, but include a conspiracy to interfere with government functions. *United States v. Goldberg*, 105 F.3d 770, 773 (1st Cir. 1999). For the reasons discussed above, concerning Counts 26 and 27, the filing of a false 2003 and 2004 Forms 1040 with a false Commonwealth tax returns attached, and efforts to conceal and cover-up the true nature or source of unreported income payments, have a natural tendency to impede and impair the IRS in carrying out its lawful governmental functions.

Count 25 of the Superseding Indictment sufficiently alleges a *Klein*-conspiracy to impede and impair the Internal Revenue Service in the ascertainment, computation, assessment, and collection of defendant's federal individual income taxes. Counts 26 and 27 of the Superseding Indictment also sufficiently allege the filing of false 2003 and 2004 federal income tax returns. As a result, the Superseding Indictment constitutionally provides defendant with sufficient notice of the charges. Therefore defendant Acevedo Vilá's Motion to Dismiss Count 25 through 27 should be denied.

F. Count 25 is Legally Sufficient as to Defendant Luisa Inclán Bird.

Defendant Luisa Inclán Bird challenges the sufficiency of Count 25 of the Superseding Indictment which alleges her participation in a *Klein*-type conspiracy²⁹ with defendant Acevedo Vilá. Defendant Inclán Bird argues that Count 25 does not allege a nexus between her actions and the actions of defendant Acevedo Vilá. (LIB Motion to Dismiss, p. 2). The Superseding Indictment is sufficient, however, because it contains all the essential elements of a *Klein* conspiracy; it tracks the language of the statute, and it states the approximate time and place of the crime. In fact, the language of the conspiracy count almost exactly matches the language approved in *United States v. White*, 241 F.3d 1015 (8th Cir. 2001).

To be sufficient, an indictment must contain the elements of the charged offense, fairly inform the defendant of the charge against which he must defend and enable the defendant to plead double jeopardy, if applicable. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). Specific details of the crime are generally not constitutionally required. *United States v. Weiss*, 491 F.2d 460, 466 (2d Cir. 1974); *but see Russell*, 369 U.S. at 764 (invalidating an indictment for failing to allege an elemental detail). Rather, an indictment “need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.” *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975). Thus, in the context of 18 U.S.C. § 371,

²⁹A conspiracy to defraud the Internal Revenue Service (“IRS”) generally charged under Section 371's defraud clause is commonly referred to as a "*Klein* conspiracy." See, e.g., *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957). In *Klein*, the Second Circuit upheld the government's use of the defraud clause to charge conduct that impeded the functions of the IRS and upheld the conspiracy conviction, finding sufficient evidence to make out the crime. *Id.* at 916. The Court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS.

an indictment must allege (1) an agreement to commit an unlawful act; (2) the defendant's knowledge of the and voluntary participation in it; and (3) an overt act by at least one of the co-conspirators in furtherance of the conspiracy. *United States v. Muñoz-Franco*, 487 F.3d 25, 45 (1st Cir.), *cert. denied*, ___ U.S. ___, 128 S.Ct. 678 (2007). Furthermore, the evidentiary basis of an indictment cannot be challenged through the filing of a motion to dismiss. *See Costello v. United States*, 350 U.S. 359, 363-364 (1956).

The Superseding Indictment in this case is legally sufficient because it contains the essential elements of the crime. Count 25 alleges that defendant Acevedo Vilá and defendant Inclán Bird “did knowingly, willfully, and unlawfully, combine, conspire, confederate, and agree to defraud the United States . . . by impeding, impairing, obstructing and defeating the lawful government functions of the [IRS] in the ascertainment, computation, assessment, and collection of federal income taxes.” Superseding Indictment, Count 25, p. 50. The Superseding Indictment goes on to allege several overt actions taken by defendant Acevedo Vilá and three overt actions taken by defendant Inclán Bird pursuant to the agreement. First, defendant Inclán Bird arranged for the payment of defendant Acevedo Vilá's personal credit card account using funds from Store A. Second, defendant Inclán Bird provided defendant Acevedo Vilá with cash to supplement his income. Finally, defendant Inclán Bird attempted with others to cover up the purchase of highly expensive suits for defendant Acevedo Vilá using party funds. Thus, the Superseding Indictment alleges that defendants Acevedo Vilá and Inclán Bird (1) agreed (2) to defraud the United States, an unlawful object under section 371, and (3) that both defendant Acevedo Vilá and defendant Inclán Bird took overt actions toward defrauding the United States. These are the essential elements of a *Klein* conspiracy.

The Superseding Indictment also tracks the language of the statute and states the approximate time and place of the crime. The relevant text of section 371 is as follows:

If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be [guilty of a felony].

This language is adequately alleged in the Superseding Indictment and several overt actions taken by each defendant, including defendant Acevedo Vilá's filing of false income tax returns for 2003 and 2004, are likewise alleged. Defendant Inclán Bird does not challenge the sufficiency of the time and place allegations.³⁰ Because the Superseding Indictment tracks the language of the statute and alleges several specific actions attributable to the defendants, it sufficiently alleges that defendant Inclán Bird participated in a *Klein* conspiracy in violation of Title 18, *United States Code*, Section 371.

Defendant Inclán Bird complains that she had nothing to do with the filing of the tax returns at issue in this case nor did she have any connection with their preparation. (LIB Motion to Dismiss, p. 2). In addition, defendant pleads ignorance regarding knowledge that the cash payments to Acevedo Vilá constituted income or that he had omitted these amounts from his tax returns. *Id.*

In order to establish defendant Inclán Bird's membership in a conspiracy, the government must prove that she knew of the conspiracy and that she intended to join it and to accomplish its

³⁰ When time is not an essential element courts have been very lenient in approving broad time periods. *See, e.g., United States v. Tedesco*, 441 F. Supp. 1336, 1340 (M.D. Pa. 1977) (approving time allegation covering fourteen-year period for Sherman Act offense). Some circuits, however, appear hesitant to approve large time periods. The Sixth Circuit noted "This Court and numerous others have found that fairly large time frames are not in conflict with constitutional notice requirements." *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005) (citing cases from the Sixth, Seventh, and Tenth Circuits approving periods ranging from six months to three years).

object. *United States v. Flaherty*, 668 F.2d 566, 580 (1st Cir. 1981). Defendant Inclán Bird's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. *United States v. David*, 940 F.2d 722, 724 (1st Cir. 1991). Furthermore, it is not essential that the government establish that the defendant was aware of all the activities of the other co-conspirators, nor that each conspirator participated in all of the activities of the conspiracy. *United States v. Berger*, 224 F.3d 107, 114-115 (2d Cir. 2000).

Finally, in *United States v. White*, 241 F.3d 1015 (8th Cir. 2001), the Eighth Circuit held that “the words combined, conspired, confederated, and agreed’ adequately set forth the charge of conspiracy, especially combined with the references to 21 U.S.C. §§ 846 and 841(a)(1) [the drug conspiracy statute].” *Id.* at 1021. Similar to the *White* indictment, the Superseding Indictment here alleges that defendants Inclán Bird and Acevedo Vilá “did . . . combine, conspire, confederate, and agree . . . [a]ll in violation of Title 18, *United States Code*, Section 371.” Furthermore, as in the *White* indictment, Count 25 makes reference to a particular Code section. Therefore, consistent with the holding in *White*, this Superseding Indictment is sufficient and should not be dismissed.

Count 25 sufficiently alleges a *Klein*-conspiracy to impede and impair the Internal Revenue Service in the ascertainment, computation, assessment, and collection of defendant Acevedo Vilá's individual income taxes. As the Third Circuit reasoned in *United States v. Vitillo*, 490 F.3d 314, 320 (3rd Cir. 2007):

It is well established that “[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, *if valid on its face*, is enough to call for trial of the charge on the merits.

(citing *Costello v. United States*, 350 U.S. at 363 (emphasis in original)). Therefore, defendant Inclán Bird's motion should be denied.

WHEREFORE, the United States respectfully requests that this Honorable Court deny the motions to dismiss filed by defendants Acevedo Vilá, Inclán Bird, González Freyre, and Colón Rodríguez, for the reasons set forth above.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 24th day of July, 2008.

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CERTIFICATION

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 send notification of such filing to all parties in this case.

s/Maria A. Dominguez-Victoriano
Maria A. Dominguez-Victoriano