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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GARY EDWARD KOVALL, DAVID ALAN HESLOP, PAUL PHILLIP BARDOS, and PEGGY ANNE SHAMBAUGH, Defendants.	Case No.: CR 12-00441 (A) - MWF **DEFENDANTS' OMNIBUS REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST SUPERSEDING INDICTMENT** Judge Michael W. Fitzgerald Hearing Date: March 11, 2013 Time: 1:30 p.m. Trial Date: May 7, 2013 Time: 8:30 a.m.

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I. INTRODUCTION

Unable to escape the plain insufficiency of the allegations in the Indictment, the government manufactures new allegations and dismisses critical omissions as "technical deficiencies." But omissions of essential jurisdictional elements cannot simply be overlooked as mere technicalities. As discussed in Defendants' opening brief, the Indictment contains several fatal flaws, which the government's opposition only further highlights.

First, the § 666 counts fail to allege essential elements of the crime and basic facts sufficient to inform Defendants of the specific offense with which they are charged. It is undisputed, for example, that the § 666 counts do not expressly allege that Mr. Heslop and Mr. Kovall were "agents" of the Tribe—the only entity alleged to have received funds under a "Federal program." Instead, the Indictment vaguely alleges that Mr. Heslop served as manager of Echo Trail Holdings—a California limited liability company that indisputably received no federal funds—and that Mr. Kovall served as the Tribe's attorney, acting only in an advisory role.

Notably, there is not a single allegation in the Indictment—whether incorporated by reference or not—that Mr. Heslop or Mr. Kovall exercised any official authority whatsoever as purported "agents" of the Tribe or Echo Trail Holdings. With respect to Mr. Heslop, the Indictment alleges only that he "introduced" Mr. Bardos to the Tribe and "recommended" that they hire him as an "owner's representative" in September 2006. None of the payments made to Mr. Bardos under that contract are alleged to have been shared with any other defendant, including Mr. Heslop.

Similarly, with respect to Mr. Kovall, the Indictment alleges, at most, that he "advised" the Tribe to enter into certain bona-fide contracts with Mr. Bardos. The Indictment does not allege that he actually had or exercised any decision-making authority with respect to those contracts. Indeed, there is no allegation that anyone

but the Tribe made the ultimate decision to engage in any of the transactions alleged in the Indictment.

Without such allegations, the § 666 counts do not come close to alleging a quid pro quo exchange, as they must. Not only do they fail to identify any official acts corruptly undertaken by Mr. Heslop or Mr. Kovall in connection with the unspecified "construction-related" contracts, they fail to allege any official acts were taken by Mr. Heslop and Mr. Kovall on behalf of the Tribe whatsoever.

Second, the government fails to justify the Indictment's multiplicitous § 666 counts. Completely ignoring directly relevant case law regarding the correct "unit of prosecution," the government invent their own unit of prosecution based on the number of payments made *by the Tribe* to Mr. Bardos. Notably, the § 666 counts are multiplicitous even under the government's own definition. In any event, it is undisputed that the Indictment alleges but one bribery scheme; common sense and the law therefore dictate that each Defendant face at most one § 666 count. Defendants should not be punished multiple times for the same offense.

Third, the government does not genuinely dispute that the § 1957 counts fail to set forth facts sufficient to inform Defendants of the specific offense charged. Instead, the government argues—contrary to well-established law—that no such facts are required. As explained below, the government is plainly wrong.

Finally, the government advances no credible argument to defeat Defendants' claim that the conspiracy count is duplicitous. It should therefore be dismissed.

For these reasons and the reasons provided in the Defendants' opening brief, Defendants' Motion to Dismiss should be granted.

II. ARGUMENT

A. The Section 666 Counts Are Impermissibly Vague And Do Not State A Federal Offense.

1. The counts based on Mr. Heslop's agency status are deficient as a matter of law.

Unable to dispute the plain fact that the 666 counts fail to allege, as they must, that Mr. Heslop was an "agent" of the Tribe, the government argues that Mr. Heslop's status as an agent is nevertheless sufficiently alleged because Paragraph 5 of the Indictment, which is incorporated into the 666 counts by reference, alleges that Mr. Heslop served as manager of Echo Trail Holdings—a California limited liability real estate company—at some unspecified point in time. The government claims this allegation is sufficient because Echo Trail Holdings was an "agency" of the Tribe pursuant to 18 U.S.C. § 666(a)(1). Nowhere does the Indictment allege that Echo Trail Holdings was an "agency" of the Tribe. Nor does the Indictment allege that Echo Trail Holdings ever received federal funds. Instead, the government argues that Echo Trail Holdings' "agency" status under section 666 is sufficiently alleged simply because the Indictment alleges that Echo Trail Holdings was "created" by the Tribe. But the government misreads the statute and disregards binding Ninth Circuit case law.

The plain language of the statute defines "government agency" as a "subdivision of the executive, legislative, judicial, or other branch of government…established, and subject to control, by a government…***for the execution of a governmental or intergovernmental program***." 18 U.S.C. § 666(d)(2) (emphasis added). Moreover, the statute is not violated unless the agency itself "receives, in any one year period, benefits in excess of $10,000 ***under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance***." *Id*. at § 666(b). Finally, the alleged bribe must be made "in connection with any business, transaction, or series

of transactions" ***of the agency***. *Id*. at § 666(a)(1)(b) and (a)(2). The legislative history of the statute is also instructive. It provides as follows: "The term 'Federal Program' means that there ***must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives***. Thus, not every Federal contract or disbursement of funds would be covered." S.Rep. No. 225, 98th Cong., 2d Sess. 369, reprinted in 1984 U.S.Code Cong. & Admin.News 3182, 3511 (emphasis added).

Here, the Indictment does not allege that Echo Trail Holdings received *any* federal funds, let alone received benefits in excess of $10,000 under a "Federal program." Nor does the Indictment allege, as it must, that the Echo Trail Holdings was established by the Tribe *for the execution* of any governmental program. Rather, the Indictment alleges that it was established under California law for the commercial purpose of *purchasing real estate*. Indictment ¶ 3. Moreover, of the eighteen 666 counts in the Indictment purportedly based on Mr. Heslop's status as an agent of Echo Trail Holdings, only two actually concern transactions involving Echo Trail Holdings in any way and even those fail to allege *any* official act taken or contemplated by Mr. Heslop (Counts 34 and 35).

Indeed, there is not a single allegation in the Indictment—whether incorporated by reference into the substantive 666 counts or not—stating how Mr. Heslop used his purported authority as an agent to influence or attempt to influence any transaction. Indeed, the ***only*** allegations in the Indictment relating to any specific action taken or contemplated by Mr. Heslop concern Mr. Heslop's introduction of Mr. Bardos to the Tribe and his recommendation in September 2006 that the Tribe hire Mr. Bardos as its "owner's representative" in connection with certain construction work planned by the Tribe. Indictment, ¶¶ 6, 11(1). Several months later, the Tribe decided to enter into such a contract with Mr. Bardos. Even if this introduction and recommendation to the Tribe could possibly constitute an official act undertaken by Mr. Heslop within the scope of his authority as an agent

of Echo Trail Holdings, which of course it cannot, nowhere does the Indictment allege that Mr. Bardos bribed Mr. Heslop in connection with this owner's representative contract, that Mr. Heslop executed the contract on behalf of the Tribe or had any decision-making authority with respect to this or any other contract concerning Mr. Bardos, or that this contract in any way involved Echo Trail Holdings or its funds. In fact, the Indictment alleges that the *Tribe* paid Mr. Bardos under the "owner's representative" contract, not Echo Trail Holdings. *Id*., ¶ 11(2). Moreover, the Indictment does not allege that Mr. Bardos shared any portion of the payments he received pursuant to this "owner's representative" contract to Mr. Heslop or anyone else. *Id*., ¶ 11(1)-(17).

The Indictment does not allege any other specific act undertaken by Mr. Heslop on behalf of Echo Trail Holdings or the Tribe.[1] While the Indictment lists things he was purportedly "authorized" to do on behalf of Echo Trail Holdings, nowhere does the Indictment allege that he actually did any of those things or how any of those unexercised functions could possibly have played a role in the purported bribery scheme, especially concerning "construction-related contracts." *Id*., ¶ 5. Simply put, there are no allegations anywhere in the Indictment—let alone in the 666 counts—supporting the ***eighteen*** section 666 charges based on Mr. Heslop's status as an agent.

Curiously, the Government tries to distinguish the directly relevant cases cited by Defendants by arguing they are inapplicable because the agencies in those cases did not receive federal funds. Opposition at 10. But that is precisely the point.

[1] Paragraph 24(e) in Counts 32 and 33 (which charge Mr. Kovall with violations of 18 U.S.C. § 1343)—which is not incorporated into any 666 counts—alleges Mr. Heslop, together with Mr. Kovall, somehow "caused" Echo Trail Holdings to purchase a 47-acre parcel for $31.7 million. Count 22, however, which *is* incorporated into the two 666 counts involving Echo Trail Holdings (Counts 34 and 35), alleges only that the Tribe sought to purchase the 47-acre parcel and Mr. Kovall negotiated the price. Thus, it is entirely unclear, and unalleged, what official act Mr. Heslop corruptly undertook or could have undertaken with respect to this transaction in exchange for any bribe.

Echo Trail Holdings—the only entity "managed" by Mr. Heslop— did not receive any federal funds. As discussed in Defendants' opening brief, the Ninth Circuit held in *United States v. Wyncoop*, 11 F.3d 119, 122-23 (9th Cir. 1983) that where an organization received federal funds only *indirectly*, the organization's employees were not agents under section 666 and dismissal of the indictment was appropriate. In *Wyncoop*, as here, the defendant was employed by an entity that never received any funds under the "Federal program" in question (or, at most, benefitted from federal funds only "indirectly"). *See also United States v. Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003) (reaffirming *Wyncoop*'s holding that, to constitute a section 666 violation, "the defrauded program or agency must receive federal funding directly"); *see also United States v. Stewart*, 727 F. Supp. 1068, 1072-73 (N.D. Texas 1989) (reviewing legislative history of section 666 and concluding that the organization performing commercial services for governmental entity was not a section 666 qualifying entity, nor were its employees section 666 agents); *United States v.Webb*, 691 F. Supp. 1164, 1167-70 (N.D. Ill. 1988) (company performing consulting services for federal agency is not a section 666 qualifying entity, nor are its employees section 666 agents).

Confusingly, when "distinguishing" these cases, the Government flip-flops, backing away from its position that Mr. Heslop is a covered agent under section 666 because Echo Trail Holdings is a covered "agency." That position, of course, is not sustainable under *Wyncoop* and *Cabrera*, among others, because the Indictment does not allege Echo Trail Holdings was (1) an agency of the Tribe, (2) established for the execution of any governmental program, or (3) ever received any funds under a "Federal program" or otherwise. Unable to overcome these deficiencies in the Indictment, the Government blurs the lines, claiming Mr. Heslop's mere status as an agent for Echo Trail Holdings automatically makes him an agent of the Tribe. This, of course, is inconsistent with the plain language of section 666 and relevant case law, which require that the agency itself meet the statute's jurisdictional

hurdles. *See, e.g., U.S. v. Sunia*, 643 F.Supp.2d 51, 63 (D.D.C. 2009) (applying the canon against surplusage, the terms "organization," "government," and "agency" must be given "separate meanings"; "the term 'government' cannot be read as encompassing the 'subdivision[s]' of those entities; otherwise, the term "agency" would be subsumed within that term and have no 'operative effect'").

Moreover, the mere fact that the Tribe purportedly paid Mr. Heslop to manage Echo Trail Holdings does not make him an agent of the Tribe. He was paid to manage Echo Trail Holdings, not as an employee or manager of the Tribe. *Id*. at 66 ("While the Department of Treasury may have written the checks that covered the defendants' salaries as governmental employees, it would have done so only in its capacity as an agent of the legislative branch."). Notably, Paragraph 5 of the Indictment only sets forth Mr. Heslop's purported authority to perform certain acts for Echo Trails Holding (*i.e.*, "the company"), not the Tribe.[2] Indictment, ¶ 5.

In any event, even if Mr. Heslop's position as manager of Echo Trail Holdings did somehow automatically make him an agent of the Tribe under section 666, the section 666 counts must still be dismissed because they do not identify a *single* misuse of any official authority conferred upon him as an agent of the Tribe or otherwise. *Sunia*, 643 F. Supp.2d at 67 (dismissing the indictment where, among other things, the government did not allege that the defendants "used any official authority conferred [upon them].") In fact, the Indictment does not allege *any* specific act taken by Mr. Heslop on behalf of the Tribe *at all*.[3]

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[2] Although Paragraph 5 vaguely notes that Mr. Heslop also provided the Tribe with "demographic consulting services" in the "mid-2000s," the Indictment does not contend Mr. Heslop had any authority as an agent to act on behalf of the Tribe in providing these services as an outside consultant or that the services related in any way to the other allegations in the Indictment.

[3] The government does not have a genuine answer to *Sunia* other than that it was "wrongly decided." The government misconstrues *Sunia* as somehow contradicting the Supreme Court's holding in *Sabri v. United States*, 541 U.S. 600, 605 (2004). In *Sabri*, the Supreme Court held that section 666 does not require the government to prove a nexus between the bribe and specific federal funds because money is "fungible" and such funds are often commingled with other non-federal funds. It is enough that the entity received federal funds pursuant to a "Federal

The *Pemberton* case relied on by the Government is not "on point." In *Pemberton*, as here, the section 666 counts failed to state that the defendant was an agent of the tribe. The court nevertheless held the indictment was sufficient because of three factors "considered in combination": (1) although not sufficient by itself, the 666 counts cited the statute, which makes agency an element of the offense; (2) paragraphs alleging that the defendant was the tribe's attorney were expressly incorporated by reference, *and* (3) the 666 counts expressly alleged that the "*same acts*" by defendant that violated § 666 also violated 18 U.S.C. § 1163, and in the § 1163 counts, the indictment alleged that defendant was an agent of the tribe on the relevant dates. *U.S. v. Pemberton*, 121 F.3d 1157, 1169 (8th Cir. 1997)

Here, the allegations incorporated by reference into the 666 counts only state that Mr. Heslop was a manager of Echo Trail Holdings, not the Tribe. The 666 counts also do not incorporate by reference any paragraphs stating Mr. Heslop was an "agent" of the Tribe.[4] Moreover, the 666 counts in the Indictment do not contend

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program." The court in *Sunia* did not hold differently. *Sunia* merely holds that there must be a nexus between the bribe and the agency receiving federal funds. In other words, the "agent" accepting bribes must be an agent of the entity receiving federal funds. This reading is supported by the plain language of the statute and the Ninth Circuit. *Wyncoop*, 11 F.3d at 122-23; *Cabrera*, 328 F.3d at 509. Here, of course, the Indictment does not allege that Echo Trail Holdings received any federal funds.

[4] The government disingenuously reduces Defendants' arguments regarding the insufficiency of the agency allegations to the government's failure to incorporate Paragraph 10(a) into the 666 counts by reference. They argue that the failure to allege the essential element of agency in the 666 counts was a mere "technical deficiency." Opp. at 6 n.1. The government therefore urges the Court to apply a "common sense" reading to the Indictment and incorporate paragraphs into the 666 counts that the grand jury did not. As an initial matter, it is well settled that each count "must stand or fall on its own allegations without reference to other counts not expressly incorporated by reference." *Rodriguez-Gonzales*, 358 F.3d 1156 (9th Cir. 2004) (citing *Walker v. United States*, 176 F.2d 796, 798 (9th Cir. 1949)). The Government cannot simply borrow allegations from one count to fix another. Given that the grand jury expressly incorporated *other* paragraphs into the 666 counts, it clearly knew how to do that and chose not to. But even if Paragraph 10 had been incorporated, the agency allegations in the 666 counts would still be deficient. Paragraph 5, which *was* incorporated by reference into the 666 counts, is the only paragraph in the Indictment alleging facts even arguably supporting Mr. Heslop's agency status. But Paragraph 5 only alleges that Mr. Heslop was authorized to perform certain acts as manager of Echo Trail Holdings. Thus, the Government's conclusory allegation that Mr. Heslop was an agent of the Tribe in

that the acts violating section 666 are the "same acts" alleged in the conspiracy count. Instead, the 666 counts are completely silent as to which acts undertaken by Mr. Heslop violated section 666.[5] Thus, the agency allegations in *Pemberton* are quite different than those presented here.

Defendants also misleadingly rely on *Pemberton* to make the point that Echo Trail Holdings was an agency of the Tribe. In *Pemberton*, the court analyzed whether a "corporation established under tribal law as a sub-entity of a tribe" is an "Indian tribal organization" under 18 U.S.C. § 1163. But § 1163 defines "Indian tribal organization" as "any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws." 18 U.S.C. § 1163. Thus, unlike section 666, to establish a violation of § 1163, an indictment

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Paragraph 10 is not supported by the Indictment's "factual" allegations, which are supposed to inform Mr. Heslop of the specific offense with which he is charged. And, for the reasons discussed herein and in the opening brief, Mr. Heslop's status as manager of Echo Trail Holdings does not make him an agent of the Tribe for purposes of section 666. Moreover, simply injecting the word "agency" into the 666 counts would not cure the counts' other fatal defects, such as the failure to allege *anywhere* any official act undertaken by Mr. Heslop or Mr. Kovall within the scope of their purported agency.

[5] The government argues that the fact that Defendants do not challenge the sufficiency of the agency allegations in the conspiracy count (Count 1) suggests they believe the agency allegations in that count to be sufficient. But as the government surely knows, Defendants do not challenge the sufficiency of the agency allegations in the conspiracy count because it is well settled that conspiracy is an inchoate offense that centers upon the agreement to commit an unlawful act, not the commission of the unlawful act itself. Because "the conspiracy is the gist of the crime" charged in such an indictment, the Supreme Court has held that "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545 (1927) (citations omitted). Nevertheless, the government raises a good point: like the substantive 666 counts, the conspiracy count fails to allege that Echo Trail Holding LLC was a government or tribal "agency" receiving federal funds directly (or for that matter, indirectly). Thus, Mr. Heslop could not have been an agent of an organization receiving federal funds. The agency allegations are therefore not merely deficient because they lack sufficient detail; they are deficient because they fail to state a federal offense under section 666. Thus, it stands to reason that a failure to meet jurisdictional hurdles in the substantive 666 counts should result in a dismissal of the conspiracy count as well.

does not need to allege that the tribal sub-entity received funds under a "Federal program" or that the entity was created for "the execution of a governmental or intergovernmental program." Here, the Indictment does not even allege that Echo Trail Holdings was a tribal "agency," let alone allege, as it must, that it received funds under a "Federal program" and was created "for the execution of a governmental or intergovernmental program." 18 U.S.C. § 666. The absence of these jurisdictional elements is fatal to the 666 counts based on Mr. Heslop's status as an agent.

Moreover, the court's holding in *Pemberton* that the corporation in question was an "Indian tribal organization" under § 1163 was largely based on the fact that the corporation was "chartered under tribal law" rather than a corporation organized under state law. *Pemberton*, 121 F.3d at 1170. The court noted that "because tribal law gives the corporation its legal existence, a corporation chartered under tribal law necessarily has a closer legal relationship with the tribe than does a state-chartered corporation that is merely controlled by one or more tribes." *Id.* at 1170. Accordingly, an entity created under state law can only be an "Indian tribal organization" under § 1163 if, among other things, it is "patterned after or deliberately ha[s] conformed its operations to federal laws for Indian affairs." *Id.* The Government conveniently fails to mention this aspect of the court's analysis in *Pemberton* for obvious reasons: the Indictment alleges that Echo Trail Holdings was a California limited liability company, not a corporation chartered under "tribal law." Indictment, ¶ 3.

In sum, a charging document "fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute[ ] as a matter of statutory interpretation." *Sunia*, 643 F.Supp.2d at 68 (citation omitted) (granting motion to dismiss section 666 charges based on deficient allegations of agency); *see also Thor v. United States*, 554 F.2d 759, 762 (5th Cir.1977) ("[i]f the indictment ... fail[s] to allege a federal offense, the district court

lack[s] the subject matter jurisdiction necessary to try [the defendant] for the actions alleged in the indictment."). The eighteen 666 counts based on Mr. Heslop's status as an agent must fail as a matter of law for the reasons stated herein and in Defendants' opening brief.

2. Mr. Kovall is not adequately alleged to be an agent of the Tribe.

Counts 2 through 9 and 18 through 31 should be dismissed for failing to adequately allege that Mr. Kovall was an agent of the Tribe under § 666. The Opposition's contention that "[t]he mere allegation that Kovall represented the Tribe is sufficient," to allege Kovall's agency, relies on a misreading of the case law, the statute, and the opening brief, and should be rejected.

The Opposition does not dispute that the relevant Counts contain no language tracking the language of the statute to allege that Kovall was either an "agent" of the Tribe or "authorized to act on [the Tribe's] behalf." *See* 18 U.S.C. § 666(d). There is also no dispute that the Counts do not contain any allegations that Mr. Kovall used, or even possessed, any agency power in connection with the "construction-related contracts" or the 47-acre land purchase—a deficiency which is highlighted by the Counts' lack of any allegations regarding any specific construction-related contracts. Simply put, the Government cannot dispute what the Indictment makes clear: Mr. Kovall's relationship with the Tribe concerning who the Tribe should do business with was solely advisory in nature. The power to act, *i.e.*, the power to contract, was retained by the Tribe; the Government does not contend otherwise.

The Indictment thus relegates the Opposition to arguing that Kovall's relevant actions as an agent are to be identified somewhere in the penumbra of the word "attorney." But the mere allegation that an individual was an attorney for a governmental body is insufficient to allege the essential element of agency. *See United States v. Sunia*, 643 F. Supp. 2d 51, 65-68 (D.C.D.C. 2009) (dismissing § 666 counts regarding attorney defendant). While an attorney may surely be the

agent of an organization in some circumstances, the government must plead and prove specific acts performed pursuant to the agency power, and related to the alleged kickbacks, in order to show that the agency power is relevant. *See id.*; *United States v. Ferber*, 966 F. Supp. 90, 100 (D. Mass. 1997); *United States v. Garner*, No. 2:11-CR-00038-NBB-DAS, 2012 WL 3643834, at *3-7 (N.D. Miss. Aug. 23, 2012). In this case, the relevant Counts do not contain allegations of any such acts, or link those acts to Messrs. Bardos and Heslop's payments to Ms. Shambaugh. The relevant Counts do not allege what Mr. Kovall did in exchange for the alleged kickbacks, nor what Messrs. Bardos or Heslop expected him to do, let alone how any such non-pleaded acts related to any agency power held by Mr. Kovall. The allegations do not even state when Mr. Kovall was an attorney for the Tribe, or that that role as attorney at all coincided temporally with the timing of payments in Counts 2 to 9, and 18 to 31.

Sunia, as well as *Ferber* and *Garner*, all directly support Defendants' arguments. The Opposition miscites the *Mosberg* case for the erroneous proposition that "[t]he mere allegation that Kovall represented the Tribe is sufficient." Opposition, at 13:11-12. In fact, *Mosberg* supports Defendants' arguments by illustrating the kind of detailed allegations that are entirely absent from this case's Indictment. *See United States v. Mosberg*, 866 F. Supp. 2d 275, 280-82 (D.N.J. 2011). The *Mosberg* indictment contained extremely detailed allegations specifically linking the attorney's acts as an agent to Mosberg's payment of kickbacks. *See id.* For example, the indictment alleged that in relation to various corrupt payments, (1) "the Attorney []represented the Township concerning litigation between the Township and Mosberg," (2) "assist[ed] Mosberg with development-related business and litigation involving the Township and the Planning Board, without the public's knowledge," (3) impermissibly participated on the mediation team in a matter regarding Mosberg, (4) "endorsed [] agreements between the Township and MOSBERG entities that undermined the Township's

legal position," (5) "expedited development applications for Mosberg," and (6) "disclosed confidential Township litigation strategy to Mosberg, to the Township's detriment." *Id.* The allegations of our Indictment are sparser than those held insufficient in *Sunia*, and a far cry from the detailed, extensive *Mosberg* allegations.

The Opposition is correct that the Court must, for this motion, assume the allegations in the relevant Counts are true. But the Court is also limited to the Indictment's allegations. To state an offense, Counts 2-9, and 18-31, must allege each element of the offense charged, must allege sufficient facts to support this court's jurisdiction and to permit the Defendants to prepare their defense and plead double jeopardy, and must permit the Court to determine that the grand jury found that Mr. Kovall was an agent of the Tribe in connection with the alleged payments. *See* FED. R. CRIM. P. 7 (c)(1); *Russell v. United States*, 369 U.S. 749, 763, 82 S. Ct. 1038, 1046, 8 L.Ed.2d 240 (1962); *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979) (per curiam); *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001). In these respects, the Indictment fails and should be dismissed.

3. The section 666 Counts fail to allege quid pro quo bribery.

(a) Section 666(a)(1)(B) and (a)(2) penalize only quid pro quo bribery, not illegal gratuities.

According to the text and legislative history of section 666, as well as pertinent case law, § 666 penalizes only quid pro quo bribery, not gratuities. There is nothing in the text of the statute, or in its legislative history, indicating that this statute was meant to cover mere illegal gratuities. Yet the Opposition argues that Defendants are attempting to add a "non-existent element[]" by pointing out that the Indictment fails to allege a quid pro quo, or even any link between the alleged kickbacks and specific governmental contracts. The Opposition, however, relies on a misreading of the statute and questionable case law from other circuits. There is currently a genuine Circuit split regarding whether a quid pro quo is a necessary element of § 666 violations, and this Court should hold that Section 666 penalizes

"corrupt" bribes, not non-"corrupt" payments, *i.e.*, gratuities. And even if this Court were to hold, erroneously, that § 666 does penalize gratuities, the government has conceded that the bare bones allegations in the Indictment's section 666 counts fail to allege even an illegal gratuity, let alone quid pro quo bribery. In trying to fill the Indictment's glaring gaps, the government points not to the words of the section 666 counts, but instead to paragraphs of the Indictment ***not*** incorporated into the section 666 counts, and to unidentified documents purportedly somewhere in the vast sea of "discovery the government has turned over." Opposition, at 20:22-21:1. The text of the section 666 counts, however, fails to allege quid pro quo bribery, or any gratuity-based link between the alleged kickbacks and specific "construction-related contracts." These counts should be dismissed.

In its first argument that § 666(a)(1)(B) and (a)(2) penalize both quid pro quo bribery ***and*** illegal gratuities, the Opposition proposes a false dichotomy based on a misreading of the word "reward." The government contends that § 666's penalization of illegal gratuities emanates from the statute's use of a single word: "reward." Opposition, at 14:20-16:5. But § 666's use of the word "reward" simply denotes that a bribe is penalized, regardless of whether it is paid before action by the agent (i.e., "to influence" the agent), or after (i.e., to "reward" the agent). *See United States v. Santopietro*, 996 F.2d 17, 20 (2d Cir. 1993) ("[T]he difference between influencing and rewarding official action is one of timing. To influence, the payment is made before the official action; to reward, the payment is made afterwards."); *United States v. Jennings*, 160 F.3d 1006, 1020 (4th Cir. 1998) ("[P]ayments made to 'influence' an official are made before the official's act (or omission), while payments made to 'reward' an official are made after the act. Thus, § 666(a)(2) prohibits all bribes, regardless of whether they were made before or after the official act."). Section 666's use of the words "to influence or reward" denotes merely a temporal distinction, not the penalization of two entirely different

crimes. *See Jennings*, 160 F.3d at 1015 ("Jenning's intent therefore was sufficiently corrupt to call his payments 'bribes' (or 'rewards')."). To support its view that a "reward" is an "illegal gratuity," and not a bribe, the Opposition misreads *Jennings* as well as *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). As *Sun-Diamond* explained, the "distinguishing feature" between bribery and the giving of illegal gratuities is the "intent element," not any distinction between whether the payment was given before or after the official act. 526 U.S. at 404. In paying or promising a bribe, a person intends to cause the payee to engage in specific behavior, whereas "[a]n illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event." *Jennings*, 160 F.3d at 1013. The intent element for bribery in the criminal statute discussed in *Sun-Diamond*, 18 U.S.C. § 201(b), is provided by the phrases "corruptly . . . to influence any official act", "corruptly . . . to induce", and "corruptly . . . in return for being influenced". 18 U.S.C. § 201(b)(1)(A), b(1)(C), (b)(2)(A); *see Sun-Diamond*, 526 U.S. at 404. On the other hand, § 201(c), which penalizes gratuities, does not contain the word "corruptly," nor the word "reward," and instead supplies the intent element for illegal gratuities with the phrase "for or because of any official act." 18 U.S.C. § 201(c)(1)-(3); *see* 526 U.S. at 404.

It is thus the word "corrupt" in § 201(b)'s bribery provisions that differentiates bribes from illegal gratuities. *See United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) ("The requisite 'corrupt' intent has been defined as incorporating a concept of the bribe being the prime mover or producer of the official act. It is this element of quid pro quo that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuity sections." (citation and quotation marks omitted)). Whether a § 666 charge regards payments made before an official act ("to influence" the act) or after ("to reward" the act), those payments must be

made "corruptly," and thus must be bribes made as a quid pro quo. *See id.*; *Jennings*, 160 F.3d at 1018-19 ("One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in a fairly specific quid pro quo with that official."); *United States v. Zacher*, 586 F.2d 912, 915 (2d Cir. 1978) (collecting cases, explaining that under § 201, a "corrupt intent" distinguishes bribes from illegal gratuities); *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977) (holding that § 201's illegal gratuity subsection (formerly § 201(f)) "is a lesser offense included within § 201(b)(1)" including "all of the essential elements" of § 201(b) except for the corrupt intent element).[6]

Contrary to the Opposition's assertions, "corrupt" intent in the context of a bribery statute necessarily denotes a quid pro quo exchange, not a gratuity. *See e.g.*, *United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009) (A finding of corrupt intent "necessarily entailed a finding of an *exchange* of things of value"); *Jennings*, 160 F.3d at 1016 n.4 (detailing how Congress has previously used the term "corrupt" intent to mean an exchange and did so again in § 666). *United States v. Quinn*, 359 F.3d 666, 675 (4th Cir. 2004) ("The critical question is whether the government official solicited something of value with a corrupt intent, *i.e.*, in exchange for an official act."). Thus the use of the word "corruptly" establishes section 666 as a bribery statute for which an exchange is required, as opposed to an illegal gratuity statute, for which an exchange is not required.

The legislative history of § 666 also demonstrates that § 666(a)(1)(B) and (a)(2) were based on § 201 and intended to cover only bribery, not illegal gratuities. The Senate Judiciary Report explained that § 666's purpose was to expand

[6] Furthermore, it is the "corrupt purpose" element of § 666 violations that mandates that anyone convicted under § 666 be sentenced under the sentencing statute penalizing "Offering, Giving, Soliciting, or Receiving a Bribe," ***not*** the statute penalizing "Offering, Giving, Soliciting, or Receiving a Gratuity." *See United States v. Santopietro*, 996 F.2d 17, 21 (2d Cir. 1993) ("Since a corrupt purpose was an essential element of Giusti's conviction under 18 U.S.C. § 666 . . . sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline."); 18 U.S.C. § 2C1.1, 2C1.2.

§ 201(b)'s penalization of bribery to include bribes made to "agents" under § 666 who are not necessarily "public officials" under § 201. *See* Senate Report No. 98–225, 1984 U.S.C.C.A.N. 3182, 3510–11 ("With respect to bribery, 18 U.S.C. 201 generally punishes ***corrupt*** payments to Federal public officials, but there is some doubt as to [who] may be considered as a "public official" under the definition in 18 U.S.C. 201(a) . . . ." (emphasis added)). Section 666 was thus "designed to . . . augment the ability of the United States to vindicate significant acts of theft, fraud, and ***bribery*** involving Federal monies," not illegal gratuities involving Federal monies. *Id.* (emphasis added). This legislative history does not use the word "gratuity," as § 666(a)(1)(B) and (a)(2) were meant to penalize only "corrupt payments," i.e., "bribery." *See id.*

Although the Opposition attempts to analogize § 666(a)(1)(B) and (a)(2) to § 201(c), the text of § 666 mimics § 201(b), not § 201(c). *See Jennings*, 160 F.3d at 1016 n.4 ("[T]he 'corruptly ... with intent to influence or reward' language of § 666(a)(2) has the same effect as the 'corruptly ... with intent to influence' language of § 201(b) and not the same effect as the 'for or because of' language of § 201(c)."). *Sun-Diamond* also affirmed the Circuit Court's holding, on which *Jennings* relied to find plain error in a § 666 jury instruction "omitting the basic quid pro quo requirement." *Jennings*, 160 F.3d at 1022. The Opposition is wrong in stating that courts "routinely reject[]" the application of *Sun-Diamond*'s § 201 analysis to § 666 cases, or that *Jennings*'s extensive statutory interpretation and discussion of the quid pro quo requirement is "dicta." Opposition at 14:7, 18:18.[7]

In attempting to deprive "corruptly" of its specific, clear reference to quid pro quo bribery, the Opposition falls back on a vague assertion that "corruptly" instead

[7] The Opposition is correct that *Jennings* did not expressly determine that the government must always prove a quid pro quo under § 666, as it was not necessary to the court's ruling, but *Jenning*'s in-depth discussion shows that principles consistent statutory interpretation mandate that determination, particularly in this case. *See, e.g.*, *Jennings*, 160 F.3d at 1016 n.4.

somehow "does the work . . . of distinguishing between permissible and criminal." Opposition, at 19:17-18. If that were true, then § 201(c), the illegal gratuity statutory subsection, would contain the word "corrupt" or "corruptly" in order to distinguish illegal gratuities from legal ones. But, as mentioned, § 201(c) does not use any form of the word "corrupt," a word that is only used in reference to bribes, not gratuities. *Compare* 18 U.S.C. § 201(b), *with* 18 U.S.C. § 201(c). The Opposition is correct that *Sun-Diamond* was partly concerned with ensuring that § 201(c) not penalize legal gratuities. *See Sun-Diamond*, 526 U.S. at 406-11. But nowhere in *Sun-Diamond*, or in § 201(c), did "corruptly" separate illegal gratuities from legal ones, as the Court found that § 201(c)'s key phrase "for or because of any official act," and the accompanying definition of "illegal act," made that distinction. *See id.* at 407-08; 18 U.S.C. § 201(a)(3). The absence of that phrase, and that definition, in § 666 further indicates that § 666 does not cover gratuities. Furthermore, by attempting to diminish the importance of the word "corruptly" in § 666, and by ignoring the clear textual differences between § 666 and § 201(c), the Opposition advocates converting § 666 into a boundless statute covering even legal gratuities, as § 666 is devoid of the limiting definition that constrained § 201(c) to cover only illegal gratuities. *See Sun-Diamond*, 526 U.S. at 408 ("When . . . no particular 'official act' need be identified . . ., nothing but the Government's discretion prevents [legal gratuities] from being prosecuted.").

In seeking to expand § 666 to include illegal gratuities, and perhaps legal gratuities, the government ignores the Ninth Circuit authorities of *Strand*, 574 F.2d 993, and *Crutchfield*, 547 F.2d 496, while repeatedly citing *United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988). But *Bordallo* did not include any discussion of whether § 666 penalizes gratuities in addition to bribes. *See* 857 F.2d at 523 (the issue on appeal was the "[a]pplicability of 18 U.S.C. § 666 to Guam"). The government also relies on the Seventh Circuit case of *United States v. Agostino*, 132 F.3d 1183 (7th Cir. 1997), but *Agostino* did not mention § 201 and "*Agostino*'s

persuasive weight is therefore subject to debate." *Jennings*, 160 F.3d at 1016 n.4. Although the Seventh Circuit has considered "revisit[ing] *Agostino*" and the later *Gee* case, it has instead adhered to an erroneous view of § 666 that ignores the meaning of "corruptly" in § 666 and the significant differences between § 666 and § 201(c). *See United States v. Boender*, 649 F.3d 650, 654-55 (7th Cir. 2011).[8]

Another case cited by the Opposition, *United States v. McNair*, erroneously attempts to distinguish *Sun-Diamond* by ascribing to § 666 an impermissibly undefined, boundless scope. 605 F.3d 1152, 1191 (11th Cir. 2010). *McNair*, along with *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), are at odds with *Strand* and *Sun-Diamond* in failing to require a showing of quid pro quo under § 666, and these cases should be rejected by the Court. Noting that § 666 "does not say 'in return for' or 'because of' but says 'in connection with,'" *McNair* holds *Sun-Diamond* inapplicable and fails to adopt any of its reasoning. *Id.* *McNair* also fails to define the meaning of "in connection with" or limit it such that, for instance, legal gratuities are not also penalized under § 666. *See id.* Instead, *McNair* concludes blithely that "§ 666 sweeps more broadly than either § 201(b) or (c)" and that any concern that § 666 penalizes legal gratuities "is diminished" because § 666 uses the word "corruptly." *Id.* Unsurprisingly, the court cites no authority for this non-sequiter, which ignores the fact that "corrupt" payments meant to influence a government agent are bribes. *See id.*; *Strand*, 574 F.2d at 995; *Jennings*, 160 F.3d at 1016 n.4. It also ignores the Supreme Court's detailed catalogue of illegal payment statutes that do not contain a quid pro quo requirement. Those statutes all use

[8] The Opposition cites *United States v. Aguilar*, but *Aguilar*'s analysis of the meaning of "corruptly" in a jury protection statute under 18 U.S.C § 1503 – a wholly different type of law—fails to consider § 666's "intent to influence" language and the fact that § 666 is an illegal payment statute. *See* 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995). The definition of "corruptly" in *United States v. Ogle* was also limited to the specific, narrow context of § 1503, 613 F.2d 233, 239 (10th Cir. 1979) (definition limited to "the present context"). Whatever its meaning in regards to § 1503, "corruptly . . . to influence" in the context of an illegal payment statute mandates a quid pro quo exchange under *Strand* and *Sun-Diamond*. *See Strand*, 574 F.2d at 995-96.

language very different than § 666's penalization of "corrupt" influencing. *See Sun-Diamond*, 526 U.S. at 408 (citing, *inter alia*, 18 U.S.C § 205 (penalizing non-corrupt "gratuity"), 209(a) (penalizing non-corrupt "supplementation"), § 212-213 (penalizing non-corrupt "gratuity"), and 29 U.S.C. § 186 (penalizing non-corrupt payments)). If Congress had wished to craft § 666 without a quid pro quo requirement, and to include gratuities, it would have drafted § 666 with the language of those statutes, not the "corruptly . . . to influence" language of § 666, which mirrors § 201(b)'s quid pro quo requirement. Those other statutes prohibit a gratuity "without regard to the purpose for which it is given," *id.*, while § 666 clearly ties the corrupt payment to governmental "business" "in connection with" which the payment is made. *See* 18 U.S.C. § 666(a)(1)(B), (a)(2). By ignoring *Sun-Diamond*'s framework for determining whether an illegal payment statute contains a quid pro quo requirement, *McNair* interprets § 666 far too broadly.

Moreover, the *McNair* court should have taken a narrower reading of any ambiguous phrases in section 666 (*e.g.*, "in connection with") based on the rule of lenity. The rule of lenity commands that ambiguous criminal statutes be read narrowly. *See United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522, 30 L. Ed. 2d 488 (1971) (applying rule of lenity to set aside a conviction based on the ambiguous phrase "in commerce or affecting commerce"); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1134 (9th Cir. 2009) (applying rule of lenity to reject a broad interpretation of the phrase "without authorization"). The rule of lenity has particular applicability to the "litter[ed] field" of statutes criminalizing bribery. *Sun-Diamond*, 526 U.S. at 412 ("[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."). For courts to choose a harsher alternative, Congress must "have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952)). *Sun-Diamond* demonstrates, through its citation of § 201(c), and its

comparison of sections 205, 209(a), and 212-213, *inter alia*, the exact type of clear and definite language that Congress uses when it wishes to penalize payments without requiring a quid pro quo element. *See Sun-Diamond*, 526 U.S. at 408. Section 666's "in connection with" language is at the very least ambiguous. *See Bass*, 581 U.S. at 336. Under the rule of lenity, § 666 should be read narrowly to penalize only quid pro quo bribery, not to penalize all sorts of gratuities under the Opposition's and *McNair*'s "meat axe" approach.

The text of § 666, as well as the the statute's legislative history, demonstrate that § 666 penalizes only quid pro quo bribery, not mere illegal gratuities. As the Opposition has failed to argue that the Indictment alleges quid pro quo bribery, the Court should dismiss the § 666 counts for failing to allege all of the crime's essential elements, and for failing to apprise Defendants of the specific offenses with which they are charged.

(b) Even if section 666(a)(1)(B) and (a)(2) penalize illegal gratuities, the government has failed to allege any link between any gratuities and any acts or governmental contracts

Even if the Court agrees with the Opposition that § 666 penalizes gratuities in addition to bribes, the Indictment's § 666 counts must still be dismissed for failing to allege any specific connection between the alleged payments and any particular government projects, or even a course of conduct regarding construction projects. Gratuities are not actionable unless the government alleges "a link between a thing of value conferred . . . and a specific official act for or because of which it was given." *Sun-Diamond*, 526 U.S. at 414. Because § 666 uses the phrase "in connection with . . . business" instead of § 201(c)'s phrase "for or because of," at a bare minimum an indictment under § 666 must allege a link, or a "specific connection," *id.* at 402, between the payment and the governmental business "in

connection with" which it was made. The Indictment's § 666 Counts completely fail to allege that link, and the Opposition concedes that failure.

The indictment in *Sun-Diamond* illustrates the deficiencies of the Indictment in this case. In *Sun-Diamond*, "[t]he indictment alleged that respondent sought the Department of Agriculture's assistance in persuading the EPA to abandon its proposed rule altogether, or at least to mitigate its impact. In the latter event, [the defendant] wanted the Department to fund research efforts to develop reliable alternatives to methyl bromide." *Id.* Although that indictment thus specifically identified "these two matters before the Secretary in which [the defendant] had an interest, the indictment did not allege a specific connection between either of them-or between any other action of the Secretary-and the gratuities conferred." *Id.*

In our case, the § 666 Counts wholly fail to identify ***any*** specific connection between particular "construction-related contracts" and ***any*** of the identified payments. *See* Indictment, Counts 2-31, 34-35. These Counts also fail to identify any specific connection between any action by Messrs. Heslop or Kovall and the alleged payments. *See id.* The § 666 counts do not identify or describe the nature of any contracts, the dates they were consummated, the amount of money each involved, or the way in which Mr. Heslop or Mr. Kovall acted as agents of Tribe or otherwise exerted influence with respect to them. Nor is any specific contract or transaction in any way linked to a particular payment or payments. In sum, in addition to there being no "specific connection" alleged between payments and specific construction projects, there are not even allegations of specific construction projects to which payments could be linked. Allegations this vague fail the *Sun-Diamond* test for allegations of illegal gratuities. *See Sun-Diamond*, 526 U.S. at 414. They also prevent the Defendants from adequately mounting their defense and from pleading double jeopardy in any separate prosecution. Furthermore, the Court cannot determine from the face of the § 666 Counts that the grand jury considered this element of the offense when returning the Indictment or which, if any, specific

construction projects the grand jury had in mind when returning these individual Counts. *See United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001).

The Opposition does not dispute that the Indictment lacks the required "specific connection." Instead, the Opposition argues that "the details Defendants say are missing are, in fact, alleged in Counts 1, 32, and 33. They are also part of the discovery the government has turned over in this case." Opposition, at 20:26-21:1. But as explained in Defendants' opening brief, the § 666 counts incorporate by reference only paragraphs 1 through 8 and 13 of the Indictment, not the portions of Count 1 that the Opposition references, and not Counts 32 and 33.[9] It is well-settled law that "each count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself. Therefore, it must stand or fall upon its own allegations without reference to other counts not expressly incorporated by reference." *Walker v. United States*, 176 F. 2d 796, 798 (9th Cir. 1949); *see United States v. Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988) (en banc) (holding that the failure to incorporate paragraphs by reference "is a particularly striking omission" where counts incorporate some, but not all, other indictment paragraphs, "showing that the grand jury knew how to incorporate by reference if it so chose").[10] And the government cites no authority for the Opposition's strange assertion that vague references to unidentified documents not in the record support an end run around an indictment's obvious failure to allege an essential element of the offense charged. *See Russell v. United States*, 82 S.Ct. at 1050.

[9] The only paragraphs of Count 1 incorporated into the § 666 Counts are paragraphs 1 through 8, which do not mention any specific construction projects. Counts 34 and 35 incorporate paragraph 22 of the Indictment, but Counts 34 and 35 still fail to establish any specific connection between the alleged payments and any acts by Mr. Heslop.

[10] As discussed in Defendant's opening brief, even if the grand jury had incorporated all of the allegations in the conspiracy count into the § 666 Counts, which it knew how to do and chose not to, the § 666 Counts would still fail to allege quid pro quo bribery or even criminal gratuities. *See* Motion, at 19 n.6.

In sum, according to the text of § 666, its legislative history, and pertinent case law, § 666 penalizes "corrupt" payments, i.e., only quid pro quo bribery. The Court should dismiss the Indictment's § 666 allegations because, as the Opposition concedes, no § 666 Count alleges a quid pro quo. Alternatively, even if the Court determines that § 666 criminalizes gratuities in addition to bribes, each of the § 666 Counts should be dismissed for failing to allege a specific connection between any gratuity and any specific "construction-related project."

4. The section 666 counts fail to allege that the awarding of construction-related contracts did not relate to bona fide transactions.

As Defendants' opening brief explains, each of the Indictment's thirty-two counts under § 666 fails to allege any facts regarding the legitimacy or necessity of the relevant Tribal projects, and thus fails to allege that the projects were not bona fide. The government's only effort to fill the immense gaps in the Indictment's allegations is to mangle instructive case law and cite inapposite rulings.

The government first argues that Defendants have misread *United States v. Mills*, 140 F.3d 630 (6th Cir. 1998), when Defendants in fact simply repeated the court's holding:

> In this case, the government failed to allege that the salaries received by individuals who paid bribes to obtain employment positions within the Shelby County government were unnecessary or unjustified. Consequently, for that reason and because the government could not otherwise establish that the values of the deputy positions themselves were greater than $5,000, . . . we AFFIRM" the district court's dismissal of several section 666 counts.

140 F.3d at 634 (dismissing section 666 counts under § 666(c)) (cited by Motion, at 22:10-14). The Opposition ignores this clear holding in making the flatly absurd statement that "Defendants have found no case law that dismisses an indictment or any charge in one for failing to negatively allege a Section 666(c) count."

Opposition, at 22:3-5. In fact, *Mills* dismissed six § 666 counts for that exact deficiency. 140 F.3d at 634. The Opposition contends that *Mills*'s holding was grounded in the Indictment's failure to meet the $5,000 jurisdictional requirement, but as the excerpt above illustrates, that deficiency in the Indictment was an *additional* grounds for dismissing the section 666 counts, as "[i]t is the application of the subsection (c) that lies at the heart of the disagreement involved in this appeal." *Id.* at 632. The counts in *Mills*, as in this case, failed to allege that bribery resulted in non-bona fide governmental contracts:

> Unfortunately for the government, the indictment does not allege that the jobs in question were unnecessary or that the individuals who obtained those [] positions did not responsibly fulfill the duties associated with their employment. In the absence of such allegations, the government has no support for its claims that the salaries paid . . . were not properly earned "in the usual course of business."

Id. (citing § 666(c)). *Mills* is thus directly on point. And the Opposition's hail mary argument that *Mills* has been abrogated by *United States v. Freeman*, 86 Fed. Appx. 35 (6th Cir. 2003), is also clearly wrong. That disposition is inapposite, as it did not involve a motion to dismiss, but instead considered, under plain error review, whether the jury "instructions, when viewed as a whole, were confusing, misleading and prejudicial." 86 Fed. Appx. at 39 (citation omitted). Furthermore, *Freeman* ***re-affirmed*** **Mills**, holding that while, under *Mills*, "the district court's instruction erroneously limits subsection (c)'s purview . . . taken as a whole . . . we find no plain error." *Id.* at 42 (citing *Mills*, 140 F.3d at 633). *Mills* was also re-affirmed in *United States v. Mann*, 172 F.3d 50, at *2 (6th Cir. 1999) (Section 666(c) "bars prosecution of [bribe-payers] who actually undertook to do the work for which they were being paid although they were paid more than their legal entitlement." (citing district court order)). *Mills* remains highly persuasive precedent on this issue, amplified by *Mann*'s holding that § 666 charges cannot be grounded in mere overpayment for legitimate, or "bona fide," services. *See also United States v.*

Harloff, 815 F. Supp. 618, 619-20 (W.D.N.Y. 1993) (dismissing § 666 counts, on court's own motion, as § 666 charges cannot be predicated on allegations of merely deficient or overcompensated work in exchange for bribes)

The Opposition's second argument is that section 666(c) applies only to "the payments to the agents, not the contracts acquired as a result of those payments." Opposition, at 22:21-22. As discussed above, this contention is directly refuted by *Mills* and *Mann*. *See Mills*, 140 F.3d at 633 (indictment dismissed as "subsection (c) must be read to apply to all of § 666" and the indictment failed to allege that the salaries received by bribe payers were not bona fide); *Mann*, 172 F.3d 50. *Freeman* also reiterated this point, and other courts agree. *See Freeman*, 86 Fed. Appx. at 42 ("We have previously explained that subsection (c) applies to the entirety of § 666." (citing *Mills*)); *see Harloff*, 815 F. Supp. at 619-20. The Opposition relies on *United States v. Robinson*, 663 F.3d 265 (7th Cir. 2011), but that case, decided after trial, merely concerned an evidentiary issue regarding the value of the transaction involved, not the applicability of § 666(c) to bona fide governmental contracts. 663 F.3d at 275-76 ("Without excluding other possible methods of valuation, we agree that the amount of the bribe may suffice as a proxy for value; at least it provides a floor for the valuation question."). *Robinson* is inapposite, as Defendants do not dispute that the value of the alleged bribes may be used to meet the $5,000 requirement. The government also relies on *Cornier-Ortiz*, but that case's holding was specifically limited to § 666(a)(1)(A), a subsection not charged in this case. *See United States v. Cornier-Ortiz*, 361 F.3d 29, 36-37 (1st Cir. 2004) (parsing the meaning of § 666(a)(1)(A)'s "intentional misapplication" phrase and concluding that "[t]o hold that such payments were bona fide under § 666(c) would be inconsistent with § 666(a)(1)(A)."). Furthermore, the court in *Cornier-Ortiz* held that the evidence showed defendant's claims of "bona fide" work truly regarded "sham contracts." *Id.* at 36; *see United States v. Jimenez*, -- F.3d --, 2013 WL275642, at *5 (11th Cir. Jan. 25, 2013) (confining *Cornier-Ortiz* to its facts

under § 666(a)(1)(A): "We read *Cornier-Ortiz* as upholding the conviction of a defendant who misapplied funds . . . [and had] a sham employee.").[11]

The Indictment in this case involves no allegations of sham employees or sham construction projects. Because the § 666 charges only incorporate by reference paragraphs 1-8, and 13, of the Indictment, those charges do not even allege the kind of overpayment that was at issue in *Harloff* and *Mann*. *See Harloff*, 815 F. Supp. at 619; *Mann*, 172 F.3d 50, at *2. But even if those allegations had been incorporated, the counts would still only describe a price issue that "is not a federal crime under 18 U.S.C. § 666." *Mann*, 172 F.2d at *3 (citing *Harloff* and *Mills*). Counts 2 through 31, 34, and 35 fail to allege that the relevant contracts were unnecessary, unjustified, or otherwise outside "the usual course of business." 18 U.S.C. § 666(c). The Court should dismiss Counts 2 through 31, 34, and 35 for failure to state a violation of section 666. *See Mills*, 140 F.3d at 634.

B. The Section 666 Counts Should Be Dismissed As Multiplicitous.

Unable to find legal support for its decision to charge Defendants with ***thirty-two*** separate section 666 violations, the Government instead urges the Court to discover a "flexible" unit of prosecution. But the Government's push for a "flexible" interpretation of section 666 ignores directly relevant case law and flies in the face of the rule of lenity's mandate that a statutory ambiguity, or "flexibility," be resolved in a defendant's favor.

The government fails to address, even in passing, the case law cited by Defendants' opening brief *specifically addressing* the unit of prosecution for section

[11] The Opposition also cites *United States v. Nichols*, 40 F.3d 999 (9th Cir. 1994), but *Nichols* supports Defendants' motion. In *Nichols*, the Ninth Circuit applied § 666(c) to test an indictment as a matter of law, just as Defendants ask this Court to do. *See* 40 F.3d at 1000. The Ninth Circuit also read section 666(c) broadly to apply to the funds received by local agencies. *See id.* Ultimately, the Court issued a narrow, inapposite holding rejecting the Defendant's limited request that the Court create "a rule that the statute covers only agencies that receive gifts or charitable distributions from the federal government, and excludes all agencies that provide the federal government with some form of quid pro quo." *Id.*

666 violations. In *Urlacher*, the court held that "the unit of prosecution [for section 666 violations] is $5,000 or more, from whatever source, in any one year period in which the government or agency at issue receives more than $10,000 in Federal aid." *United States v. Urlacher*, 784 F. Supp. 61, 64 (W.D.N.Y. 1992) (quotation marks omitted). The Second Circuit affirmed, reiterating that a defendant "should not be charged with two counts of embezzlement for the same fiscal year." *United States v. Urlacher*, 979 F.2d 935, 936 (2d Cir. 1992). As the Indictment in this case alleges bribe activity by each Defendant during just one year, pursuant to one scheme, and against one governmental entity, under *Urlacher*, each Defendant may face no more than one charge under section 666.

The Opposition also fails to address the detailed analysis of *United States v. Swan*, which relied on Ninth Circuit precedent to reject as multiplicitous payment-based section 666 counts relating to but one scheme to engage in bribe activity. *See* Recommended Decision on Motion to Dismiss, *United States v. Swan*, No. 12-cr-00027-JAW, at *11 (D. Me. Nov. 26, 2012), ECF No. 77 (Individual payments "[a]re not separate transactions[, but] simply steps in the fulfillment of a transaction . . . .") (citing *United States v. Jewell*, 827 F.2d 586, 587 (9th Cir. 1987)) . Ignoring this persuasive precedent,[12] the government proposes that section 666 is a "flexible" statute that "allows" the government "to charge in the aggregate . . . or as individual payments (if each payment is related to a separate transaction or a separate series of transactions)." Opposition, at 24:17-21. This evasive interpretation promotes ambiguity and flaunts the rule of lenity, which mandates clarity and predictability in penal statutes. *See Bell v. United States*, 349 U.S. 81, 82-83, 75 S. Ct. 620, 622 (1955); *Swan*, Docket #77, at *10-11 (Under section 666, "[t]reating each . . .

[12] This week, the district court judge in *Swan* affirmed the magistrate's recommendation that five § 666 counts be dismissed as multiplicitous. *See United States v. Swan*, No. 12-cr-00027-JAW (D. Me. Feb. 25, 2013), ECF No. 103. The district court judge's adoption of the magistrate judge's reasoning, without any qualification, buttresses Defendants' multiplicity arguments.

payment as a separate violation, as the Government proposes, is neither the objectively reasonable nor the lenient approach."). The *Urlacher* court also disavowed such "flexibility," holding that because the government can aggregate payments to reach the $5,000 threshold for section 666 violations, it would be "illogical and certainly unfair" to start over with a second count once that threshold is reached. *Urlacher*, 784 F. Supp. at 64. Unsurprisingly, the Opposition provides no citation to case law or other authority for its shifty statutory interpretation. Opposition, at 24:14-21.

Even under the Opposition's erroneous view of section 666, the Indictment is multiplicitous. The Opposition argues that each ***payment by the Tribe*** to Mr. Bardos is a "separate transaction" and therefore the "appropriate unit of prosecution." Thus, even if several payments were made by the Tribe to Mr. Bardos pursuant to a single construction contract (awarded pursuant to a single scheme), the government contends the relevant "transaction" under section 666 is the Tribe's payment, not the contract or overall scheme pursuant to which the payments were made. Opposition, at 25:19-26. The government offers this alternative definition of the unit of prosecution without any citation to case law or other authority. *See id.* But even if this tribal-payment-based unit of prosecution were valid, which it is not, the Indictment would still be grossly multiplicitous. For example, for each payment received by Mr. Heslop from Mr. Bardos purportedly relating to an unidentified construction contract, Mr. Heslop is charged with approximately two section 666 violations, solely because he allegedly passed a portion of those payments on to Ms. Shambaugh. As explained in Defendants' Motion, the government's double counting against Mr. Heslop is emblematic of the Indictment's gross multiplicity. *See* Motion, at 26:6-27. Neither the purpose of section 666 nor the kinds of conduct in question merit cumulative punishment for Mr. Heslop's alleged role as a bribe middleman. *See id.*; *United States v. UCO Oil Co.*, 546 F.2d 833, 836 (9th Cir. 1976). The Opposition does not counter these arguments.

Finally, the Opposition raises the straw man argument that if the government had brought only one section 666 count against each of the Defendants, the Defendants would have labeled that hypothetical indictment duplicitous. *See id.* at 24:22-23. Again the government ignores the applicable case law cited by Defendants, in which this same argument—that consolidation of counts would engender duplicity—was expressly rejected. *See Swan*, Docket #77, at *7-8 ("Charging [multiple counts] in one count would not result in duplicity."); *see also Urlacher*, 784 F. Supp. at 64 (consolidating section 666 counts). The Opposition relies on *United States v. Newell*, 658 F.3d 1 (1st Cir. 2011), but *Swan* discussed and distinguished *Newell*, determining that where, as in our case, there is "a singular fraudulent scheme," there is but one section 666 violation and there is no issue of duplicity. *Swan*, Docket #77, at *6-8 (holding that *Newell* "does not . . . indicate that every payment . . . supports a separate count" under section 666).[13]

In sum, payments made in connection with a series of transactions regarding one qualifying governmental entity during a one-year period pursuant to one alleged "scheme" support only one section 666 count against each Defendant. The Opposition understandably provides no reason for the Court to adopt a payment-based unit of prosecution or any impermissibly "flexible" approach to construing penal statutes. The Court should dismiss Counts 2-31, 34, and 35 of the First Superseding Indictment.

[13] The Opposition also cites *United States v. Wilkinson*, 124 F.3d 971 (8th Cir. 1997), *United States v. Hart*, 70 F.3d 854 (6th Cir. 1992), and *United States v. Garlick*, 240 F.3d 789 (9th Cir. 2001), but those cases are inapposite. *Hart* "decline[d] to reach th[e] issue" of multiplicity, 70 F.3d at 859, and *Wilkinson* merely states that in some circumstances, a defendant may be charged with more than one section 666 count, 124 F.3d at 975. The *Garlick* mail fraud case is inapplicable because, as *Swan* explains, section 666 is best analogized to bank fraud, not mail fraud. *See Swan*, Docket #77, at 8-11; 240 F.3d 789.

C. The Section 1957 Counts Are Impermissibly Vague.

The government admits that 18 U.S.C. § 1957 requires proof at trial of all the elements of the specified unlawful activity – here a violation of California Penal Code Section 641.3. Opposition at 28 n. 12. While it is true that a section 1957 charge does not always need to allege the essential elements of the specified unlawful activity, the general rule still applies: an indictment must contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged. *Cecil*, 608 F.2d at 1296. Absent this essential (and legally required) information defendants cannot mount an adequate defense. *United States v. King*, 200 F.3d 1207, 1217-18 (9th Cir. 1999) (holding that an Indictment must include sufficient information to enable an adequate defense).

The government's claim that *Lazarenko v. United States*, a case under 18 U.S.C. § 1956, is controlling authority that excuses the deficiencies in the Indictment is erroneous. 564 F.3d 1026 (9th Cir. 2009). The government's opposition concedes *Lazarenko* did not alter the Ninth Circuit pleading standards. Opp. at 29. Thus the essential question is whether the indictment "fairly informed" the defendants of the charge against them and provided sufficient information for defendants to mount an adequate defense. *See Lazarenko*, 564 F.3d at 1033l; *King*, 200 F.3d at 1217-18. Under that standard, this Indictment fails, because in contrast to *Lazarenko*, it does not provide "statement of the facts and circumstances [to] inform the accused of the specific offence…with which [they are] charged." *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S. Ct. 2887, 2907, 41 L. Ed. 2d 590 (1974).

A comparison of *Lazarenko* with this Indictment highlights the inadequacy of the 1957 counts in the Indictment. In *Lazarenko*, "the indictment identified interstate transportation of stolen property, extortion, and wire fraud as the 'specified unlawful activit[ies]' and provided detailed allegations regarding each of these offenses." *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009)

(emphasis added). All factual allegations necessary for each of these specified unlawful activities were incorporated by reference into the money laundering counts. Second Superseding Indictment at ¶¶ 27, 29, *United States v. Lazarenko*, No. CR 00-0284 (ND Cal. Nov. 19, 2001). Moreover, in *Lazarenko* the "indictment provided detailed allegations regarding the basis for the charges." *Lazarenko*, 564 F.3d at 1034 (emphasis added). Tellingly, the government has not incorporated any facts into the money laundering counts. Nor could they; the factual detail necessary to support a commercial bribery charge under California Penal Code Section 641.3 is not alleged anywhere in the Indictment.

The government's discussion of *Lazarenko* emphasizes the fact that foreign law statutes were not cited in the *Lazarenko* indictment. Opp. at 28. But the government ignores the extensive information incorporated into *Lazarenko* money laundering counts, including the specific facts sufficient to meet the elements of the specified unlawful activities (including the foreign law violations). The Indictment laid out specific facts relating to the transport of stolen property and under 18 U.S.C. § 2314 and extortion under 18 U.S.C. § 1956(c)(7)(B)(ii) and incorporated these facts into the section 1956 counts. Second Superseding Indictment at ¶¶ 19, 26, 27, 29, *United States v. Lazarenko*. This information established the basis for the alleged violations of foreign law and it is the inclusion of these facts that "fairly informed" the defendants of the charges. *See Lazarenko*, 564 F.3d at 1033l; *King*, 200 F.3d at 1217-18. That information is not included in this Indictment. Moreover, the *Lazarenko* defendant was separately charged of violating 18 U.S.C. § 2314, 18 U.S.C § 1343, and 18 U.S.C § 1346, three of the alleged specified unlawful activities. In contrast here, the government has alleged an underlying state law violation unmentioned elsewhere in the indictment.

The Opposition admonishes the Defendants to read the Indictment "in its entirety" and to construe the Indictment according to "common sense." Opposition at 29 (quoting *Lazarenko*). But a common sense reading of the Indictment raises

more questions than it answers. If the government had meant to charge the same unlawful activity it alleged elsewhere in the Indictment, it could have named section 666 as specified unlawful activity -- an available alternative under the section 1957.[14] Instead, by vaguely alleging a violation of section 641.3, defendants must wonder what exactly the government is charging and why.

Out-of-circuit cases cited by the government also involved indictments providing substantially more information regarding the specified unlawful activity. In *United States v. Caldwell*, the indictment separately charged the defendant under 18 U.S.C § 1341, which was also specified unlawful activity alleged in the 1957 count, providing sufficient notice of the facts and elements of the specified unlawful activity under section 1957. 302 F.3d 399 (5th Cir. 2002). Similarly, in *United States v. Cherry*, the indictment separately charged the defendant with a violating 18 U.S.C. § 656, again providing notice to the defendant. 330 F.3d 658, 667 (4th Cir. 2003).[15] While these cases do not require the indictment to include all elements of the specified underlying activity, they also do not authorize (or even consider) indictments with the paucity of information in Counts 36-52.

The government's attempt to place the burden on the Defendants to resolve the omissions and vagueness in the Indictment through a bill of particulars is improper. The burden is on the government to draft a proper indictment and a bill of particulars cannot save an improper indictment. *See Russell*, 369 U.S. at 770;

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[14] Though this still would have been deficient based on the failure to incorporate these allegations into the section 1957 counts. *See also United States v. Redcorn*, 528 F.3d 727, 734-35 (10th Cir. 2008) ("Each count in an indictment is regarded as if it was a separate indictment," so it is "improper" to consider paragraphs of an indictment not expressly incorporated into a particular count) (citation omitted).

[15] *United States v. Smith*, also cited by the government, is the same. There, the defendant was separately charged with violating section 1341, the alleged specified unlawful activity. *United States v. Smith*, 44 F.3d 1259, 1263 (4th Cir. 1995). *United States v. McGauley*, stands for the proposition that the defendant need not be charged with the underlying activity. 279 F.3d 62, 70 (1st Cir. 2002). This issue is not disputed. The issue in this case is not whether the defendants must be charged with violating section 641.3, but rather whether the Indictment provides adequate notice of the facts and elements of the alleged specified unlawful activity.

United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979) (holding that neither a bill of particulars nor the government's open file discovery could save a deficient indictment). Since the Indictment fails to include essential facts and elements regarding the specified unlawful activity, the proper remedy is dismissal. *See Flores v. Emerich & Fike*, No. 1:05-CV-0291 AWI DLB, 2009 WL 900738, at *11 (E.D. Cal. Mar. 31, 2009) (granting defendant's motion to dismiss a claim under section 1957 where the complaint failed to allege necessary facts to support the predicate act of burglary).

D. The Conspiracy Count Is Duplicitous.

The conspiracy charge of Count 1 is duplicitous because it alleges two separate "schemes:" (1) an alleged bribery scheme among the Defendants resulting in the award of tribal construction contracts to Mr. Bardos in violation of section 666; and (2) an alleged overcharge of granite by Mr. Bardos. The Indictment does not allege that the granite purchase is in any way connected to the awarding of construction contracts or otherwise an act in furtherance of the construction contract conspiracy. The Opposition's argument that these are in fact different objects of the same conspiracy is wrong because a single conspiracy must be linked by common purpose, participants, and acts. Count 1 instead pleads two conspiracies with different purposes, participants, and acts.

As the government would have it, the alleged conspiracy in this case was to take money from the Tribe. This overbroad interpretation of the conspiracy violates the core of the prohibition on duplicitous charges, which is designed to ensure both that defendants are given adequate notice of the charges against them and that the jury verdict is unanimous. *United States v. Aguilar*, 756 F. 2d 1418, 1420 n. 2 (9th Cir. 1985); *United States v. Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988) (holding a count is duplicitous when there is a "genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts."). A jury, presented with Count 1's two alleged

conspiracies, could erroneously fail to reach a unanimous verdict with respect to the alleged construction contract kickback scheme or the alleged granite overcharge, while still unanimously convicting any or all Defendants of conspiracy. For example, some jurors could believe that only Mr. Bardos was guilty of the granite overcharging, and on that basis erroneously find all Defendants guilty of the broader "single" conspiracy as alleged. The notice problem created by the duplicitous conspiracy charge is particularly evident for Mr. Kovall. He is not alleged to have played any role whatsoever in the granite overcharge. Mr. Heslop and Ms. Shambaugh similarly are not alleged to have played any particular role in the overcharging, other than allegedly receiving payments derived from the "profits." The Defendants should not be convicted on a conspiracy to commit bribery in violation of section 666 simply because a jury finds that Mr. Bardos overcharged for granite. The alleged overcharging was not an act in furtherance of the bribery scheme.

The government's reliance on *Braverman v. United States* is misplaced. That case involved an overall conspiracy amongst a single group of individuals to violate several different statutes. 317 U.S. 49, 52, 63 S. Ct. 99, 101, 87 L. Ed. 23 (1942). Here the issue is not whether the conspiracy alleges an intent to violate separate statutes, but rather whether the government can allege a conspiracy with different actors, aims, and methods. This is the exact issue addressed by *United States v. Gordon*. There, the court held that whether a conspiracy is duplicitous depends on the "nature of the scheme, the identity of the participants, the quality, frequency and duration of each conspirator's transactions, and the commonality of times and goals." 844 F.2d 1397, 1401 (9th Cir. 1988). The *Gordon* court determined the "primary agreement," which constituted a single conspiracy, was a kickback scheme to secure government contracts. *Id.* The second conspiracy, to obstruct justice, was the result of a separate agreement. *See id.* The duplicity is even more pronounced in our case, as the two alleged conspiracies also involve different actors.

Here, the government's own description of the conspiracy belies the notion of a single overarching agreement, as required by *Gordon*. The Opposition states: "all of the conduct alleged relates to illicit payments made to two agents of the Tribe to influence and reward them for having the Tribe award business to Bardos." Opposition at 31. Yet, the allegations relating to the granite payments do not relate to the award of any business to Bardos. Rather they relate to a preexisting construction contract. Furthermore, Kovall is not alleged to have been at all involved in the granite over-payment. These facts, even if taken as true for the purposes of this motion, indicate that there must have been a separate agreement (or, more likely, no agreement at all).

While it is true that in some cases, the government may remedy a duplicity issue by electing between two or more duplicitous charges, in this case that remedy is insufficient to cure the notice problems in Count 1. The Opposition argues that Mr. Kovall is implicated in both the granite and construction contract conspiracies. However, Mr. Kovall is not alleged to have participated in the granite overcharge in any way. Thus, should the government elect to allege only the granite overcharge conspiracy, Mr. Kovall will have insufficient notice of the alleged conspiracy and the role he purportedly played in connection with the granite conspiracy. *United States v. Kearney*, 451 F. Supp. 33, 38 (S.D.N.Y. 1978) (holding dismissal of a duplicitous count is proper when election would not cure the notice deficiencies).

Moreover, the government fails to even acknowledge the evidentiary issues posed by the duplicitous conspiracy charges. *See* Motion, at 30-31. These problems would not be cured by an election in this case as the allegations fail to provide adequate notice of who the alleged co-conspirators under the two conspiracies are. Evidence that would not otherwise be admissible against a particular defendant could be improperly admitted based on the overbroad conspiracy charge. Consequently, the proper remedy is dismissal.

III. CONCLUSION

For the reasons discussed herein and in Defendants' opening brief, the Defendants respectfully request that the Court grant their Motion to Dismiss Counts 1 through 31, 34, 35, 36 through 52, and the dependent Forfeiture Allegations, of the First Superseding Indictment.

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Respectfully submitted,

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