UNITED STATES DISTICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	
	:	Crim. No. 24-267 (KMW)
Plaintiff,	:	
vs.	:	OMNIBUS
ADRIENNE PONZO, et al.	:	PRE TRIAL MOTIONS
	:	
	:	
Defendant.	:	

<u>OMNIBUS PRE TRIAL MOTIONS ON BEHALF OF DEFENDANT</u>

<u>ADRIENNE PONZO</u>

<u>Statement of Facts</u>

The Indictment in the present case, in general terms, alleges multiple conspiracies to defraud both the United States Government and unidentified financial institutions through the federal Paycheck Protection Program ("PPP"). PPP was part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, a federal law enacted in or about March 2020 to assist business owners affected by the pandemic. By way of application, these business owners were able to obtain forgivable loans for job retention and certain other expenses, provided that the business owners complied with various requirements and utilized the funds for certain permissible business expenses. The Indictment further alleges similar schemes in connection with the Economic Injury Disaster Loan ("EIDL") Program, an SBA program that provided low-interest financing to small businesses, renters, and homeowners in regions affected by declared disasters. Like the PPP, borrowers needed to meet certain requirements and use the finds in certain manner in order to qualify. (Indictment, Count 1, ¶¶ 1q.-y.).

Although the Indictment charges three individuals, these individuals do not have equal involvement in the fraudulent schemes, nor has the Government alleged a conspiracy that involves all three of the Defendants. The allegations of the Indictment establish a rather vast conspiracy devised by Eric Rivera ("Rivera") and James Wessels ("Wessels"), and an unconnected, much smaller scale conspiracy devised by Rivera and Defendant Adrienne Ponzo ("Ponzo"). In fact, although the Indictment concerns both PPP and EIDL, the allegations against Ponzo concern solely two loans obtained pursuant to the EIDL program and do not involve any of the identified or unidentified co-conspirators, unlike the Rivera/Wessels fraud which implicates all of the identified or unidentified co-conspirators.

The Bank Fraud Conspiracy (Rivera and Wessels): The Indictment alleges that Rivera and Wessels conspired with Co-Conspirator 1 (a branch manager at Lender-1's Conshohocken location, with Lender-1 identified as a financial lender that participated in the PPP), Co-Conspirator 3 (a resident of North Carolina who owned or controlled Delaware companies), and William Ingram ("Ingram") "to financially enrich themselves by obtaining PPP loans that were intended for small businesses distressed by the COVID-19 pandemic through the submission of fraudulent loan applications, for companies with little or no operations ('Non-Operating Companies'), that included false statements about the Non- Operating Companies' number of employees and payroll expenses, and by providing false documentation to Lender-1." This conspiracy involved loan applications that contained materially false representations, fraudulent IRS tax forms, and other false documentation to obtain PPP loans, resulting in $5,000,000 in disbursements to Non-Operating Companies. (Indictment, Count 1, ¶¶ 2-16).

Bank Fraud (Rivera and Wessels): The Government has further alleged that Rivera and Wessels "did knowingly and intentionally execute and attempt to execute a scheme and artifice to defraud a financial institution, and aid and abet the scheme and artifice to defraud a financial institution, that was Lender-1, and to obtain moneys, funds, credits, assets, securities, and other property owned by, and under the control of, a financial institution, Lender-1, by means of materially false and fraudulent pretenses, representations, and promises." Specifically, these defendants caused three fraudulent PPP loan applications to be submitted: 1) $122,000 to King of Aces Barbershop, LLC on 3/19/21; 2) $143,000 to East Coast Commercial Investment LLC on 4/10/21; and 3) $145,000 to Leader of the Pack Productions LLC on 4/20/21. The total amount of identified proceeds derived from the Bank Fraud totaled $410,000. Both the Fraud and the Conspiracy occurred from January 2021-December 2021. (Indictment, Counts 2-4; Count 1, ¶2).

Money Laundering Conspiracy (Wessels only): The Government alleges that Wessels "did knowingly and intentionally conspire and agree with William Ingram, CC-2, and others to knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce which involved the proceeds of a specified unlawful activity, namely bank fraud, contrary to Title 18, United States Code, Section 1344." To accomplish the conspiracy, "William Ingram and CC-2 received into bank accounts at Lender-1 in the name of Non-Operating Companies that they controlled at Lender-1, four PPP loans based on fraudulent PPP loan applications." Wessels, Ingram and CC-2 also facilitated "the issuance of fake payroll checks by William Ingram's and CC-2's Non-Operating Companies;" utilized associates and family members to receive the PPP proceeds; and "printed fake payroll checks and sent them to William Ingram in New Jersey and CC-2 in New York for further distribution to William Ingram's and CC-2's associates and family member." In short, Wessels (through Ingram, CC-2 and the Non-Operating Companies) sought to disguise the proceeds of the unlawful activity as legitimate payroll expenses. (Indictment, Count 8).

The Wire Fraud Conspiracy (Rivera and Ponzo): The allegations against Defendant Ponzo pale in comparison to the above allegations in extent, design, and effect. The Government has alleged that Defendant Ponzo provided assistance to Rivera in connection with fraudulent loan applications submitted to the SBA pursuant to the EIDL program. Specifically, the Government has alleged that Ponzo "prepared applications for EIDLs on behalf of Non-Operating Companies recruited by [Rivera] and others," wherein Ponzo provided materially false information (including gross revenues for the twelve months preceding January 31, 2020) and prepared "fraudulent bank statements and fraudulent IRS tax documents for some of the EIDL applications she facilitated." Ponzo also allegedly, along with Rivera, "directed some Recruits to transfer ownership of their Non- Operating Companies to other individuals to increase their chances of obtaining EIDL loans." Rivera then compensated Ponzo for her services. The conspiracy is alleged to have occurred between July 2020- December 2020. (Indictment, Count 5, ¶¶2-10).

Wire Fraud (Rivera and Ponzo): The Government alleges that Rivera and Ponzo used "wire communications in interstate and foreign commerce" in order to "knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and aid and abet the scheme and artifice to defraud, the SBA, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises." Specifically, the Government asserts that on 11/20/20, there was "payment of approximately $147,100 from the SBA, through New Jersey, to the bank account of Visionworks Group of America at Financial Institution-1, representing proceeds of an EIDL loan approved based on a fraudulent EIDL application" and that on 12/15/20, there was a "payment of approximately $141,500 from the SBA, through New Jersey, to the bank account of King of Aces Barbershop at Financial Institution-2, representing proceeds of … a fraudulent EIDL application." (Indictment, Counts 6-7).

Conspiracy to Engage in Monetary Transactions in Property Derived from Specified Unlawful Activity and Engaging in Property Derived from Specified Unlawful Activity (Rivera and Ponzo): The Government has alleged Rivera and Ponzo "did knowingly conspire and agree with each other and with others to engage in, or attempt to engage in, monetary transactions, namely, deposits, withdrawals, transfers and exchanges of U.S. Currency and monetary instruments, through financial institutions, affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, such property having been derived from specified unlawful activity." The conspiracy was effectuated by depositing "the PPP and EIDL proceeds into bank accounts in the name of the Non-Operating Companies," which "represented proceeds of bank fraud conspiracy, wire fraud conspiracy, bank fraud, and wire fraud." Once the funds were deposited into these accounts, Rivera (and not Ponzo) "caused the Recruits to transfer a portion of those funds from the Non-Operating Companies' bank accounts to bank accounts controlled by" Rivera. Rivera (and not Ponzo) then "caused transfers of a portion of the PPP proceeds from bank accounts that he controlled to bank accounts controlled by CC-3." (Indictment, Count 9, ¶¶1-5).

These transfers totaled $158,500 ($72000; $21450; $9000; $12750; $10800; $7500; $25000). (Indictment Count 9, ¶¶6a-7)

Finally, with regard to Ponzo, the Government alleges that she (along with Rivera) "caused transfers of a portion of the EIDL proceeds from bank accounts controlled by defendant ERIC RIVERA to bank accounts controlled by" Ponzo, yet the allegations are restricted to one $15,000 wire on November 27, 2020 and one $14,330 wire on December 17, 2020 from the Precis Laboratory bank account at Financial Institution-3 to a bank account controlled by Ponzo at Financial Institution-5. In the substantive Counts, the Government further specifies that Rivera and Ponzo are collectively responsible for these two wires only. (Counts 10-17). At most, the allegations of the complaint reveal that Ponzo and Rivera collectively transferred $29,330 to accounts controlled by Ponzo, yet contains no detail about the use of these funds, other than the general allegation that "after defendants [Rivera and Ponzo] received the PPP and EIDL loan proceeds, they used the funds to pay personal expenses." (Count 9, ¶¶8-9)

The Prosecution thereby involves three named Defendants (Ponzo, Wessels, and Rivera), two co-conspirators charged elsewhere (William Ingram and Yasha Barjona), three unnamed and uncharged co-conspirators (CC-1, -2, -3) and one unnamed individual (Individual-1). In terms of victims, the Indictment identifies six (6) financial institutions (Lender-1 and Financial Institutions -1 through -5) and one Governmental Entity (the SBA). The Bank Fraud Conspiracy Count asserted against **Wessels and Rivera** involved both of these Defendants, Lender-1, CC-1, CC-3, "and others." In terms of the scope of the conspiracy, the Indictment alleges that **Wessels and Rivera** caused Lender -1 to "approve[] more than 35 PPP loans and disburse[] almost $5,000,000 to the Non-Operating Companies." (Indictment Count One, ¶¶2-16). The substantive Bank Fraud allegations then focus on three specific loans obtained through fraudulent PPP application. (Counts Two-Four).

Defendant Ponzo, however, is implicated solely with regard to providing services on behalf of Rivera in the Wire Fraud Counts, and has no connection to the allegations of Bank Fraud. In fact, of all the individuals discussed in the Indictment (i.e. the Defendants, the named conspirators, and the three unidentified co-conspirators), the Indictment only alleges that Ponzo conspired with Rivera. Defendant Ponzo has literally no connection, direct or indirect, with any of the other individuals that participated in the Bank Fraud Conspiracy and the Money Laundering Conspiracy.

As the Indictment alleges with regard to the Wire Fraud Conspiracy, Ponzo provided materially false information on the EIDL applications (but had no involvement with the PPP applications that generated $5,000,000 in disbursements from Lender-1) at Rivera's direction and, in exchange, received compensation for her role. The substantive Wire Fraud Counts, in turn, contain no allegations at all with regard to Ponzo's conduct. Ponzo was not involved in the recruitment of individuals, as the Indictment makes clear that Rivera exclusively controlled that aspect of the alleged conspiracy. (Count 5, ¶¶5-7, 10; Counts 6-7).

With regard to the money laundering conspiracy, the Indictment alleges that Rivera effectively dictated the entire Manner and Means of the Conspiracy. Ponzo involvement is restricted to the following: "defendants ERIC RIVERA and ADRIENNE PONZO caused transfers of a portion of the EIDL proceeds from bank accounts controlled by defendant ERIC RIVERA to bank accounts controlled by defendant ADRIENNE PONZO," and then identifies two specific transfers, one amounting to $15,000 and the other to $14,330. The substantive Count thereby lists these two transfers. (Count 9, ¶¶3-9; Counts 11-12). Notably, none of the allegations involve Ponzo's interaction with any identified or unidentified co-conspirators, other than Rivera, and then only in connection with only two applications and two transfers.

Legal Argument

I. BECAUSE THE INDICTMENT IMPROPERLY JOINS MULTIPLE, UNRELATED CONSPIRACIES PURSUANT TO FRCP 8(B), THIS COURT SHOULD ORDER SEVERANCE OF THE COUNTS ASSERTING CLAIMS AGAINST PONZO AND RIVERA, DESPITE RIVERA'S INDEPENDENT CONNECTIONS TO OTHER PARTIES.

The Indictment in the present case joins multiple, unconnected conspiracies simply because Defendant Rivera was a participant in multiple, unconnected conspiracies. The Bank Fraud/Laundering Counts asserted against all of the named Defendants other than Ponzo (which involve multiple named and unnamed co-conspirators) are not sufficiently connected to the Wire Fraud/Laundering Counts that involve only Ponzo and Rivera (which involve no other named or unnamed co-conspirator). The timing, extent, scope, and participants involved in the separate conspiracies are simply too divergent to permit joinder. Accordingly, the Court should sever the trial of the Bank Fraud/Laundering involving Rivera and Wessels from the trial of the Wire Fraud/Conspiracy charges against Rivera and Ponzo.

A. Because of the Lack of Connection Between the Various Conspiracies, and the Fact That They Were Not Part of the Same Series of Acts or Transactions, the Government Engaged in Misjoinder.

Joinder of Defendants is governed by Federal Rule of Criminal Procedure 8(b), which provides:

> **(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

To satisfy Rule 8(b), "[i]t is not enough that defendants are involved in offenses of the same or similar character; there must exist a transactional nexus in that the defendants must have participated in 'the same act or transaction, or in the same series of acts or transactions.'" United States v. Jimenez, 513 F.3d 62, 82–83 (3d Cir. 2008) (quoting Fed. R. Crim. P. 8(b)).

The "inquiry into whether … defendants were properly joined focuses upon the indictment, not upon the proof that was subsequently produced at trial." United States v. Irizarry, 341 F.3d 273, 287 (3d Cir. 2003); United States v. Somers, 496 F.2d 723, 729 (3d Cir. 1974) ("A Rule 8(b) motion is addressed to the pleadings, and not to the proof subsequently adduced."). It is common for a federal indictment to join conspiracy counts and substantive counts, "*since the claim of conspiracy provides a common link*, and demonstrates the existence of a common scheme or plan." Irizarry, 341 F.3d at 289 (quoting Somers, 496 F.2d at 730, emphasis in original).

Multiple conspiracies involving separate defendants, by contrast, may be prosecuted within the same indictment only when the "conspiracies were related." United States v. McGurn, 305 F. App'x 879, 880 (3d Cir. 2009). For example, prosecution of multiple conspiracies is proper in a racketeering case, "even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with a commonly charged RICO enterprise or conspiracy." United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir. 1991). Similarly, where the indictment charges all of the named defendants in a conspiracy count, and all defendants are named in the subsequent substantive counts, they are properly "linked together," in the "'same series of acts or transactions constituting an offense or offenses' under Rule 8(b)." United States v. Addonizio, 313 F. Supp. 486, 498 (D.N.J. 1970).

In the present case, there are no allegations, however, that similarly connect the various conspiracies alleged in the Indictment, and thus the Indictment fails to show a "link" between the offenses alleged against the various defendants. Irizarry, 341 F.3d at 289. The indictment does not allege a criminal plan, scheme, endeavor, or enterprise whereby the Bank Fraud alleged between Rivera and Wessels is any way related to the alleged Wire Fraud/Conspiracy between Rivera and Defendant Ponzo. In sum, the indictment fails to include allegations sufficient to permit either a joint trial of the Bank Fraud Counts (Counts 1-4) with the other counts of the indictment, specifically the Counts predicated upon Wire Fraud/Conspiracy (Counts 5-7) and Money Laundering/Conspiracy (Counts 9, 11-12) asserted against Defendant Ponzo. They are wholly distinct conspiracies, involving different individuals (other than the fact that Rivera is a part of both conspiracies) and are not part of the same act or transaction, or the same series of acts or transactions.

In addition, the there is no overlap in time between the conspiracies alleged. The Rivera/Wessels Bank Fraud Conspiracy and Bank Fraud occurred in January

2021 through December 2021. The Rivera/Ponzo Wire Fraud Conspiracy is alleged to have occurred between July 2020 through December 2020 and thus was completed before the Rivera/Wessels conspiracy began. (Compare Count One, ¶2 with Count 5, ¶2). The Money Laundering conspiracies are similar, whereby the Rivera/Wessels Conspiracy occurred between June 2021 and December 2021 while the Rivera/Ponzo conspiracy occurred between November 2020 through June 2021. (Compare Count Eight, ¶2 with Count 9, ¶2). Finally, the allegations involve entirely different loan programs, where the Rivera/Wessels Conspiracy focused on PPP whereas the Rivera/Ponzo conspiracy focused on the EIDL. Although the programs may be similar, severance would actually promote efficiency as the trials would be compartmentalized based on the loan program involved.

B. Because the Rivera/Wessels Conspiracies Were Larger, Involved More Participants, and Resulted in the Transfer of Far More Funds than the Rivera/Ponzo Conspiracy, a Joint Trial Will Result in Prejudicial Evidence Introduced Against Ponzo.

Federal Rule of Criminal Procedure 14(a) permits severance and/or separate trials of counts where "the joinder of offenses or defendants in an indictment ... for trial appears to prejudice a defendant." Fed. R. Crim. P. 14(a). Such prejudice exists sufficient to require severance when "there is a serious risk that joint-trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." United States v. Blunt, 930 F.3d 119, 125 (3d Cir. 2019); Zafiro v. United States, 506 U.S. 534, 539

(1993); United States v. Urban, 404 F.3d 754, 775-76 (3d Cir. 2005) (recognizing jury's inability to compartmentalize evidence as grounds for severance). Serious risk of prejudicial joinder "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." Id. The "critical issue" is "whether the jury will be able to compartmentalize the evidence as it relates to separate defendants in view of its volume and limited admissibility." United States v. Scarfo, 41 F.4th 136, 182 (3d Cir. 2022)(citations omitted).

Courts in this district and elsewhere have also long recognized case complexity and practical administrative concerns as bases for severance of a criminal trial. In United States v. Gatto, 746 F. Supp. 432 (D.N.J. 1990), the Honorable District Court Judge Stanley Brotman found that even where the Government alleged a RICO conspiracy, the fact that the indictment also alleged multiple additional conspiracies created a concern about the jury's ability to keep track of the limiting instructions that would be required. Id. at 451. The jury would be asked to distinguish between separate conspiracies, separate conspirators and then determine which statements are admissible against which co-conspirators in which conspiracies, Id. at 449-50, which is precisely the situation here. Finally, Judge Brotman also determined that the fact that the indictment alleged four separate conspiracies was a sufficient reason to warrant a severance even though the *Gatto* case included fewer defendants and fewer counts than were alleged in other Federal District Court cases granting severance. Id. at 449.

In fact, the Third Circuit has recognized that in certain scenarios severing trials may in fact preserve, rather than waste judicial resources:

> To be sure, it has ever been the case that no defendant should "be deprived of a fair trial because it is easier or more economical." *Boscia*, 573 F.2d at 833. Our judicial system does not aim to resolve cases as quickly or inexpensively as possible, to the detriment of a criminal defendant. To be sure, certain severed trials might require more judicial time and energy to adjudicate than would a single joint trial. But even that eventuality is not assured; in some cases, severed trials might actually conserve court resources. *See Zafiro*, 506 U.S. at 544-45 (Stevens, J., concurring) (declining to endorse "unqualified" preference for joint trials, and reasoning that trying certain multidefendant cases separately is "not only more reliable, but also more efficient and manageable than some of the mammoth conspiracy cases which the Government often elects to prosecute").

United States v. Green, 114 F.4th 163, 173 (3d Cir. 2024). Accordingly, although "judicial economy remains a relevant consideration for courts in determining whether to sever the joint trials of defendants," the Third Circuit nonetheless has determined that "to the extent that our earlier decisions rest on the notion that there is a 'substantial' public interest in economically resolving cases in joint trials, we are not convinced that concerns of judicial economy should weigh as heavily in our severance analysis as they have in prior decades." Id.

The present case presents one of those rare scenarios where severing trials may in fact lead to a conservation of judicial resources, precisely because the allegations against Rivera and Wessels more complex, involving far more witnesses, participants, co-conspirators, transactions and victims. The allegations involving Rivera and Wessels contemplate nearly $5,000,000 in disbursements from the affected financial institutions, as a result of 35 fraudulent PPP loans, and implicate every person mentioned in the Indictment, *other than Ponzo.* The allegations against Ponzo, by contrast, implicate only Rivera, and resulted in only two fraudulent applications under the separate EIDL program. In short, a trial of Rivera and Ponzo will be far simpler and streamlined and decrease the complexity of both trials.

II. THE COURT SHOULD ORDER THE GOVERNMENT TO FILE A BILL OF PARTICULARS DISCLOSING THE IDENTITY OF THE NON-OPERATING COMPANIES, THE "RECRUITS," AND THE UNIDENTIFIED "OTHER INDIVIDUALS."

The Third Circuit has ruled that a bill of particulars "inform[s] the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." United States v. Addonizio, 451 F.2d 49, 63-64 (3d Cir. 1971). Although Federal Rule of Criminal Procedure 7(f) once required a showing of good cause, the 1966 amendments eliminated this requirement in order "to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." Id. at 64 (quoting Notes of

Advisory Committee on Rules, 18 U.S.C. Rule 7(f)). Our Circuit has determined that the "net result of the change" ultimately "increase[s] the instances in which particulars are granted, thus contributing to a desirable decline in the 'sporting theory' of criminal justice." Id.

Pursuant to Federal Rules of Criminal Procedure Rule 7(f), the Court should order the Government to file a bill of particulars disclosing the identities of the non-operating companies, the recruits and the other individuals mentioned in the Wire Fraud Counts. With regard to the Conspiracy, the Government has alleged that Rivera "recruited individuals who owned or controlled Non-Operating Companies (the 'Recruits'). At least one of the Non-Operating Companies was a New Jersey company and at least one of the Recruits was a resident of New Jersey." Ponzo's role, in turn, was to prepare fraudulent "applications for EIDLs on behalf of Non-Operating Companies recruited by defendant ERIC RIVERA and others." Finally, the Government claims that Ponzo "directed some Recruits to transfer ownership of their Non- Operating Companies to other individuals to increase their chances of obtaining EIDL loans." (Count 5, ¶¶4-5)

Evidence linking Ponzo to any conspiracy is tenuous at best, and the identities of the non-operating companies, the recruits and the other individuals mentioned in the Wire Fraud Counts are essential to the preparation of Ponzo's defense and to avoid surprise at trial. Ponzo's entire involvement in the underlying facts is restricted to providing services for Rivera, after he (exclusively and without Ponzo's assistance) recruited the individuals and companies that nominally submitted the applications. The Government's entire case against Ponzo depends in substantial part at least upon the testimony of these individuals. Without their identity, Ponzo is unable develop legal strategies for refuting the accusations and to obtain evidence in support of those legal strategies.

In addition, because there are separate conspiracies alleged with regard to money laundering, occurring at different times involving separate and distinct individuals, the Government should specify the source of the proceeds that Ponzo supposedly laundered. To illustrate, the Government alleges, "It was part of the conspiracy that, based on false information and documentation that was included in the Non-Operating Companies' PPP and EIDL applications, the Lender-1 and the SBA approved PPP and EIDL loans for the Non- Operating Companies and deposited the PPP and EIDL proceeds into bank accounts in the name of the Non-Operating Companies. These proceeds represented proceeds of bank fraud conspiracy, wire fraud conspiracy, bank fraud, and wire fraud." The remaining allegations of the supposed conspiracy between Rivera and Ponzo then focus almost exclusively upon Rivera's transactions with the identified and unidentified co-conspirators, while Ponzo's direct involvement is restricted to two transfers from Rivera's bank accounts to Ponzo's accounts, with no connection to the identified and unidentified co-conspirators. (Count 9, ¶¶4-8).

Notably, Ponzo has not asked for a bill of particulars with regard to the unidentified co-conspirators, as the Indictment makes clear that Ponzo had no connection whatsoever to these individuals; Ponzo's entire involvement is restricted to receiving instructions from Rivera, acting upon those instructions, and then receiving compensation for doing so. As will be established in the following section, these allegations compel dismissal of the money laundering counts against Ponzo as the allegations establishing potential Wire Fraud/Conspiracy serve as the sole basis for the money laundering counts, without any additional conduct indicating how the money was actually laundered, engendering a merger problem.

III. THE MERGER PROBLEM ANALYZED BY THE SUPREME COURT WITH REGARD TO WEALTH ACQUIRING CRIMES COMPELS DISMISSAL OF MONEY LAUNDERING COUNTS AGAINST PONZO.

The Third Circuit has set forth a three-part test for determining the sufficiency of an indictment. It must 1) "contain[] the elements of the offense intended to be charged, 2) sufficiently apprise[] the defendant of what he must be prepared to meet and 3) allow[] the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007). Although the Government's failure to set forth the specific acts establishing the essential elements of the statutory offense is thereby one potential basis for challenging the sufficiency of the indictment, a defendant may also lodge a successful challenge on the ground that "the specific facts alleged ... fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002). If the facts set forth in an indictment fail to satisfy the elements of the particular offense, the government's recitation, in general terms, of the elements of the offense is insufficient. Id.

In the present case, the Government has admittedly set forth the proper statutory citation, and the correct statutory language, for each of the offenses charged. However, based on the allegations of the Complaint, the Government has sought to criminalize activity that the Supreme Court of the United States has already determined is not a separate criminal offense. In short, the payments made from Rivera to Ponzo were in payment for her actions that were the basis for the allegations of Wire Fraud/Conspiracy, and thus part of the essential expenses of the original alleged conspiracy, as in United States v. Santos, 553 U.S. 507 (2008).

A. The Factual Allegations of the Indictment Engender the "Merger Problem" Whereby Payment of the Essential Expenses of Wire or Mail Fraud Cannot Also be Used as the Basis for Money Laundering.

The money laundering allegations in the present case further suffer from the "merger problem" first identified by the Supreme Court in United States v. Santos, 553 U.S. 507 (2008). In Santos, defendant Santos operated an illegal lottery in

Indiana, and employed a number of helpers to run the lottery. The runners would gather bets, keep a portion of those monies as their commission and deliver the remainder to people employed as collectors. The collectors would then deliver the money to Santos, who would use the funds to pay salaries to his collectors, one of whom was respondent Benedicto Diaz. The Government alleged that these payments constituted money laundering pursuant to 18 U.S.C. §1956(a)(1) and obtained convictions on that basis. Id. at 509-10.

The Supreme Court agreed that the money laundering convictions should be vacated, based upon what it deemed a "merger problem." The specific issue before the Court was whether the term "proceeds" in the money laundering statute equated to "profits" or "receipts". Essentially, the Court ruled that if proceeds signified receipts, "nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." Id. at 551. Such an interpretation was clearly unwarranted since Congress penalized the operation of an illegal lottery by up to five years, while money-laundering carries a potential of 20 years in prison. Because of this merger of the otherwise two separate crimes, "[p]rosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both – which would predictably be used to induce a plea bargain to the lesser charge." Id. at 515-16.

The Supreme Court made clear, moreover, that the merger problem resulting from the interpretation of the money-laundering statute was not restricted to the illegal-lottery statute. On the contrary:

> For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays the costs of a crime with its proceeds - for example, the felon who uses the stolen money to pay for the rented getaway car – would violate the money-laundering statute. **And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares.** Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering.

Id. at 515 (emphasis added). Engaging in a concerted illegal activity, and then dividing the proceeds from that illegal activity amongst the various participants, simply does not fall within the definition of money-laundering. Id.

Decisions post-Santos describe precisely how that decision applies in the fraud context, as opposed to the illegal lottery scheme. To illustrate, in United States v. Abdulwahab, 715 F.3d 521 (4th Cir. 2013), the defendant was charged with mail and securities fraud in connection with the sale of life settlement investments, which are interests in life insurance policies. The government alleged that the defendant's payment of commissions to the sales agents constituted money laundering. However, these funds were generated from the sale of interests in life insurance policies and other investment vehicles and thereby represented the expenses of the completed mail and securities frauds. Based on these facts, the defendant argued that that his money laundering convictions are barred by the "merger problem" identified in Santos since those convictions were based on allegations that he paid the expenses of completed frauds with money that the frauds generated. Id. at 528-529.

The Fourth Circuit agreed that the payment of commissions, which were the basis for the money laundering counts, were simply part and parcel of the underlying mail and securities frauds:

> The money laundering counts at issue concerned commission payments to HIC sales agent Tim Bromseth. These payments ... were for services that played a critical role in the underlying fraud scheme in that it was the promise of payment for services rendered that enticed HIC and Bromseth to obtain investors for A & O. As such, [defendant] was no different than "the felon who uses the stolen money to pay for the rented getaway car" or "the initial recipient of the wealth" in "any wealth-acquiring crime with multiple participants ... [who] gives his confederates their shares."

Id. at 531 (quoting Santos, 553 U.S. at 516). In short, the commission payments were essential expenses of the illegal activity. Although the payments may constitute evidence of the underlying fraud, they simply do not establish the independent crime of money laundering. Id.

The Third Circuit, in turn, has specifically held that Santos overturned previous Third Circuit law with regard to the definition of proceeds under the money-laundering statute. To illustrate, the Third Circuit stated that "the Supreme Court, in United States v. Santos, recently clarified that the term 'proceeds', as that term is used in the federal money laundering statute, applies to criminal profits, not criminal receipts, derived from a specified unlawful activity." United States v. Yusuf, 536 F.3d 178, 186 (3d Cir. 2008). The Third Circuit acknowledged that this holding overruled standing Third Circuit precedent that had declared "proceeds" as synonymous with "gross receipts." Id. fn 12 (citing United States v. Grasso, 382 F.3d 160 (3d Cir. 2004)). Courts in the wake of Yusuf have reinforced "that 'proceeds' also means profits when the 'specified unlawful activity' underlying a money laundering offense is wire fraud, in violation of 18 U.S.C. § 1343 …" United States v. Rashid, 39 F. Supp. 3d 649, 653 (E.D. Pa. 2014).

In order to obtain a conviction for substantive money-laundering, the Government must prove the following elements: "(1) an actual or attempted financial transaction; (2) involving the proceeds of [a] specified unlawful activity; (3) knowledge that the transaction involves the proceeds of some unlawful activity; and (4) ... knowledge that the transaction [was] designed in whole or in part to conceal the nature, location, source, ownership, or control of the proceeds of [a] specified unlawful activity." United States v. Richardson, 658 F.3d 333, 337–38

(3d Cir. 2011). To prove a conspiracy in violation of section 1956(h), in turn, the Government must show: (1) that an agreement was formed between two or more persons; and (2) that the defendant knowingly became a member of the conspiracy, with the objective to commit money laundering." United States v. Greenridge, 495 F.3d 85, 100 (3d Cir. 2007).

Because the money-laundering statute is intended to punish the intentional concealment of illicit proceeds and not just the spending of illicit proceeds, a conviction must be supported by "proof that the purpose—and not merely the effect—of the [transaction] was to conceal or disguise" the funds. See Cuellar v. United States, 128 S. Ct. 1994, 2005 (2008). As the Third Circuit stated:

> There is a fine line between the concealment inherent in fraud offenses and concealment money laundering. "Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money." This Court has found that 18 U.S.C. § 1956(a)(1) "addressed this concern, and therefore delineated clearly [the difference] between the underlying offense and the money laundering offense, by including an intent requirement," namely "the intent to conceal or disguise the nature, source, ownership and control of the proceeds of the . . . fraud," as distinct from the intent to commit the underlying fraud itself. Even the Supreme Court has warned about the danger of reading the money laundering statute in a way that would "merge" money laundering with the transactions inherent to the underlying crime that generates the proceeds to be laundered because "Congress [did not] want[] a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime."

United States v. Fallon, 61 F.4th 95, 116 (3d Cir. 2023). The money laundering statute's focus upon concealment "would preclude the application of section 1956 to non-money laundering acts such as a defendant's depositing the proceeds of unlawful activity in a bank account in his own name and using the money for personal purposes." United States v. Conley, 37 F.3d 970, 979 (3d Cir. 1994). Our courts should "guard the line between fraud concealment and money laundering concealment." Fallon, 61 F.4th at 116.

Evaluating the evidence in the light most favorable to the Government, the present case involves a "wealth-acquiring crime" that required the division of criminal receipts between Rivera and Ponzo in compensation for the services she provided in connection with the fraudulent applications, much like the payments to the runners and collectors in Santos. The facts alleged in support of the money laundering counts were neither payments to conceal the fraud, nor were they designed to promote future frauds. On the contrary, the way the Government framed the indictment establishes a singular "scheme to defraud" that inevitably required payments to coconspirators in order to sustain the fraud. In short, like Santos and its progeny, the payments used as evidence of money laundering were all integral to the fraud itself. In short, the payments made to Ponzo that were allegedly retained to perpetrate the fraud, in turn, were simple costs of doing business, again in the same manner that Santos described the payments to various participants in that scheme.

Moreover, the allegations of the Indictment do not even mention concealment, but rather merely conclude that it "was further part of the conspiracy that after defendants ERIC RIVERA and ADRIENNE PONZO received the PPP and EIDL loan proceeds, they used the funds to pay personal expenses." (Count 9, ¶9). That is the exact scenario envisioned by the Court in United States v. Conley, where the Third Circuit ruled that §1956 does not apply "to non-money laundering acts such as a defendant's depositing the proceeds of unlawful activity in a bank account in his own name and using the money for personal purposes."

B. The Money Laundering Counts Should Be Dismissed as Multiplicitous As They Rely Upon Proof of the Same Underlying Conduct as the Wire Fraud Counts.

Courts within the Third Circuit have stated that "[m]ultiplicity is the charging of the same offense in two or more counts of an indictment," which in turn, "may lead to multiple sentences for a single violation." United States v. Tartaglione, 228 F. Supp. 3d 455, 459 (E.D. Pa. 2017)(citing United States v. Kennedy, 682 F.3d 244, 254-55 (3d Cir. 2012) and quoting United States v. Carter, 576 F.2d 1061, 1064 (3d Cir. 1978)). To determine if there is a multiplicitous indictment, the Court should first "inquire whether proof of one offense charged requires an additional fact that proof of the other offense does not necessitate." United States v. Caruso, 948 F. Supp. 382, 390 (D.N.J. 1996).

In the present case, the Wire Fraud Counts and the Money Laundering Counts are not multiplicitous per se or by definition, but become so as charged in this Indictment as the only allegations supporting the money laundering counts comprise the same conduct that supports the Wire Fraud Counts.

IV. THIS COURT SHOULD RULE THAT ALL DEFENDANTS ARE PERMITTED TO JOIN IN ALL APPLICABLE MOTIONS MADE BY CO-DEFENDANTS IN THIS CASE.

Defendant Ponzo respectfully requests that the Court permit the defendant to join in all applicable motions made by co-defendants in this case, and vice-versa.

CONCLUSION

Wherefore, for the foregoing reasons the undersigned respectfully request this Honorable Court to GRANT defendant Ponzo's motions.

Respectfully Submitted,

/s/ Troy Archie

Troy A. Archie, Esquire

Counsel for Adrienne Ponzo

Dated: December 2, 2024

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the within Pre Trial Omnibus Motions was served upon the following persons electronically via ECF:

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All Defense Counsel

Dated: December 2, 2024

/s/ Troy A. Archie

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