IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **YOLANDA RODRIGUEZ-TORRES, et als,** **Defendants.**	**CR. NO. 07-302 (JAG-BJM)**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
RE: MOTIONS TO DISMISS COUNT ONE OF THE INDICTMENT

This case involves an alleged conspiracy to improperly obtain licenses to practice medicine in Puerto Rico for numerous persons who fraudulently were given passing scores on one or more parts of the medical revalidation examination. Four defendants have moved to dismiss Count One of the second superseding indictment ("Indictment") (Docket No. 1104) on various grounds. (Docket Nos. 1557, 1661, 1788, 1872). The government has opposed the motions. (Docket Nos. 1610, 1708, 1795). Following motions by various other defendants to join the motions to dismiss, the court ordered that all named defendants automatically would be joined to all pending dispositive motions. (Docket No. 1867). The matter was referred to me by the presiding district judge for a report and recommendation. (Docket Nos. 1611, 1688, 1794, 1879).

BACKGROUND

Count One of the Indictment alleges a conspiracy in violation of Title 18, United States Code, Section 371. In particular, Count One alleges that from on or about November 2000, through the date of the Indictment, the seventy-six defendants named in Count One conspired with each other

and others to commit honest services mail fraud in violation of Title 18, United States Code, Sections 1341 and 1346. The object of the unlawful conspiracy is alleged to be the improper obtaining of licenses to practice medicine in Puerto Rico by individuals that had fraudulently passed the Basic and/or Clinical skills parts of the revalidation examinations of the Board of Medical Examiners of Puerto Rico (the "Board"), depriving the Board of the honest services of its employees and officials and causing the use of the United States mail in furtherance of the scheme. (Docket No. 1104, p. 31). Margarita Perocier-Aguirre and Rafael Jiménez-Méndez served as Board members and officials, and Yolanda Rodríguez-Torres served as an employee of the Board (collectively, the "Board defendants"), and thus each owed a fiduciary duty to the Board.

Count One describes two different schemes employed to achieve the object of the conspiracy, which the Indictment refers to as the "fraudulent revision scheme" and the "fraudulent passing scheme."

The fraudulent revision scheme, which pertained to individuals who had failed the November 2000 Basic Skills and/or Clinical Skills parts of the revalidation exam with scores well below the minimum passing score of 700, consisted of the fabrication of false individual score sheets containing near-700 failing scores, which were inserted in the applicants' files at the Board. The failing co-conspirators who received a false and fraudulent near-700 score result would apply for revision and would be improperly passed by co-defendant Perocier-Aguirre, under the guise of the revision process. Perocier-Aguirre, using false pretenses, arranged for the sending of the official individual result sheets to her home, in Mayaguez, instead of the Board's offices in San Juan, and caused the failing score sheets to be replaced by false passing score sheets. The Indictment names

thirteen co-defendant physicians who fraudulently received passing results by means of the fraudulent revision scheme.

The fraudulent passing scheme, which pertained to individuals who had failed the Basic and/or Clinical parts of the exam from April 2001 to November 2005[1], consisted of fabricating and inserting into their files at the Board false and fraudulent individual score sheets with scores of 700 or more. The failing co-conspirators who received false passing scores of 700 or more for examinations from April 2001 onwards would fraudulently pass the exam without the need to undergo revision. Count One alleges that defendants Perocier-Aguirre and Jiménez-Méndez caused the replacement of true failing score sheets with fraudulent passing score sheets for the examinations of April and November 2001. Defendant Rodríguez-Torres caused the fraudulent replacement of score sheets for the exams of April 2001 to November 2005, and allegedly did this for money, things of value, and in some instances, for free. The Indictment further alleges that four first-tier brokers and six second-tier brokers referred cases of failing applicants to Rodríguez-Torres for her to create and insert false passing scores. The Indictment names fifty co-defendant physicians who fraudulently received passing results by means of the fraudulent passing scheme.

Under both schemes, a photocopy of a near-700 failing score or a passing score sheet of an unsuspecting applicant was superimposed over the failed score sheet of the co-conspirator applicant in a manner that the name, social security number, and identification number of the co-conspirator applicant remained visible. The documents were held together with tape or staples, and a photocopy of the two documents was made, resulting in a one-page false and fraudulent individual score sheet.

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[1] Count One also alleges that a single co-defendant who took the exam in April 1995 was part of the fraudulent passing scheme.

The false score sheet then was inserted into the co-conspirator's file at the Board, and to conceal the fraudulent nature of the scheme, the true failing score sheet was removed and destroyed. The failing co-conspirator received the false score sheet or was informed that the false score sheet had been placed inside his or her file. In some instances, the failing co-conspirator would request from the Board a certification of the results of the tests taken, in order to assure that the false score sheets had been inserted in his/her file at the Board. By fraudulently passing one part of the exam, the co-conspirator applicants were able to complete the remaining requirements necessary to obtain a license to practice medicine in Puerto Rico.

With respect to the co-defendant applicant-physicians, Count One alleges that each co-defendant physician on a specified date failed the Basic Skills, Clinical Skills, or both, portions of the licensing exam, and that passing score sheets were fabricated and inserted into their files, allowing each co-defendant physician to complete the remaining requirements necessary to obtain a license to practice medicine in Puerto Rico. Each co-defendant physician received a copy of the false score sheet or was informed that it had been placed in the file, and in some cases, inquired to the Board for a certification of the test results. Each individual would then proceed with the additional portions of the exam and application process in order to receive a medical license from the Board.

The Indictment alleges that Board defendant Perocier-Aguirre engaged in the fraudulent activities as personal favors and in some instances as favors to politicians. The Indictment alleges that Board defendant Rodríguez-Torres engaged in the fraudulent activities "for money, things of value, and in some instances, for free." The Indictment, however, does not allege that each co-defendant physician gave money or something of value to a Board defendant, or even that each

requested, implicitly or explicitly, assistance from a Board defendant or a broker. Further, the Indictment does not allege that each co-defendant physician knew or had any reason to know that he or she was entering into a larger scheme involving other participants or that each co-defendant physician knew that other applicants were falsely receiving passing grades under the schemes.

DISCUSSION

"Given the broad scope of the federal fraud statutes, motions charging insufficient pleadings... generally deserve careful consideration." United States v. Czubinski, 106 F.3d 1069, 1071 (1st Cir. 1997). Rule 12 of the Federal Rules of Criminal Procedure requires a defendant to raise any motion to dismiss a defective indictment prior to trial. Fed. R. Crim. P. 12(b)(3)(B). The failure to charge an offense, duplicity, and statute of limitations are matters that properly may be raised in a pretrial motion. Wright & Leipold, Federal Practice and Procedure: Criminal 4th §§191, 193 (2008). In this case, defendants argue: (1) Count One fails to adequately allege the offense of honest services mail fraud; (2) Count One suffers from duplicity insofar as it charges multiple conspiracies; and (3) Count One is time-barred. Each argument will be addressed in turn.

A. Honest Services Mail Fraud

Defendants argue that Count One, which charges conspiracy to commit honest services mail fraud in violation of Title 18, United States Code, Sections 371, 1341, and 1346, must be dismissed for failure to state an offense. In particular, defendants contend that the crime of honest services mail fraud involving a public official must contain an allegation of "bribery or breach of fiduciary duty resulting in private gain" on the part of that official. (Docket No. 1557, p. 9). The government disagrees, and contends that it is not required to plead or prove that any public official profited from the scheme or acted for personal gain. (Docket No. 1610, p. 2). Defendants also argue that the

honest services mail fraud statute is unconstitutionally vague as applied.

Rule 7(c)(1) requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment need only contain those facts and elements of the alleged offense necessary to inform the defendant of the charge so that he/she may prepare a defense. United States v. Burgos, 254 F.3d 8, 11 (1st Cir. 2001). However, an indictment is not sufficient if it fails to state a material element of the offense. United States v. Mojica-Baez, 229 F.3d 292, 308-09 (1st Cir. 2000). The question, then, is whether the bribery or breach of a fiduciary duty resulting in the private gain for a public official is part of an element of the offense of honest services mail fraud under the statutes.

"When asked to construe a statute we begin with its text." United States v. Herrera-Martinez, 525 F.3d 60, 65 (1st Cir. 2008). Section 1341 provides, in pertinent part, that "whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice to defraud" mails, attempts to mail, or causes to be mailed any matter, is guilty of a crime. 18 U.S.C. §1341. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346. However, Section 1346 was "passed with scant legislative history" and does not define the phrase "intangible right of honest services." United States v. Urciuoli, 513 F.3d 290, 293-94 (1st Cir. 2008).

Although "the right to honest services 'eludes easy definition,' honest services convictions of public officials typically involve serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision-makers to disclose certain conflicts of

interest." Czubinski, 106 F.3d at 1076 (*citing* United States v. Sawyer, 85 F.3d 713 , 724 (1st Cir. 1996)). "[A]s one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses." Urciuoli, 513 F.3d at 294.

The government relies primarily on United States v. Silvano, 812 F.2d 754 (1st Cir. 1987), to support its contention that the personal gain of a public official is not an element of honest services mail fraud. That case concerned the mail fraud convictions under Section 1341 of a Boston city official and his friend, an insurance agent, arising from a scheme to defraud the city in connection with the city employees health insurance program. McNeill, the city official, lobbied the city to award certain contracts; in doing so, he falsely claimed that his friend, Silvano, was a consultant for the city, and failed to disclose Silvano's interest in the contracts. The First Circuit, in upholding the convictions for mail fraud, held that a scheme to defraud under Section 1341 could be shown by the mere failure to disclose material information where the defendant was a government official with an affirmative duty to disclose. Id. at 759-60. The court went on to hold that it was "immaterial whether McNeill personally profited from the scheme or whether the City suffered a financial loss from it. The loss to the City of McNeill's good faith services alone establishes the breach." Id. at 760 (internal citations omitted). The government argues that Count One must be upheld under the reasoning of Silvano because the Indictment alleges that employees of the Board affirmatively engaged in fraud and deceptive practices by falsifying test scores to the benefit of the defendant physicians, even if the Board employees did not in every instance personally benefit from doing so.

Shortly after Silvano was decided, the Supreme Court held that the mail fraud statute (18

U.S.C. § 1341) did not prohibit schemes to defraud citizens of their intangible, non-property right to honest and impartial government. McNally v. United States, 483 U.S. 350, 359 (1987). Congress reacted to the McNally decision by enacting Section 1346, which provides that for the purpose of the mail and wire fraud statutes "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." The First Circuit has recognized "that §1346 was intended to overturn McNally and reinstate the reasoning of pre-McNally case law holding that the mail fraud statute reached schemes to defraud individuals of the intangible right to honest services of government officials." Sawyer, 85 F.3d at 723-24. Given this turn of events, the government correctly argues that the Supreme Court's holding in McNally does not impede the precedential value of Silvano.

Nevertheless, defendants argue that the case law has evolved since Silvano, with the First Circuit highlighting the difficulty of applying the honest services mail fraud statute in cases involving alleged misdeeds of public officials. The First Circuit's most extended analysis of the issue came in Sawyer. 85 F.3d 713. There, the court reversed the convictions of public officials who violated state laws, when their actions were not found to have defrauded citizens of their right to honest services because the officials did not actually fail to perform their official duties properly. In reaching this decision, the court was guided by three principles. First, the court acknowledged that honest services convictions of public officials "typically involve either bribery of the official or her failure to disclose a conflict of interest." Id. at 724. Second, the court cautioned that to "allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced." Id. at 728. Third, and most importantly, the court concluded that "although a public official might engage in reprehensible

misconduct related to an official position, the conviction of that official for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result. Similarly, if a non-public-official is prosecuted for scheming to defraud the public of an official's honest services, the government must prove that the target of the scheme is the deprivation of the official's honest services." Id. at 725. Put another way, the purpose of a scheme to deprive the public or a government entity of the honest services of an employee must be to "improperly affect the official's performance of duties". Id at 729.

The First Circuit soon after applied the principles identified in Sawyer to overturn the honest services wire fraud conviction of an Internal Revenue Service employee in Czubinski, on which defendants rely. 106 F.3d at 1077. The evidence in that case established that the defendant had without authorization browsed confidential taxpayer information, but was insufficient to establish that he was bribed or otherwise influenced in his decision making, or that he had disclosed the information to a third party. In applying the principles articulated in Sawyer, the court in Czubinski found first that the case "falls outside the core of honest services fraud precedents" in that the defendant "was not bribed or otherwise influenced in any public decision-making capacity." 106 F.3d at 1077. Second, the court emphasized that it should hesitate to turn what amounted to a workplace violation into a federal felony. However, the "conclusive consideration [was] that the government ... did not prove that Czubinski deprived, or intended to deprive, the public or his employer of their right to his honest services. Although he clearly committed wrongdoing in searching confidential information, there is no suggestion that he failed to carry out his official tasks adequately, or intended to do so." Id.

Although the decisions in Sawyer and Czubinski clearly express the court's concern over the

potential reach of the crime of honest services mail fraud as applied to the misconduct of public officials, these cases do not, as defendants suggest, require that the public official receive a bribe or other private gain in exchange for breaches of duty. Nor do these cases overrule the court's holding in Silvano. Rather, the "conclusive consideration" of the First Circuit's post-McNally cases appears to be that the public official was influenced (by means of a bribe, undisclosed conflict of interest, or other means) in his/her public decision-making capacity and that the target of the scheme to defraud was to deprive the public and/or the government entity of their right to the official's honest services.

Turning to the Indictment in this case, I find that Count One sufficiently alleges honest services mail fraud when measured against the principles discussed above. Initially, Count One alleges that Board defendant Yolanda Rodríguez-Torres played a pivotal role in the fraudulent passing scheme, caused the fraudulent replacement of score sheets for the exams of April 2001 to November 2005, and that she did this for money, things of value, and in some instances, for free. Therefore, even assuming that defendants were correct in that honest services mail fraud requires the bribery or personal gain of a public official, Count One adequately alleges that a public official received a personal gain as part of the fraudulent passing scheme. For this reason alone, the argument must fail at least as to all defendants who allegedly conspired to deprive the Board of the honest services of its employees by means of the fraudulent passing scheme.

Rodríguez-Torres, however, is the only public official who the Indictment alleges received any personal benefit from her role in the conspiracy. Moreover, the allegations in Count One do not indicate that Rodriguez-Torres had any involvement in the fraudulent revision scheme. Therefore, the thirteen co-defendant physicians whom Count One alleges participated only in the fraudulent

revision scheme therefore arguably stand in a different light. Nevertheless, that scheme also adequately alleges a scheme to deprive the Board of its honest services under the principles discussed above. Importantly, Count One alleges that the object of the conspiracy was to deprive the Board of the honest services of its employees and officials. More particularly with respect to the fraudulent revision scheme, the Indictment alleges that Board defendant Margarita Perocier-Aguirre falsely arranged for the sending of the official individual result sheets to her home instead of the Board's offices in San Juan and improperly passed, under the guise of the revision process, applicants who failed at least one part of the revalidation exam, and that she did this as personal or political favors. These alleged actions, moreover, were in dereliction of her fiduciary duty as the Board's President. In bringing these allegations, Count One of the Indictment satisfies the "conclusive considerations" discussed in the First Circuit's decisions, namely, that a public official was improperly influenced in her public decision-making capacity and that the target of the scheme to defraud was to deprive the public and/or the government entity of their right to the official's honest services. Accordingly, I recommend that defendants' motions to dismiss Count One be denied insofar as concerns the ground that it fails to state the offense of honest services mail fraud.

Defendants also argue that Count One should be dismissed because the honest services mail fraud statute is unconstitutionally vague as applied. (Docket No. 1557). The only case cited by defendants that found the statute unconstitutionally vague as applied is United States v. Handakas, F.3d 92 (2d Cir. 2002). As defendants themselves concede, this decision was overturned just one year later in United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003). Defendants note that the First Circuit has not yet ruled on the question. Czubinski, 106 F.3d at 1076, n.11 (declining to reach constitutional issue). Other circuits have rejected vagueness challenges to the honest services mail

fraud statute. U.S. v. Sorich, 523 F.3d 702, 711 (7th Cir. 2008) (citing cases from seven circuits rejecting vagueness challenges).

In order to find a statute unconstitutionally vague as applied, a court considers whether the statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" in light of the "framework of the specific facts in the record of the case." United States v. Marquardo, 149 F.3d 36, 41-42 (1st Cir. 1998). Defendants have not presented any compelling argument that the statute is unconstitutionally vague as applied to the alleged conduct. The indictment alleges that co-conspirator Board defendants were improperly influenced to commit fraud in dereliction of their fiduciary duties to the Board and to the public. As discussed previously, supra, the alleged conduct falls sufficiently within the "core of honest services fraud precedents" to adequately put defendants on notice that their conduct may be prohibited by law. Czubinski, 106 F.3d at 1077 (noting core misconduct includes being "bribed or otherwise influenced in public decisionmaking"). Accordingly, I recommend that defendants' motions to dismiss Count One on the ground that the honest services mail fraud statute is unconstitutionally vague as applied be denied.

B. Duplicity

1. *Single or Multiple Conspiracies?*

Defendants next move to dismiss Count One for duplicity. In particular, defendants argue that while Count One purports to allege a single conspiracy, it in fact alleges multiple conspiracies.

The government opposes, arguing that Count One adequately describes a single over-arching conspiracy.

Duplicity is the joining in a single count two or more distinct and separate offenses. United

States v. Canas, 595 F.2d 73, 78 (1st Cir. 1979). "The prohibition against duplicitous indictments arises primarily out of a concern that the jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of any particular offense," United States v. Verrecchia, 196 F.3d 294, 297 (1st Cir. 1999) (*quoting* United States v. Valerio, 48 F.3d 58, 63 (1st Cir. 1995)), and that the defendant has ample notice of the nature and cause of the proceedings against him so that he can adequately prepare a defense. United States v. Trainor, 477 F.3d 24, 32 n.16 (1st Cir. 2007). Uncured, a duplicitous count improperly joining multiple defendants carries the additional risks inherent in mass trials of the dangers of transference of guilt from one defendant to another. Kotteakos v. United States, 328 U.S. 750, 773-74 (1946). "Duplicitous charges also make it more difficult to determine if the earlier alleged crime occurred beyond the statute of limitations." Wright & Leipold, Federal Practice & Procedure: 4th §142 (2008).

A claim that the government improperly has characterized a series of allegedly unlawful transactions as a single enterprise can implicate the doctrine of duplicity. Trainor, 477 F.3d at 31. "While the First Circuit has not been extensive in its analysis of duplicity arguments in the context of conspiracy charges, other circuits have looked at 'whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy.'" United States v. Ramallo-Diaz, 455 F.Supp.2d 22, 26-27 (D.P.R. 2006) (*quoting* United States v. Gordon, 844 F.2d 1397, 1401 (9th Cir. 1987)). Courts determine whether there is a single conspiracy based on the totality of the circumstances, focusing on whether there is a common goal, interdependence, and overlap among participants. United States v. Portela, 167 F.3d 687, 696 (1st Cir. 1999), Trainor, 477 F.3d at 33. Moreover, the government must prove that each defendant knowingly participated in the charged conspiracy. Id. And as the First Circuit has

emphasized, the gist of the conspiracy offense "remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant." United States v. Glenn, 828 F.2d 855, 857 (1st Cir. 1987).

"The determination whether an indictment is duplicitous must be based on the allegations of the indictment itself." United States v. Muñoz-Franco, 986 F.Supp. 70, 71 (D.P.R. 1997). See also Trainor, 477 F.3d at 32 (on a motion to dismiss, court looks at whether "the facts set out in the indictment ... describe a scenario that is permissibly viewed as a single conspiracy"). Thus, the court must consider whether the facts alleged, if proven, describe a single conspiracy.

In this case, Count One begins by alleging that from on or about November 2000, through the date of the Indictment, the seventy-six defendants named in Count One conspired with each other and others to commit honest services mail fraud in violation of Title 18, United States Code, Sections 1341 and 1346. The object of the unlawful conspiracy is alleged to be the improper obtaining of licenses to practice medicine in Puerto Rico by individuals that had fraudulently passed the Basic and/or Clinical skills parts of the revalidation examinations of the Board, depriving the Board of the honest services of its employees and officials and causing the use of the United States mail in furtherance of the scheme.

Up to this point, Count One quite clearly alleges a single over-arching conspiracy: all defendants are alleged to have conspired to achieve the same illegal objectives. Difficulties arise, however, with the allegations that particularize the manner and means in which the object of the conspiracy was achieved and the acts and roles performed by the individual co-conspirator participants. Defendants argue that these detailed allegations reveal the existence of multiple agreements rather than a single conspiracy. First, defendants note that Count One describes two

distinct schemes - the fraudulent revision scheme and the fraudulent passing scheme - that were used to achieve the object of the conspiracy. Second, defendants note that Count One alleges that the conspiracy took place during eleven distinct administrations of the exam from April 1995 through November 2005. Third, the defendants argue that the Board defendants who deprived the Board of their honest services changed over time and with very little overlap in their dates of participation in the conspiracy. Finally, the defendants, citing Kotteakos, argue that the inclusion of the numerous applicant-physician defendants - each of whom allegedly had their individual test scores falsified - renders the over-arching offense charged in Count One a rimless "wheel conspiracy" in which the outer spokes - the doctors - have no connection to one another.

In considering defendants' arguments, it is important to note that the fact that different defendants participated at different times does not "inevitably signal that a new enterprise was born: '[O]ne conspiracy [does not] necessarily end and a new one begin each time a new member joins the organization.'" Trainor, 477 F.3d at 34 *(quoting* United States v. Balthazard, 360 F.3d 309, 314 (1st Cir. 2004)). Nor is a particular defendant precluded from being a part of an ongoing charged conspiracy "because the prior operations were completed before [the defendant] joined the conspiracy." Balthazard, 360 F.3d at 314. And the fact that certain operational details changed as the conspiracy progressed does not necessarily mean that a new conspiracy has emerged: in Balthazard, the First Circuit found that a "single conspiracy does not fracture into multiple conspiracies merely because the conspirators shift locations at which they conduct operations." Id. Thus, the facts that the alleged conspiracy employed first the fraudulent revision scheme and later the fraudulent passing scheme to achieve its objectives, and that different co-conspirators joined over time, do not by themselves establish multiple conspiracies; rather, the court's focus must remain on

whether the co-conspirators knew themselves to be aiding "a single over-all comprehensive plan". Blumenthal v. United States, 332 U.S. 539, 558 (1947).

Giving due weight to such considerations, I nevertheless believe that Count One does not sufficiently allege that all defendants charged were engaged in a single over-arching enterprise. Initially, defendants are correct in pointing out that Count One alleges very little overlap and interdependence between the fraudulent revision scheme and the fraudulent passing scheme. Initially, Perocier-Aguirre, the Board's President, is the only public official identified as participating in the fraudulent revision scheme, which itself pertained only to individuals who failed the November 2000 revalidation exam. While it is alleged that she conspired during the fraudulent revision scheme with one or more of the applicants who failed the November 2000 revalidation exam, she is, importantly, the only defendant in the indictment identified as having participated in falsifying scores both during and after that exam. Since a conspiracy requires at least two participants, see United States v. Kakley, 741 F.2d 1, 3 (1st Cir. 1984), I find it problematic that the Indictment identifies only one person (Perocier-Aguirre) as having actively participated in both the initial phase of the alleged single conspiracy (the November 2000 administration) and the next phase (the April 2001 participation). To put it another way, if a conspiracy requires at least two participants, and only one participant (Perocier-Aguirre) carries over from the November 2000 exam to the subsequent exam, that participant necessarily struck a new agreement with regard to the subsequent exam. It thus appears that Count One alleges (at least) one agreement between Perocier-Aguirre and (one or more of the) thirteen applicant defendants corresponding to the November 2000 administration of the exam, and that such agreement is distinct from any subsequent agreement(s) Perocier-Aguirre made with other Board defendants and applicants corresponding to later

administrations of the exam.

I do not, however - and setting aside for the moment the "rimless wheel" problem of the numerous physician defendants who received false passing scores - find similarly insufficient overlap of identified core conspirators spanning the administration of the exams that made up the fraudulent passing scheme which stretched from the April 2001 exam onward. With respect to the April and November 2001 exams, Count One alleges that Perocier-Aguirre referred failing applicants to Board defendants Jiménez-Méndez and Rodríguez-Torres in order to create false and fraudulent passing scores. (Docket No. 1104, ¶13). Count One further alleges that Rodríguez-Torres would cause true failing score sheets to be replaced by false test scores for the examinations from April 2001 to November 2005 (Docket No. 1104, p.12), and that failing applicants were referred to her for this purpose by four identified first tier brokers and six identified second tier brokers. (Docket No. 1104, Count One ¶¶15, 16). Accepting this as true, Count One sufficiently alleges and identifies at least two "core" conspirators (that is, Board defendants and/or brokers) whose participation spans one administration of the test to the next from April 2001 to November 2005.

Defendants' most compelling argument, however, is that Count One presents a "rimless wheel" conspiracy as described in the seminal decision in Kotteakos. 328 U.S. 750. In Kotteakos, the Supreme Court held that the government's evidence demonstrated multiple conspiracies and had resulted in a prejudicial variance at trial. Id. The government had alleged that thirty-two defendants conspired to defraud the government and various financial institutions in connection with obtaining National Housing Act loans. Evidence demonstrated that one defendant, Simon Brown, was involved in all of the alleged transactions, and Brown was the sole connection between each of the other defendants. Id. at 754. The Court described the conspiracy as a pattern of "separate spokes

meeting at a common center ... without the rim of the wheel to enclose the spokes," where Brown was the central hub and the co-conspirators were the spokes. Id. at 755. The Court held that such evidence made out a case not for a single conspiracy but for "at least eight and perhaps more, separate and independent groups [of co-conspirators], none of which had any connection with any other, though all dealt independently with Brown as their agent." Id. at 754-55. The Court held that this variance was not harmless error, cautioning against the risks inherent in mass trials of the dangers of transference of guilt from one defendant to another. Id. at 773-74.

The following session, the Court contrasted Kotteakos in finding a single hub-and-spokes conspiracy where a group of distributors conspired to unlawfully sell whiskey. Blumenthal, 332 U.S. at 559. The Court compared the two situations: "Apart from the much larger number of agreements there involved [in Kotteakos], no two of those agreements were tied together as stages in the formation of a large all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all comprehensive plan." Blumenthal, 332 U.S. at 558.

In a hub-and-spokes conspiracy, the central question in finding a "rim" - that is, a single conspiracy - is whether the spokes "knew or had reason to know of the existence, but not necessarily

the identity" of one or more other spokes. United States v. Manarite, 448 F.2d 583, 589-90 (2d Cir. 1971) (distributor of pornographic material "must have known" that materials were also being distributed by other dealers). See also Blumenthal, 332 U.S. at 559 (co-conspirators in illegal whiskey sales scheme "knew the lot to be sold was larger [than his part] and thus that he was aiding in a larger plan"). If such knowledge is absent, the "rimless wheel" conspiracy must properly be viewed as multiple conspiracies with "as many conspiracies as there are spokes." United States v. Chandler, 388 F.3d 796, 807 (11th Cir. 2004) (*citing* Kotteakos, 328 U.S. at 754-55).

The facts alleged in Count One closely parallel those in Kotteakos. The complaint describes a hub-and-spokes conspiracy with Board defendants Perocier-Aguirre, Jiménez-Méndez, and Rodríguez-Torres at the hub, along with four first-tier brokers and six second-tier brokers. Connected to that hub are eighty spokes: fifty co-defendant physicians and thirty other physicians who the government alleges fraudulently received passing results through the scheme. The allegations pertaining to each of the applicant-physician defendants consist only of the fact that each defendant failed the examination on one or more occasions, received a false passing score, fraudulently received a license to practice medicine, and, in some cases, contacted one of the Board defendants or brokers. Importantly, the allegations regarding each of the applicant-physician defendants pertain only to the obtaining by that defendant of his/or her own fraudulently obtained score or medical license; there are no allegations that suggest that each of the applicant-physician defendants knew of an over-arching conspiracy that involved other similarly situated applicants, or sought to aid in obtaining false test scores or medical licenses for the other applicants.

The distinction between Kotteakos and Blumenthal is instructive in this regard. Blumenthal contrasted the "large number of agreements" in Kotteakos - a minimum of eight. 332 U.S. at 558.

Here, depending on how one views the Indictment, there may be as many conspiracies as exam administrations (eleven), applicant physicians (ninety-three), or some other formulation. As in Kotteakos, "each separate agreement had its own distinct, illegal end" - a passing test result and ultimately a medical license for each applicant physician defendant. Id. Just as in Kotteakos, the allegations in Count One do not suggest that any of the applicants was interested in whether any other co-defendant received a passing exam score and medical license. Id. Nor does Count One contain any allegation that the applicant-physicians "aided in any way, by agreement or otherwise, in procuring another's [passing exam score and license]." Id. The allegations thus describe "distinct and disconnected" conspiracies which do not result in a single, comprehensive plan. Id. See also Muñoz-Franco, 986 F.Supp. at 72 (dismissing conspiracy charge alleging scheme to defraud banks where indictment contained no allegations tying the two sets of participants to each other).

Moreover, and fundamentally, the Indictment must allege that each defendant "knowingly participated in the charged conspiracy." Trainor, 477 F.3d at 33 (*citing* Balthazard, 360 F.3d at 315). In a hub-and-spokes conspiracy, this requisite knowledge means that the defendant must have known or had reason to know of the existence of other spokes. Manarite, 448 F.2d at 589-90. Here, Count One does not allege such knowledge, "[n]or is this the type of conspiracy that *must* have had other members; it would have been perfectly reasonable for [each spoke] to have believed that they were doing business only with [the hub participants]" United States v. Kemp, 500 F.3d 257, 288 (3rd Cir. 2007) (original emphasis).

The government nevertheless argues that the scheme "became known in the medical student community." (Docket No. 1610). Be that as it may, the court must determine whether the indictment is duplicitous "based on the allegations of the indictment itself," Muñoz-Franco, 986

F.Supp. at 71, and the Indictment fails to make any such allegation. Even if the Indictment contained this allegation, it still must allege that each applicant- physician defendant (apart from the amorphous "community") had knowledge of the single over-arching conspiracy.

The government further argues that each co-defendant "had a vested interest in the success of the scheme, since the detection of the scheme would have resulted in its immediate collapse." (Docket No. 1610). The Supreme Court, however, has rejected such an argument as insufficient to tie together otherwise-unconnected co-defendants, drawing on the analogy of thieves selling to a common fence. Kotteakos, 328 U.S. at 755. "In essence, the Supreme Court was saying that if one robber who sold to a particular fence was caught and the evidence led to the fence, the identification of the fence could foreseeably lead to other people doing business with the fence, but that is not sufficient to establish a single conspiracy." United States v Pappathanasi, 383 F.Supp.2d 289, 297 (D. Mass. 2005) *(citing* Kotteakos). Thus, the co-defendant physicians' shared interest in the secrecy of the scheme here is insufficient to allege interdependence.

Nor does the Indictment allege any other type of interdependence between the spokes. Interdependence requires determining "whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." Portela, 167 F.3d at 695 (internal citation omitted). There is no interdependence where "[t]he combined efforts of the spokes was not required to insure the success of the venture" and none of the alleged co-conspirators "depended upon, was aided by, or had any interest in the success of the others." Chandler, 388 F.3d at 811. Courts examining analogous corruption and fraud schemes have found that alleged conspiracies fail for lack of interdependence among the "spoke" participants who received the benefit of the central figure's corrupt activities. See, e.g., Kemp, 500 F.3d at 289-90 (no

interdependence among co-defendants who were steered business by city treasurer which benefitted each spoke individually); Pappathanasi, 383 F.Supp.2d at 297 (D.Mass. 2005) (in tax evasion scheme involving hub sales-business and five different hub purchaser-businesses, "The success of one [co-conspirator] in evading taxes does not depend on the efforts of any others, and there is no evidence that the [co-conspirators] thought it did"); United States v. Marlinga, No. 04-80372, 2005 WL 513494, at *5 (E.D.Mich. Feb. 28, 2005) (county prosecutor's favors in various pending cases in exchange for campaign contributions alleged multiple conspiracies because scheme regarding each case did not depend on or benefit from the existence of other cases).

I find, therefore, that Count One alleges multiple conspiracies and is impermissibly duplicitous.

2. *Remedy*

Having found that Count One alleges multiple conspiracies, there remains the question of remedy. In such cases, various remedies may be available. Wright & Leipold, Federal Practice and Procedure: Criminal 4th §145 (2008). A court may (1) require the government to elect the single count on which it plans to rely; (2) cure the risk of duplicitous counts through a jury instruction; or (3) dismiss the count. Id.

The first alternative - of requiring the government to elect a single theory to present at trial - has been preferred in cases where a single count charges a single defendant with two separate crimes. See e.g., United States v. Ramírez-Martínez, 273 F.3d 903, 915 (9th Cir. 2001), *overruled on other grounds*, United States v. López, 484 F.3d 1186 (9th Cir. 2007). The remedy of election, however, is a less comfortable fit in cases like the present one that involve multiple conspiracies and multiple defendants, where an election to proceed on a single identified conspiracy likely would require the

government to eliminate multiple defendants from a conspiracy count. Attempting to remedy the problem through a jury instruction also is insufficient when, as here, "the problem and its potential for harm and prejudice is recognized so far in advance of trial." Marlinga, 2005 WL 513494, at *6 (requiring government to reformulate in separate indictments charge alleging rimless wheel conspiracy).

Accordingly, courts finding indictments duplicitous because the allegations described multiple conspiracies have elected to dismiss the conspiracy count without prejudice to reformulation as separate counts or indictments. Id., 2005 WL 513494, at *6 ("Acknowledging that [the conspiracy count] is duplicitous prior to trial, but failing to cure the duplicity until the jury instruction stage, would leave the Defendant[s] open to the very prejudices the Court can prevent."). The Tenth Circuit, while acknowledging that dismissal usually is not the remedy for duplicity, similarly affirmed the district court's dismissal of a conspiracy charge against seven co-defendants where multiple conspiracies were alleged and not all defendants were alleged to have participated in all of the conspiracies. United States v. Bowline, 593 F.2d 944, 947 (10th Cir. 1979). The court found dismissal appropriate in order to avoid subjecting these co-defendants to prejudice "as a result of being tried in an atmosphere where the acts and conspiracies of others were introduced." Id. This district also has granted pretrial dismissal of a conspiracy indictment which alleged that two bank officials conspired with two distinct sets of bank customers to defraud the bank. Muñoz-Franco, 986 F.Supp. at 72. I therefore conclude and recommend that the proper remedy is dismissal of Count One of the Indictment without prejudice to its reformulation in subsequent counts or indictments.

C. Statute of Limitations

Defendants also seek to dismiss the Indictment on statute of limitations grounds. If the

district court adopts my recommendation in Section B, Duplicity, supra, then the statute of limitations arguments are moot subject to their applicability, if any, to the allegations raised in any reformulated conspiracy counts whether brought in this case or in separate cases.

On the other hand, if the district court determines instead that Count One alleges a single conspiracy, then that Count should not be dismissed on statute of limitations grounds. The Indictment alleges a conspiracy under Title 18, United States Code, Section 371. The statute of limitations for conspiracy charges is five years. 18 U.S.C. §3282. The statute of limitations runs from the time of the last overt act during the existence of the conspiracy. Grunewald v. United States, 353 U.S. 391 (1957). The only exception is if a defendant withdraws from the conspiracy, which requires the co-conspirator to "act affirmatively either to defeat or disavow the purposes of the conspiracy." United States v. Juodakis, 834 F.2d 1099, 1102 (1st Cir. 1987) *(citing* Hyde v. United States, 225 U.S. 347, 369 (1912)).

Here, Count One alleges that the last overt act occurred on October 21, 2006. None of the defendants have proffered evidence of withdrawal from the alleged conspiracy. Thus, assuming Count One charges a single conspiracy, the statute of limitations on Count One began to run on October 21, 2006, and expires on October 21, 2011. Therefore, I recommend that defendants' motions to dismiss Count One on statute of limitations grounds be denied.

CONCLUSION

I recommend that the motions to dismiss Count One of the Indictment be **granted** on the ground that Count One alleges multiple conspiracies and is therefore duplicitous. If the District Court does not adopt this recommendation, and instead determines on review that Count One alleges a single over-arching conspiracy, then I recommend that the motion to dismiss for failure to state a

claim for honest services mail fraud and on statute of limitations grounds be **denied**.

This report and recommendation is filed pursuant to 28 U.S.C. 636(b)(1)(B) and Rule 72(d) of the Local Rules of this Court. Any objections to the same must be specific and must be filed with the Clerk of Court within ten (10) business days. Failure to file timely and specific objections to the report and recommendation is a waiver of the right to appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this 20th day of June, 2008.

S/ Bruce J. McGiverin
BRUCE J. McGIVERIN
United States Magistrate Judge