UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Case No. 5:20-CR-28-MW/MJF

UNITED STATES OF AMERICA

v.

JAMES D. FINCH,

Defendant.
_____/

DEFENDANT FINCH'S MOTION TO DISMISS
THE THIRD SUPERSEDING INDICTMENT

Defendant James D. Finch, by and through undersigned counsel, moves pursuant to Federal Rule of Criminal Procedure 12 to dismiss the Third Superseding Indictment.

I. Procedural Background

On March 16, 2021, the Grand Jury in Tallahassee returned a 43-count Superseding Indictment charging Margo Anderson, Adam Albritton, James Finch, and Antonius Barnes. Count one charged a single conspiracy count for engaging in honest services fraud, alleging violations of 18 U.S.C. §§ 1343, 1346, and 1349. ECF No. 64. The charging document incorporated much of the same confusing, legally flawed, inaccurate language from the initial Indictment, which the Court had previously criticized. ECF No. 60.

The "Manner and Means" section of the conspiracy count covered a period of 66 months and included over 100 paragraphs. It was broken down into nine subheadings—each containing different facts of the alleged "overall" conspiracy of honest services fraud. Each section involved a different set of facts, people, circumstances, and time frames. Thematically, the charging language attempted to first describe a fraud associated with certain post-hurricane cleanup and involving a fraudulent invoicing scheme between Erosion Control Specialist ("ECS") and Michael White, the City of Lynn Haven's former City Manager. The allegations eventually transformed into an attempt to criminalize repeated complaints by Finch about the high cost of proposed construction projects.[1]

On June 7, 2021, Anderson and Finch challenged multiple counts of the Superseding Indictment, arguing that the conspiracy count violated the well-settled doctrine of duplicity. Defendants further demonstrated that other substantive counts

[1] After over two years of litigation, the origin and evolution of this case is now clear. On or about March 17, 2019, state authorities initially arrested City Manager Michael White for assaulting his wife. The state seized White's cell phone, which contained incriminating text messages. Close in time, Mayor Anderson and James Finch discovered startling evidence regarding Derwin White and others committing construction fraud. As "whistleblowers," Anderson and Finch turned this evidence over to the Lynn Haven Chief of Police Ricky Ramie and eventually Bay County (BCSO) Sheriff Tommy Ford and BCSO Major Jimmy Stanford. Within days, Major Stanford, leading the investigation, joined forces with FBI Agent Larry Borghini as outlined in the various BCSO investigative reports. Additional arrests occurred. A federal indictment followed, attempting to go both forward and backward in time, forcing a host of often unrelated events into a single, continuous conspiracy.

were insufficiently pled. ECF Nos. 131, 138, 143, 149, 155. After careful consideration, the Court dismissed Count 1 of the Superseding Indictment on August 19, 2021. ECF No. 185. Following the dismissal of Count 1, and with leave of Court, the government expressed a desire "to take another stab at Count—at the conspiracy allegations" and figure out "how to charge them in light of the Court's ruling," for the third time in this case. ECF No. 187, Hr'g Tr. at 97.

On November 16, 2021, the government obtained a 26-Count Second Superseding Indictment, again charging a virtually identical, duplicitous honest services conspiracy count. ECF No. 214. The remaining counts charged Defendants Finch and/or Anderson with substantive honest services wire fraud (Counts 2–14, 20–24), theft or bribery concerning programs receiving federal funds (Counts 15–17), wire fraud (Counts 18–19), and making false statements (Counts 25–26). *Id.* Yet again, the government incorporated all 122 paragraphs of factually duplicitous allegations in each of Counts 1–25. *Id.*

Following Defendants' challenges to the government's case, the Court issued two Orders on June 13, 2022, addressing Defendants' Motions to Dismiss the Second Superseding Indictment as duplicitous and for governmental misconduct before the Grand Juries. ECF Nos. 293, 294.

In one of the two Orders, the Court granted Defendants' Motions to Dismiss, in part, finding again that the government's conspiracy count was duplicitous. ECF

No. 293. After the second Order of Dismissal, the Court permitted the government to repair this repeat violation by returning to the Grand Jury. The government declined, instead filing a Motion for Reconsideration. ECF No. 317. The Court granted in part and denied in part the government's motion, affirming for the third time its finding that the government's conspiracy charges are impermissibly duplicitous. ECF No. 323.

Despite recognizing for the third time *during the pretrial stages* that the Second Superseding Indictment remained impermissibly duplicitous, the government, in declining to repair the charging document in front of a new Grand Jury, forced Defendant Finch to seek severance of counts related to ECS and WorldClaim. ECF No. 325. Over the government's objection, the Court granted severance of several counts on September 16, 2022. ECF No. 335.

Adhering to the Court's scheduling order, before the Court's Order granting severance, Defendants filed a series of Rule 12(b) Motions to Dismiss the Second Superseding Indictment. ECF No. 329, 330, 331, 332. On October 7, 2022, the government responded to Defendants' motions to dismiss, abandoning the honest services charges that it vigorously had fought to preserve for the last two years. ECF No. 347. The government expressed no opposition to Defendant's Motions to Dismiss the honest services conspiracy charge or any of the honest services wire fraud counts. *See id.* The government also conceded that the false statement count

against Finch was ambiguously pled. *Id.* at n. 3.

At the October 11, 2022, Status Conference, the government announced that it had a "different theory of liability" and that it intended to present to a fourth Grand Jury on October 18, 2022. Hr'g Tr. at 13:21-22, Oct. 18, 2022. On October 18, 2022, another Grand Jury returned a five-count Third Superseding Indictment. ECF No. 355. Indeed, the government abandoned an "honest services" theory, obtaining a § 666 conspiracy-based indictment.

The Court denied without prejudice the pending Motions to Dismiss, ECF No. 348, to grant the parties time to review the five-count indictment attempting to charge based on a "different theory of liability" and to refile defense motions. Hr'g Tr. at 13:21-22, Oct. 18, 2022.[2] Unfortunately, the government's efforts have fallen well short of what the law requires.

II. The non-exhaustive conspiracy count warrants dismissal.

A motion to dismiss tests the legal sufficiency of an indictment. An indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c), and "'each count of an indictment must be regarded as if it were a separate indictment and must stand on its own content without dependence for its validity on the allegations on

[2] At the same time, the government continued to produce *Brady* material that is subject to a separately filed Amended Motion for an Order to Show Cause and Third Motion to Compel. ECF No. 380.

any other count not expressly incorporated.' " *United States v. Schmitz*, 634 F. 3d 1247, 1261 (11th Cir. 2011) (quoting *United States v. Huff*, 512 F. 2d 66, 69 (5th Cir. 1975)). Even when an indictment "tracks the language of the statute, 'it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Schmitz*, 634 F. 3d at 1259-60 (quoting *United States v. Jordan*, 582 F. 3d 1239, 1245 (11th Cir. 2009); *United States v. Bobo*, 344 F. 3d 1076, 1083 (11th Cir. 2003)).

The requirement that an indictment charge each element of an offense extends to elements that are judicially imposed on a statute as well. While it often is sufficient for an indictment to simply track statutory language, the Supreme Court long ago made clear that "it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll*, 105 U.S. 611, 612 (1881).

The problems with a duplicitous count are threefold: "(1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence." *United States v. Schlei*, 122 F.3d 944, 977 (11th Cir. 1997)*; see also United States v. Kamalu*, No. 06-4956, 298

Fed. App'x 251, 254 (4th Cir. 2008) (unpublished) (quoting *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988)). All three legal dangers remain manifestly present in this case.

The government represented that it had a "different theory of [criminal] liability," but Count 1 of the Third Superseding Indictment again charges Anderson and Finch with participating in a conspiracy to commit federal funds program fraud in violation of 18 U.S.C. §§ 371 and 666 by conducting general City business in a manner "favorable to Finch." ECF 355 ¶¶ 6, 10, 12(d), 12(e). The government represented that it anticipated that the Third Superseding Indictment "will not include charges that the Court has severed" and would eliminate "the need for substantial redactions . . . concerning severed counts and factual allegations related solely to them." ECF No. 347 at 2.

The government took nothing from the Court's prior orders and findings on duplicity. It seems clear that the government remains intent on trying virtually the same case, indicating that the ECS and WorldClaim evidence remains relevant to the current Third Superseding Indictment. *See* ECF 238 at 14 (arguing that ECS and World Claim conspiracies "are plainly relevant" to the allegations involving Finch's business interest). In addition, and even more problematic, Count 1 now lacks any allegations that the alleged Finch/Anderson conspiratorial agreements over a six-year period shared a common goal or purpose.

Critically missing from the allegations that ostensibly support the existence of "one" conspiracy are allegations that the various schemes shared a common purpose, depended on each other for their own success, were of a like or even similar nature, or had a substantial overlap in membership. Instead, the government has ***again*** alleged distinct and freestanding allegations of schemes that existed independently of one another, and therefore, if anything, constitute separate conspiracies.

Unlike the prior indictments, which attempted to define parameters of various "projects," the Third Superseding Indictment uses broad, undefined language that encompasses "any business, transaction, and series of transactions of the City in a manner favorable to Finch." ECF No. 355 ¶ 10. Here, there is no legally viable objective that unites the allegations under the umbrella of a single conspiracy. *See United States v. Alexander*, 736 F. Supp. 968, 995 (D. Minn. 1990) (explaining that when complex, multiple-object conspiracies are alleged in a single count, "[t]he linchpin for such a charge to be properly pleaded is the existence of a single common objective").

The government will undoubtedly attempt to argue, yet again, that the conspiracy is limited to "the 17th Street ditch project, a ½ [sic] Sales Tax Contract, hurricane debris disposal, and the rebuilding of municipal facilities damaged by Hurricane Michael" as listed within Paragraph 12(d). But, the government's allegation in Paragraph 12 is non-exhaustive by once more using the legally flawed

"including" language, which the Court has previously criticized and rejected on multiple occasions. ECF Nos. 293 at 6, 323 at 2.

As recent as August 2022, this Court affirmed its finding that the Second Superseding Indictment remained duplicitous by (1) "describing the charged conspiracy as 'including' the three projects that the Court found to form one conspiracy, " and (2) "incorporate[ing] extensive factual allegations about the remaining two projects." ECF No. 323 at 2. Once more the government ignored the Court's carefully crafted findings and conclusions and has included non-exhaustive lists within several paragraphs of the indictment. *See* ECF No. 355 12(b), (d), (e). Respectfully, the Court should again correctly and accurately conclude that the government's draftsmanship of Count 1 of the Third Superseding Indictment "is most naturally read as containing a non-exhaustive list of schemes" ECF No. 293 at 6. And, as a result, it should be dismissed.

Even with the best of judicial intentions, including the careful monitoring of trial evidence and oft-repeated limiting instructions to the jury, the conspiracy count is legally infirm. Finch is now exposed criminally to "any business, transaction, and series of transactions of the City in a manner favorable to Finch." ECF No. 355 ¶ 10. Finch is now criminally responsible for undefined, open-ended conduct, much of which is constitutionally protected. For example, it may very well be "favorable to Finch" to express vehement objection to out-of-control City contracting costs,

which he often did. He often criticized and disagreed with bureaucratic dogma. He often appeared at City Commission meetings (before, during, and after Margo Anderson's election) advocating for more cost-effective decision making. In short, Finch regularly participated in Lynn Haven government activity because he cared deeply about the town in which he was born and raised.[3] And it may be that his participation in government naturally resulted in a "transaction, and series of transactions of the City in a manner favorable to Finch." ECF No 355 ¶ 10. But, how can Finch's advocating for cost-effective, good government, even if his company might have been the beneficiary of such a platform, be subject to criminal liability? In short, how does Finch defend against such an open-ended, undefined, hyper-manufactured allegation? The law simply cannot and does not permit it.

Maybe even more importantly, how will the jury sort through this government-created legal morass? Finch has been doing honest, successful business with Lynn Haven (and other state, local, and federal governments successfully) for

[3] The true measure of James Finch is best reflected by his giving and charitable nature. He is a proud citizen of Lynn Haven, Florida, and a two-time citizen of the year. He routinely donates time, money, and services to his community. In fact, he has paid for the City's Fourth of July fireworks display for the past four decades, donated countless amounts of resources into City projects, and directly supports several charities and individuals with disabilities. He recently donated hundreds of palm trees worth tens of thousands of dollars to the City as replacements. These are merely a few examples of James's good works, and we stand prepared to provide dozens of additional examples when appropriate. Do these same good works fall under the government-manufactured penumbra: "transaction, and series of transactions of the City in a manner favorable to Finch?"

over 40 years. For sure, this evidence will be part of the defense presentation. No jury instruction, no matter how refined, or oft-repeated, will likely prevent the inevitable confusion caused by the government's failed draftsmanship. The conspiracy count should be dismissed.

The government's intentional rejection of the Court's prior admonitions is inexplicable, especially when the criminal (as opposed to civil) stakes are so high. The Court and the defense have worked hard to correct repeatedly the government's "haphazard," "reckless" approach to pleading its case. ECF No. 294 at 45. If this were a civil case, sanctions would have already been imposed. Why should a criminal case be different, especially when the sovereign has proceeded with such "reckless[ness]?" ECF No. 294 at 38. Due to the government's repeated disregard for the Court's findings and conclusions of law, Defendant Finch respectfully suggests that dismissal is the appropriate remedy.[4] In short, the duplicity cannot be chalked up in this case as a harmless pleading defect or remedied by a curative jury

[4] In general, the Court has discretion to fashion appropriate relief "according to the particular harm or harms to be avoided" in a particular case. *United States v. Sturdivant*, 244 F.3d 71, 79 (2d Cir. 2001). "Where an indictment or information contains a duplicitous count, the proper remedy is to dismiss the count or to require the United States to elect which offense it desires to pursue." *United States v. Pleasant*, 125 F. Supp. 2d 173, 176 (E.D. Va. 2000); *see also United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985); *United States v. Roy*, No. 11-CR-109, 2012 WL 47768, at *5 (D. Vt. Jan. 9, 2012); *United States v. Bachman*, 164 F. Supp. 898, 900 (D.D.C. 1958) ("[I]f there are two or more separate and distinct offenses charged in one count, the indictment becomes subject to a motion to dismiss.").

instruction at trial. *See* ECF No. 380 at 29-32 (detailing the government's history of misconduct and impossible legal theories giving rise to a presumption of vindictive prosecution).

Finally, it is worth noting that the latest indictment iteration continues to run afoul of the United States Supreme Court proscriptions. Prosecutorial overreach within the realm of honest services and federal funds fraud has been and continues to be harshly criticized and challenged before the United States Supreme Court.[5] We have previously discussed and outlined the historical limitation of "honest service" bribery, which served as the basis for the government's "theory of liability" for the prior Indictments. *See generally* ECF Nos. 131, 330. The government's "different theory of liability" is now grounded in a different federal statute—18 U.S.C. § 666—which is not without its own limitations.[6]

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[5] On the date of this pleading, the United States Supreme Court will be hearing oral argument regarding prosecutorial overreach within public fraud cases. In *Perrcoco v. United States*, Docket No. 21-1158, the issue is whether a private citizen who holds no elected office or government employment but has informal political or other influence over governmental decision making owes a fiduciary duty to the general public such that he can be convicted of honest services fraud. And, in *Ciminelli v. United States*, Docket No. 21-1170, the issue is whether the United States Court of Appeals for the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute. Both theories of prosecutions, like the "new theory of liability" in the instant case, are worthy of harsh criticism.

[6] Defendant Finch adopts, joins, and incorporates by reference Defendant Anderson's Motion to Dismiss the Third Superseding Indictment.

III. Counts 2 and 3 are legally insufficient.

Counts 2 and 3 of the Second Superseding Indictment charge Finch with violating 18 U.S.C. § 666(a)(2), which makes punishable a person's "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(2).

Specifically, Count 2 states:

COUNT TWO
Bribery (Finch)
18 U.S.C. §666(a)(2)

14. The allegations in paragraphs 1, 2, 4, 5, 12a, 12b, paragraphs 13a through 13e, and paragraph 13g of this Third Superseding Indictment are hereby realleged and incorporated by reference as if fully set forth herein.

15. On or about December 4, 2017, in the Northern District of Florida, and elsewhere, the defendant,

JAMES DAVID FINCH,

did corruptly give, offer, and agree to give a thing of value, to wit, a check in the amount of $5,000, that was valued at $5,000 or more, to Antonius Genzarra Barnes with the intent to influence and reward Antonius Genzarra Barnes, an agent of a local government, the City of Lynn Haven, which received in the one-year period beginning on or about May 1, 2017, benefits in excess of $10,000 under a federal program involving grants, contracts, subsidies, loans, guarantees, and other forms of federal assistance, as described in paragraphs 2b and 2c in connection with a business, transaction, or series of transactions of the City of Lynn Haven, Florida, as described in paragraph 5 and 12b.

In violation of Title 18, United States Code, Sections 666(a)(2) and 2.

ECF No. 355 ¶ 14-15. In short, this is a new 666 count related to a $5,000 loan Finch gave to his childhood friend, former Lynn Haven Commissioner Antonius Barnes.

Count 3 specifically states:

COUNT THREE
Bribery (Finch)
18 U.S.C. §666(a)(2)

16. The allegations in paragraphs 1 through 4, 6 and 7, 11, 12c through 12e, 13f, and paragraphs 13h through 13n, of this Third Superseding Indictment are hereby realleged and incorporated by reference as if fully set forth herein.

17. On or about February 14, 2018, in the Northern District of Florida, and elsewhere, the defendant,

JAMES DAVID FINCH,

did corruptly give, offer, and agree to give a thing of value, to wit, a 2006 ITAS, that was valued at $5,000 or more, to **MARGO DEAL ANDERSON** and her spouse with the intent to influence and reward **MARGO DEAL ANDERSON**, an agent of a local government, the City of Lynn Haven, which received in the one-year period beginning on or about May 1, 2017, benefits in excess of $10,000 under a federal program involving grants, contracts, subsidies, loans, guarantees, and other forms of federal assistance, as described in paragraphs 2b and 2c, in connection with a business, transaction, or series of transactions of the City of Lynn Haven, Florida, as described in paragraphs 1 through 4, 6 and 7, 12c, 12d, 13f, and 13i through 13l.

In violation of Title 18, United States Code, Sections 666(a)(2) and 2.

ECF No. 355 ¶ 16-17. In short, this is the 666 count in which the government alleges

Finch sold a motorhome to Lee Anderson for $70,000.[7]

A. Section 666 criminalizes *quid pro quo* bribery, not mere gratuities.

Section 666 demands the government allege and ultimately prove a *quid pro quo* bribery. Despite the similarities between the general bribery statute, 18 U.S.C. § 201(b), and theft or bribery concerning federal funds, 18 U.S.C. § 666(a), a lopsided split has emerged about whether § 666(a) criminalizes *both* bribery *and* illegal gratuities.[8]

We understand that at first blush, *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010), and its progeny arguably allow for prosecution of a mere gratuity without demonstrating a ***specific*** *quid pro quo* bribery. In *McNair*, the defendants argued that § 666 required proof that a benefit was exchanged for a specific and

[7] The discussion below regarding Count 5, the False Statement count, demonstrates the gross inconsistencies in evidence that may be relevant to the Court's review of the motorhome allegations. *See infra,* Section IV, at 28.

[8] On one side of the issue is the First Circuit, which held that § 666(a) criminalizes only a *quid pro quo* and not mere gratuities. *United States v. Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013); *see also id.* at 39-40 (Howard, J., concurring in part) (concluding that "because it is ambiguous whether [§ 666] criminalizes gratuity," under the rule of lenity, "the defendants cannot be convicted for giving or receiving a gratuity"). Likewise, the Fourth Circuit in *dicta* expressed agreement with the approach eventually taken by the First Circuit. *United States v. Jennings*, 160 F.3d 1006, 1015 & nn.3-4 (4th Cir. 1998). The Second, Sixth, Seventh, and Eighth Circuits have broadly concluded that § 666(a) covers both bribery and illegal gratuities. *See, e.g.*, *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007); *United States v. Porter*, 886 F.3d 562, 565-66 (6th Cir. 2018); *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007).

identifiable official act. The court, at the outset, defined the term "*quid pro quo*" to include an "exchange for, and with the intent that, the employees perform a specific official act." *Id.* at 1184. The court explained that the text of § 666 failed to include language such as, "in exchange for ***an official act***" or "in return for ***an official act***." *Id.* at 1187 (emphasis added). The court broadly concluded that the ***corrupt intent*** requirement of § 666 "does not impose a specific *quid pro quo* requirement," but then later clarified: "simply put, the government is not required to tie or directly link a benefit or payment to a ***specific official act***." *Id.* at 1188 (emphasis added).

We further acknowledge that subsequent Eleventh Circuit courts have apparently attempted to follow *McNair*, permitting § 666 prosecutions to proceed based on expansive and vague bribery or gratuity theories without compelling the government to demonstrate a specific *quid pro quo*. *See United States v. Roberson*, 998 F.3d 1237 (11th Cir. 2021); *United States v. Langford*, 647 F.3d 1309, 1331 (11th Cir. 2011). But, a careful reading of *McNair*, *Langford*, and *Roberson* indicate that their holdings were ***limited*** to whether § 666 required proof of a "specific official act." *See United States v. Roberson*, 998 F.3d 1237, 1246-47 (11th Cir. 2021) (declining to extend the official act requirements and limitations in *United States v. McDonnell*, 579 U.S. 550 (2016), because *McNair* held that § 666 had no such requirements); *United States v. Langford*, 647 F.3d 1309, 1331 (11th Cir. 2011) ("[T]here is no requirement in [18 U.S.C.] § 666(a)(1)(B) or (a)(2) that the

government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a ***specific official act***" (alteration in original) (citing *McNair*, 605 F.3d at 1188)).

To the extent that the Eleventh Circuit opinion in *McNair* arguably suggests that there is ***no*** *quid pro quo* requirement in a § 666 prosecution, the Court of Appeals' analysis is inconsistent with United States Supreme Court current law. In fact, two Circuit Courts have determined that § 666 clearly requires a *quid pro quo* exchange. *See United States v. Hamilton*, No. 21-11157, 2022 WL 3593974, at *3-8 (5th Cir. Aug. 23, 2022) ("We conclude that § 666 does, in fact, require a *quo*; a *quid* alone will not suffice"); *United States v. Fernandez*, 722 F.3d 1, 22 (1st Cir. 2013) (holding that § 666(a) criminalized only a *quid pro quo* and not mere gratuities); *see also id.* at 39-40 (Howard, J., concurring in part) (concluding that "because it is ambiguous whether [§ 666] criminalizes gratuity," under the rule of lenity, "the defendants cannot be convicted for giving or receiving a gratuity").[9]

Section 666 imposes up to 10 years of imprisonment on anyone who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a . . . local . . . government,

[9] The legal distinction is critically important because the government secured the new § 666 charge by instructing the Grand Jury in Pensacola that the motorhome was a "reward that Mr. Finch gave Mrs. Anderson for voting and getting contracts in Lynn Haven." DX 8, Grand Jury Tr. at 9:6-13, Nov. 16, 2021.

or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(2).

The statutory text, with its focus on "corrupt" actions undertaken with "an intent to influence or reward" covered agents "in connection with any business" or "transaction," calls for a *quid pro quo*. The thing of value (i.e., the *quid*) must be provided in connection with (*pro*) "business" or "transactions" (i.e., the *quo*), and the presence of a *quid pro quo* is what makes the arrangement "corrupt" and avoids making every campaign contribution or other gratuity based on past effective service a felonious "reward."

The context and origins of § 666 strongly reinforce this conclusion. Section 666 was enacted to augment 18 U.S.C. § 201, the federal-officer corruption statute, and extend it, in part, to agents of state, local, tribal, and even private organizations that receive federal benefits. *See Salinas v. United States*, 522 U.S. 52, 58 (1997). Section 201 generally applies only to federal officials and contains two distinct subsections, one proscribing *quid pro quo* bribery and one proscribing gratuities. *See generally United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999). Subsection (b) of § 201 proscribes bribery and requires a showing that something of value was "corruptly" given or received with intent, *inter alia*, "to influence any official act." Subsection (c) of § 201 proscribes gratuities and requires only a

showing that something of value was given or received "for or because of any official act performed or to be performed by" a public official. Section 201 makes clear that Congress viewed actual *quid pro quo* bribery and unlawful gratuities as very different offenses, with the former treated as a substantially more serious offense. Bribery carries a sentence of up to 15 years, while providing an unlawful gratuity even to a high-ranking federal official carries a maximum sentence of just two years. *See* 18 U.S.C. § 201(b), -(c); *Sun–Diamond*, 526 U.S. at 405 (the respective punishments "reflect their relative seriousness").

The Supreme Court has held that the key distinction between the two § 201 crimes is the existence of a *quid pro quo*. The "corruptly" and "influence" language in the bribery subsection requires a "*quid pro quo*," meaning "a specific intent to give or receive something of value in exchange for an official act." *Sun–Diamond*, 526 U.S. at 404-05. By contrast, the "for or because of" language in the gratuities subsection captures "mere[]" rewards "for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id.* at 405.

Both the language Congress borrowed from § 201 and the penalties § 666 imposes strongly reinforce the conclusion that the latter reaches only *quid pro quo* corruption and not mere gratuities. Congress borrowed the word "corruptly" from § 201(b)'s prohibition on bribery and imposed a maximum sentence of 10 years. The

former word was critical to the Supreme Court's conclusion in *Sun-Diamond* that § 201(b)'s bribery prohibition requires a *quid pro quo*. And, of course, "corruptly" is absent from § 201(c)'s less draconian prohibition on gratuities. Congress's deliberate action in borrowing a phrase that demands a corrupt exchange plainly supports reading § 666 to reach only *quid pro quo* corruption. *See United States v. Fernandez*, 722 F.3d 1, 22 (1st Cir. 2013); *see also United States v. Grace*, 568 F.App'x 344, 350 (5th Cir. 2014) (noting that "[t]he decisive factor" under § 666 is "that the public official has 'corruptly entered into a *quid pro quo*, knowing that the purpose behind the payment that he has received, or agreed to receive, is to induce or influence him in an official act' "). The use of the word "corruptly" in § 666(a) "brought the statute closer to § 201's bribery provision," § 201(b), which punishes one who "corruptly gives, offers or promises anything of value to any public official." *Fernandez*, 722 F.3d at 22; 18 U.S.C. § 201(b).

The penalties imposed for a violation of § 666 underscore that Congress was targeting *quid pro quo* corruption, rather than capriciously punishing gratuities to nonfederal officers five times more severely than comparable gratuities for federal officers. The 10-year maximum sentence Congress chose for violations of § 666 comes much closer to the 15-year maximum sentence for *quid pro quo* bribes of federal officials than the much lower 2-year maximum for gratuities directed at federal officials. Given that § 201 is generally limited to federal officials, while

§ 666 extends not just to state, local, and tribal officials but to nongovernmental officials who work for numerous private organizations that need only receive modest amounts of federal benefits, a congressional decision to treat bribery of federal officials slightly more severely than comparable efforts to bribe the wide range of agents within the ambit of § 666 makes perfect sense. In short, if the punishment is to fit the crime, then the crime punished by § 666 is *quid pro quo* corruption and not mere gratuities.

Making matters worse, in contrast to § 201(c), the broader range of agents covered by § 666 includes countless state, local, and tribal officials who stand for election and receive campaign contributions that are both constitutionally protected and easily characterized as gratuitous rewards for past actions. Restricting § 666 to *quid pro quo* bribery eliminates the countless dubious and/or constitutionally problematic applications that would be entailed by a gratuity prohibition applicable to more than a million agents of hundreds of thousands of different governments and organizations. *Cf. Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (limiting honest services fraud to bribery and kickbacks to avoid vagueness concerns).

Two additional principles strongly support limiting § 666 to *quid pro quo* bribery. First, federal criminal statutes "must be read consistent with principles of federalism inherent in our constitutional structure." *Bond v. United States*, 572 U.S. 844, 856 (2014). "[T]raditional state authority" extends not only to "the punishment

of local criminal activity," *id.* at 858, but also to the "regulat[ion]" of "the permissible scope of interactions between state officials and their constituents," *McDonnell*, 579 U.S. at 576. Thus, in the absence of a clear statement to the contrary, courts must choose a "more limited interpretation" of federal criminal statutes—and especially federal public-corruption statutes—rather than construe them "'in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" *Id.*; *see also Bond*, 572 U.S. at 858 ("[I]f the Federal Government would 'radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit' about it.").

Second, if this Court had any lingering doubt, the rule of lenity should resolve it. Under that "venerable" doctrine, "ambiguous criminal laws [must] be interpreted in favor of the defendants subjected to them," in part because "no citizen should be . . . subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008). Whatever else can be said about § 666(a), it does not unambiguously prohibit gratuities, which is enough to limit it to *quid pro quo* bribery. *See Fernandez*, 722 F.3d at 40 (Howard, J., concurring inpart and concurring in the judgment) (applying rule of lenity because "it is ambiguous whether Section 666 criminalizes gratuities").

Counts 2 and 3 do not sufficiently allege a legally cognizable claim of *quid*

pro quo bribery. And even if the Court decides that section 666 does not require one as a matter of law, one is required in this case based on all the facts and circumstances.

B. Count 2

Count 2 charges Finch with violating § 666(a)(2). Count 2 alleges that Finch corruptly gave, offered, or agreed to give Commissioner Barnes a check for $5,000 on or about December 4, 2017, with the intent to influence and reward Barnes "in connection with a business, transaction, or series of transactions" of the City "as described in 5 and 12b." ECF No. 355 ¶ 15. However, paragraphs 5 and 12b do not identify the item of business or transaction that is the subject of the alleged fraudulent scheme. *Id.* ¶ 5 (merely describing the business, transaction, or series of transactions as "Finch's matters"), 12(b) (containing an "including" list of non-exhaustive actions purportedly associated with Barnes).

Count 2 does not identify which, if any, of these matters is the item of business, transaction, or series of transactions for which Finch allegedly offered, gave, or agreed to give in relation to the $5,000 loan. The utter lack of any detailed allegation is not insignificant.

Defendant Finch understands that evidence of an offer or agreement may be express or implied. But, that flexibility does not mean that the government can throw legal caution to the wind by failing to describe the details of who, where, when, and

how—especially in light of the regular and routine yellow-light caution the United States Supreme Court continues to flash in the bribery and fraud context.

In this case, there are no allegations of a promise or agreement in the Third Superseding Indictment. *See* ECF No. 355. There are no allegations of ***when*** a promise, offer, or agreement was made. There is no description of ***how*** these individuals expressed their intentions or understanding. There is no detail whatsoever as to the ***nature*** of an alleged agreement or ***what*** was expected. Although "in some circumstances, a wink and a nod, an exchange of monies, and a subsequent vote on a bill likely will be sufficient," *United States v. Silver*, 948 F.3d 538, 558 n.10 (2d Cir. 2020), there are no allegations of a wink and a nod in this case.

In fact, in a videotaped discussion between Commissioner Barnes and former FBI Agent Borghini, Barnes explained the purpose of the loans. Barnes explained to the government those loans "had nothing to do with" any commission vote. His business with Finch and his service to the City of Lynn Haven "stayed separate." At the conclusion of the interview, Barnes promises that he was never "up to selling a vote or anything of that nature." It was a loan to a friend, nothing more. Like Finch,

Barnes is a long-time citizen of Lynn Haven, and his actions were aligned with "the best interest of the City."[10]

In short, the allegations are devoid of any specifics as to Finch's alleged promise, offer, or agreement.

C. Count 3

Count 3 shares the same fatal flaws. Count 3 alleges that Finch corruptly gave, offered, or agreed to give Anderson a motorhome on or about February 14, 2018, with the intent to influence and reward Anderson "in connection with a business, transaction, or series of transactions" of the City "as described in paragraphs 1 through 4, 6 through 7, 12c, 12d, 13, f, and 13i through 13l." ECF No. 355 ¶ 17. Again, the referenced paragraphs do not identify the item of business or transaction that is the subject of the alleged fraudulent scheme.

And, as identified and described by Anderson in her Motion to Dismiss, the 17th Street ditch project and the half-cent sales tax contract came to fruition before

[10] In October 2021, Barnes entered into a plea agreement with the government regarding his actions unrelated to the allegations against Finch. Barnes agreed to pled guilty to Count One (False Statement to a Federally Insured Institution) of an Information in return for the government's agreeing to dismiss charges against him in *United States v. Anderson, et al.*, Case No. 5:21-CR-28 (N.D. Fla.). *See United States v. Barnes*, Case No. 5:21-CR-00031, (N.D. Fla), ECF No. 13. The Statement of Facts that the government had Barnes sign included tortured language that was unrelated to providing a false statement to a federally insured institution. *See id.* at ECF No. 12. In fact, the government-drafted document wholly contorts Barnes' prior sworn testimony, allowing him to speculate improperly as to what Finch's intentions may have been when Finch provided a loan to Barnes. *Id.*

February 14, 2018. No factual basis is alleged to suggest that there was an offer of the motorhome as a bribe or "reward" at the time those matters were before the City. How could Finch's or Anderson's conduct associated with the 17th Street ditch project and the half-cent sales tax contract have been corrupted by a distant motorhome transaction? In contrast, the hurricane debris projects and the rebuild project were results of Hurricane Michael's landfall in October 2018. Neither were reasonably known or foreseeable on February 14, 2018, and thus Finch could not have offered or agreed to offer a motorhome to influence unknown matters.

The Fifth and Sixth Amendments require that an indictment provide notice of charges that "sufficiently apprises the defendant of what he must be prepared to meet" at trial. *Russell v. United States*, 369 U.S. 749, 763 (1962); *see, e.g.*, *United States v. Outler*, 659 F.2d 1306, 1310 n.5 (5th Cir. Unit B 1981) ("The defendant must be informed of which transaction, or facts, give rise to the alleged offense.").[11]

[11] *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) ("In the early Republic, if an indictment or 'accusation . . . lack[ed] any particular fact which the laws ma[d]e essential to the punishment,' it was treated as 'no accusation' at all." (alteration in original) (quoting 1 J. Bishop, *Criminal Procedure* § 87, at 55 (2d ed. 1872))); *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."); *United States v. Matthews*, 178 F.3d 295, 301 (5th Cir. 1999) (vacating conviction where element was not included in the indictment); *United States v. Kingrea*, 573 F.3d 186, 193 (4th Cir. 2009) ("'[A] sufficient indictment must contain the elements of the offense *and* apprise the defendant of the nature of the charge.' While the notice requirement is based on a defendant's 'Sixth Amendment right to be informed of the nature and cause of the accusation,' the requirement that all elements of the offense be present

Consequently, "[a] count of an indictment is 'repugnant' and must be dismissed if there is a 'contradiction between material allegations' in the count." *United States v. Cisneros*, 26 F. Supp. 2d 24, 52 (D.D.C. 1998) (quoting *United States v. Briggs*, 54 F. Supp. 731, 732 (D.D.C. 1944)). The reason for dismissing the charges is that the inconsistency prevents the defendants from anticipating the evidence that will be used at trial and preparing to meet it. *See United States v. Cantrell*, 612 F.2d 509, 511 (10th Cir. 1980) (dismissing count); *United States v. Conde*, 309 F. Supp. 2d 510, 512 (S.D.N.Y 2003) (dismissing count because otherwise "defendant's ability to prepare for trial would be seriously impaired"); *United States v. Eason*, 434 F. Supp. 1217, 1221 (W.D. La. 1977) (where government presented three inconsistent charges, government was ordered to elect which two to dismiss).

IV. Count 5 remains legally ambiguous.

To start, the government previously conceded that the so-called Finch false statement count, Count 26 of the Second Superseding Indictment, was ambiguously pled. ECF No. 347 at n. 3. The Third Superseding Indictment made no material change to the false statement allegations contained in Count 5. Accordingly, Finch repeats his challenges to the False Statement count as alleged in the Third Superseding Indictment.

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in the indictment 'derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present.'" (quoting *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc)).

For Finch to be found guilty of 18 U.S.C. § 1001, the government must prove each of the following elements beyond a reasonable doubt: first, that Finch made the statement or used the documents as charged; second, that the statement or document was false; third, that the falsity concerned a material matter; fourth, that Finch acted willfully, knowing that the statement or document was false; and fifth, that that false statement or false document was made or used for a matter within the jurisdiction of a department or agency of the United States. *See Pattern Criminal Jury Instructions for the Eleventh Circuit*, O36.

An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States,* 418 U.S. 87, 117 (1974); *United States v. Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling*, 418 U.S. at 117. On a motion to dismiss, the question is "whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense." *United States v. Stepanets*, 879 F.3d 367, 372 (1st Cir. 2018) (quoting *United States v. Savarese*, 686 F.3d 1, 7 (1st Cir.

2012)).

A. Count 5 lacks legal specificity required to charge a false statement.

Count 5 is legally infirm because it lacks specificity regarding alleged falsity and does not provide Finch sufficiently specific notice of his criminal conduct. This investigation involved the government's formulating an ambiguous legal conclusion about Finch's statements and records provided to the FBI. While the government alleges that Finch lied when providing a statement to former FBI Special Agent Lawrence Borghini on July 13, 2020, the Third Superseding Indictment fails to state the factors or truth the government relies upon to make the legal conclusion. Count 5 does not fairly inform Finch of his alleged illegal conduct. Finch asserts that Count 5 is insufficient because he is unable—from looking at the four corners of the document—to answer the following:

- Does Count 5 allege that Finch falsely stated that he **sold** a motorhome?
- Does Count 5 allege that Finch falsely identified **the buyer** of the motorhome?
- Does Count 5 allege that Finch falsely stated the **sale price** of the motorhome?
- Does Count 5 allege that Finch falsely stated how he **received payment** for the motorhome?
- Does Count 5 allege that the bill of sale falsely states the **agreed upon terms** of the transaction?
- Does Count 5 allege some combination of **all or part** of the above?

As drafted and charged, how will the Court fairly instruct the jury on the ambiguous and unspecific allegations in Count 5? Will the government be tasked with proving beyond a reasonable doubt that Defendant Anderson was a buyer of the motorhome at the time of the sale, and if so, under what legal standard and criteria? Will the jury be tasked with making a legal conclusion as to Defendant Anderson's legal entitlement to items and property purchased by her husband without her knowledge or involvement, and if so, pursuant to what criteria? The Second Superseding Indictment fails to provide Finch with sufficient information to "prepare a defense and to invoke double-jeopardy protections to forestall a later trial on the same charges." *Stepanets*, 879 F.3d at 373. Accordingly, because of the government's grossly ambiguous drafting leaves a defendant groping around in the proverbial dark, the Court should dismiss Count 5.

B. Count 5 fails to state a crime.

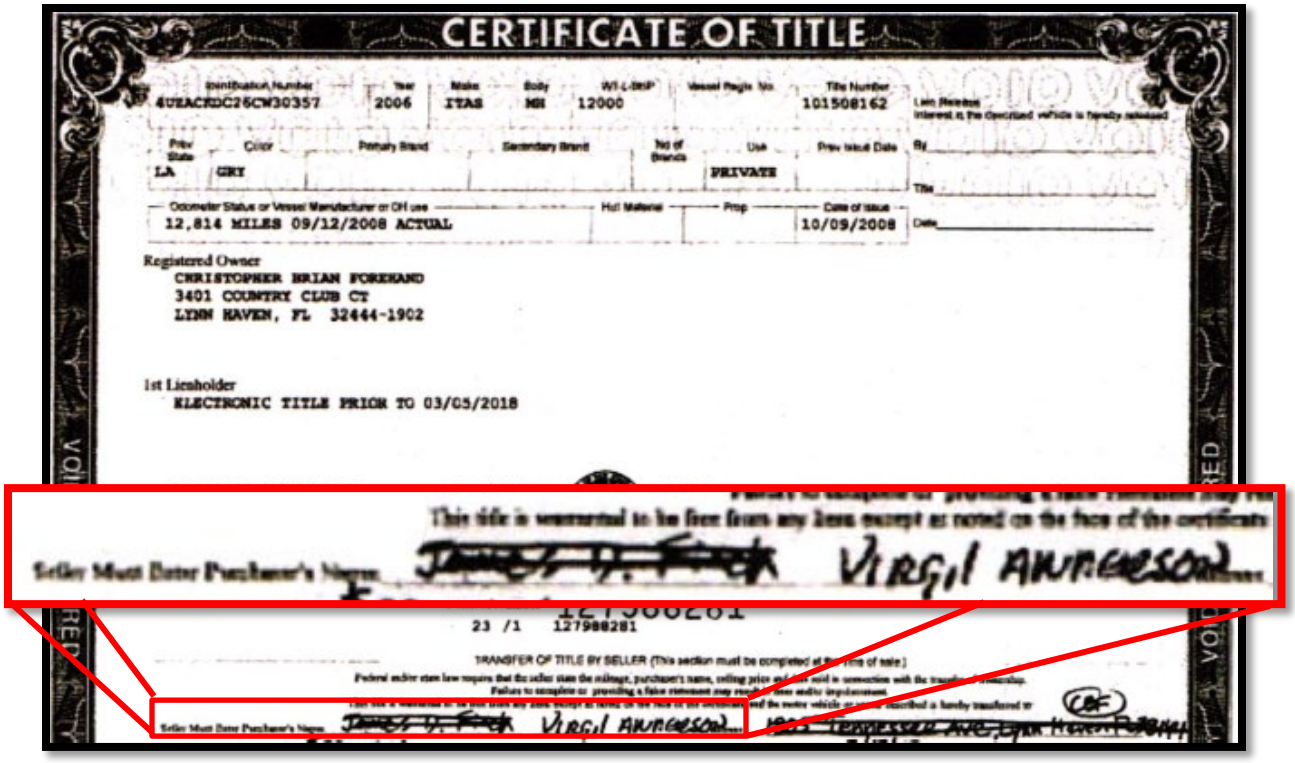
Second, and equally important, Count 5 fails to state a crime and dismissal is warranted because (1) the Third Superseding Indictment does not "track" Finch's actual statement to the FBI *per the government's own evidence* and (2) Finch's statements are objectively true. In Count 5, the government alleges that Finch made the following statement: that he "sold a 2006 ITAS Motorhome to MARGO DEAL ANDERSON's husband for a purchase price of $70,000" ECF No. 355 ¶ 21(a).

The government's discovery and Borghini's sworn testimony about Finch's

statements are internally inconsistent. Indeed, the government has not presented and cannot present a unified version of Finch's alleged July 13, 2020, statement. The government has improperly pieced together select portions of Finch's statement and manufactured an ambiguous violation of 18 U.S.C. §1001(a)(2).

If the false statement concerns whether Finch **sold** the motorhome: the FBI 302 of Finch's interview on July 13, 2020, claims, "Finch stated . . . he had purchased [the motorhome] from Chris Forehand." The government's discovery shows Finch's name was on the title documents from Chris Forehand.[12]

[12] The Court will recall that Chris Forehand was and is the City's outside engineer. He was interviewed multiple times by the government and supposedly was and is a witness for the government. He was subpoenaed to appear at the last hearing on the Motions to Dismiss on March 31, 2022. He appeared, but apparently through his attorney, declined to testify under oath in open court without a grant of immunity. After much back and forth with the government, the government informed the defense that Forehand's counsel indicated that Forehand's testimony "would not be helpful to the government."


CERTIFICATE OF TITLE

4UEACRDC26CW30357 | 2006 | ITAS | MH | 12000 | 101508162

Prev State: LA | Color: GRY | Use: PRIVATE

12,814 MILES 09/12/2008 ACTUAL | Date of Issue: 10/09/2008

Registered Owner
CHRISTOPHER BRIAN FOREHAND
3401 COUNTRY CLUB CT
LYNN HAVEN, FL 32444-1902

1st Lienholder
ELECTRONIC TITLE PRIOR TO 03/05/2018

This title is warranted to be free from any liens except as noted on the face of the certificate

Seller Must Enter Purchaser's Name: [redacted] Virgil Anderson

23 /1 127988281

TRANSFER OF TITLE BY SELLER (This section must be completed at the time of sale.)

Federal and/or state law requires that the seller state the mileage, purchaser's name, selling price and date sold in connection with the transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

Seller Must Enter Purchaser's Name: [redacted] Virgil Anderson

Margo Anderson was not interviewed about the motorhome transaction. Lee Anderson, her husband, was not interviewed by any law enforcement officer. Forehand and Finch apparently were the only two people who were interviewed about the motorhome, and their statements are not inconsistent with the fact that Finch purchased the motorhome from Forehand and Finch later sold the motorhome to Lee Anderson. Thus, the discrepancy and ambiguity, even in the government's own evidence, demonstrate that the allegation fails to state a crime, and this statement cannot be objectively false.

If the false statement concerns the **identity of the buyer**: the FBI 302 of Finch's interview on July 13, 2020, claims, "Finch stated that he sold the Andersons a motorhome." James Finch 302 (July 13, 2020). But, Borghini's notes, which were

withheld until July 17, 2021, contradict the 302. The suppressed Borghini notes indicate that Finch stated that he "sold [the motorhome] to Lee Anderson," not that "he sold the Andersons a motorhome . . . ."[13] The allegations clearly do not "track" Finch's statement regarding the **identity of the buyer**. Therefore, the allegation fails to state a crime, and the statement cannot be objectively false.

If the false statement concerns the **sale price** of the motorhome: the FBI 302 of Finch's interview on July 13, 2020, claims "Finch stated . . . that he sold . . . a motorhome for $70,000 – $75,000." The allegations in Count 5 clearly do not "track" Finch's statement regarding the **sale price** of the motorhome. Additionally, the government's discovery contains no evidence to the contrary and none was presented to the Grand Jury. Again, this allegation fails to state a crime and cannot be objectively false.

If the false statement concerns the **amount received** by Finch and **when**: the FBI 302 of Finch's interview on July 13, 2020, stated he was paid in "cash" and "check." The government claims this statement is objectively false because Borghini testified that he could not "find any money, any cash being withdrawn from

[13] The government's twisted narratives presented to multiple Grand Juries and the public have changed repeatedly. At one point, it was alleged that Finch "arranged to have [Chris Forehand] sell" the motorhome to Margo Anderson. ECF No. 1 ¶ 54; ECF No. 64 ¶ 81. In the same charging documents, the allegations changed from Finch's selling the motorhome to Margo Anderson to her "receiving a free Motorhome" from Finch. ECF No. 1 ¶ 57; ECF No. 64 ¶ 84.

the Andersons' accounts or anything like that going to Mr. Finch in July 2018 or anytime thereafter." Grand Jury Tr. 65:18-22, Nov. 16, 2021; *see also id.* 67:6-11 (Q: And could you find any money in this time frame with respect to being taken out of—cash being taken out or other checks or anything like that for this? A: I could find no funds that the Andersons converted to cash or had any cash that was paid to Mr. Finch."). This claimed justification for charging a false statement may be the most troubling of all, reflecting the way this case has been investigated and presented throughout.

The government's conclusory leaps and the presentation of evidence created a false dichotomy. ***Just because Borghini could not locate or trace a specific cash transaction does not objectively prove that it did not or could not have happened.*** Indeed, the inherent nature of cash transactions militates against the government's flawed and impossible conclusions about what Finch knew to be true. *See e.g.*, *United States v. Vesaas*, 586 F.2d 101, 103 (8th Cir. 1978) (dismissing § 1001 charge alleging that defendant falsely claimed he did not own property in joint tenancy with his deceased mother; indictment failed to allege a false statement because it is legally impossible to own property in joint tenancy with a deceased person).

In other words, the government has presented no objective evidence or allegation that disproves Finch's statements regarding the **amount received** for the sale of the motorhome. Therefore Count 5 fails to state a crime and should be

dismissed.

Numerous courts of appeals have upheld the dismissal of indictments or counts charging false statement offenses where the government alleges a falsity that fails to "track" the statement alleged to be false. *See United States v. Finucan*, 708 F.2d 838, 846-48 (1st Cir. 1983) ("[I]n order for a charge of perjury to be sustained, the 'true' paragraph must 'track' the false testimony." (quoting *United States v. Tonelli*, 577 F.2d 194, 199 (3d Cir. 1978))); *see Tonelli*, 577 F.2d at 198-99 (indictment which alleged that defendant falsely claimed he never "handled the transmission" of checks by stating that he "never handled any checks" failed to allege a false statement); *United States v. Gatewood*, 173 F.3d 983, 986-88 (6th Cir. 1999) (dismissing § 1001 charge alleging that defendant falsely claimed he made "full payment" to certain subcontractors by certifying "that he had made payments" to those subcontractors and explaining that "[t]he indictment presents a false dichotomy, because certifying that one has made payments to subcontractors is not inconsistent with having yet to pay the subcontractors in full"); *United States v. Williams*, 536 F.2d 1202, 1206-07 (7th Cir. 1976) (dismissing perjury count which alleged that defendant falsely claimed she saw her co-defendant's husband at a particular address on a particular day by answering "yes" when asked if she "continue[d] to see" him at that address on that day); *United States v. Cowley*, 720 F.2d 1037, 1043-44 (9th Cir. 1983) (concluding that perjury count failed to state an

offense where count alleged that defendant falsely claimed he had been given checks by stating that he had been given an envelope); *cf. United States v. Good*, 326 F.3d 589, 591-92 (4th Cir. 2003) (affirming dismissal of § 1001 charge where indictment charged defendant with falsely stating she had not been convicted of certain specified crimes on an employment application; although defendant had been convicted of embezzlement, embezzlement was not one of the listed crimes). Here, dismissal is justified based on the lack of specificity, the internal inconsistencies, as well as the recklessness and lack of precision with which the government is seeking to hold a citizen accountable criminally.

For a conviction to be sustained under § 1001(a)(3), it is imperative that the "writing or document" be "false." *United States v. Blankenship*, 382 F.3d 1110, 1132 (11th Cir. 2004) ("Based on our analysis of both the text of § 1001 and caselaw, it appears there are only two ways in which a contract can possibly be considered "false."). First, a contract is false if a person forges or alters it. *Id.* This is not the case here. The only other way in which a contract can be "false" is if it contains factual misrepresentations. *Id.* However, a "contract is a document that serves only to establish a legal relationship between two parties; it gives each party nothing more than a legal expectancy in having the other party either perform or (generally) respond in damages." *Id.* (citations omitted). A contract, like the motorhome's bill of sale, "is nothing more than an instrument giving each party the legal right to do

so; how they choose to exercise that power (or whether they ever intended to exercise it at all) is a matter beyond the four corners of the document, and has no impact on whether the contract itself is 'false.'" *Id.* at 1134.

The contracts at issue actually created the legal rights they purported to create; the creation of such legal rights is the sole purpose of a contract. "Presentation of a contract to a third party does not convey and implicitly guarantee either that the parties to the contract intended to perform, or that they intended to actually enforce their contractual rights. A contract is nothing more, and nothing less, than what it actually states." *Id.* Even if the government subjectively disbelieves the parties' intent or motivations for entering into a written agreement, "this does not render the contract 'false'" *Id.*[14]

V. Conclusion

For the reasons stated above, the Third Superseding Indictment is legally defective and should be dismissed for failing to allege or incorporate sufficient, specific facts and for failing to state an offense.

As pled by the government, Count 1 requires an allegation of bribery that is legally specific enough for the defendant to adequately prepare his defenses. Here,

[14] Ignoring objective truths about the motorhome transaction to force a narrative and "different theory of liability" is additional evidence of vindictiveness. ECF No. 380 at 29-32 (detailing the government's history of misconduct and impossible legal theories giving rise to a presumption of vindictive prosecution).

alleging an intent to influence or act in favor of unlimited and non-exhaustive "interest" is not legally sufficient. Likewise, if Counts 2 and 3 are permitted to charge an illegal gratuity under § 666 and the government need not allege or prove an actual *quid pro quo* bribe or an official act *quo*, then § 666 is truly boundless, and decades of federal prosecutions asserting expansive theories under other statutes and Supreme Court cases reining in those prosecutions were all beside the point. Because that cannot plausibly be what Congress intended with respect to § 666, and because the Constitution would not countenance such a result in all events, Count 2 and 3 should be dismissed.

Because the Third Superseding Indictment is fatally flawed, it must be dismissed. Respectfully, Defendant Finch urges that the Court strongly consider dismissal ***with prejudice*** as the government should not get unlimited bites at the apple.

LOCAL RULE 7.1(K) REQUEST FOR HEARING

Pursuant to Local Rule 7.1(K), Defendant James D. Finch respectfully requests that the Court set this matter for hearing because oral argument would assist the Court in resolving the issues raised in this Motion to Dismiss. The undersigned estimates that the defense would need approximately 90 minutes for argument.

Respectfully submitted,

/s/ Guy A. Lewis
Guy A. Lewis
Florida Bar No. 623740
Jeffrey M. Forman
Florida Bar No. 105135
The Law Offices of Guy A. Lewis PLLC
12575 SW 67th Avenue
Pinecrest, Florida 33156
954-688-6340
glewis@lewistein.com
jforman@lewistein.com

Counsel for Defendant,
James D. Finch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that a true and correct copy of the foregoing has been served electronically via the CM/ECF System on all counsel of record.

/s/ Guy A. Lewis
GUY A. LEWIS