

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

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUISA INCLAN BIRD
Defendants.

Criminal No. 08-036 (PJB)

**RESPONSE OF THE UNITED STATES
IN OPPOSITION TO DEFENDANT LUISA INCLAN'S
MOTION TO DISMISS COUNT ONE ON GROUNDS OF VAGUENESS (D.E. 169)**

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through its undersigned attorneys Rosa Emilia Rodríguez-Vélez, United States Attorney, María A. Domínguez, First Assistant United States Attorney, Ernesto López Soltero, Assistant United States Attorney, and Daniel Schwager, Trial Attorney, Public Integrity Section, U.S. Department of Justice, and files this response to the pre-trial motion filed by defendant Luisa Inclán Bird. In response thereto the government respectfully states as follows:

PRELIMINARY STATEMENT

As a preliminary matter, while titled a Motion to Dismiss for Vagueness, the substance of Defendant Luisa Inclán Bird's ("Inclán") motion makes it the legal equivalent to a motion to dismiss the indictment as insufficient.¹ While Inclán cites cases dealing with statutory vagueness, at no time does the motion ever allege that Title 18, *United States Code*, §371 is unconstitutionally vague. Instead, the motion alleges that the indictment is impermissibly vague. (Docket Entry "D.E." 169, p.1). Specifically, Inclán argues the indictment is vague since "it is impossible to tell whether

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In the conclusion, Inclán specifically states that Count One "fails to adequately apprise Defendant Inclán Bird of the nature of the allegations against her." Such a claim is a sufficiency of the indictment claim and the Government will treat it as such.

Count One describes one or multiple conspiracies; what acts of different defendants and ‘co-conspirators’, if any, relate to Defendant Inclán Bird; what agreement, if any, is attributed to Defendant Inclán Bird; and what Defendant Inclán Bird actually knowingly did to become a member of the conspiracy.” (D.E. 169, p.1). Accordingly, since Inclán’s claims are more similar to an attack on the sufficiency of the indictment, the Government will address the sufficiency of the superseding indictment. The motion to dismiss should be denied because the indictment is sufficient on its face.

ARGUMENT

Inclán’s thesis hinges on the erroneous equation of what the Government must charge in the indictment with what the Government must prove at trial. A motion to dismiss an indictment is not a device for summary trial of the evidence, but rather directed only to the question of the validity of the indictment on its face. *United States v. Winer*, 323 F.Supp. 604, 605 (E.D.Pa.,1971) (citing *United States v. Sampson*, 371 U.S. 75 (1962)); see also *United States v. Dunbar*, 367 F. Supp. 2d 59, 60 (D.Mass., 2005) (noting that any inquiry into whether the government can prove its case at trial is inappropriate at the motion to dismiss stage); *United States v. Marbelt*, 129 F.Supp. 2d 49, 56 (D.Mass., 2000) (stating when a motion to dismiss the indictment involves mixed questions of fact and law that are properly decided a trial, the motion to dismiss the indictment must be denied). In determining whether an indictment is sufficient on its face, the Supreme Court set forth a two prong test. *Hamling v. United States*, 418 U.S. 87, 117 (1974). First, the indictment must contain all the elements of the offense charged and fairly inform the defendant of the charge against him which he must defend. *Id.* Second, the indictment must enable a defendant to pled and acquittal or conviction in bar of future prosecutions for the same offense. *Id.*; *United States v. Cianci*, 378 F.3d 71, 81 (1st Cir.2004).

Count One charges a violation of 18 U.S.C. § 371, which provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Title 18, *United States Code*, § 371. The First Circuit has stated that to charge an offense under §371, an information or indictment must contain three essential elements. *United States v. Barker Steel Co., Inc.*, 985 F.2d 1123, 1127-1128 (1st Cir.1993). These elements are “an agreement, the unlawful objective of the agreement, and an overt act in furtherance of the agreement.” *Id.* The Superseding Indictment contains all three elements.

In the instant case, Count One of the superseding indictment not only contains all the elements of the offense but also fairly informs Inclán and the other co-defendants of the charges they must defend. The superseding indictment properly tracks the statutory language.² (Superseding Indictment, pp. 6-7). Furthermore, the superseding indictment properly informs the co-defendants of the objects of the conspiracy. (Superseding Indictment, pp. 7-8). Specifically, the indictment alleges the conspirators knowingly and willfully solicited and received illegal contributions for the candidacy of defendant Acevedo Vila. (Superseding Indictment, p. 7). Another object of the

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In her motion, Inclán concedes the indictment generally tracks the statutory language of 18 U.S.C. §371. (D.E. 169, p. 4). Specifically, Count One provides in pertinent part:

“Beginning in or about September 1999, and continuing thereafter through on or about June 30, 2003, in the District of Puerto Rico and elsewhere, the defendants... did knowingly, intentionally and willfully combine, conspire, confederate, and **agree** with each other and with others known and unknown to the Grand Jury, to knowingly and willfully commit offenses against the United States....in violation of Title 18 United States Code, Section 1001(a)(1). (emphasis added).

conspiracy was to was mislead the Federal Election Commission. (Superseding Indictment, p. 7). Moreover, the Superseding Indictment details forty-three (43) overt acts in furtherance of the conspiracy. Consequently, the indictment contains all the essential elements and goes into considerable detail with respect to the underlying factual allegations, properly apprising Inclán and the other co-defendants of the charges. Lastly, Inclán cites no case law that requires an indictment to provide further factual detail, including what Inclán knowingly did to become a member of the conspiracy or what agreement is specifically attributed to her. Such requests test the evidentiary strength of the Government's case against Inclán as opposed to the validity of the Superseding Indictment and should be reserved for trial. See *Dunbar*, 367 F. Supp. 2d at 60.

In conclusion, Inclán has not established that the Superseding Indictment is insufficient, ambiguous or vague. All of the elements of the crimes are charged. The defendants have fair notice of the theory and factual outline of the case the Government intends to offer at trial, as the Superseding Indictment has specified the dates, participants, goals and methods of the conspiracy. There is simply no crucial fact lacking which prevents Inclán or any other co-defendant from preparing a defense or defending against a second prosecution for the same conduct. Nothing more is required at the indictment stage. Accordingly, Inclán's Motion to Dismiss Count One on the grounds of vagueness (D.E. 169) should be denied.

WHEREFORE, all of the above considered, the United States of America respectfully requests that the defendant's motion identified with docket number 169 be DENIED.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 28th day of July, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record. At San Juan, Puerto Rico, this 28th day of July 2008.

s / María A. Domínguez

María A. Domínguez

First Assistant United States Attorney