IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	§	
v.	§	Criminal Case No. 2:17-cr-00563-JD
KENNETH SMUKLER,	§	
Defendant.	§	

MEMORANDUM IN SUPPORT OF DEFENDANT KENNETH SMUKLER'S MOTION TO DISMISS COUNTS III, IV, V, VI, X AND XI FOR FAILURE TO ALLEGE THAT MR. SMUKLER WILLFULLY CAUSED ANY FALSE FEC FILINGS

The Superseding Indictment contains two groups of charges. Counts One through Five charge Defendant Kenneth Smukler with a variety of election-law offenses stemming from the 2012 reelection campaign of Congressman Robert Brady ("Brady Charges"). Counts Six through Eleven charge Mr. Smukler with election-law offenses arising from the 2014 congressional campaign of Marjorie Margolies ("Margolies Charges").[1] Both groups of charges accuse Mr. Smukler of willfully causing the campaigns to make allegedly false statements to the Federal Election Commission ("FEC"). These statements to the FEC form the basis for Counts Three, Four, and Five of the Brady Charges and Counts Six, Ten, and Eleven of the Margolies Charges. All of the counts based on allegedly false statements to the FEC fail to state an offense and should be dismissed.

In the Brady Charges, the Superseding Indictment contains no allegations *about Mr. Smukler* that relate to the allegedly false statements made to the FEC in any way. All of the statements at issue were made in formal FEC reports by the campaigns of Congressman Brady

[1] Congressman Brady and Ms. Margolies are referenced in the Superseding Indictment as "Candidate A" and "Candidate C," respectively.

and his Democratic primary challenger, Jimmie Moore. Mr. Smukler did not work for either campaign; he provided outside consulting services to the Brady campaign. Under the charged statutes, only the official treasurer of a campaign or someone who personally "prepare[d] or file[d]" an FEC report can be directly liable for a false statement in that report. *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994). Because Mr. Smukler obviously did not fall into either category, the government is attempting to prosecute him *indirectly* by alleging that he "willfully caused" both campaigns to file false FEC reports within the meaning of 18 U.S.C. § 2(b). *See* Superseding Indictment ("Indictment"), ECF No. 62, Count III ¶ 2; Count IV ¶ 2; Count V ¶ 2. But the Superseding Indictment contains no allegation that Mr. Smukler gave campaign officials (or anyone else) instructions about what to write (or not write) in the FEC reports, that he knew which campaign officials were responsible for FEC filings, or that he communicated with the Brady or Moore campaigns on the subject of FEC filings in any way. In other words, the Superseding Indictment contains no allegations that amount to Mr. Smukler "willfully causing" false FEC reports by the Brady or Moore campaigns.

As for the Margolies Charges, Counts Six and Ten are based on FEC reports that the Margolies campaign submitted in which it characterized certain vendor repayments from Mr. Smukler's companies as "refunds," but that characterization was *not false*. It is clear on the face of the Superseding Indictment that the vendor repayments at issue were refunds as that term is commonly understood, and the FEC specifically instructs campaigns to report such vendor repayments as "refunds." Count Eleven of the Margolies Charges accuses Mr. Smukler of "corruptly influenc[ing]" a federal agency proceeding by causing an attorney to write a letter to the FEC containing a false statement, *id.* Count XI ¶ 2, but even if the statement in the letter was

false, there is no allegation that Mr. Smukler "influenced" the attorney to make the statement, as required by the statute.

Because the Superseding Indictment contains no allegations in support of essential elements of the charges in Counts Three, Four, Five, Six, Ten, and Eleven, those counts must be dismissed for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). At a minimum, several of those counts fail to adequately apprise Mr. Smukler of the misconduct alleged and must be dismissed on that independent basis. *See Russell v. United States*, 369 U.S. 749 (1962); Fed. R. Crim. P. 7(c)(1).

I. THE BRADY CHARGES

A. BACKGROUND

The Brady Charges revolve around Congressman Brady's alleged agreement with Mr. Moore, his challenger in the 2012 Democratic congressional primary, to pay Mr. Moore to drop out of the race. Counts Three, Four, and Five of the Brady Charges relate to how the Brady and Moore campaigns reported (or did not report) those payments to the FEC.

1. The Agreement Between Congressman Brady and Mr. Moore

According to the Superseding Indictment, in February 2012, Congressman Brady and Mr. Moore had a "conversation" in which they "agreed" that Congressman Brady would use some of his campaign funds to pay off Mr. Moore's campaign debts "in exchange for Moore's agreement to withdraw from the primary election." Indictment, Count I ¶¶ 16(a)–(b). Congressman Brady and Mr. Moore allegedly also agreed that payments from Congressman Brady's campaign to Mr. Moore's campaign "would be disguised." *Id.* ¶ 16(b). Mr. Moore announced his withdrawal from the primary on February 29, 2012. *Id.* ¶ 16(c). In March 2012, Mr. Moore and Carolyn Cavaness, a member of Mr. Moore's campaign staff, allegedly prepared an estimate of their outstanding campaign debts for Congressman Brady, and Congressman Brady subsequently

informed Mr. Moore, through an unidentified intermediary, that he would be willing to pay off $90,000 of those debts from his own campaign funds. *Id.* ¶¶ 16(d)–(e). Despite Congressman Brady's pivotal role as one of only two parties to the agreement, he has not been charged in this investigation.

2. Defendant Smukler's Alleged Involvement

Mr. Smukler is not alleged to have participated in any of these conversations or to have known about the *quid pro quo* agreement between Congressman Brady and Mr. Moore. Mr. Smukler was an outside consultant to the Brady campaign, not an employee of either the Brady or Moore campaigns. *Id.* ¶ 6. The Superseding Indictment first references an overt act by Mr. Smukler in an allegation describing a period from March to June 2012—that is, after the alleged agreement between Congressman Brady had already been consummated and after Mr. Moore had already dropped out of the primary on February 29, 2012. *Id.* ¶ 16(f). During that period, Mr. Smukler allegedly informed Mr. Moore that the Brady campaign would make three separate payments to the Moore campaign to help pay off its debts: two payments in exchange for a poll analyzing the primary matchup between Congressman Brady and Mr. Moore, and a third payment in exchange for consulting services to be performed by Ms. Cavaness. *Id.* ¶¶ 16(b), (f).[2] The government alleges that the poll had no value to the Brady campaign and that the consulting services were never performed, but it does not allege that Mr. Smukler knew either of those alleged facts. *See id.* ¶¶ 16(f), (i), (y). Mr. Smukler allegedly told Mr. Moore to create an entity separate from the Moore campaign to receive the payments, and Mr. Moore allegedly directed

[2] The Superseding Indictment speaks of "consulting services" generally and does not specify that the consulting services were purportedly to be performed by Ms. Cavaness. *See, e.g.*, Indictment, Count I ¶ 15(c). Counsel assumes that the government means to allege that the consulting services were purportedly to be performed by Ms. Cavaness because later in the Superseding Indictment, the government alleges that, ultimately, "neither Cavaness nor [her company] did any work of any kind" for the Brady campaign. *Id.* ¶ 16(y).

Ms. Cavaness to create a company, which was called "CavaSense," for that purpose. *Id.* ¶¶ 16(f)–(g).

According to the Superseding Indictment, the Brady campaign processed the two poll payments through "VLDS," a consulting company owned by Mr. Smukler. *Id.* ¶¶ 6, 16(h). The government alleges that the Brady campaign wrote checks to VLDS for $40,000 and $25,000, *id.* ¶¶ 16(*l*), (r), and that VLDS subsequently wrote checks to Ms. Cavaness for those same amounts with "Poll" in the memo line, *id.* ¶¶ 16(m), (s). The Superseding Indictment does not suggest that the Brady campaign processed the third payment—for Ms. Cavaness's consulting services—through Mr. Smukler or VLDS. Instead, that payment was allegedly processed through "D. Jones & Associates," a consulting company owned by (former co-defendant) D.A. Jones. *Id.* ¶ 7. Specifically, the government alleges that the Brady campaign wrote a check to D. Jones & Associates for $25,000, *id.* ¶ 16(x), and that D. Jones & Associates subsequently wrote a check to CavaSense for the same amount with "Consulting" in the memo line, *id.* ¶ 16(y).

3. FEC Reports

The Superseding Indictment references several FEC reports that the Brady and Moore campaigns filed. The Brady campaign filed FEC reports in which it referred to the first two expenditures noted above as payments to VLDS for "Survey and Polling Services" and "Acquisition of Cross Tabs." *Id.* ¶¶ 16(o)–(q), (u)–(v). The Brady campaign also filed FEC reports in which it referred to the third expenditure as a payment to D. Jones & Associates for "Political Consulting." *Id.* ¶¶ 16(z)–(aa). In the Superseding Indictment, the government alleges that all of those references were "false[]" because the payments were actually contributions to the Moore campaign, and further alleges, without elaboration, that the conspirators "caused" the Brady campaign to file each of these allegedly false reports. *Id.* ¶¶ 16(*o*)–(q), (u)–(v), (z)–(aa). An FEC report must be filed by a campaign's treasurer, 52 U.S.C. § 30104(a)(1), and none of the

named conspirators was the Brady campaign's treasurer (or even a Brady campaign employee), *see* Indictment, Count I ¶ 16.

The Moore campaign allegedly filed FEC reports "falsely omitting any mention of" the three payments altogether. *Id.* ¶¶ 16(gg)–(hh). Even though none of the named conspirators was the Moore campaign's treasurer, *see id.* ¶ 16, the government alleges, again with no elaboration, that the conspirators "caused" the Moore campaign to file each of its allegedly false FEC reports, *id.* ¶¶ 16(gg)–(hh).

4. The Brady Charges

The Superseding Indictment charges Mr. Smukler with five criminal offenses in connection with the Brady and Moore campaigns, three of which are at issue in this motion:

Count Three: willfully causing the Brady campaign to file false FEC reports in violation of 52 U.S.C. § 30104(a)(1);

Count Four: willfully causing the Moore campaign to file false FEC reports in violation of 52 U.S.C. § 30104(a)(1); and

Count Five: willfully causing both the Brady and Moore campaigns to make materially false statements in their FEC reports in violation of 18 U.S.C. § 1001(a)(1).

All three of these Counts involve allegedly false FEC reports that the Brady and Moore campaigns filed. Specifically, Counts Three and Four charge violations of 52 U.S.C. § 30104(a)(1), which provides that the "treasurer of a political committee" must file FEC reports that disclose certain information about the campaign's finances. A campaign treasurer who violates that provision is subject to criminal penalties if certain dollar thresholds are satisfied. *See id.* § 30109(d)(1)(A). Count Three charges Mr. Smukler with willfully causing a violation of that statute by the Brady campaign, and Count Four charges Mr. Smukler with willfully causing a violation of that statute by the Moore campaign.

Count Five charges a violation of 18 U.S.C. § 1001(a)(1), which prohibits "knowingly and willfully . . . falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact" in any matter within the jurisdiction of the United States Government. Only someone who "prepare[s] or file[s]" an FEC report can be criminally liable for a falsehood in that report under 18 U.S.C. § 1001. *Curran*, 20 F.3d at 567. Count Five charges Mr. Smukler with willfully causing both the Moore and Brady campaigns to violate § 1001 by filing false FEC reports.

Counts Three, Four, and Five all invoke 18 U.S.C. § 2(b) in order to charge Mr. Smukler with willfully causing false FEC reports by the Brady and Moore campaigns. *See* 18 U.S.C. § 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."). But those Counts contain absolutely no detail to explain *how* Mr. Smukler—who was not employed by either campaign—"willfully caused" false FEC filings by the (unidentified) treasurers of the two campaigns. Rather, Count Three alleges, with no elaboration, that Mr. Smukler:

> ***caus[ed]*** [the Brady campaign] to report to the FEC disbursements to VLDS for "Survey and Polling Services" and "Acquisition of Cross Tabs" and a disbursement to D. Jones & Associates for "Political Consulting" that were in fact contributions to the Jimmie Moore for Congress campaign aggregating $25,000 and more in calendar year 2012.

Indictment, Count III ¶ 2 (emphasis added). Count Four alleges, likewise with no elaboration, that Mr. Smukler:

> ***caus[ed]*** the Jimmie Moore for Congress campaign to fail to report to the FEC contributions from [the Brady campaign] in the form of payment of debts owed by Jimmie Moore for Congress aggregating $25,000 and more in calendar year 2012.

Indictment, Count IV ¶ 2 (emphasis added). And Count Five simply combines the language from Counts Three and Four, alleging, again with no elaboration, that Mr. Smukler "caus[ed]" both campaigns to file false FEC reports. Indictment Count, V ¶ 2.[3]

In other words, the Superseding Indictment contains no factual allegations whatsoever illuminating how Mr. Smukler "willfully caused" the filing of false FEC reports.

B. LEGAL STANDARDS

Under Federal Rule of Criminal Procedure 12, a defendant may move to dismiss an indictment on the grounds that it "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). An indictment fails to state an offense if it fails to set forth the offense's essential elements "with sufficient factual orientation." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012). In evaluating whether an indictment adequately pleads an offense, a court "need not blindly accept a recitation in general terms of the elements of the offense." *Id.* Instead, Rule 12 "allows a district court to review the sufficiency of the government's pleadings to ensure that legally deficient charges do not go to a jury." *Id.* (internal quotation marks, citation, and alterations omitted). A court's task in adjudicating a Rule 12 motion is to examine the factual allegations in the indictment and "determin[e] whether, assuming all of those facts as true, a jury could find that the defendant committed the offense for which he was charged." *Id.* at 596.

In addition to simply pleading the elements of an offense, an indictment must also provide notice of the nature of the charges with sufficient clarity "to apprise the defendant of what he must be prepared to meet" and to ensure that the government is not "free to roam at large." *Russell*, 369 U.S. at 764, 768 (quotations omitted). As the Supreme Court has explained,

[3] Although Counts Three through Five cite "18 U.S.C. § 2" without specifying whether they are invoking secondary liability under § 2(a) (aiding and abetting) or § 2(b) (willfully causing), it is clear from the "causing" language quoted above that the government is invoking § 2(b) and is accusing Mr. Smukler of "willfully causing" each of the underlying statutory violations. *See* Indictment, Count III ¶ 2; Count IV ¶ 2; Count V ¶ 2.

the indictment must "descend to particulars" in order to "apprise the defendant *with reasonable certainty* of the nature of the accusation against him." *Id.* at 765 (quotations omitted; emphasis added). Indeed, "a cryptic form of indictment" that leaves a "chief issue undefined" is defective. *Id.* at 766. "[T]he language of the statute may be used in the general description of an offense, but 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." *Hamling v. United States*, 418 U.S. 87, 117–18 (1974) (citation omitted; emphasis added). This bedrock requirement emanates not only from the defendant's Sixth Amendment right to notice of the nature of the charges against him, but also from his Fifth Amendment grand jury right; if the indictment is too vague, "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell*, 369 U.S. at 770.

C. ARGUMENT

Because Mr. Smukler was not an employee of either the Brady or Moore campaigns and thus cannot be directly liable for any false FEC reports, the crux of his alleged criminal liability under Counts III, IV, and V is that he somehow "willfully caused" relevant employees of both campaigns to file such false reports. *Curran*, 20 F.3d at 567. Where a defendant was not the "treasurer" of a campaign committee and did not personally "prepare or file" FEC reports, he cannot have directly violated statutes that prohibit false FEC filings. 52 U.S.C. § 30104(a)(1); *Curran*, 20 F.3d at 567. Under such circumstances, the government must "bridge that gap" with factual allegations showing that the defendant "willfully cause[d]" the person who actually filed the false FEC reports to do so. *Curran*, 20 F.3d at 567; *see also* 18 U.S.C. § 2(b). Accordingly, the Superseding Indictment must contain specific allegations apprising Mr. Smukler of how he is

alleged to have "willfully caused" the campaigns to file false FEC reports. *See Russell*, 369 U.S. at 764 ("Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."); *United States v. Moyer*, 674 F.3d 192, 203 (3d Cir. 2012) ("When an indictment merely quotes the language of a statute and that statute contains generalities, the indictment must factually define those generalities, descending into particulars."). The Superseding Indictment in this case contains no allegations that connect Mr. Smukler to the FEC filings of either campaign in any way, and the Superseding Indictment therefore fails to adequately plead that Mr. Smukler "willfully caused" either campaign's allegedly false FEC filings, as charged in Counts Three, Four, and Five.

1. To charge a defendant with "willfully causing" a false FEC report, the Superseding Indictment must contain factual allegations showing some nexus between the defendant and the person who filed the report.

In order to "willfully cause" another person's criminal act under 18 U.S.C. § 2(b), a defendant must have known about a legal obligation belonging to the other person and intentionally "act[ed] to subvert" that obligation by causing the other person to violate it. *United States v. Am. Inv. of Pittsburgh, Inc.*, 879 F.2d 1087, 1097 (3d Cir. 1989). "Section 2(b) imposes liability on a defendant who does not himself commit the prohibited *actus reus*, but intentionally manipulates an innocent intermediary to commit the prohibited *actus reus*." *United States v. Gumbs*, 283 F.3d 128, 134 (3d Cir. 2002). In other words, a defendant can be criminally responsible under 18 U.S.C. § 2(b) only if he intentionally "brought about" the other person's violation of the law. Third Circuit, Model Criminal Jury Instructions § 7.05.

To show that the defendant "brought about" the filing of false FEC reports, *id.*, indictments in other cases that charge defendants with "willfully causing" false FEC filings often

contain factual allegations showing that the defendant intentionally interacted with one of the specific individuals responsible for FEC reports in order to get them to violate their statutory obligations. For example, in *United States v. Benton*, No. 4:15-cr-00103-JAJ-HCA (S.D. Iowa), senior staff members of a 2012 presidential campaign were charged with willfully causing the campaign to file FEC reports omitting any reference to payments that the campaign had made in exchange for a local official's endorsement. *See* Ex. 1 (*United States v. Benton*, Superseding Indictment, ECF No. 323). Not only were the defendants in that case internal employees of the campaign, the indictment specifically alleged that they instructed a campaign financial staffer to exclude the payments from a filing to the FEC. *See id.* ¶ 24 ("Wipe it off the books."). That specific allegation and the evidence supporting it were critical in the U.S. Court of Appeals for the Eighth Circuit's recent decision rejecting defendants' arguments that they were not "involved in preparing the false [FEC] reports." *United States v. Benton*, No. 16-3861, 2018 WL 2171243, at *6 (8th Cir. May 11, 2018). So too in *United States v. Braddock*, which involved a "conduit contribution" scheme whereby campaign contributors disguised their contributions to a campaign by passing them through straw donors. *See* No. 12-cr-157, 2013 WL 4441531 (D. Conn. Aug. 14, 2013). The indictment in that case contained numerous allegations of the defendants communicating with the campaign's finance director about the processing of the false checks that they had collected. *See* Ex. 2 (*United States v. Braddock*, Superseding Indictment, ECF No. 21) ¶¶ 26–30, 37, 54, 57, 75–76, 81; *see also id.* ¶ 8 (identifying the finance director). The Margolies Charges in the instant case provide yet another example: there, in contrast to the Brady Charges, the Superseding Indictment contains allegations of direct communication between Mr. Smukler and the campaign treasurer and contains a basis for a nexus between that communication and the FEC filings at issue. *See* Indictment, Count VI ¶¶ 9(h), (p).

Ultimately, in order to charge somebody with "willfully causing" a false FEC report, an indictment must contain factual allegations that, if true, show some nexus between the defendant and the campaign employee responsible for FEC reports whereby the defendant actually "brought about" the filing of false reports. Model Criminal Jury Instructions § 7.05. No such nexus is alleged in the Brady Charges.

2. The government fails to allege that Mr. Smukler "willfully caused" Brady campaign officials to file false FEC reports.

Counts Three and Five both accuse Mr. Smukler of "willfully causing" the Brady campaign to file false reports with the FEC. Count Three does so by invoking 52 U.S.C. § 30104(b)(5)(A), which requires a campaign's treasurer to file a report with the FEC that identifies the purpose and recipient of each campaign expenditure. And Count Five does so by invoking 18 U.S.C. § 1001(a), which forbids material false statements in any matter within the jurisdiction of the United States Government. But neither Count contains allegations which, if true, show that Mr. Smukler "willfully caused" the Brady campaign to file false reports.

The Superseding Indictment contains no allegations showing how Mr. Smukler was involved in any way with the Brady campaign's FEC filings. There is no allegation that Mr. Smukler communicated with the Brady campaign's treasurer, or with any campaign official, about FEC filings. The Superseding Indictment does not even set forth which person within the Brady campaign made any of the allegedly false FEC filings, let alone indicate how Mr. Smukler's conduct willfully caused them to do so.

The only allegations that even hint at an interaction between Mr. Smukler and the Brady campaign do not adequately plead that he "willfully caused" false FEC reports. The government alleges that the conspirators caused the Brady campaign to write three checks, two to VLDS and one to D. Jones & Associates. *See* Indictment, Count I ¶¶ 16(l), (r), (x). The government may

argue that causing those checks to be written amounted to causing false FEC reports, because the Brady campaign ultimately "report[ed] to the FEC disbursements to VLDS . . . and a disbursement to D. Jones & Associates . . . that were in fact contributions to the Jimmie Moore for Congress campaign." Indictment, Count V ¶ 2. But the allegations in the Superseding Indictment about causing the Brady campaign to write checks to VLDS and D. Jones & Associates do not amount to any communication between Mr. Smukler and the Brady campaign about how the checks would be reported to the FEC. Indeed, there are many situations in which a campaign issues a disbursement through a conduit but lists the ultimate payee in an FEC report as the recipient of the disbursement. *See, e.g.*, Ex. 3 (FEC Interpretive Rule on Ultimate Payees). The Superseding Indictment contains no allegation that Mr. Smukler (or any of the other named conspirators) "willfully caused" the Brady campaign to do otherwise in this case; indeed, there is no allegation that Mr. Smukler (or any of the other identified conspirators) communicated with the Brady campaign on the subject of FEC filings in any way.

3. The government fails to allege that Mr. Smukler "willfully caused" Moore campaign officials to file false FEC reports.

The absence of any allegations connecting Mr. Smukler to the filing of false FEC reports is even more egregious with respect to the Moore campaign. Counts IV and V both accuse Mr. Smukler of "willfully causing" the Moore campaign to file false reports with the FEC. As noted above, Count Four does so by invoking 52 U.S.C. § 30104(a)(1), and Count Five does so by invoking 18 U.S.C. § 1001(a). But neither Count contains allegations which, if true, show that Mr. Smukler "willfully caused" the Moore campaign to file false reports.

First, to be clear, the Moore campaign in its FEC filings did not make *any* reference to the $90,000 that the government alleges was sent to Ms. Cavaness. Perhaps this was because, according to the Superseding Indictment, Ms. Cavaness never actually passed the funds into the

campaign's bank account, and Ms. Cavaness and Mr. Moore ultimately kept all but $21,000 of the monies received for themselves. *See* Indictment, Count I ¶¶ 16(bb)–(dd). But because the Moore campaign did not reference any of these monies in its FEC reports, the government's specific charge is that Mr. Smukler willfully caused an omission in the reports.

Second, nothing in the Superseding Indictment suggests that Mr. Smukler had any role with the Moore campaign's accounting or FEC reporting or that he communicated with the Moore campaign at any time about FEC filings. Nor does the Superseding Indictment identify the employee of the Moore campaign who was responsible for filing FEC reports.

Third, even if the Superseding Indictment were entirely correct when it insinuates that Mr. Smukler disguised payments to the Moore campaign as *bona fide* payments for value when they were actually contributions, that course of conduct would have absolutely no bearing on the Moore campaign's alleged FEC reporting violation. If the Superseding Indictment's allegations are true, then the Moore campaign violated its reporting duties *regardless* of whether the three payments at issue in this case were contributions or payments for value. That is because a campaign committee is required to report *both* "contribution[s]" *and* all "other receipt[s]." 52 U.S.C. § 30104(b)(3)(B), (G); *see also id.* § 30104(b)(2)(D), (J). The Superseding Indictment does not merely allege that the Moore campaign's FEC reports mischaracterized one type of incoming payment as another; rather, it alleges that the Moore campaign "omitt[ed] any mention" of the payments altogether. Indictment, Count I ¶¶ 16(gg)–(hh). Even if Mr. Smukler played a role in disguising one type of payment to the Moore campaign as a different type of payment, that would not explain why the Moore campaign violated its reporting obligations by not reporting the payments at all. Under these circumstances, the Superseding Indictment cannot

simply assert without elaboration that Mr. Smukler "caused" the Moore campaign's false filings. *Id.*

Finally, the Superseding Indictment also fails to allege facts showing that any conduct of Mr. Smukler's with respect to the Moore campaign's FEC filings was "willful." An indictment that charges a defendant with "willfully causing" an *election law* offense "require[s] proof that the defendant actually knew of the specific law prohibiting the conduct" and acted with the intent of subverting that specific law. *United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009) (citing *Curran*, 20 F.3d at 569). Yet the Superseding Indictment does not even clearly allege which of the many FEC filing requirements the Moore campaign purportedly violated, let alone allege that Mr. Smukler "knew of the specific law" that the FEC filings violated. *Id.* Indeed, the statute that the Superseding Indictment cites as the basis for Count Four—52 U.S.C. § 30104(b)(5)(A)—requires a campaign to report its outgoing "expenditure[s]," and could not possibly apply to a charge that describes the Moore campaign's alleged failure to report its incoming *contributions* to the FEC. *See* Indictment, Count IV ¶ 2.[4] In other words, the government cannot even get straight which FEC reporting requirement the Moore campaign allegedly violated, let alone allege that Mr. Smukler had that specific requirement in mind and intentionally acted to subvert it so as to support a charge of "willfully causing" the Moore campaign to file false FEC reports.

Simply put, there is no allegation that Mr. Smukler played any role in how the Moore campaign decided to report (or not report) incoming contributions and other receipts to the FEC or that he intended to subvert a specific reporting obligation of the Moore campaign.

[4] Nor do the other statutes cited in support of Count Four make clear which FEC reporting requirement the Moore campaign is alleged to have violated. *See* 52 U.S.C. § 30104(a)(1) (setting forth the general requirement that a campaign treasurer must file an FEC report); *id.* § 30109(d)(1)(A)(i) (prescribing criminal penalties for certain election law violations); 18 U.S.C. § 2 (assigning criminal liability to a person who "willfully causes" another person to violate the law).

II. THE MARGOLIES CHARGES

A. BACKGROUND

The Margolies Charges also reference several allegedly false statements to the FEC. After receiving money from the Margolies campaign for election services, Mr. Smukler's campaign consulting companies returned the same amount of money to the campaign (plus an overpayment that was later returned), and the campaign stated to the FEC that those repayments were "refunds." Counts Six, Ten, and Eleven all arise out of those statements to the FEC.

1. Mr. Smukler's Work for the Margolies Campaign

According to the Superseding Indictment, Mr. Smukler worked as a "political analyst and consultant" for Marjorie 2014, the congressional campaign committee of Marjorie Margolies. Indictment, Count I ¶ 6. Two companies that Mr. Smukler owned and operated, InfoVoter Technologies, Inc. ("InfoVoter") and Black and Blue Media, Inc. ("Black and Blue"), received payments from the Margolies campaign in exchange for political campaign services related to the 2014 primary election. *Id.*; *see also id.* Count VI ¶ 9(a). InfoVoter and Black and Blue received approximately $210,750 from the Margolies campaign between June 2013 and April 2014 – payments that the Margolies campaign characterized as relating to primary election expenses. *Id.* Count VI ¶ 9(a). Of that amount, InfoVoter and Black and Blue are alleged to have spent $99,951 on expenses associated with the 2014 primary campaign as of April 2014. *Id.* ¶ 9(b).

Mr. Smukler is also alleged to have communicated with the treasurer of the Margolies campaign, Jennifer May, about how the campaign would spend its money. *Id.* ¶ 9(c). In April and May 2014 while the primary campaign was still ongoing, Mr. Smukler is alleged to have directed Ms. May to continue spending funds, a direction that allegedly resulted in the campaign spending money that had been raised for the general election. *Id.*

2. Mr. Smukler Repays Money to the Campaign and the Campaign Reports Those Repayments to the FEC as "Refunds"

On May 5, 2014, Mr. Smukler repaid $78,750 from Black and Blue to the Margolies campaign, informed the campaign treasurer that the money was "segregated media account funds," and instructed her to use that money for advertising. *Id.* ¶¶ 9(d), (f). According to the Superseding Indictment, significantly more than $78,750 of the money that Mr. Smukler's companies had received from the campaign remained unspent at the time of the payment. *See id.* ¶¶ 9(a)–(b) (explaining that Mr. Smukler's companies had been paid $210,750 and had spent $99,951 of that amount at the time of the transfer of $78,750). Nonetheless, the government contends that the $78,750 was not initially sitting in the Black and Blue bank account, but rather was placed there by Mr. Smukler through a wire from his personal brokerage account shortly before Black and Blue made the payment to the Margolies campaign. *Id.* ¶¶ 9(e)–(f). Two days after the payment from Black and Blue to the Margolies campaign, the government alleges that Mr. Smukler received a payment of $75,000 in his personal brokerage account from "Person 1." *Id.* ¶ 9(g). The Margolies campaign submitted an FEC report on July 15, 2014, after receiving the repayment of $78,750 from Black and Blue, in which it referred to that payment as a "Refund of Media Account," and the government alleges that this characterization was false. *Id.* ¶ 9(h). The repayment was listed on the FEC report as being associated with the "Primary." Ex. 4 at 63 (July 2014 FEC Report).[5]

Ms. Margolies lost the primary election, Indictment, Count VI ¶ 9(*i*), and as a result, the campaign was required to refund all general election contributions to the original contributors. *See* 11 C.F.R. § 102.9(e)(3). During July 2014, Ms. May informed Mr. Smukler that the campaign did not have sufficient funds to refund general election contributions because the

[5] Exhibits 4 and 5 are truncated versions of the Margolies campaign's July 2014 and October 2014 quarterly FEC reports. For full versions, see https://www.fec.gov/data/filings/?data_type=processed&committee_id=C00545301.

campaign had spent money raised for the general election during the primary. Indictment, Count VI ¶ 9(*i*). This circumstance allegedly occurred because of Mr. Smukler's directive to Ms. May, while the primary campaign was still ongoing, to keep spending money. *Id.* ¶ 9(c). Mr. Smukler emailed Ms. May on July 9, 2014, stating that the campaign's general election funds would be "refunded by [I]nfo[V]oter to the campaign" and had been "escrowed in [I]nfo[V]oter." *Id.* ¶ 9(j) (alterations in original).

On July 14, 2014, Mr. Smukler wired $150,000 to the campaign's bank account – $40,000 from Black and Blue and $110,000 from InfoVoter. *Id.* ¶¶ 9(n)–(*o*). The government alleges that this money was not sitting in the InfoVoter and Black and Blue bank accounts, but rather was placed there by Mr. Smukler around the same time that he received a payment of $150,000 from "Person 2." *Id.* ¶¶ 9(k)–(m). On July 15, 2014, the Margolies campaign filed an FEC report in which it allegedly indicated "that the campaign would soon be receiving 'the refund of the advanced payment of general election consulting and media expenses,'" which the government contends was a reference to the payments from Mr. Smukler's companies on July 14, 2014, the previous day. *Id.* ¶ 9(s). On October 15, 2014, the Margolies campaign filed an FEC report in which it characterized the $40,000 payment from Black and Blue as a "Refund of Media Account" and the $110,000 payment from InfoVoter as a "Refund." *Id.* ¶¶ 9(p)–(q). The government contends that these characterizations were false. *See id.* The repayments were listed on the FEC report as being associated with the "Primary." Ex. 5 at 7 (October 2014 FEC Report). [6]

On March 4, 2015, the FEC wrote to the Margolies campaign and noted that "[t]he refund(s) exceeded the payments made to the vendor, 'Info Voter Technologies, Inc.' by $18,000." Ex. 6 at 1 (FEC Request for Additional Information); *see also* Indictment, Count VI

[6] *See supra* note 5.

¶ 9(t).[7] The FEC noted that if the campaign "received an amount greater than what was paid," the excess might constitute a campaign contribution. Ex. 6 at 1. The FEC instructed the campaign to "take and report corrective action." Ex. 6 at 1. The Margolies campaign returned the excess refund to InfoVoter shortly thereafter. Indictment, Count VI ¶ 9(v); *see also* Ex. 7 (FEC, Alternative Dispute Resolution 775) (noting the return of the $18,000 and deeming the matter resolved).

3. The FEC Complaint and the Campaign's Response

On April 24, 2014, while the primary campaign was still ongoing, another candidate, Daylin Leach, filed a complaint with the FEC against the Margolies campaign, Mr. Smukler, and Ms. May, alleging that the Margolies campaign had been spending general election funds on the primary. *See* Indictment, Count VI ¶¶ 3, 7; *see also* Ex. 8 (Leach Complaint). The FEC wrote to the campaign on April 29, 2014, indicating that it had opened an investigation and inviting the campaign to respond. *See* Ex. 9 (FEC Letter to Jennifer May). On July 22, 2014, an attorney from the law firm of Perkins Coie LLP sent a letter to the FEC urging that the complaint be dismissed and stating in part that some of the funds that the complaint suggested had been spent on the primary actually were "advanced funds . . . to pay for general election media and consulting expenses," which had later been "refund[ed]" to the campaign. Indictment, Count VI ¶ 9(r). The government alleges, without elaboration, that Mr. Smukler caused the attorney to send this letter to the FEC. *Id.*

The FEC ultimately dismissed the complaint, and in doing so, it fully recognized that when the Margolies campaign filed FEC reports regarding the disbursements to Mr. Smukler's companies and the refunds of those monies to the campaign, it "identified [them] as being made

[7] Mr. Smukler's companies had allegedly received $210,750 from the Margolies campaign, *see* Indictment, Count VI ¶ 9(a), and had repaid a total of $228,750 to the campaign across three payments – one of $78,750, one of $40,000, and one of $110,000. *See id. Id.* ¶¶ 9(f), (n)–(*o*).

for the 2014 primary election and not for the general election." Ex. 10 at 4 n.16 (FEC Opinion in MUR 6811). The FEC also recognized the tension between this characterization in FEC reports and Mr. Sandstrom's letter, which described the payments as relating to general election expenses. *See id.* But neither of these observations prevented the FEC from dismissing the complaint.

4. The Charges

Counts Six, Ten, and Eleven of the Margolies charges are each based on one or more of the statements that the Margolies campaign made to the FEC referenced above. Count Six invokes the statements in the July 2014 and October 2014 FEC reports in which the Margolies campaign characterized payments to the FEC as "refunds" and charges Mr. Smukler with willfully causing a false statement to the FEC in violation of 18 U.S.C. § 1001 and § 2. *See* Indictment, Count VI ¶ 2 (explaining the focus of Count VI); *see also id.* ¶¶ 9(h), (p), (q), (s) (alleging that references to "refunds" in FEC reports were false). Count Ten invokes the same "refunds" characterizations and charges Mr. Smukler with willfully causing a campaign to falsely report contributions in violation of 52 U.S.C. § 30104(b)(5)(A) and 18 U.S.C. § 2. *See* Indictment, Count X ¶ 2.[8] And Count Eleven invokes the letter from the Perkins Coie attorney to the FEC and charges Mr. Smukler with corruptly influencing the due administration of the law in violation of 18 U.S.C. § 1505 and § 2. *See id.* Count XI ¶ 2.

B. LEGAL STANDARD

As noted above, a defendant may move to dismiss an indictment on the grounds that it "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). An indictment fails to state an

[8] As discussed below, Count Ten also accuses Mr. Smukler of "causing [Marjorie] 2014 to report contributions from SMUKLER in the names of others," but there is no allegation of such a report in the Superseding Indictment. Indictment, Count X ¶ 2.

offense if it fails to set forth the offense's essential elements "with sufficient factual orientation." *Huet*, 665 F.3d at 595.

In order to properly charge a defendant with willfully causing a violation of 18 U.S.C. § 1001 (Count Six), the government must allege, *inter alia*, "that [the accused] made a statement or representation [and] that the statement or representation was false." *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013) (citation omitted) (first alteration in original). The government likewise must allege a false statement in order to properly charge a defendant with causing false reporting of campaign contributions (Count Ten). *See Curran*, 20 F.3d at 565 (explaining that the reporting provisions of FECA prohibit the same underlying conduct as § 1001). In order to properly charge a defendant with corruptly influencing the due administration of the law in violation of 18 U.S.C. § 1505 (Count Eleven), in a case where the defendant allegedly submitted a false statement to a federal agency through an intermediary, the government must allege that the defendant "influenc[ed]" the intermediary. 18 U.S.C. § 1515(b).

C. ARGUMENT

Counts Six, Ten, and Eleven all suffer from fatal flaws and must be dismissed. Counts Six and Ten must be dismissed because there is nothing false about reporting a vendor repayment as a "refund" to the FEC – indeed, the FEC's reporting system *requires* that they be reported as such. And Count Eleven must be dismissed because there is no allegation that Mr. Smukler corruptly influenced the attorney to lie to the FEC.

1. Counts Six and Ten must be dismissed because it was not false to characterize vendor repayments as "refunds."

In Counts Six and Ten of the Superseding Indictment, the government attempts to satisfy the falsity element of the charged offenses by pointing to statements that the Marjorie 2014 campaign made in FEC reports that characterized certain receipts as "refunds." Indictment,

Count VI ¶ 2; *id.* Count X ¶ 2.[9] The government alleges that calling those payments "refunds" was false because they were actually campaign contributions, not refunds. *See id.* But it is plain from the face of the Superseding Indictment that referring to those payments as "refunds" was not false. Counts Six and Ten therefore must be dismissed.

First, as a matter of plain English, there is nothing false about referring to a vendor repayment as a "refund." The noun "refund" means "[a] repayment of a sum of money." *Oxford Living Dictionaries* (English), https://en.oxforddictionaries.com/definition/refund (last visited May 24, 2018). The Superseding Indictment contains an allegation that "SMUKLER's companies Black and Blue and InfoVoter received approximated $210,750 from [Marjorie] 2014." Indictment, Count VI ¶ 9(a). When Mr. Smukler's companies repaid the same amount of money to Marjorie 2014 over three payments (accounting for the return of the $18,000 overpayment), those repayments were "refunds," plain and simple.

Those repayments were "refunds" regardless of whether Mr. Smukler's companies repaid *the same* money to Marjorie 2014 or repaid the campaign with money they received from elsewhere after having spent the money that they received from the campaign. According to the Superseding Indictment, two of the repayments from Mr. Smukler's companies – one for $40,000 and one for $110,000 – could not have been "refunds" because "SMUKLER had already spent that money." Indictment, Count VI ¶ 9(p); *see also id.* ¶ 9(q).[10] But the plain meaning of the word "refund" is not limited to repayments of *the same* money. Money is fungible. *Cf.*

[9] The Superseding Indictment references two additional allegedly false statements to the FEC. *See* Indictment, Count VI ¶ 9(r) (referencing attorney letter to the FEC); *id.* ¶ 9(w) (referencing statement in an FEC report that a payment was a loan from Ms. Margolies). But because these two statements were not references to "refunds" in FEC reports, they are not the asserted basis for Counts Six and Ten. *See id.* ¶ 2; *id.* Count X ¶ 2.

[10] The government does not make this same allegation with respect to the third repayment from Mr. Smukler's companies – a payment of $78,750. *See* Indictment, Count VI ¶ 9(f). In fact, it is clear from the Superseding Indictment that at the time of that payment, Mr. Smukler's companies still had more than $78,750 remaining out of what they had received from Marjorie 2014. *See* Indictment, Count VI ¶¶ 9(a)–(f). It is thus especially clear that there was nothing false about calling this repayment a "refund."

Robers v. United States, 134 S. Ct. 1854 (2014) ("Money being fungible . . . , 'the property returned' need not be the very same bills or checks." (citation omitted)). When a clothing store offers a "refund" pursuant to store policy, one would not expect the refund to be paid from money that was sitting in escrow since the original purchase. A campaign vendor is no different, and indeed the FEC has never suggested that campaign vendors are required to segregate any money that they receive from a campaign. Attachment A ¶ 26 (Decl. of Scott E. Thomas).[11] There was nothing false about referring to repayments from Mr. Smukler's companies as "refunds," even if one accepts as true the allegation that "SMUKLER had already spent that money" or had borrowed money to make these refund payments. Indictment, Count VI ¶ 9(p). In short, as long as Mr. Smukler returned the same amount of money his companies originally received, that is the definition of a "refund."

The government's false-statement allegations are even more baseless with respect to the third repayment – the $78,750 payment from Black and Blue in May 2014. *See id.* ¶¶ 9(f), (h). The government does not allege that "SMUKLER had already spent that money," as it does for the other two payments. *Id.* ¶ 9(p); *see also id.* ¶ 9(q). Indeed, it is clear on the face of the Superseding Indictment that the campaign *had not* spent the $78,750; at the time of that repayment, the campaign had received $210,750 from the Margolies campaign and had spent $99,951. *See id.* ¶¶ 9(a)–(b). Thus, even if the government is correct that money already spent cannot be "refund[ed]," *see id.* ¶¶ 9(p)–(q), there was nothing false about referring to the repayment of $78,750 as a "refund."

Second, the FEC explicitly directs campaign committees to report vendor repayments as "refunds," not contributions, on campaign finance reports. Campaign committees must submit

[11] In support of this Motion, Mr. Smukler submits the declaration of Scott E. Thomas, who served as an FEC commissioner from 1986 to 2006. *See* Attachment A (Decl. of Scott E. Thomas).

quarterly campaign finance reports on FEC Form 3, and that form instructs campaigns to report "Offsets to Operating Expenditures (Refunds, Rebates, etc.)" on Line 14 separately from "Contributions" on Line 11. Ex. 11 (Blank FEC Form 3), at 3.[12] Attachment A ¶ 15. On a page of its website titled "How to Report," the FEC explains that "vendor refunds and rebates are considered offsets to operating expenditures" to be reported "on Form 3, Line 14," and "are not considered contributions." Ex 12 (FEC, "How to Report"); *see also* Attachment A ¶ 15. When itemizing such vendor repayments, campaign committees are specifically instructed to "include 'refund,' 'rebate,' etc." "[i]n the description field." Ex. 12; *see also* Attachment A ¶ 16. There is no suggestion that a vendor refund should be reported any differently by virtue of the vendor having obtained the refunded money from a third party. Had Marjorie 2014 reported repayments from Mr. Smukler's companies as anything other than "refunds," it would have been violating the FEC's express instructions. Attachment A ¶ 16.

In light of the FEC's direct and specific guidance, as well as the plain meaning of the word "refund," it was not false for the treasurer of the Margolies campaign to report the repayments from Mr. Smukler's companies as "refunds." There was thus no false statement for Mr. Smukler to willfully cause.

Finally, Count Ten contains a stray allegation – separate from the discussion of refunds – that Mr. Smukler caused false reporting of campaign contributions by "causing [Marjorie] 2014 to report contributions from SMUKLER in the names of others." Indictment, Count X ¶ 2. This stray portion of Count Ten fails to state an offense because it is not supported by an allegation of *any* statement to the FEC, let alone a false one. This portion of Count Ten references "contributions from SMUKLER" personally, not from one of his companies. *Id.* *Compare id.*

[12] The Court may take judicial notice of information that, like FEC Form 3, is "publicly available on government websites." *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017).

Count VI ¶ 9(w) (referencing "an unlawful campaign contribution from Black and Blue"); *id.* Count VII ¶ 2 (referencing "contributions . . . through Black and Blue and InfoVoter"). There is only one allegation in the Margolies Charges that references a payment from Mr. Smukler personally – an alleged reimbursement paid to D.A. Jones after he made a contribution to the campaign, *see id.* Count VI ¶ 9(x) – and there is no allegation in the Superseding Indictment of any statement to the FEC about that payment. Accordingly, the Superseding Indictment fails to state an offense for willfully causing false reporting of campaign contributions based on the theory that Mr. Smukler "caus[ed] [Marjorie] 2014 to report contributions from SMUKLER in the names of others." *Id.* Count X ¶ 2.[13]

2. Count Eleven must be dismissed because there is no allegation that Mr. Smukler "corruptly influenced" the campaign's attorney.

In Count Eleven, the Superseding Indictment charges that Mr. Smukler "corruptly influenced, obstructed, and impeded . . . the due and proper administration of the law" in violation of 18 U.S.C. § 1505 and § 2. Indictment, Count XI ¶ 2. Mr. Smukler allegedly did so "by causing an attorney for [Marjorie] 2014 to send a letter to the FEC containing false information about payments from Smukler's companies to [Marjorie] 2014." *Id.*; *see also id.* Count VI ¶ 9(r) ("On or about July 22, 2014, SMUKLER caused an attorney for [Marjorie] 2014 to send a letter to the FEC successfully urging the FEC to dismiss a complaint against [Marjorie] 2014 based on [a] false representation . . . ."). Although a defendant can corruptly influence an agency proceeding through an intermediary, the defendant must have actually "influenc[ed]" the intermediary. 18 U.S.C. § 1515(b) (defining "corruptly" within the meaning of § 1505).

[13] Count Ten in its entirety also suffers from the same defect as Count Four of the Brady Charges discussed above. *See supra* at 15. The narrative portion of the Count charges Mr. Smukler with falsely reporting campaign contributions, but the specific statutory reporting requirement cited at the end of the Count deals with reporting of campaign *expenditures*, not contributions. See Indictment, Count X ¶ 2 (citing 52 U.S.C. § 30104(b)(5)(A)).

There is no factual allegation in the Superseding Indictment that sheds any light on how Mr. Smukler "influenced" the attorney to submit allegedly false statements to the FEC. "When an indictment merely quotes the language of a statute and that statute contains generalities, the indictment must factually define those generalities, descending into particulars." *Moyer*, 674 F.3d at 203. Here, the government merely alleges that Mr. Smukler "caused" the attorney to submit a false statement. Indictment, Count XI ¶ 9(r). That allegation, without more, does not amount to corrupt influencing in violation of 18 U.S.C. § 1505. There is no allegation that Mr. Smukler lied to the attorney, that he used improper means to induce the attorney to lie, or that he took any other step that could be construed as corruptly "influencing" the attorney. The Court need not determine the exact contours of what it means to corruptly "influence" a person in order to conclude that an allegation of "causing" a person to submit a false statement, without more, is not enough. At minimum, the government was required to include specific allegations in the Superseding Indictment so as to adequately apprise Mr. Smukler of how he is accused of having corruptly "influenced" the campaign's attorney to submit a false statement. *See Russell*, 369 U.S. at 765; *Moyer*, 674 F.3d at 203.[14]

[14] For preservation purposes, Mr. Smukler also argues that the prohibition on "corruptly . . . influenc[ing] . . . the due and proper administration of the law" by a federal agency or Congress is unconstitutionally vague as applied to his alleged conduct. 18 U.S.C. § 1505. In *United States v. Poindexter*, the U.S. Court of Appeals for the D.C. Circuit held that, "[a]s used in § 1505, . . . the term 'corruptly' is too vague to provide constitutionally adequate notice that it prohibits lying to Congress." 951 F.2d 369, 399 (D.C. Cir. 1991). The same analysis applies to lying to a federal agency. In response to the *Poindexter* decision, Congress attempted to clarify the statute by defining the term "corruptly" to mean "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b); *see also United States v. Kanchanalak*, 37 F. Supp. 1, 3–4 (D.D.C. 1999) (recounting this history). But this amendment did not solve the vagueness problem because it is no easier to figure out what constitutes "acting with an improper purpose" than it is to discern what constitutes acting "corruptly." *See Poindexter*, 951 F.2d at 379 ("Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' *and 'improper'* are no more specific—indeed they may be less specific—than 'corrupt.'" (emphasis added)). As currently drafted, the statute empowers prosecutors to arbitrarily decide whose motives are "improper," and arbitrary enforcement is one of the chief motivating concerns of the vagueness doctrine. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

III. CONCLUSION

For the foregoing reasons, Mr. Smukler respectfully requests that the Court dismiss Counts Three, Four, Five, Six, Ten, and Eleven of the Superseding Indictment.

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Respectfully submitted,

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