UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES—GENERAL

Case No. CR-12-00441-MWF **Date: March 4, 2014**
Title: United States of America -*v*- Gary Edward Kovall, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER DENYING MOTION TO DISMISS FILED BY DEFENDANT DAVID ALAN HESLOP [160], AND JOINDERS FILED BY GARY EDWARD KOVALL AND PEGGY ANNE SHAMBAUGH [165, 169]

This matter is before the Court on the Motion to Dismiss (the "Motion"), filed by Defendant David Alan Heslop. (Docket No. 160). The court read and considered the papers on the Motion, and held a hearing on **February 18, 2014**. For the reasons stated below, the Court **DENIES** the Motion.

Background

The First Superseding Indictment ("Indictment") was filed on September 5, 2012. (Docket No. 63). The Indictment charges 58 counts against four Defendants: Gary Edward Kovall, David Alan Heslop, Paul Phillip Bardos, and Peggy Anne Shambaugh. The Indictment alleges the following facts.

The Twenty-Nine Palms Band of Mission Indians (the "Tribe") is a Native American tribe. (Indictment, ¶ 1). The Tribe owned Twenty-Nine Palms Enterprises Corp. ("EC"), through which it operated a casino. (Indictment, ¶ 2). Mr. Kovall served as the Tribe's legal counsel. (Indictment, ¶ 3). Mr. Kovall advised the Tribe to create Echo Trail Holdings, LLC ("ETH"). (*Id.*). The Tribe was the sole member of ETH. (*Id.*). Mr. Kovall further advised the Tribe to name Dr. Heslop as ETH's manager. (Indictment, ¶ 5).

From September 2006 to August 2008, Mr. Kovall and Dr. Heslop were "agents" of the Tribe, acting as the Tribe's attorney and manager, respectively. (Indictment, ¶¶ 3, 5, 9, 10(a)). Mr. Kovall and Dr. Heslop persuaded the Tribe to contract with Mr. Bardos, a licensed general contractor, to act as its "owner's representative" in connection with a number of construction contracts. (Indictment, ¶ 6). Mr. Kovall also advised the Tribe to accept proposals for Mr. Bardos to perform work when additional construction and oversight became necessary. (Indictment, ¶¶ 10(b)-(c)). Mr. Bardos subcontracted virtually all of the work he was awarded and then paid kickbacks to Dr. Heslop, who, in turn, paid further kickbacks to Mr. Kovall through Mr. Kovall's then-girlfriend, Ms. Shambaugh. (Indictment, ¶¶ 10(d)-(e)).

The Indictment charges the following counts against Dr. Heslop:

- Count 1: All Defendants conspired under 18 U.S.C. § 371 to violate 18 U.S.C. § 666 by corruptly accepting payments as agents of the Tribe and making payments to agents of the Tribe;

- Counts 10 through 17: Dr. Heslop corruptly accepted payments from Mr. Bardos in violation of 18 U.S.C. § 666(a)(1)(B);

- Counts 18 through 24: Dr. Heslop corruptly made payments to Mr. Kovall in violation of 18 U.S.C. § 666(a)(2);

- Count 35: Dr. Heslop corruptly solicited, demanded, accepted, and agreed to accept $10,000 from Ms. Shambaugh with the intent to be influenced and rewarded in connection with ETH's purchase of a 47-acre parcel of land, in violation of 18 U.S.C. § 666(a)(2); and

- Counts 36 through 52: Mr. Bardos, Dr. Heslop and Ms. Shambaugh engaged in money laundering in violation of 18 U.S.C. § 1957.

On February 5, 2013, Defendants filed their first motion to dismiss, titled Omnibus Motion to Dismiss the First Superseding Indictment. (Docket No. 92). That

motion was denied by the Court on March 25, 2013 (the "March 25 Order"). (Docket No. 115).

On January 6, 2014, Dr. Heslop filed this Motion, which is his second motion to dismiss. (Docket No. 160). On January 24, 2014, the government filed a motion to dismiss Counts 10-17, Counts 36-52, and Forfeiture Allegation III, which the Court granted on January 27, 2014. (Docket Nos. 170, 172). Therefore, with regard to Dr. Heslop, this Order only addresses Counts 1, 18-24, and 35.

Mr. Kovall joined this Motion on January 14, 2014, and Ms. Shambaugh followed suit on January 24, 2014 (the "Joinders"). (Docket Nos. 165, 169). In particular, Mr. Kovall and Ms. Shambaugh join the Motion in seeking dismissal of Count 1, and join the request for judicial notice filed concurrently with this Motion. (*See* Joinders at 1-2). They also seek dismissal of Counts 25-31 of the Indictment on the basis of Points One, Two, and Three of Dr. Heslop's Motion. (*Id.*). Counts 25-31 allege that Mr. Kovall, aided and abetted by Ms. Shambaugh, corruptly accepted monetary payments in violation of 18 U.S.C. § 666(a)(1)(B). (*See* Indictment, Counts 25-31). After joining the Motion, Mr. Kovall pled guilty on February 21, 2014. (Docket No. 223).

On January 24, 2014, the government filed an Opposition to Defendant's Alan Heslop's Motion to Dismiss (the "Opposition"). (Docket No. 171). On January 31, 2014, Dr. Heslop filed a Reply on Heslop's Motion to Dismiss (the "Reply"). (Docket No. 174).

Request for Judicial Notice

In support of this Motion, Dr. Heslop asks the Court to look beyond the Indictment and take judicial notice of (1) the Tribe's Charter, (2) ETH's Operating Agreement, (3) a number of checks that EC apparently paid to Mr. Bardos for the construction contracts referenced in the Indictment, (4) ETH's bank account information, and (5) a number of checks that ETH apparently paid to Dr. Heslop in his

capacity as ETH's manager. (Defendant David Alan Heslop's Request for Judicial Notice at 2-5 (the "Request") (Docket No. 158)).

Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The documents listed in the Request do not contain facts generally known within the jurisdiction, nor are they drawn from sources whose accuracy cannot reasonably be questioned, such as the public record.

Instead, Dr. Heslop argues that the documents can be judicially noticed under a doctrine developed in the context of civil cases. (Request at 5-6). In civil cases, "a district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (superseded by statute on unrelated grounds). Dr. Heslop cites *United States v. International Longshoreman's Association*, 518 F. Supp.2d 422 (E.D.N.Y. 2007), to demonstrate that this doctrine has been applied in criminal cases. However, *International Longshoreman's Association* involved a civil Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO") action. Therefore, the Court is not persuaded that the doctrine articulated in *Parrino* applies in criminal cases, to the same extent that it does in civil cases.

With regard to criminal cases, Federal Rule of Criminal Procedure 12 was not "intended to permit 'speaking motions,' that is, motions that require consideration of facts outside the pleadings." 1A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure Criminal* § 194 (4th ed. 2013). But "[t]his is not to say, of course, that courts may not consider and resolve fact questions when ruling on motions prior to trial, it just may not resolve matters that constitutionally must be decided by a jury." *Id.* For example, the Ninth Circuit has found that where neither party contested the facts, the Court did not invade the province of the jury when it determined jurisdiction on a pretrial motion to dismiss. *See United States v. Phillips*, 367 F.3d 846, 885 & n.25 (9th Cir. 2004).

The government has not disputed the authenticity of the documents attached to the Request. However, as discussed more fully below, taking judicial notice of the documents would be improper. With regard to the Tribe's Charter and the checks from EC to Mr. Bardos, Dr. Heslop asks the Court to take judicial notice of these documents to determine factual issues, and doing so would invade the province of the fact finder. The Court, moreover, does not take judicial notice of the other documents because it is bound by the four corners of the Indictment when assessing challenges to the sufficiency of the Indictment.

Accordingly, the Request is **DENIED**.

Motion to Dismiss

As an initial matter, Mr. Kovall's joinder is **DENIED** as moot since he has pled guilty.

Propriety of the Motion

The government argues that the Motion is an improper motion to reconsider and should be denied because it fails to provide an appropriate basis, as required by Local Civil Rule 7-18. (Opp. at 5-7).

Although Rule 7-18 is a Local Civil Rule, "[c]ourts have held that motions for reconsideration in criminal cases are governed by the rules that govern equivalent motions in civil proceedings." *United States v. Mendez*, No. CR-07-00011 MMM, 2008 WL 2561962, at *2 (C.D. Cal. June 25, 2008). Therefore, courts in this district have applied Local Civil Rule 7-18 in criminal cases. *See, e.g.*, *id.* (applying Local Civil Rule 7-18 to a motion for reconsideration of an order denying a defendant's request that the government provide a list of potential trial witnesses in a criminal case); *United States v. Herrera*, No. CR 02-00531-RSWL-1, 2013 WL 4012625, at *2 (C.D. Cal. Aug. 2, 2013) (applying Local Civil Rule 7-18 to the defendant's request to reconsider the court's prior order denying the defendant's argument that because the

government did not rebut the defendant's affidavit and stipulated answers, it acquiesced in his assertion that the court lacked subject matter jurisdiction).

Local Civil Rule 7-18 permits a motion for reconsideration on the grounds of (1) "a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision," (2) "the emergence of new material facts or a change of law," or (3) "a manifest showing of a failure to consider material facts." Local Civil Rule 7-18.

The Motion raises some similar arguments as the previous motion to dismiss. In particular, the Motion's arguments that the transactions are not related to an entity receiving federal funds and that Dr. Heslop is not an agent of the Tribe were essentially raised in the previous motion to dismiss. (*Compare* Mot. at 8-17, 18-22 *with* Docket No. 92 at 8-14). The Motion also presents new arguments not previously raised, including that the Indictment fails to allege a connection between Dr. Heslop's influence and any alleged improper payment. (*See* Mot. at 17-18). It is not clear that any of these arguments, or the extrinsic evidence on which they rely, could not reasonably have been known to Dr. Heslop when he filed the earlier motion to dismiss, as required by Local Civil Rule 7-18.

However, as Dr. Heslop points out, Federal Rule of Criminal Procedure 12(b)(3)(B) permits a defendant to challenge "a defect in the indictment . . . at any time while the case is pending." Fed. R. Crim. P. 12(b)(3)(B). The government has not cited any case law prohibiting a defendant from bringing more than one motion to dismiss before trial.

Therefore, even if the Motion can be construed as a reconsideration motion that does not meet the technical requirements of Local Civil Rule 7-18, "it is in the interests of justice and judicial economy" to consider the Motion. *United States v. Pulido-Estrada*, No. CR 12-00032 DDP, 2013 WL 1498888, at *2 (C.D. Cal. Apr. 11, 2013) (quoting *United States v. Quintanilla*, No. CR 09–01188 SBA, 2011 WL 4502668, at *5 (N.D. Cal. Sep. 28, 2011)) (considering the merits of a reconsideration motion, even

though "the technical requirements of Local Civil Rule 7-18 [we]re not met"). Accordingly, the Court will err on the side of caution and proceed to the merits of the Motion.

Federal Funds Element of 18 U.S.C. § 666 (Counts 18-24, 25-31, and 35)

The Motion argues that this Court lacks jurisdiction over the 18 U.S.C. § 666 Counts (*i.e.*, Counts 18-24, 25-31, and 35) because the Indictment fails to allege that improper payments were made in connection with an entity that received federal benefits in excess of $10,000 within one year. (Mot. at 8-17). Counts 18-24, 25-31, and 35 allege violations of 18 U.S.C. § 666(a)(1)(B) and (a)(2). (*See* Indictment, Counts 18-24, 25-31, 35).

Section 666(a)(1)(B) and (a)(2) make the following actions a criminal offense:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
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> > (1) being an ***agent*** of an organization, or of a State, local, or ***Indian tribal government***, or ***any agency thereof***--
> >
> > . . .
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or ***accepts or agrees to accept***, ***anything of value*** from any person, intending to be influenced or rewarded ***in connection with any*** business, ***transaction***, or series of transactions ***of such organization, government, or agency*** involving any thing of value of $5,000 or more; or
> >
> > (2) corruptly gives***, offers, or agrees to give anything of value*** to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, ***in***

> ***connection with any*** business, ***transaction***, or series of transactions ***of such organization, government, or agenc***y involving anything of value of $5,000 or more;
>
> . . .
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a)-(b) (emphasis added).

As discussed above, Dr. Heslop asks the Court to look beyond the Indictment and take judicial notice, in pertinent part, of (1) the Tribe's Charter, and (2) a number of checks that EC apparently paid to Mr. Bardos for the construction contracts referenced in the Indictment. (*See* Request at 2, Exs. 1, 3-24). Dr. Heslop argues that the Tribe's Charter demonstrates that EC is a federally chartered corporation under Section 17 of the Indian Reorganization Act of 1934, and thus, a separate legal entity from the Tribe. (Mot. at 4). The checks, moreover, demonstrate that the alleged payments from the Tribe to Mr. Bardos were actually payments that originated from EC, rather than the Tribe. (Mot. at 8). Therefore, Dr. Heslop argues that these documents present "indisputable evidence that the entities involved in the charged transactions were not a tribal government, but rather were distinct corporate entities, EC and ETH, and neither is alleged to have received federal money." (Mot. at 12).

In making this argument, Dr. Heslop relies heavily on *United States v. Wyncoop*, 11 F.3d 119 (9th Cir. 1993). In *Wyncoop*, the Ninth Circuit reversed a defendant's conviction under 18 U.S.C. § 666 for embezzling money from a private technical school because the school was not an organization that received benefits in excess of $10,000 each year. *Id.* at 123. In so holding, the Ninth Circuit reasoned as follows:

> The specific question before us is whether the statute [18 U.S.C. § 666] applies to employees of entities receiving only indirect benefits from a federal program. After a review of the statute itself, its history, and its interpretation in this and other federal courts, we conclude that Congress' intent was to bring conduct that could have an effect on the administration or integrity of federal funds within the ambit of federal criminal law. Congress did not intend, however, to make misappropriations of money from every organization that receives *indirect* benefits from a federal program a federal crime.
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> . . .
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> . . . In this case, . . . the defendant was employed by an entity that never received any federal funds under [student] loan programs. Trend College itself received only the indirect benefits associated with increased enrollment of students receiving private loans induced by federal guarantees to the private lenders. Thus, applying section 666 to defendant's misdeeds would not further the recognized purpose of section 666.

Id. at 121-23. *Wyncoop* thus stands for the proposition that "the defrauded program or agency must receive federal funding directly." *United States v. Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003) (summarizing the holding in *Wyncoop*).

In light of *Wyncoop*, Dr. Heslop makes a colorable argument that the alleged transactions in the Indictment were not made in connection with an entity that receives federal funds. However, the case law strongly indicates that it would be premature for the Court to determine this issue at this stage for several reasons.

First, when "ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). Moreover, on such a motion, "the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." *Id.*

The Indictment itself sufficiently alleges that the transactions related to the 18 U.S.C. § 666 counts were in connection with an entity that receives federal funds in excess of $10,000 a year. The Indictment alleges that the Tribe received "hundreds of thousands of dollars in federal assistance" from the United States Environmental Protection Agency "[o]n an annual basis." (Indictment, ¶ 8). The Indictment further alleges that the kickbacks to Dr. Heslop, Ms. Shambaugh, and Mr. Kovall were related to transactions between Mr. Bardos or his company, Cadmus Construction Co., and the Tribe itself. (*See, e.g.*, Indictment, ¶¶ 6, 9, 10(b)-(e)). For example, the Indictment alleges that in March 2007, Mr. Kovall advised the Tribe to contract with Mr. Bardos to construct a temporary parking lot and access road for the Tribe. (Indictment, ¶¶ 3, 4). With regard to this contract, Mr. Bardos allegedly received checks from the Tribe in April and May 2007, from which kickbacks were paid to Dr. Heslop, who in turn paid Ms. Shambaugh. (Indictment, ¶ 6). The same basic fact pattern is alleged with regard to other construction contracts between Mr. Bardos and the Tribe. (*See, e.g.*, Indictment, ¶¶ 10, 13, 15 17).

Second, it is appropriate under certain circumstances for the trial court to make preliminary factual findings on a pretrial motion, but it does not appear that those circumstances exist here. The Ninth Circuit has stated:

> A pretrial motion is generally "capable of determination" before trial if it involves questions of law rather than fact. . . . However, "a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motions so long as the court's findings on the motion do not invade the province of the ultimate finder of fact." . . . As the ultimate finder of fact is concerned with the general issue of guilt, a motion requiring factual determinations may be decided before trial if "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." . . .
>
> Under this standard, the district court must decide the issue raised in the pretrial motion before trial if it is "entirely segregable" from the evidence to be presented at trial.

United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986) (citations omitted).

The federal-funds element of 18 U.S.C. § 666 appears to be both an element of the offense, and one that confers jurisdiction on this Court. In *Wyncoop*, for example, the Ninth Circuit analyzed the question whether the defrauded entity received federal funds in excess of $10,000 each year as a jurisdictional issue. *See* 11 F.3d at 121. However, the face of the statute, 18 U.S.C. § 666, indicates that the federal-funds requirement is also a material element of the offense itself, which is presented to the jury. *See, e.g.*, *United States v. Robinson*, 663 F.3d 265, 270 (7th Cir. 2011) (finding that there was sufficient evidence at trial to support the jury's finding that the federal-funds element of § 666 was met).

The Ninth Circuit has held that "'when a question of federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue should be determined at trial. This is clearly the case when the jurisdictional requirement is also a substantive element of the offense charged.'" *United States v. Nukida*, 8 F.3d 665, 670 (9th Cir. 1993). Accordingly, whether the federal-funds element is met here is within, or at least overlaps with, the province of the fact finder, and the Court should refrain from deciding this issue now.

Moreover, this is not a situation in which the Motion turns entirely on undisputed facts. While the government has not disputed the authenticity of the documents for which Dr. Heslop seeks judicial notice, the government has argued that it will present additional facts at trial that will establish that the charged transactions belong to the Tribe. (*See* Opp. at 14). It thus appears that to properly rule on this issue, the Court would be required to weigh the parties' evidence, which would be improper. "'A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence.'" *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (quoting *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir.), *cert. denied*, 414 U.S. 1004, 94 S. Ct. 361, 38 L. Ed. 2d 240 (1973)); *see also United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) ("Federal Rule of Criminal Procedure 12

allows a defendant to assert a defense in a pretrial motion if the merits of the defense can be determined 'without a trial of the general issue.'"); *but see United States v. Dranfield*, 913 F. Supp. 702, 707 (E.D.N.Y. 1996) (finding that whether an agency "received federal assistance in excess of $10,000 in a one-year period goes to whether § 666 applies to the Defendants' alleged criminal conduct, not to the issue of the Defendants' guilt or innocence").

Accordingly, the Motion and the Joinder filed by Ms. Shambaugh are **DENIED** on the issue of whether the federal-funds element is met.

Dr. Heslop's Intent to Influence

The Motion also argues that Counts 1 and 35 fail to allege a crime because they do not allege that Dr. Heslop had the requisite intent to influence the Tribe. (Mot. at 17-18). According to the Motion, "the only 'influence' Heslop is accused of having exerted over the Tribe is his 'recommendation' that the Tribe retain Bardos as an 'owner's representative.'" (*Id.* at 17). However, the Indictment does not allege that Dr. Heslop "was bribed or rewarded in any way for making this 'recommendation.'" (*Id.*). Moreover, the other alleged payments in the Indictment are alleged to have been influenced by Mr. Kovall, not Dr. Heslop. (*Id.* at 18).

However, as the government argues, the statute does not appear to require that the agent actually influence the relevant transactions, but only that the agent "intended to be influenced or rewarded in connection with" the Tribe's transactions. 18 U.S.C. § 666(a)(1)(B). Therefore, Counts 1 and 35 sufficiently allege that Dr. Heslop accepted or agreed to accept monetary payments with the intent of being influenced or rewarded in connection with the construction-related contracts and the purchase of the 47-acre property.

Moreover, although the Indictment does not tie any of the alleged payments received by Dr. Heslop to specific instances in which Dr. Heslop influenced the Tribe, such a connection is not required. The statute does not require that the agent accept or agree to accept a thing of value, in exchange for a specific official act. *See United*

States v. Garrido, 713 F.3d 985, 996-97 (9th Cir. 2013) (concluding that 18 U.S.C. § 666 does not require specific *quid pro quo*, which is the "specific intent to give or receive something of value *in exchange* for an official act") (emphasis in original) (quotation marks and citation omitted).

Accordingly, the Motion is **DENIED** as to the argument that the Indictment failed to allege a connection between Dr. Heslop's alleged influence and any alleged improper payment.

Dr. Heslop as Agent of the Tribe

The government acknowledges that it is no longer "pursuing a theory at trial that Heslop acted as an agent of the Tribe with respect to the construction contracts." (Opp. at 3-4). However, the government is "still pursuing allegations that Heslop acted as an agent of the Tribe with respect to the 47-acre purchase" (*id.* at 4), which is the subject of Count 35.

The government further argues that under the law of the case doctrine, this Court is bound by its ruling in the previous motion to dismiss. (Opp. at 15). "Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.), *cert. denied*, 508 U.S. 951, 113 S. Ct. 2443, 124 L. Ed. 2d 661 (1993)).

This Court previously held that the Indictment sufficiently alleges that Dr. Heslop was an agent of the Tribe. The Court reasoned as follows:

> . . . [E]ven if [ETH] is not an agency for the purposes of Section 666, Dr. Heslop still can be an agent of the Tribe (for the purposes of Section 666) based on his authority to act on behalf of the Tribe. Stated differently, while Dr. Heslop's title as "manager" of [ETH] does not automatically make him an agent of the

> Tribe, his alleged authority to act in that role – and on behalf of the Tribe – may, in fact, make him an agent of the Tribe.
>
> For example, the Indictment alleges that Dr. Heslop was authorized to manage assets, borrow money, sign contracts, and employ individuals. (Indictment, ¶ 5). Although the Indictment alleges that this authority arose with respect to "the company" pursuant to the Operating Agreement of [ETH], the Tribe was the sole member of the company, which was created to purchase real estate on behalf of the Tribe. (Indictment, ¶¶ 3, 5). Indeed, the Tribe allegedly paid Dr. Heslop to manage [ETH]. (Indictment, ¶ 5).
>
> Practically speaking, the Indictment alleges that Dr. Heslop was the Tribe's agent with respect to its purchase of real estate – irrespective of the allegation that this agency relationship arose through his role as manager of [ETH]. In this regard, the allegations in the Indictment are sufficient.

(Mar. 25 Order at 5).

Despite the Court's previous ruling, Dr. Heslop now argues that extrinsic documents contradict the allegations in the Indictment. Dr. Heslop asks the Court to take judicial notice of (1) ETH's Operating Agreement (Request at 2 & Ex. 2), and (2) checks paid from ETH to Dr. Heslop (Request at 5 & Ex. 26). Dr. Heslop argues that the Operating Agreement demonstrates that Dr. Heslop is only a limited agent of ETH, which is legally distinct from the Tribe. (Mot. at 19). The Operating Agreement further demonstrates that each of Dr. Heslop's powers, which are enumerated in the Indictment, was conferred on him by ETH, not the Tribe. (*Id.*). Therefore, Dr. Heslop argues that "[w]hen the ETH 'powers' listed in the indictment are properly ***put to one side***, the indictment contains no specific allegations that Heslop was an agent of the Tribe." (*Id.*) (emphasis added). Additionally, the checks demonstrate that ETH, not the Tribe, paid Dr. Heslop for his work. (Mot. at 21; Reply at 7).

Case law indicates that it would be improper for the Court to look outside the Indictment on this Motion. When determining the sufficiency of the Indictment, "the

district court is bound by the four corners of the indictment," and "the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." *Boren*, 278 F.3d at 914. Moreover, whether Dr. Heslop was an agent of the Tribe is a material element of the offense in 18 U.S.C. § 666. *See, e.g.*, *United States v. Lupton*, 620 F.3d 790, 801 (7th Cir. 2010) ("The factfinder concluded that Lupton was authorized to act on behalf of the State in connection with the sale of the building and was therefore an 'agent' for the purposes of 18 U.S.C. § 666."). Therefore, to the extent that Dr. Heslop believes that the evidence does not show that he is an agent of the Tribe, the evidence is for the fact finder to weigh.

Even if the Court can properly consider the extrinsic evidence without transgressing on the jury's role, the evidence is insufficient to alter the Court's previous ruling. For example, Dr. Heslop overstates how limited his authority on behalf of ETH was. The Operating Agreement only limits Dr. Heslop's authority to acquire assets in excess of $1,000.00 "without approval of all Members." (Operating Agreement at § 4.2(h)). The sole Member of ETH is the Tribe. (Operating Agreement at § 1.9). The Tribe thus could authorize Dr. Heslop to purchase real estate in excess of $1,000 pursuant to the Operating Agreement.

Similarly, even if the checks show that Dr. Heslop was paid by ETH, not the Tribe, that fact would only discredit one of many factors in the Indictment that allege that Dr. Heslop was an agent of the Tribe. As summarized above, "the Indictment [also] alleges that Dr. Heslop was authorized to manage assets, borrow money, sign contracts, and employ individuals" on behalf of the Tribe. (Mar. 25 Order at 5). Moreover, the Court previously found that the Indictment sufficiently alleges that Dr. Heslop was the Tribe's agent with respect to its purchase of the 47-acre parcel "*irrespective* of the allegation that this agency relationship arose through his role as manager of" ETH. (*Id.*) (emphasis added).

Accordingly, the Motion is **DENIED** as to whether the Indictment fails to allege that Dr. Heslop acted as an agent of the Tribe, with regard to its purchase of real estate.

Constructive Amendment

In the Reply, Dr. Heslop also argues that the government's abandonment of the theory that Dr. Heslop was an agent of the Tribe, with respect to the construction-related contracts, constructively amends the Indictment as to Counts 1 and 18-24. (Reply at 10-11).

"The Fifth Amendment guarantees a criminal defendant '[the] right to stand trial only on charges made by a grand jury in its indictment.'" *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) *holding modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (quoting *United States v. Garcia-Paz*, 282 F.3d 1212, 1215 (9th Cir. 2002)). "[W]here a defendant is convicted of a crime and where a grand jury never charges the defendant with an essential element of that crime, a constructive amendment of the indictment has occurred." *Jones v. Smith*, 231 F.3d 1227, 1232-33 (9th Cir. 2000) (citing *Stirone v. United States,* 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960)). A "'critical consideration [in determining if a constructive amendment has occurred] is whether the introduction of the new theory changes the offense charged . . . or so alters the case that the defendant has not had a fair opportunity to defend.'" *Id.* (quoting *Lincoln v. Sunn*, 807 F.2d 805 (9th Cir. 1987)).

However, it is premature for the Court to determine that the Indictment has been constructively amended. "Motions based on constructive amendment and variance must be made after a trial has been completed because both theories involve a review of the evidence presented at trial." *United States v. Vondette*, 248 F. Supp. 2d 149, 163 (E.D.N.Y. 2001); *see also United States v. Thomas*, 545 F. Supp. 2d 1018, 1023 (N.D. Cal. 2008) (denying the defendant's pre-trial "motion to dismiss or strike a charge based on constructive amendment because the motion is premature," and stating that "after evidence has been presented to the jury at trial . . . , defendant may move for a limiting instruction at that time").

Accordingly, the Motion is **DENIED** in its entirety.

IT IS SO ORDERED.