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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 UNITED STATES OF AMERICA,) Case No.: CR 12-00441 (A) - MWF
16)
Plaintiff,)
17 v.) **DEFENDANTS' OMNIBUS**
) **MOTION TO DISMISS THE FIRST**
18) **SUPERSEDING INDICTMENT**
GARY EDWARD KOVALL,)
19 DAVID ALAN HESLOP,)
PAUL PHILLIP BARDOS, and) Judge Michael W. Fitzgerald
20 PEGGY ANNE SHAMBAUGH,)
21)
Defendants.)
22)
23)

1 **TO THE CLERK OF THIS COURT AND ALL COUNSEL OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on March 11, 2013 at 1:30 p.m. or as soon
3 thereafter as this matter may be heard, in Courtroom 1600 of the United States
4 Courthouse for the Central District of California, 312 North Spring Street, Los
5 Angeles, CA 90012, Defendants David Alan Heslop, Paul Bardos, Gary Kovall, and
6 Peggy Shambaugh will and hereby do move the Court, pursuant to Rules 7(c)(1),
7 12(b)(2) and 12(b)(3) of the Federal Rules of Criminal Procedure as well as the Fifth
8 and Sixth Amendments to the United States Constitution, for an order dismissing
9 Counts 1 through 31, 34, 35, 36 through 52, and the dependent Forfeiture
10 Allegations of the First Superseding Indictment, which charge Defendants with
11 violations of 18 U.S.C. § 371, 18 U.S.C. § 666(a)(1)(B) and (a)(2), and 18 U.S.C. §
12 1957. Count 1 should be dismissed as duplicitous. Counts 2 through 31, 34, and 35
13 are defective as they fail to adequately allege and/or state specific facts relating to
14 all of the statute's elements, including allegations that the recipients of alleged
15 payments were governmental agents of qualifying covered entities, that the
16 payments involved a quid pro quo, and that the payments regarded construction
17 contracts that were not bona fide. The section 666 counts should also be dismissed
18 as multiplicitous. Counts 36 through 52 are unconstitutionally vague and fail to
19 provide defendants with the legally required notice needed to mount a defense or
20 plead double jeopardy in any future prosecution.

21 The motion is based on this Notice of Motion, the attached Memorandum of
22 Points and Authorities, the papers filed in this matter, and such oral argument and
23 documentary evidence as may be presented at the hearing on the motion.

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TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	MEMORANDUM OF POINTS AND AUTHORITIES..... 1
4	I. LEGAL STANDARD 3
5	II. ARGUMENT 6
6	A. The Section 666 Counts Are Impermissibly Vague. 6
7	1. Statutory Background 6
8	2. The Bare Allegations In the 666 Counts Fail To
9	Plead The Essential Elements Of The Crime And
10	Do Not Sufficiently Inform Defendants Of The
11	Specific Offense Charged. 8
12	(a) Mr. Heslop is not alleged to be an agent of
13	the Tribe, and Echo Trail Holdings, LLC is
14	not alleged to be a qualifying organization
15	receiving federal funds. 8
16	(b) Mr. Kovall is not adequately alleged to be an
17	agent of the Tribe. 14
18	(c) The section 666 Counts fail to allege quid pro
19	quo bribery..... 17
20	(d) The section 666 Counts fail to allege that the
21	awarding of construction-related contracts did
22	not relate to bona fide transactions..... 21
23	B. The Section 666 Counts Are Multiplicitous. 23
24	C. The Section 1957 Counts Are Impermissibly Vague. 27
25	D. The Conspiracy Count Is Duplicitous..... 29
26	E. The Indictment’s Forfeiture Allegations Must Be
27	Dismissed Along With Their Predicate Offenses. 31
28	III. CONCLUSION 31

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Bell v. United States</i> , 349 U.S. 81, 75 S. Ct. 620 (1955)	24
<i>Bourjaily v. United States</i> , 483 U.S. 171, 107 S. Ct. 2775 (1987)	29
<i>Bruton v. United States</i> , 391 U.S. 123, 88 S. Ct. 1620 (1968)	29
<i>Fischer v. United States</i> , 529 U.S. 667, 120 S. Ct. 1780 (2000)	20
<i>Flores v. Emerich & Fike</i> , 2009 WL 900738 (E.D. Cal. Mar. 31, 2009)	27
<i>Hamling v. United States</i> , 418 U.S. 87, 94 S. Ct. 2887 (1974)	2
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881 (1975)	20
<i>People v. Cumberworth</i> , 2006 WL 3549939, 20 (Cal. Ct. App. Dec. 11, 2006)	26
<i>Russell v. United States</i> , 369 U.S. 749, 82 S. Ct. 1038 (1962)	1, 19
<i>Salinas v. United States</i> , 522 U.S. 52, 118 S. Ct. 469 (1997)	2, 9
<i>Sanabria v. United States</i> , 437 U.S. 54, 98 S. Ct. 2170 (1978)	22
<i>Skilling v. United States</i> , 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010)	2, 16
<i>U.S. v. Gordon</i> , 844 F.2d 1397 (9th Cir. 1988)	27, 28
<i>U.S. v. Kohring</i> , 637 F.3d 895 (9th Cir. 2011)	15
<i>United States v. Abu-Shawish</i> , 507 F.3d 550 (7th Cir. 2007)	11
<i>United States v. Aguilar</i> , 756 F.2d 1418 (9th Cir. 1985)	28
<i>United States v. Bass</i> , 404 U.S. 336, 92 S. Ct. 515 (1971)	16

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
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10	
11	
12	
13	
14	
15	
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24	
25	
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27	
28	

<i>United States v. Blumhagen</i> , 2005 WL 3059395 (W.D.N.Y. Nov. 15, 2005).....	3, 17
<i>United States v. Cabrera</i> , 328 F.3d 506 (9th Cir. 2003).....	8, 12
<i>United States v. Carucci</i> , 364 F.3d 339 (1st Cir. 2004)	26, 27
<i>United States v. Cecil</i> , 608 F.2d 1294 (9th Cir. 1979).....	passim
<i>United States v. Davenport</i> , 519 F.3d 940 (9th Cir. 2008).....	21
<i>United States v. Ferber</i> , 966 F. Supp. 90 (D. Mass. 1997)	passim
<i>United States v. Frega</i> , 179 F.3d 793 (9th Cir. 1999).....	16
<i>United States v. Fulcher</i> , 626 F.2d 985 (D.C. Cir. 1980)	2, 3, 18
<i>United States v. Ganim</i> , 510 F.3d 134 (2d Cir. 2007).....	18
<i>United States v. Harmon</i> , 2011 WL 7937876 (N.D. Cal. Aug. 18, 2011).....	27
<i>United States v. Heckler</i> , 428 F. Supp. 269 (S.D.N.Y. 1976).....	29
<i>United States v. Hitt</i> , 249 F.3d 1010 (D.C. Cir. 2001)	3
<i>United States v. Hooker</i> , 841 F.2d 1225 (4th Cir. 1988).....	3, 17
<i>United States v. Jackson</i> , 72 F.3d 1370 (9th Cir. 1995).....	26
<i>United States v. Jennings</i> , 160 F.3d 1006, 1022 (4th Cir. 1998).....	15
<i>United States v. Jewell</i> , 827 F.2d 586 (9th Cir. 1987).....	23
<i>United States v. Keen</i> , 104 F.3d 1111 (9th Cir. 1996).....	22, 24

	<u>Page(s)</u>
1	
2	
3	
4	
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8	
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10	
11	
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23	
24	
25	
26	
27	
28	

<i>United States v. Keith</i> , 605 F.2d 462 (9th Cir. 1979).....	1, 19
<i>United States v. Lovett</i> , 964 F.2d 1029 (10th Cir. 1992).....	25, 27
<i>United States v. Miller</i> , 774 F.2d 883 (8th Cir. 1985).....	2, 3, 18
<i>United States v. Panarella</i> , 277 F.3d 678 (3d Cir. 2002).....	2
<i>United States v. Pheaster</i> , 544 F.2d 353 (9th Cir. 1976).....	1, 19
<i>United States v. Rodriguez-Gonzales</i> , 358 F.3d 1156 (9th Cir. 2004).....	2
<i>United States v. Rooney</i> , 37 F.3d 847 (2d Cir. 1994).....	20, 21
<i>United States v. Siegelman</i> , 561 F.3d 1215 (11th Cir. 2009).....	15
<i>United States v. Stewart</i> , 727 F. Supp. at 1068 (N.D. Texas 1989).....	9, 11, 12
<i>United States v. Sun-Diamond Growers of California</i> , 526 U.S. 398, 119 S. Ct. 1402 (1999).....	15, 16
<i>United States v. Sunia</i> , 643 F. Supp. 2d 51 (D.C.D.C. 2009).....	passim
<i>United States v. Turner</i> , 2007 WL 1300462 (W.D. Wash. May 1, 2007).....	25
<i>United States v. UCO Oil Co.</i> , 546 F.2d 833 (9th Cir. 1976).....	24, 25, 28
<i>United States v. Universal C.I.T. Credit Corp.</i> , 344 U.S. 218, 73 S. Ct. 227 (1952).....	22
<i>United States v. Urlacher</i> , 784 F. Supp. 61 (W.D.N.Y. 1992).....	22, 23
<i>United States v. Valentine</i> , 63 F.3d 459 (6th Cir. 1995).....	12, 22
<i>United States v. Winter</i> , 663 F.2d 1120 (1st Cir. 1981).....	2

	<u>Page(s)</u>
1	
2	
3 <i>United States v. Wyncoop,</i>	
4 11 F.3d 119 (9th Cir. 1993).....	passim
5 <i>United States v. Webb,</i>	
6 691 F. Supp. 1164 (N.D. Ill. 1988)	passim
7 <i>United States v. Mills,</i>	
8 140 F.3d 630 (6th Cir. 1998).....	1, 5, 20, 21
9 <i>Walker v. United States,</i>	
10 176 F.2d 796 (9th Cir. 1949).....	2
11 <u>Statutes</u>	
12 <i>United States v. Vargas-Castillo,</i>	
13 329 F.3d 715 (9th Cir. 2003).....	24
14 U.S. Const. amend. VI.....	1, 28, 29
15 U.S. Const. amend. V	1, 3, 28
16 18 U.S.C § 208.....	23
17 18 U.S.C. § 201.....	15, 16
18 18 U.S.C. § 201(c)(1)(A).....	16
19 18 U.S.C. § 371.....	1
20 18 U.S.C. § 666.....	passim
21 18 U.S.C. § 666(a)(1)(B)	passim
22 18 U.S.C. § 666(a)(2)	passim
23 18 U.S.C. § 666(c)	20, 21, 23
24 18 U.S.C. § 666(d)(1)	13
25 18 U.S.C. § 1957.....	1, 25, 26, 27
26 Cal. Pen. Code § 641.3	26
27 <u>Other Authorities</u>	
28 H.R.Rep. 797, 99th Cong., 2d Sess. 30 & n. 9 (1986), reprinted in 1986	
U.S.C.C.A.N. 6138, 6153 & n.9.....	21
29 <u>Rules</u>	
30 Fed. R. Evid. 801 (d)(2)(E).....	28, 29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Fed. R. Crim. P. 7	1
Fed. R. Crim. P. 7 (c)(1)	1
Fed. R. Crim. P. 12(b)(3)(B).....	1
Fed. R. Crim. P. 12(b)(3)	1
Fed. R. Crim. P. 12(b)(2)	1

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 The First Superseding Indictment (“Indictment”) launches an absurdly
3 ambitious and overreaching attack on Defendants David Alan Heslop, Paul Bardos,
4 Gary Kovall, and Peggy Shambaugh, charging multiple violations of 18 U.S.C. §
5 666 (“Theft or bribery concerning programs receiving Federal funds”) as well as a
6 violation 18 U.S.C. § 371 (alleging conspiracy to violate the same bribery statute).
7 These charges are primarily based on conclusory allegations that Defendants were
8 involved in a bribery scheme pursuant to which Defendant Bardos was awarded
9 construction contracts with the Twenty-Nine Palms Band of Mission Indians (“the
10 Tribe”). The Indictment also charges Defendants Heslop, Bardos, and Shambaugh
11 with multiple violations of 18 U.S.C. § 1957 for purportedly “engaging in monetary
12 transactions in property derived from specified unlawful activity,” namely,
13 commercial bribery under California state law.¹ Dismissal of the Indictment is
14 warranted for several reasons.

15 *First*, the government’s paltry factual allegations fail to state violations of 18
16 U.S.C. § 666 as a matter of law. Section 666 penalizes the giving of bribes to an
17 agent of an organization receiving at least \$10,000 in federal funds during a one-
18 year period, with the intent to influence or reward that agent in connection with any
19 business, transaction, or series of transactions of such organization involving
20 anything of value of \$5,000 or more. Section 666 also penalizes the receipt of such
21 bribes by the agent. Shockingly, the section 666 counts fail to adequately allege
22 even the most basic elements of the crime. For example, the government fails to
23 adequately allege (1) that Mr. Heslop and/or Mr. Kovall were “agents” of an
24 organization receiving federal funds during the relevant time period; (2) that any
25 payments were given or received with the requisite corrupt intent to engage in a *quid*

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27
28 ¹ The Indictment also charges Defendant Kovall with violations of 18 U.S.C.
§ 1343 and Defendant Bardos with violations of 26 U.S.C. § 7201 and 26 U.S.C. §
7206, but those counts are not addressed in this motion.

1 *pro quo*; indeed, the section 666 counts fail specify even a single transaction
2 influenced by the purported “bribes”; or (3) that the unspecified “construction-
3 related contracts” were not bona-fide transactions excluded from the reach of
4 section 666. Thus, these counts fail to state facts sufficient to inform Defendants of
5 the specific offenses with which they are charged or to protect them against double
6 jeopardy in any future prosecution. As such, they should be dismissed as
7 unconstitutionally vague.

8 ***Second***, the section 666 counts should be dismissed as multiplicitous. The
9 Indictment alleges ***thirty-two*** separate violations of section 666 against Defendants,
10 ***sixteen*** of which are alleged against Mr. Heslop alone. Although courts considering
11 the applicable unit of prosecution for section 666 violations have aggregated bribe
12 payments during the relevant one-year period so long as those payments were made
13 pursuant to a single bribery scheme, the government in this case charged Defendants
14 with a separate count for *each* alleged bribery payment even though the government
15 also alleges that all such payments were made pursuant to a single scheme or
16 conspiracy. Defendants should not be punished multiple times for the same offense
17 and should therefore each face, at most, one count under section 666.

18 ***Third***, like the section 666 counts, the section 1957 counts are
19 unconstitutionally vague and fail to provide defendants with the legally required
20 notice needed to mount a defense or plead double jeopardy. In particular, the
21 government alleges that Defendants Heslop, Bardos, and Shambaugh engaged in
22 monetary transactions involving proceeds from “specified unlawful activity,” which
23 is identified, without elaboration, as commercial bribery in violation of California
24 Penal Code § 641.3. Although the government is required to prove at trial that a
25 violation of California Penal Code § 641.3 in fact occurred in order to prove its
26 section 1957 charges, nowhere does the Indictment allege any facts sufficient to
27 inform Defendants of the specific offense charged. For example, the Indictment
28 does not allege even basic facts informing Defendants regarding the person or

1 persons alleged to have engaged in commercial bribery, when, and for what
2 purpose. Thus, Defendants are not able to mount an adequate defense to these
3 charges.

4 *Finally*, because the conspiracy count alleges at least two distinct
5 conspiracies, it should be dismissed as duplicitous.

6 For these reasons, Defendants respectfully request this Court to dismiss
7 Counts 1 though 31 and 34 through 52 of the Indictment.

8 **I. LEGAL STANDARD**

9 The Sixth Amendment provides that “in all criminal prosecutions, the accused
10 shall enjoy the right ... to be informed of the nature and cause of the accusation.”
11 U.S. CONST. amend. VI. This constitutional protection is implemented by Federal
12 Rule of Criminal Procedure 7, which requires that the indictment “be a plain,
13 concise, and definite written statement of the essential facts constituting the offense
14 charged.” FED. R. CRIM. P. 7 (c)(1). At any time while the case is pending, the
15 court may hear a claim “that the indictment . . . fails to invoke the court’s
16 jurisdiction or to state an offense.” FED. R. CRIM. P. 12(b)(3)(B). A district court’s
17 ruling concerning the adequacy of an indictment is a question of law. *United States*
18 *v. Mills*, 140 F.3d 630, 631 (6th Cir. 1998) (affirming dismissal of indictment in
19 section 666 case).

20 In determining the validity of an indictment, the issue is whether the
21 indictment provides “the substantial safeguards” to criminal defendants that
22 indictments are designed to guarantee. *Russell v. United States*, 369 U.S. 749, 763,
23 82 S. Ct. 1038, 1046 (1962); *see United States v. Cecil*, 608 F.2d 1294, 1296 (9th
24 Cir. 1979) (per curiam). Pursuant to this purpose, an indictment must furnish the
25 defendant with a sufficient description of the charges against him to enable him to
26 prepare his defense, to ensure that the defendant is prosecuted on the basis of facts
27 presented to the grand jury, to enable him to plead jeopardy against a later
28 prosecution, and to inform the court of the facts alleged so that it can determine the

1 sufficiency of the charge. *See Cecil*, 608 F.2d at 1296; *Russell*, 369 U.S. at 768
2 n.15; *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *United States v.*
3 *Pheaster*, 544 F.2d 353, 360 (9th Cir. 1976). To perform these functions, the
4 indictment must set forth the elements of the offense charged and contain a
5 statement of the facts and circumstances that will inform the accused of the specific
6 offense with which he is charged. *Cecil*, 608 F.2d at 1296 (citing *Hamling v. United*
7 *States*, 418 U.S. 87, 117-18, 94 S. Ct. 2887, 2908 (1974)).

8 In other words, an indictment cannot survive a motion to dismiss merely
9 because it “recites in general terms the essential elements of the offense.” *United*
10 *States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002), *abrogated on other grounds*
11 *by Skilling v. United States*, 130 S. Ct. 2896, 2927-35, 177 L. Ed. 2d 619 (2010).
12 Rather, there must be a linkage between the elements and the facts: The “specific
13 facts alleged in the charging instrument” must satisfy the elements of the offenses
14 charged. *Id.* As the Ninth Circuit has explained, “the fact that an indictment may
15 have tracked the language of the statute will not render it valid if it fails to allege an
16 essential element of the offense or the minimum facts required to fulfill the purposes
17 of indictments.” *Cecil*, 608 F.2d at 1297.

18 Importantly, “each count in an indictment is regarded as if it were a separate
19 indictment and must be sufficient in itself. Therefore, it must stand or fall upon its
20 own allegations without reference to other counts not expressly incorporated by
21 reference.” *Walker v. United States*, 176 F.2d 796, 798 (9th Cir. 1949); *see United*
22 *States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1159 (9th Cir. 2004) (citing *Walker*,
23 “re-affirm[ing] this longstanding rule’s validity,” and noting the agreement of sister
24 circuits); *United States v. Miller*, 774 F.2d 883, 885 (8th Cir. 1985) (reversing
25 conviction for failure to expressly incorporate allegations made elsewhere in the
26 indictment); *United States v. Winter*, 663 F.2d 1120, 1137-38 (1st Cir. 1981) (same),
27 *abrogated on other grounds by Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469
28 (1997); *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980) (same,

1 requiring incorporation by reference, not “by osmosis”). Moreover, failure to
2 incorporate paragraphs by reference “is a particularly striking omission” where
3 counts incorporate some, but not all, other indictment paragraphs, “showing that the
4 grand jury knew how to incorporate by reference if it so chose.” *United States v.*
5 *Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988) (en banc).

6 In multi-count indictments, courts engage in a detailed analysis of whether
7 specific allegations have or have not been incorporated by reference, as “[t]he Grand
8 Jury’s limitation of its incorporation to [specific allegations] must be given effect.”
9 *United States v. Blumhagen*, No. 03-CR-56S, 2005 WL 3059395, at *3 (W.D.N.Y.
10 Nov. 15, 2005) (granting motion to dismiss for failure to expressly incorporate
11 allegations made elsewhere in the indictment); *see, e.g., Miller*, 774 F.2d at 885;
12 *Fulcher*, 626 F.2d at 988; *Hooker*, 841 F.2d at 1231. “Adherence to the language of
13 the indictment is essential because the Fifth Amendment requires that criminal
14 prosecutions be limited to the unique allegations of the indictments returned by the
15 grand jury.” *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001). Failure to
16 allege an element prevents the reviewing court from concluding that the grand jury
17 considered the element before returning the indictment. *See id.* Thus, if a count in
18 an indictment fails to allege essential elements of the crime or state the facts and
19 circumstances necessary to inform the accused of the specific offense with which he
20 is charged, the count must be dismissed, even if allegations made elsewhere in the
21 indictment might fill those gaps had they been incorporated into the count in
22 question. *See United States v. Blumhagen*, No. 03-CR-56S, 2005 WL 3059395, at
23 *3 (W.D.N.Y. Nov. 15, 2005); *Miller*, 774 F.2d at 885; *Fulcher*, 626 F.2d at 988;
24 *Hooker*, 841 F.2d at 1231.

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1 **II. ARGUMENT**

2 **A. The Section 666 Counts Are Impermissibly Vague.**

3 **1. Statutory Background**

4 18 U.S.C. § 666, entitled “Theft or bribery concerning programs receiving
5 Federal funds,” restricts itself to crimes of theft or bribery involving agents of some
6 governmental entities receiving federal funds. *See* 18 U.S.C. § 666(a)(1)(B), (a)(2).
7 The statute reads, in relevant part:

8 (a) Whoever, if the circumstance described in subsection (b) of this
9 section exists--

10 (1) being an agent of an organization, or of a State, local, or Indian
11 tribal government, or any agency thereof--

12

13 (B) corruptly solicits or demands for the benefit of any person, or
14 accepts or agrees to accept, anything of value from any person,
15 intending to be influenced or rewarded in connection with any
16 business, transaction, or series of transactions of such organization,
17 government, or agency involving any thing of value of \$5,000 or
18 more; or

19 (2) corruptly gives, offers, or agrees to give anything of value to any
20 person, with intent to influence or reward an agent of an organization
21 or of a State, local or Indian tribal government, or any agency thereof,
22 in connection with any business, transaction, or series of transactions
23 of such organization, government, or agency involving anything of
24 value of \$5,000 or more;

25 shall be fined under this title, imprisoned not more than 10 years, or
26 both.

27 (b) The circumstance referred to in subsection (a) of this section is
28 that the organization, government, or agency receives, in any one year

1 period, benefits in excess of \$10,000 under a federal program
2 involving a grant, contract, subsidy, loan, guarantee, insurance, or
3 other form of federal assistance.

4

5 (d) As used in this section—

6 (1) the term “agent” means a person authorized to act on behalf of
7 another person or a government and, in the case of an organization or
8 government, includes a servant or employee, and a partner, director,
9 officer, manager, and representative;

10 18 U.S.C. § 666. The statute also restricts its reach to only certain types of
11 government “business” or “transactions”:

12 (c) This section does not apply to bona fide salary, wages, fees, or
13 other compensation paid, or expenses paid or reimbursed, in the usual
14 course of business.

15 *Id.* Thus, for violations of 18 U.S.C. § 666 (a)(1)(B), the government must plead the
16 following elements:

- 17 (1) The defendant was an agent of a statutorily-defined governmental
18 organization receiving benefits of more than \$10,000 under a federal
19 program in the relevant one-year period;
- 20 (2) The defendant solicited, demanded, accepted, or agreed to accept
21 something of value;
- 22 (3) The defendant did so corruptly with the intent to be influenced or
23 rewarded in connection with a non-bona fide business, transaction or
24 series of transactions of the organization; and
- 25 (4) The value of the business, transaction, or series of transactions in
26 question was at least \$5,000.

27 *See United States v. Mills*, 140 F.3d 630, 632-33 (6th Cir. 1998); *United States v.*
28 *Wyncoop*, 11 F.3d 119, 121-23 (9th Cir. 1993); *United States v. Sunia*, 643 F. Supp.

1 2d 51, 61-69 (D.C.D.C. 2009). Similarly, for violations of 18 U.S.C. § 666(a)(2),
2 the government must plead the following elements:

- 3 (1) The defendant gave, offered, or agreed to give anything of value to
4 another person;
- 5 (2) The defendant did so corruptly with the intent to influence or reward an
6 agent of a statutorily-defined governmental organization, in connection
7 with a non-bona fide business, transaction, or series of transactions of
8 the organization;
- 9 (3) The value of the business, transaction, or series of transactions in
10 question was at least \$5,000; and
- 11 (4) The organization received benefits of more than \$10,000 under a
12 federal program in the relevant one-year period.

13 **2. The Bare Allegations In the 666 Counts Fail To Plead The**
14 **Essential Elements Of The Crime And Do Not Sufficiently**
15 **Inform Defendants Of The Specific Offense Charged.**

16 As discussed above, the Indictment must set forth the essential elements of
17 the offense charged and contain a statement of the facts and circumstances that will
18 inform the accused of the specific offense with which he is charged. *Cecil*, 608 F.2d
19 at 1296. Counts 2 through 31, 34, and 35 of the Indictment—the section 666
20 counts—fall far short of these requirements.

21 **(a) Mr. Heslop is not alleged to be an agent of the Tribe,**
22 **and Echo Trail Holdings, LLC is not alleged to be a**
23 **qualifying organization receiving federal funds.**

24 Agency is an essential element of a section 666 violation. *See Sunia*, 643 F.
25 Supp. 2d at 61-69 (granting motion to dismiss section 666 charges based on
26 deficient allegations of agency); *United States v. Ferber*, 966 F. Supp. 90, 100-01
27 (D. Mass. 1997) (granting judgment of acquittal regarding thirteen section
28 666(a)(1)(B) charges based on insufficient evidence of agency). To survive a

1 motion to dismiss, an indictment must allege agency with specificity, including
 2 allegations that (1) the defendant was an agent of a qualifying organization receiving
 3 federal assistance; (2) during the relevant time period; (3) whose allegedly corrupt
 4 receipt or solicitation of bribes was based on his legally conferred agency authority.
 5 *See Sunia*, 643 F. Supp. 2d at 65-68 (granting motion to dismiss section 666 counts
 6 as “the government does not allege that the defendants used any official authority
 7 conferred upon them by their [governmental] positions” to violate section 666, and
 8 as Indictment did not adequately specify duration of agency) (quotation marks
 9 omitted). Thus, to withstand a motion to dismiss, Counts 2 through 9 against
 10 Defendant Bardos, Counts 10 through 17 and 35 against Defendant Heslop, and
 11 Count 34 against Defendant Shambaugh—all of which depend on Mr. Heslop’s
 12 status as an agent of the Tribe to survive—must allege that Mr. Heslop was in fact
 13 an agent of the Tribe when the payments listed in these counts were purportedly
 14 made by Mr. Bardos and/or Ms. Shambaugh and received by Mr. Heslop. Yet these
 15 counts make no such allegation.

16 In fact, these counts say nothing whatsoever about Mr. Heslop’s agency. For
 17 example, paragraph 16 contains the core of the government’s allegations with
 18 respect to Counts 10 through 17, alleging in a conclusory fashion that Mr. Heslop:
 19 corruptly solicited, demanded, accepted, and agreed to accept things
 20 of value from a person, that is, monetary payments set forth below,
 21 intending to be influenced and rewarded in connection with a
 22 transaction and series of transactions of the Tribe involving \$5,000 or
 23 more, namely, the awarding of the Tribe’s construction-related
 24 contracts.

25 Indictment ¶ 16. Noticeably absent is any allegation that Mr. Heslop was *ever* an
 26 agent of the Tribe, the only organization alleged in the Indictment to have received
 27 benefits of more than \$10,000 under any federal program. *See id.* ¶¶ 13, 16. The
 28 same is true of the conclusory allegations contained in Counts 2 through 9, 34, and

1 35. Moreover, Counts 34 and 35 confusingly allege that *Ms. Shambaugh*—the
 2 person *making* the alleged payment to Mr. Heslop—was the agent of the Tribe with
 3 respect to the transaction in question, *not* Mr. Heslop. *Id.* ¶¶ 34, 35
 4 (“SHAMBAUGH...the Tribe’s purported agent for the purchase of the property”).²

5 These fatal defects are not cured by resorting to the background paragraphs
 6 incorporated by reference into Counts 2 through 17, 34, or 35 (*i.e.*, paragraphs 1
 7 through 8 and 13, and 22, the *only* paragraphs in the Indictment incorporated by
 8 reference into the section 666 Counts). Nowhere do the incorporated paragraphs
 9 describe Mr. Heslop as an agent of the Tribe or allege facts sufficient to support the
 10 existence of any such agency relationship. Rather, paragraph 5 alleges only that Mr.
 11 Heslop acted at some undefined point in time as manager of Echo Trail Holdings,
 12 LLC, a for-profit *California limited liability company* created for the purpose of
 13 purchasing real estate. *See id.* ¶¶ 3, 5.

14 The Indictment also does not allege that Echo Trail Holdings, LLC was an
 15 “agency” of the Tribe or received any federal funds directly or indirectly, let alone

17 ² To confuse matters even more, Count 35 against Mr. Heslop alleges a
 18 violation of 18 U.S.C. § 666(a)(2)—which prohibits the *giving* of a bribe—yet only
 19 alleges that he *accepted* a payment from Ms. Shambaugh (who is alleged to be the
 20 agent of the Tribe for the transaction in question, not Mr. Heslop). Thus, although
 21 Count 35 purports to charge a violation of section 666(a)(2) against Mr. Heslop, the
 22 relevant paragraphs in the Indictment actually resemble allegations of a section
 23 666(a)(1)(B) violation. *Compare id.*, at 24:2, *with id.* at ¶ 29, *with* 18 U.S.C.
 24 § 666(a)(1)(B), (a)(2).

25 But, even if Count 35 *had* charged Mr. Heslop with a violation of 18 U.S.C. §
 26 666(a)(1)(B) as the recipient of the alleged bribe, it would still suffer fatal pleading
 27 defects, along with Count 34. Paragraph 22 of the Indictment, which is incorporated
 28 by reference into Counts 34 and 35, alleges that Mr. Kovall, not Mr. Heslop,
 negotiated the purchase price of the 47-acre parcel of land. Likewise, paragraphs 27
 and 29 allege that Ms. Shambaugh, not Mr. Heslop, was the Tribe’s agent with
 respect to the purchase. And, as discussed above, Count 35 does not allege that
 Echo Trail Holdings, LLC ever received federal funds; that Mr. Heslop was an agent
 of Echo Trail Holdings, LLC during the relevant time period; that Mr. Heslop
 exercised his authority as an agent in any way in connection with the purchase of the
 land or the payment of a commission to Ms. Shambaugh; or that the purchase of the
 land was unnecessary or unjustified. Count 35 is therefore a nonsensical mishmash
 of contradictions and deficient pleading that fails to state any violation of section
 666 and must be dismissed. *See id.* ¶¶ 1-8, 13, 22, 28-28.

1 benefits of more than \$10,000 under any federal program in a one-year period. Nor
2 could it: To qualify as a section 666 governmental organization, the organization or
3 agency must receive federal funds directly. *See Wyncoop*, 11 F.3d at 122-23 (where
4 organization received federal funds only *indirectly*, organization’s employees were
5 not agents under section 666); *United States v. Cabrera*, 328 F.3d 506, 509 (9th Cir.
6 2003) (reaffirming *Wyncoop*’s holding that, to constitute a section 666 violation,
7 “the defrauded program or agency must receive federal funding directly”); *see also*
8 *United States v. Stewart*, 727 F. Supp. at 1068, 1072-73 (N.D. Texas 1989)
9 (organization performing custom services for governmental entity is not a section
10 666 qualifying entity, nor are its employees section 666 agents); *United States*
11 *v. Webb*, 691 F. Supp. 1164, 1167-70 (N.D. Ill. 1988) (company performing
12 consulting services for federal agency is not a section 666 qualifying entity, nor are
13 its employees section 666 agents).

14 As the Supreme Court has explained, Congress intended for section 666 to
15 apply where there is “a threat to the integrity and proper operation of [a] federal
16 program.” *Salinas*, 522 U.S. at 61. “However, the ‘integrity’ of a federal program
17 can only be ‘threatened’ from within; i.e., by an agent of the program receiving
18 federal funds.” *Sunia*, 643 F. Supp. 2d at 64 (citing *Salinas*, 522 U.S. at 61). Here,
19 the government has not alleged that Echo Trail Holdings, LLC received any federal
20 funds *even indirectly*. Thus, it is not alleged to be a qualifying covered entity for
21 purposes of section 666. Accordingly, even if it were proper to infer from paragraph
22 5 that Mr. Heslop was at some unspecified point in time an “agent” of Echo Trail
23 Holdings, LLC—which is not expressly alleged, and which cannot be inferred—the
24 government has still failed to state an offense under 18 U.S.C. § 666.

25 The Indictment also fails to allege that the purportedly corrupt receipt or
26 solicitation of payments was based on any legally conferred agency authority.
27 Indeed, nowhere does the Indictment allege any agency authority that Mr. Heslop
28 misused, or how he did so. There are no allegations that Mr. Heslop’s work for

1 Echo Trail Holdings, LLC related in any way to the alleged awarding of the
2 unspecified “construction-related contracts” by the Tribe or that his work for Echo
3 Trail Holdings, LLC related either temporally or substantively to any of the
4 payments alleged in Counts 2 through 17 of the Indictment.

5 Notably, courts have dismissed indictments containing allegations far more
6 specific than the allegations in this case, particularly in regards to the agency
7 element. *See, e.g., Sunia*, 643 F. Supp. at 67-70; *Wyncoop*, 11 F.3d at 121-23. For
8 instance, in *Sunia*, the indictment alleged specifically that the defendants conspired
9 “to personally enrich themselves, their relatives, and their business associates by
10 using their positions in the American Samoa government and relationships with the
11 Director of Education and Chief Procurement Officer to secure for companies under
12 their control lucrative payments totaling hundreds of thousands of dollars.” *Sunia*,
13 643 F. Supp. at 57, 67. The indictment contained several specific allegations of the
14 alleged misconduct, including that the defendants “obtained payments in connection
15 with [governmental] furniture projects by . . . improperly structuring invoices and
16 other procurement documents . . .” *Id.* at 57. Unlike in Counts 2 through 9, 10
17 through 17, 34, and 35 of this Indictment, the allegations in that case alleged
18 precisely which positions the defendants used to enrich particular individuals, and
19 for whose benefit. *See id.*

20 Nonetheless, the court dismissed the charges, holding the allegations deficient
21 for failing to allege specifically which agency authority the defendants used to
22 engage in the corrupt acts. *See id.* at 67 (government failed to allege “that the
23 defendants misused their official authority as agents of the legislative branch to
24 convert funds from the executive branch”). The court also held that the allegations
25 were deficient for failing to specify precisely how the defendants used their
26 authority illegally. *See id.* (“[A]lleging that the defendants planned to ‘use their
27 positions’ in the legislative branch to their advantage in some unspecified way is not
28 the same as alleging that they actually used the authority conferred upon them by

1 law to convert funds from the American Samoa Department of Treasury.”).
2 Although the allegations in *Sunia* were far more specific than the allegations in this
3 case—in which it is entirely unclear what authority Mr. Heslop is charged with
4 misusing, or how—those allegations were still a “far cry” from being sufficient to
5 avoid a motion to dismiss. *Id.* at 67; *see also United States v. Abu-Shawish*, 507
6 F.3d 550, 558 (7th Cir. 2007) (reversing conviction after trial, under plain error
7 standard, “[b]ecause the indictment did not allege that [the defendant violated
8 section 666 regarding] the organization for which he served as an agent”).

9 Other courts have also held that the mere provision of goods or services for a
10 governmental organization does not amount to an agency relationship with that
11 organization. For instance, in *Ferber*, the court examined with particularity the
12 defendant’s alleged role in a section 666(a)(1)(B) bribery scheme. *See Ferber*, 966
13 F. Supp. at 100-01. Although defendant *Ferber*, a financial advisor to the
14 government, was a fiduciary of the public entities in question, he was not an “agent”
15 of those entities under section 666 as his role was solely “advisory.” *Id.* In *Webb*,
16 although the defendant performed services for an accounting firm that defrauded the
17 United States by falsifying records, embezzling government benefits, and stealing
18 government checks, the defendant was not an agent of a qualifying governmental
19 agency because she performed services for the accounting firm, not the United
20 States directly. *See Webb*, 691 F. Supp. at 1165-66, 1169-70. And in *Stewart*, the
21 indictment was dismissed because it alleged that the defendants were agents not of
22 the government, but of a third-party company that the government used for merely
23 commercial transactions. *See Stewart*, 727 F. Supp. at 1072-73 (government’s
24 specific allegations of defendant’s provision of “custom manufactured goods” for
25 the government insufficient to demonstrate agency of qualifying governmental
26 organization).

27 In sum, because Counts 2 through 17, 34, and 35 do not allege, as they must,
28 that Mr. Heslop was an agent of the Tribe—or any other governmental organization

1 (or agency thereof) receiving federal funds—when he received the purported bribe
2 payments or any other time, they are insufficient as a matter of law. The
3 government’s complete failure to allege Mr. Heslop’s agency, including what
4 agency power he may have used, when, regarding which “construction-related
5 projects,” and for whose benefit, renders the Indictment insufficient to support
6 federal jurisdiction, unconstitutionally vague, and inadequate to apprise Mr. Heslop,
7 Mr. Bardos, and Ms. Shambaugh of the charges being brought against them. *See*
8 *Wyncoop*, 11 F.3d at 122-23 (dismissing indictment where defendant alleged to be
9 employee of organization receiving federal benefits only indirectly); *United States v.*
10 *Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003) (reaffirming *Wyncoop*’s holding that, to
11 constitute a section 666 violation, “the defrauded program or agency must receive
12 federal funding directly”); *see also Stewart*, 727 F. Supp. at 1072-73 (granting
13 motion to dismiss section 666 counts for failure to allege agency of organization
14 receiving federal benefits); *Webb*, 691 F. Supp. at 1167-70 (granting motion for
15 judgment notwithstanding the verdict on section 666 charge for failure to prove
16 agency of organization receiving federal benefits); *United States v. Valentine*, 63
17 F.3d 459, 462 (6th Cir. 1995) (period of agency must coincide with alleged corrupt
18 acts). Accordingly, Counts 2 through 17, 34, and 35 must be dismissed.

19 **(b) Mr. Kovall is not adequately alleged to be an agent of**
20 **the Tribe.**

21 The validity of Counts 2 through 9 (which purport to allege violations of 18
22 U.S.C. § 666(a)(2) by Mr. Bardos), Counts 18 through 24 (which purport to allege
23 violations of 18 U.S.C. § 666(a)(2) by Mr. Heslop) and Counts 25 through 31
24 (which purport to allege violations of both 18 U.S.C. § 666(a)(1)(B) and (a)(2)
25 against both Mr. Kovall and Ms. Shambaugh) depends on Mr. Kovall’s status as an
26 agent of the Tribe.³ Yet nowhere do these counts expressly allege that Mr. Kovall

27 _____
28 ³ The allegations in Counts 2 through 9 are particularly vague as they fail to
specify whether Mr. Bardos intended to influence Mr. Heslop or Mr. Kovall when
he made the alleged payments to Mr. Heslop. It is unclear whether all of the

1 was an agent of the Tribe, let alone that he served as an agent of the Tribe when the
2 alleged payments were made or in connection with the unspecified “construction-
3 related contracts” that he purportedly intended to influence. *See, e.g., Sunia*, 643 F.
4 Supp. 2d at 68 (granting motion to dismiss section 666(a)(2) charges).

5 Rather, the Indictment alleges only that Mr. Kovall served as legal counsel to
6 the Tribe during an unidentified period of time—not as an employee, servant,
7 partner, director, officer, manager, or representative, but as an outside attorney who
8 sent the Tribe invoices for his work—and “advised” the Tribe to enter into
9 unspecified contracts with Mr. Bardos and Mr. Heslop. Indictment ¶ 3 (expressly
10 incorporated into the substantive bribery counts by reference). The government
11 does not allege Mr. Kovall was “authorized to act on behalf of” the Tribe. *See* 18
12 U.S.C. § 666(d)(1) (defining “agent” as one who is “authorized to act on behalf of
13 another person or a government”). Mr. Kovall’s role as legal counsel for the Tribe
14 is, by itself, not enough to substantiate an allegation of agency for purposes of 18
15 U.S.C. § 666. *See Sunia*, 643 F. Supp. 2d at 65-68 (indictment dismissed for failure
16 to allege that defendant was counsel to particular branch of government from which
17 the relevant agency power derived); *Ferber*, 966 F. Supp. at 100 (holding an
18 advisory role was insufficient to establish agency).

19 *Ferber* is instructive on this issue. *Ferber* was a financial advisor specializing
20 in public financing. He was retained as an advisor to various public entities and he
21 was employed by various investment banking firms. The district court found that
22 *Ferber*’s role as advisor created a fiduciary relationship between *Ferber* and his
23 public entity clients in that his clients, “placed a special trust and confidence in
24 [*Ferber*] based upon his knowledge and expertise and expected him to act in their
25 best interests.” *Ferber*, 966 F. Supp. at 92. The court held that although *Ferber*

26
27 payments were intended to influence one or both of the defendants with respect to
28 some or all of the “construction-related contracts.” Thus, Mr. Bardos is unable to
mount an intelligible defense with respect these counts. They should be dismissed
on this additional basis.

1 took advantage of his fiduciary relationship and accepted bribes from Wall Street
2 firms to get favorable treatment from the public entities he represented and advised,
3 he did not have authority to act on behalf of those public entities. Ferber's role was
4 solely advisory in nature. Thus, although he made recommendations concerning the
5 public entities' courses of action, such as which investment banks to hire, the power
6 to act was retained by the public entity clients themselves. Accordingly, the court
7 concluded that Ferber was not an agent of the public entity clients within the
8 meaning of 18 U.S.C. § 666 and the bribery counts were dismissed. *Id.* at 100.

9 Just as in *Ferber*, Mr. Kovall's relationship with the Tribe concerning who
10 the Tribe should do business with was solely advisory in nature. The power to act,
11 *i.e.*, the power to contract, was retained by the Tribe, and the Indictment does not
12 allege otherwise. Nor does the Indictment contain even a generalized allegation that
13 Mr. Kovall had authority to act on the Tribe's behalf. Thus, although the question
14 of whether an agency relationship exists may sometimes be a question of fact for the
15 jury, here the government does not allege even the basic facts from which a court or
16 a jury could conclude Mr. Kovall was an agent for purposes of 18 U.S.C. § 666. *See*
17 *Sunia*, 643 F. Supp. 2d at 65-68 (indictment dismissed for failure to allege that
18 defendant was counsel to particular branch of government from which the relevant
19 agency power derived).

20 In sum, the government has not adequately alleged with sufficient factual
21 particularity that Mr. Kovall was an agent of the Tribe for purposes of Counts 2
22 through 9 and 18 through 31. These counts must be dismissed as they are
23 unconstitutionally vague and fail to state a violation of 18 U.S.C. § 666.⁴

24 _____
25 ⁴ The legally irrelevant statements in paragraph 4 of the Indictment regarding
26 Mr. Kovall's general ethical obligations as a lawyer are highly prejudicial to
27 Defendants and have no place in a case such as this one. Indeed, if such evidence
28 was presented to the grand jury, it may have improperly influenced the return of the
Indictment. Without the grand jury transcripts, it is currently unknown to what
extent these allegations may have prejudiced the defendants. While such allegations
may in the past have been relevant to establish an "honest services" violation, they
have no place in this section 666 case. It is clear that the government intends to
shoehorn nondisclosure and breach of fiduciary duty arguments into its bribery

1 **(c) The section 666 Counts fail to allege quid pro quo**
2 **bribery.**

3 The very title of 18 U.S.C. § 666 reveals that its purpose is to punish “[t]heft
4 or *bribery* concerning programs receiving federal funds.” 18 U.S.C. § 666
5 (emphasis added). The Supreme Court has held that “[b]ribery requires intent ‘to
6 influence’ an official act or ‘to be influenced’ in an official act.” *United States v.*
7 *Sun-Diamond Growers of California*, 526 U.S. 398, 404, 119 S. Ct. 1402, 1406
8 (1999) (distinguishing between bribes and gratuities under 18 U.S.C. § 201). In
9 other words, “for bribery there must be a quid pro quo—a specific intent to give or
10 receive something of value in exchange for an official act.” *Id.* at 405. Thus, an
11 essential element of section 666(a)(1)(B) and (a)(2) violations is “the ‘corrupt
12 intent’ element of bribery, which is the ‘intent to engage in a relatively specific quid
13 pro quo.’” *United States v. Jennings*, 160 F.3d 1006, 1020, 1022 (4th Cir. 1998)
14 (reversing a section 666(a)(2) conviction under plain error standard as jury
15 instruction contained “corrupt intent” instruction but “omit[ed] the basic quid pro
16 quo requirement”); *see also U.S. v. Kohring*, 637 F.3d 895, 909 (9th Cir. 2011)
17 (reversing a section 666(a)(1)(B) conviction and remanding for new trial because
18 material evidence had been suppressed by prosecutor showing, *inter alia*, that
19 defendant had never been asked to do anything in exchange for payments or told the
20 payments were “quid pro quo”); *United States v. Siegelman*, 561 F.3d 1215, 1226
21 (11th Cir. 2009) (ruling that “the official must agree to take or forego some specific
22 action in order for the doing of it to be criminal” under section 666; “close-in-time
23
24
25 charges, effectively evading the Supreme Court’s honest services ruling in *U.S. v.*
26 *Skilling*. Defendants reserve their right to move to strike these irrelevant allegations
27 after reviewing the grand jury transcripts and reserve their right to move *in limine* to
28 exclude evidence of Mr. Kovall’s purported ethical duties as a lawyer. Defendants
foresee a “variance” argument at trial if these allegations are not struck from the
Indictment or if the government is permitted to introduce evidence along these lines
at trial. Indictment ¶ 4.

1 relationship” between the gift and the action is not sufficient; instead, a real quid pro
 2 quo must be proven), *vacated on other grounds by Skilling*, 130 S. Ct. at 2927-35).⁵

3 Here, Counts 2 through 31 contain only the bare bones allegations that the
 4 referenced payments were intended to influence or reward either Mr. Heslop or Mr.
 5 Kovall or both “in connection with a transaction and series of transactions of the
 6 Tribe involving \$5000 or more, namely, the awarding of the Tribe’s construction-
 7 related contracts.” Indictment ¶¶ 14, 16, 18, 20. These section 666 counts do not
 8 identify or describe the nature of these contracts, the dates they were consummated,
 9 the precise amount of money each involved, or the way in which Mr. Heslop or Mr.
 10 Kovall acted as agents of Tribe or otherwise exerted influence with respect to them.

11
 12 ⁵ Although a handful of courts have disagreed and held that quid pro quo
 13 allegations are not necessary to state a bribery violation under 18 U.S.C. § 666,
 14 those decisions are not supported by the Supreme Court’s holding in *Sun Diamond*
 15 or the plain language and purpose of the bribery statute. Nor does such a reading
 16 comply with the rule of lenity. *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct.
 17 515, 522 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be
 18 resolved in favor of lenity.”) (citation and quotation marks omitted). In any event,
 19 even if the Court sides with the handful of courts construing section 666 as
 20 criminalizing both bribes *and gratuities*, the Supreme Court holds that even
 21 gratuities are not actionable unless the government alleges and proves “a link
 22 between a thing of value conferred . . . and a specific official act for or because of
 23 which it was given.” *Sun-Diamond*, 526 U.S. at 414 (construing the anti-gratuity
 portion of 18 U.S.C. § 201, which tellingly includes an express provision
 criminalizing gratuities—a provision that is absent from 18 U.S.C. § 666). Thus, an
 indictment that fails to allege “a specific connection . . . between any [] action of the
 [government agent] and the *gratuities conferred*” fails to allege corrupt intent
 because it “d[oes] not describe any official acts that the [briber] intended to induce
 with his payments” *Id.*; see also *United States v. Frega*, 179 F.3d 793, 805
 n.11 (9th Cir. 1999) (noting that pursuant to *Sun-Diamond*, the government must
 prove a link between a thing of value conferred upon a public official and a specific
 “official act” for or because of which it was given to establish a violation of the
 federal anti-gratuity statute, 18 U.S.C. § 201(c)(1)(A)).

24 Thus, even if section 666 did not require specific quid pro quo allegations,
 25 which it does, the government is still required to allege at the very least “a link”
 26 between the alleged payments and a specific act by an agent for or because of which
 27 they were given. Here, the government does not even attempt to allege such a link,
 28 failing to identify even a single specific act that can be linked to any payment.
 Instead, the section 666 counts in the Indictment vaguely refer only to unspecified
 “construction-related contracts” and do not identify what Mr. Heslop or Mr. Kovall
 did to secure such contracts or what they were expected to do to secure such
 contracts.

1 Nor is any specific contract or transaction in any way linked to a particular payment
2 or payments.

3 Although the section 666 counts expressly incorporate by reference
4 paragraphs 1 through 8 and 13, these paragraphs do not fill the pleading gaps as they
5 do not further describe or identify the “construction-related contracts.” And while
6 there are other paragraphs in the *conspiracy* count discussing certain construction-
7 related contracts between Mr. Bardos and the Tribe in greater but still deficient
8 detail, the grand jury *chose not to* incorporate those paragraphs by reference into the
9 substantive § 666 counts.⁶ *See United States v. Hooker*, 841 F.2d 1225, 1231 (4th
10 Cir. 1988) (en banc) (holding that the failure to incorporate paragraphs by reference
11 “is a particularly striking omission” where counts incorporate some, but not all,
12 other indictment paragraphs, “showing that the grand jury knew how to incorporate
13 by reference if it so chose”); *United States v. Blumhagen*, No. 03-CR-56S, 2005 WL
14 3059395, at *3 (W.D.N.Y. Nov. 15, 2005) (granting motion to dismiss for failure to
15 expressly incorporate allegations made elsewhere in the indictment, as “[t]he Grand
16 Jury’s limitation of its incorporation to [specific allegations] must be given effect”);
17 *see also United States v. Miller*, 774 F.2d 883, 885-86 (8th Cir. 1985); *United States*
18 *v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980).

19 In addition, the language used to charge the crimes also introduces ambiguity
20 into the allegations. For instance, sections 666(a)(1)(B) and (a)(2) penalize the
21

22 ⁶ Even if the grand jury had incorporated by reference these conspiracy
23 paragraphs into the substantive section 666 counts, which they knew how to do and
24 chose not to, the section 666 counts would still fail to adequately allege quid pro quo
25 bribery or even criminal gratuities. For example, nowhere do those paragraphs
26 describe how Mr. Heslop in any way influenced or intended to influence the
27 referenced construction contracts as an agent of the Tribe or otherwise. Moreover,
28 the conspiracy paragraphs allege only that Mr. Kovall provided advice to the Tribe
regarding some, but not all, of the contracts referenced in the conspiracy count.
Finally, there are references to many more construction-related contracts in the
conspiracy count than there are payments referenced in the substantive section 666
counts, making it unclear which of those contracts could potentially supply the
elements of the section 666 counts, or were considered by the grand jury in handing
down the section 666 counts, if any.

1 receipt of bribes “intending to be influenced or rewarded” or the payment of a bribe
 2 “intending to influence or reward.” But the government charges not one of these
 3 two options, but, confusingly, both and neither at the same time, alleging that Mr.
 4 Heslop and/or Mr. Kovall received payments intending to be influenced *and*
 5 rewarded and, similarly, Mr. Bardos, Mr. Heslop, and Ms. Shambaugh made
 6 payments both to influence *and* reward. Indictment ¶¶ 14, 16, 18, 20. Because
 7 these allegations are followed only by a list of various payments, completely
 8 unconnected to any particular projects or actions by Mr. Heslop or Mr. Kovall, it is
 9 unclear whether any particular payment was allegedly made to “influence” or
 10 “reward” any particular action. That is, in addition to providing no details regarding
 11 which construction projects were provided in exchange for which payments or how
 12 the payments were otherwise linked to any specific act, the government also fails to
 13 specify whether any of the alleged payments were prospective or retrospective
 14 payments.⁷ For this additional reason, Counts 2-31 fall far short of alleging *any* link
 15 between the alleged “bribes” and specific transactions involving \$5,000 or more, let
 16 alone a specific quid pro quo as required.

17 Counts 34 or 35, involving a land purchase by Echo Trail Holdings, LLC
 18 rather than “construction-related contracts,” suffer similar fatal defects. They do not
 19 allege, for instance, how the payment by Ms. Shambaugh to Mr. Heslop was
 20 intended to influence or reward Mr. Heslop in connection with the land purchase in
 21 question. Nowhere does the indictment allege that Ms. Shambaugh paid Heslop *in*
 22 *exchange for* any particular act relating to the land purchase. There is no allegation,
 23 for example, that Mr. Heslop was the decision maker for Echo Trail Holdings, LLC
 24 regarding the land purchase or the awarding of a commission to Ms. Shambaugh.
 25 Nor do these counts allege that making such decisions was even within Mr. Heslop’s
 26 decision-making authority as an agent. These counts therefore fail to adequately
 27

28 ⁷ The section 666(a)(2) charges contain the same modification of the statutory language and thus similar ambiguities. *See* 18 U.S.C. § 666(a)(2); Indictment ¶ 18.

1 allege Mr. Heslop and Ms. Shambaugh acted with corrupt intent to engage in quid
2 pro quo bribery.

3 In sum, the section 666 counts fail to adequately allege that defendants acted
4 with the requisite corrupt intent and do not apprise the defendants of the specific
5 offenses with which they are charged. Sufficient facts are not alleged to ensure that
6 each defendant is prosecuted on the basis of facts presented to the grand jury, to
7 enable each defendant to plead jeopardy against a later prosecution and prepare a
8 meaningful defense, or to inform the court of the facts alleged so that it can
9 determine the sufficiency of the charge. *Cecil*, 608 F.2d at 1296 (stating the
10 indictment must provide the defendant with a sufficient description of the charges);
11 *Russell*, 369 U.S. at 763, 768 n.-15 (holding the indictment must inform the court of
12 the facts alleged); *Keith*, 605 F.2d at 464 (noting the failure to include all essential
13 elements is a fatal defect); *United States v. Pheaster*, 544 F.2d at 360 (noting the
14 indictment must state essential elements and facts).- The section 666 counts must be
15 dismissed.

16 **(d) The section 666 Counts fail to allege that the awarding**
17 **of construction-related contracts did not relate to bona**
18 **fide transactions.**

19 The section 666 counts should also be dismissed for failing to allege that the
20 construction-related contracts (Counts 2 through 31) and land purchase by Echo
21 Trail Holdings, LLC (Counts 34 and 35) were not “bona fide” transactions.

22 Section 666(c) precludes the government from bringing section 666 charges
23 in cases where bribes were paid in exchange for the opportunity to provide the
24 government with bona fide goods or services. *See* 18 U.S.C. § 666(c) (“This section
25 does not apply to bona fide salary, wages, fees, or other compensation paid, or
26 expenses paid or reimbursed, in the usual course of business.”).

27 By including subsection (c), Congress “saw fit to exclude from the reach of
28 the federal statute those individuals and those transactions that involved only the

1 payment of bona fide salaries, wages, fees, and other compensation.” *United States*.
2 *v. Mills*, 140 F.3d 634 (6th Cir. 1998). The *Mills* court acknowledged that even
3 though the use of bribes to obtain benefits from the government is reprehensible,
4 Congress “determined that all such instances of bribery do not merit the attention of
5 the federal courts.” *Id.* Courts must guard against “turn[ing] almost every act of
6 fraud or bribery into a federal offense, upsetting the proper federal balance.”
7 *Fischer v. United States*, 529 U.S. 667, 681, 120 S. Ct. 1780, 1788 (2000).

8 To survive a motion to dismiss, an indictment must allege that bribes were
9 paid in connection with a transaction that was not bona fide, such as unnecessary or
10 unjustified employment or other services. *See Mills*, 140 F.3d at 633-34 (affirming
11 grant of motion to dismiss section 666(a)(1)(B) charges as “the government failed to
12 allege that the salaries received by individuals who paid bribes to obtain
13 employment positions within the . . . government were *unnecessary or unjustified*”
14 or that those individuals did not responsibly fulfill their duties) (emphasis added);
15 *see also Mullaney v. Wilbur*, 421 U.S. 684, 702, 95 S. Ct. 1881, 1891 (1975)
16 (government must “prov[e] a negative” on an element of the crime when there is “no
17 unique hardship on the prosecution that would justify requiring the defendant to
18 carry the burden”). Thus, “corrupt” awards of commercial contracts that
19 nevertheless further the organization’s purpose are immune from prosecution under
20 section 666. *See United States v. Rooney*, 37 F.3d 847, 854 (2d Cir. 1994) (citing
21 section 666(c) and reversing a section 666(a)(1)(B) conviction for “corrupt” quid
22 pro quo solicitation relating to construction project, as penalizing legitimate
23 construction project threatened to “chill legitimate negotiations” relating to contracts
24 in the government’s interest). Section 666 “does not seek to constrain lawful
25 commercial business practices.” *Id.* (citing H.R.Rep. 797, 99th Cong., 2d Sess. 30
26 & n. 9 (1986), reprinted in 1986 U.S.C.C.A.N. 6138, 6153 & n.9) (quotation marks
27 omitted).

28

1 Counts 2 through 31 fail to describe the business or transactions received in
 2 exchange for the alleged payments, as those counts only vaguely allude to the
 3 awarding of unspecified “construction-related contracts.” Indictment ¶¶ 16, 18.
 4 There are no allegations that any “construction-related contracts” were awarded
 5 unnecessarily or without justification, or that they would not have been awarded but
 6 for the alleged bribes. *See id.* ¶¶ 1-8, 13, 15-18. For instance, there are no
 7 allegations that, due to the contracts, the Tribe employed or compensated anyone, or
 8 paid expenses or other reimbursements, for unnecessary or unjustified construction.
 9 Indeed, these counts do not allege any details at all regarding any construction-
 10 related contracts. Similarly, Counts 34 and 35 fail to allege that the relevant real
 11 estate purchase was unnecessary, unjustified, or otherwise outside “the usual course
 12 of business.” *See id.*; 18 U.S.C. § 666(c).

13 Thus, the Court should dismiss Counts 2 through 31, 34, and 35 for failure to
 14 state a violation of section 666, and for failure to fully allege the facts necessary for
 15 the defendants to prepare their defense and to plead double jeopardy in any future
 16 prosecution. *See Mills*, 140 F.3d at 634.

17 **B. The Section 666 Counts Are Multiplicitous.**

18 Multiple punishments for the same offense are prohibited by the Double
 19 Jeopardy Clause of the Fifth Amendment. *See United States v. Davenport*, 519 F.3d
 20 940, 947-48 (9th Cir. 2008). Where a defendant is charged with multiple violations
 21 of the same statute, the inquiry into whether the defendant has been charged more
 22 than once for the same “offense” regards “[w]hat Congress has made the allowable
 23 unit of prosecution.” *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218,
 24 221, 73 S. Ct. 227, 229 (1952); *see Sanabria v. United States*, 437 U.S. 54, 69-70,
 25 98 S. Ct. 2170, 2181 (1978) (*citing Universal C.I.T. Credit Corp.*); *United States v.*
 26 *Keen*, 104 F.3d 1111, 1118 (9th Cir. 1996) (same).

27 Here, the Indictment alleges *thirty-two* counts under 18 U.S.C. § 666—a
 28 separate violation for each payment made and received by any of the Defendants—

1 despite the fact that the section 666 counts arise from a single alleged kickback
 2 scheme in connection with a “series of transactions” of a single organization during
 3 a single year.⁸ Although the Ninth Circuit has not yet considered the applicable unit
 4 of prosecution under section 666, other courts have recognized that there should not
 5 be more than one 666 count alleged against a single defendant involving a single
 6 qualifying organization per one-year period. *See United States v. Urlacher*, 784 F.
 7 Supp. 61, 64 (W.D.N.Y. 1992); *United States v. Valentine*, 63 F.3d 459, 462-64 (6th
 8 Cir. 1995). For example, in *Urlacher*, the court held that “the ‘unit of prosecution’
 9 [for section 666 violations] is ‘\$5,000 or more,’ from whatever source, in any one
 10 year period in which the government or agency at issue receives more than \$10,000
 11 in Federal aid.” *Urlacher*, 784 F. Supp. at 64. The Second Circuit affirmed the
 12 *Urlacher* court’s dismissal of the section 666 count as multiplicitous and reiterated
 13 that the defendant “should not be charged with two counts of embezzlement for the
 14 same fiscal year.” *See United States v. Urlacher*, 979 F.2d 935, 936 (2d Cir. 1992).

15 The *Urlacher* court reasoned that because it is permissible to aggregate
 16 individual bribe payments within a one-year period in order to reach the \$5,000
 17 threshold required to state a section 666 violation, it would be “illogical and
 18 certainly unfair” to simply start over again in a separate and distinct count once that
 19 threshold was reached. *Urlacher*, 784 F. Supp. at 64; *see also United States v.*
 20 *Webb*, 691 F. Supp. 1164, 1168 (N.D. Ill. 1988) (“[A]ggregation under § 666 is
 21 proper, *provided that the multiple conversions were part of a single scheme or plan*
 22 *the intent of which was to steal more than \$5,000.*”) (emphasis added).

23 _____
 24 ⁸ As explained in Section II.C. *infra*, the conspiracy count (Count 1) actually
 25 alleges *two* distinct conspiracies or schemes and is duplicitous on that basis. The
 26 first scheme concerns kickbacks related to the award of construction contracts to
 27 Mr. Bardos, while the second alleged conspiracy involves a purported overcharging
 28 by Mr. Bardos in connection with the purchase of granite. However, no payments
 relating to the granite purchase are alleged in the substantive 666 counts. *See*
 Counts 2 through 31, 34, 35 (alleging, deficiently, bribes made or received in
 connection with “construction-related contracts” and the award of commissions to
 Shambaugh). Thus, the substantive 666 counts all relate to a single “kickback”
 scheme, not the granite purchase.

1 Thus, multiple payments made during a one-year period pursuant to a single
2 alleged scheme supports only one count under section 666 per defendant. *See*
3 Recommended Decision on Motion to Dismiss,⁹ *United States v. Swan*, No. 12-cr-
4 00027-JAW, at *8-12 (D. Me. Nov. 26, 2012), ECF No. 77 (recommending
5 dismissal of four counts under section 666 as multiplicitous because “a single
6 [section 666] count . . . in the context of one project/contract” was permissible, “not
7 a separate count for each payment,” as individual payments “[a]re not separate
8 transactions[, but] simply steps in the fulfillment of a transaction) (citing *United*
9 *States v. Jewell*, 827 F.2d 586, 587 (9th Cir. 1987)); *Urlacher*, 979 F.2d at 936
10 (affirming dismissal of multiplicitous counts under section 666); *see also Jewell*,
11 827 F.2d at 587-88 (treating a series of transactions as constituting a single violation
12 of 18 U.S.C § 208).

13 The decisions in *Swan* and *Urlacher* are supported by the language and
14 purpose of section 666 (*i.e.*, to protect federal funds), which expressly applies in
15 one-year periods and is triggered only if payments are made or received with the
16 intent to be influenced or rewarded “in connection with any business, transaction, or
17 series of transactions of such organization, government, or agency involving
18 anything of value of \$5,000 or more.” *See* 18 U.S.C. § 666(a)(1)(B), (a)(2), (c).
19 The number of distinct payments made in connection with a transaction or series of
20 transactions is irrelevant; rather, it is the value of the actual transaction or series of
21 transactions of the qualifying organization that triggers application of the statute.

22 Thus, a scheme or transaction-based unit of prosecution, rather than a
23 payment-based unit of prosecution, is consistent with the language and purpose of
24 the statute, as well as the rule of lenity. *See Bell v. United States*, 349 U.S. 81, 82-
25 83, 75 S. Ct. 620, 622 (1955) (holding that rule of lenity prohibits cumulative
26 punishments in the absence of a clear congressional intent to do so); *Keen*, 104 F.3d
27

28 ⁹ This brief cites the magistrate judge’s decision because, as of the date of this
brief’s submission, the district judge in *Swan* has not yet ruled on the motion.

1 at 1120 (same); *Swan*, Docket #77, at *10 (applying rule of lenity to section 666).
2 Indeed, any ambiguity in the statute must be resolved in defendants' favor. *See*
3 *United States v. Vargas-Castillo*, 329 F.3d 715, 721 (9th Cir. 2003). Yet, here, the
4 government charges defendants with *thirty-two* counts, *sixteen* of which are asserted
5 against Mr. Heslop.

6 Indeed, the unfairness of the Indictment's extreme multiplicity is well
7 illustrated by the counts charged against Mr. Heslop in particular. The Indictment
8 duplicates each section 666 count against Mr. Heslop based on the allegation that
9 Mr. Heslop served as an intermediary for alleged bribe payments, instead of an end
10 point. *Compare* Indictment at Counts 10-24, 35 (16 counts against Heslop), *with*
11 Counts 2-9 (8 counts against Bardos), *with* Counts 25-31, 34 (8 counts against
12 Shambaugh). This impermissible double counting illustrates the flaw in charging
13 counts based on individual payments, as opposed to the allegedly criminal scheme.
14 For the same set of payments, Mr. Heslop is charged with violating subsections
15 (a)(1)(B) *and* (a)(2), somehow purportedly acting as a double briber with respect to
16 the same transaction or series of transactions.

17 The subsections of section 666 were enacted to ensure that each individual
18 who participates in an illegal bribe is punished, not to punish one person in a
19 kickback scheme more than another simply because of his status as a middleman.
20 *See United States v. UCO Oil Co.*, 546 F.2d 833, 836 (9th Cir. 1976) (Congress was
21 "concerned with proscribing the prohibited result" of misallocation of federal funds,
22 "rather than particular kinds of conduct. . . . [T]he enumeration of different kinds of
23 conduct in the statute [reflects] different modes of achieving that result, not separate
24 and distinct offenses.") Moreover, the receipt of kickbacks and subsequent
25 transmittal of those kickbacks to another participant in a kickback scheme describe
26 two acts of the same nature and effect, "not distinctly different kinds of conduct"
27 meriting cumulative punishment. *See id.* at 837.

28

1 In sum, payments made in connection with a series of transactions during a
 2 one-year period support only one section 666 count against each defendant.¹⁰ The
 3 government’s error in submitting a multiplicitous indictment should be corrected
 4 before trial, as a multiplicitous indictment risks “improperly prejudic[ing] a jury by
 5 suggesting that a defendant has committed several crimes—not one.” *United States*
 6 *v. Turner*, No. CR05-355C, 2007 WL 1300462, at *3 (W.D. Wash. May 1, 2007)
 7 (citation omitted). The Court should therefore dismiss Counts 2-31, 34, and 35 of
 8 the First Superseding Indictment.

9 **C. The Section 1957 Counts Are Impermissibly Vague.**

10 To establish a violation of 18 U.S.C. § 1957, the government must allege and
 11 prove: (1) the defendant engaged or attempted to engage (2) in a monetary
 12 transaction (3) in criminally derived property of more than \$10,000 (4) knowing that
 13 the property is derived from unlawful activity, and (5) the property is, in fact,
 14 derived from “specified unlawful activity.” *United States v. Lovett*, 964 F.2d 1029,
 15 1041 (10th Cir. 1992); *see* 18 U.S.C. § 1957. Thus, the government must prove, as
 16 an essential element of section 1957, that a particular predicate specified unlawful
 17 activity occurred and served as the source for the allegedly laundered proceeds. *See*
 18 *United States v. Carucci*, 364 F.3d 339, 344-45 (1st Cir. 2004).

19 Here, the government alleges, without elaboration, that the “specified
 20 unlawful activity” in question is commercial bribery, in violation of California Penal
 21 Code § 641.3. Indictment ¶ 30. Yet nowhere does the Indictment allege the
 22 essential elements of a violation of California Penal Code § 641.3. Nor does the
 23 Indictment allege sufficient facts to inform defendants of the specific offense
 24

25 ¹⁰ Even if the Court rejects a scheme-based unit of prosecution for 666
 26 violations, which it should not, Defendants urge that it should at the very least adopt
 27 a transaction-based unit of prosecution. Thus, the proper unit of prosecution would
 28 be each “construction-related contract” or other transaction regarding which each
 defendant allegedly engaged in bribe activity. Multiple payments flowing from a
 single construction project should not constitute separate 666 violations as they do
 in the Indictment. Such a broad attack is not justified by the plain language or
 purpose of the statute.

1 charged. In fact, the grand jury did not incorporate by reference any allegations
2 found elsewhere in the Indictment into the section 1957 counts. *See id.*

3 Thus, the defendants are left to guess who engaged in commercial bribery and
4 when. Indeed, even the other counts in the Indictment, which in any event were not
5 incorporated by reference, do not allege facts sufficient to establish the crime of
6 commercial bribery. For example, section 641.3 applies when an employee accepts
7 a bribe from a person, with the specific intent to injure or defraud his or her
8 employer (or other employers or competitors as provided in the statute), in return for
9 using or agreeing to use his or her position for the benefit of that other person. Cal.
10 Pen. Code § 641.3; *People v. Cumberworth*, No. F047243, 2006 WL 3549939, at
11 *13, 20 (Cal. Ct. App. Dec. 11, 2006) (unpublished). But no one is alleged in the
12 Indictment to be an employee, agent, or employer within the meaning of the statute.
13 There are also no allegations describing a quid pro quo exchange, how any
14 employee used his position to benefit anyone with the requisite corrupt intent, or
15 how the various payments listed in Counts 36 through 52 in any way flow from or
16 relate to the purported commercial bribery.

17 The government's citation to section 641.3, unaccompanied by an
18 identification of the elements of that crime or facts sufficient to inform defendants
19 of the specific offense with which they are charged, fails to state "implied, necessary
20 elements, not present in the statutory language [of section 1957, which] must be
21 included in an indictment." *United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir.
22 1995); *Flores v. Emerich & Fike*, No. 1:05-CV-0291 AWI DLB, 2009 WL 900738,
23 at *11 (E.D. Cal. Mar. 31, 2009) (granting defendant's motion to dismiss a claim
24 under section 1957 where the complaint failed to allege necessary facts to support
25 the predicate act of burglary); *see United States v. Cecil*, 608 F.2d 1294, 1296 (9th
26 Cir. 1979) (per curiam); *see also United States v. Harmon*, No. CR 08-00938 JW,
27 2011 WL 7937876, at *9 (N.D. Cal. Aug. 18, 2011) ("[I]t is incumbent on the
28 government to prove that an underlying unlawful act was committed by someone

1 . . . in order to satisfy the statutory requirement that the financial transaction, in fact,
2 involved those proceeds.”); *Lovett*, 964 F.2d at 1041-42 (“the elements of the
3 particular ‘specified unlawful activity’ . . . are essential elements that the
4 prosecution must prove in order to establish a violation of § 1957”); *Carucci*, 364
5 F.3d 339, 344-45 (1st Cir. 2004) (“§ 1957 convictions necessitate proof beyond a
6 reasonable doubt of the predicate crime.”).

7 In light of these deficiencies, the section 1957 counts are unconstitutionally
8 vague and fail to provide defendants with the legally required notice needed to
9 mount a defense or plead double jeopardy in any future prosecution. Counts 36
10 through 52 should be dismissed.

11 **D. The Conspiracy Count Is Duplicious.**

12 Count 1 of the Indictment is duplicitious because it impermissibly charges at
13 least two distinct conspiracies in a single count. *U.S. v. Gordon*, 844 F.2d 1397,
14 1400-02 (9th Cir. 1988). Specifically, Count 1 improperly alleges both: (1) a
15 conspiracy to give or accept bribes in connection with Tribal construction contracts
16 in violation of 18 U.S.C. § 666, and (2) a conspiracy related to the alleged
17 overcharging by Mr. Bardos in connection with the purchase of granite for the Tribe
18 (the “Granite Purchase”).

19 The alleged Granite Purchase conspiracy named in paragraphs 14 and 15 of
20 Count 1 is distinct from the alleged construction contract conspiracy with respect to
21 its nature, participants, and aims. The Indictment alleges Mr. Bardos sought and
22 obtained \$500,000 from the Tribe to purchase granite, despite knowing the vendor
23 was only charging \$200,000, and later distributed a portion of these funds to Ms.
24 Shambaugh and Mr. Heslop. No one is alleged to have accepted these funds
25 intending to be influenced or rewarded in connection with the Granite Purchase.
26 And no one other than Mr. Bardos is alleged to have made any representations to the
27 Tribe regarding this purchase. Mr. Kovall is in not even mentioned in paragraphs 14
28 or 15 or otherwise alleged to be involved in the Granite Purchase. In other words,

1 the alleged conspiracy to fraudulently overcharge for the granite is distinct from a
2 primary conspiracy to commit bribery on connection with the Tribe's construction
3 contracts. The Indictment does not allege that the Granite Purchase is in any way
4 connected to the awarding of construction contracts or otherwise an act in
5 furtherance of the construction contract conspiracy. Thus, the Granite Purchase is
6 not part of the "overall agreement" to achieve the identified objective of Count 1
7 (*i.e.*, to engage in bribery in violation of section 666). *Gordon*, 844 F.2d at 1401.

8 The inclusion of the two distinct conspiracies in one count is prejudicial to
9 defendants. It not only violates their Fifth Amendment right to know what offense
10 they are charged with and protection against double jeopardy, but also violates their
11 "Sixth Amendment right to knowledge of the charges against [them], since
12 conviction on a duplicitous count could be obtained without a unanimous verdict as
13 to each of the offenses contained in the count." *United States v. Aguilar*, 756 F.2d
14 1418, n.2 (9th Cir. 1985); *see Gordon*, 844 F.2d at 1400 (defendants have a right "to
15 a unanimous jury verdict").

16 Additionally, the duplicity in Count 1 risks prejudicial evidentiary rulings.
17 *See UCO Oil Co.*, 546 F.2d at 835 (Duplicitous counts "give rise to problems
18 regarding the admissibility of evidence, including its admissibility against one or
19 more codefendants."). At trial the government will seek, in all likelihood, to
20 introduce hearsay statements of the defendants, allegedly admissible under Federal
21 Rule of Evidence 801(d)(2)(E) as statements of a co-conspirator during the course
22 and in furtherance of the conspiracy. Co-conspirator statements are admissible only
23 if the trial court finds that the government has established the existence of a
24 conspiracy and the defendant's participation in it by a preponderance of the
25 evidence. *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S. Ct. 2775, 2779
26 (1987). If the government cannot establish that a defendant was involved in one of
27 the separate conspiracies, that defendant is not a co-conspirator for purposes of
28 evidence relating to that conspiracy—and hearsay statements would not be

1 admissible. *See* FED. R. EVID. 801 (d)(2)(E); *Bruton v. United States*, 391 U.S. 123,
2 126-28, 88 S. Ct. 1620, 1622-24 (1968) (hearsay statements by non-testifying
3 parties violates the Sixth Amendment right to confrontation).¹¹ By charging at least
4 two distinct conspiracies in a single count as one purported conspiracy, evidence
5 that would not otherwise be admissible against a particular defendant now will be.
6 For all these reasons, Count 1 should be dismissed as duplicitous.

7 **E. The Indictment’s Forfeiture Allegations Must Be Dismissed Along**
8 **With Their Predicate Offenses.**

9 To the extent the Court dismisses any counts in the Indictment based on the
10 arguments set forth above, the Indictment’s dependent “Forfeiture Allegations” must
11 also be dismissed. *See United States v. Heckler*, 428 F. Supp. 269, 273 (S.D.N.Y.
12 1976) (dismissing dependent counts).

13 **III. CONCLUSION**

14 For the reasons discussed herein, the defendants respectfully request that the
15 Court grant their Motion to Dismiss Counts 1 through 31, 34, 35, 36 through 52, and
16 the dependent Forfeiture Allegations, of the First Superseding Indictment.

17 Dated: February 5, 2013

Respectfully submitted,

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26 ¹¹ Moreover, this type of Sixth Amendment violation cannot be cured by a
27 limiting instruction to the jury. *See Bruton*, 391 U.S. at 126 (“[T]here are some
28 contexts in which the risk that the jury will not, or cannot, follow instructions is so
great, and the consequences of failure so vital to the defendant, that the practical and
human limitations of the jury system cannot be ignored . . .”).

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