

**UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JULIA BEATRICE KELEHER [1],

Defendant.

CASE NUMBER: 19-431 (PAD)

NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this notice of supplemental authority, *Blazczack v. United States*, Supreme Court Docket No. 20-5649 (*see* Exhibit 1), in support of her *Motion to Dismiss Counts One through Twenty-three of the Superseding Indictment* (Docket No. 429, “Motion”). In the Motion, Ms. Keleher argued the Supreme Court’s decision in *Kelly v. United States*, 140 S.Ct. 1565 (2020), foreclosed the Superseding Indictment’s attempt to allege money or property fraud premised on the notion that the object of the fraud, confidential government information, is “property.” Ms. Keleher acknowledged that the Supreme Court had yet squarely to address the question. (*See* Motion at 23-24). The Supreme Court recently vacated a decision by the Second Circuit that had affirmed a conviction premised on the disclosure of confidential governmental information and ordered the case remanded for “for further consideration in light of [the *Kelly* decision],” signaling the Supreme Court’s skepticism that a conviction can be sustained on the theory that confidential government information is “property.”

I. INTRODUCTION

On January 7, 2021, Ms. Keleher filed a *Motion to Dismiss Counts One through Twenty-three of the Superseding Indictment* (Docket No. 429, “Motion”). The Motion argued the facts as alleged in the Superseding Indictment, even if taken as true, fail as a matter of law to establish an essential element of wire fraud: that Ms. Keleher intended to deprive anyone of money or property. Counts One through Eleven of the Superseding Indictment allege Ms. Keleher defrauded and deprived the Puerto Rico Department of Education (“DOE”) of a purported property “right to the exclusive use of its confidential information.” These counts charge Ms. Keleher with wire fraud and aggravated identity theft for allegedly violating her employment agreement by sending DOE-created spreadsheets containing information about DOE schools to Individual A, a former colleague who worked for a company that was seeking to provide services to the Commonwealth.

As set forth in Section IV(1)(D) of the Motion, Counts One to Eight fail to state the offense of wire fraud (and Counts Nine through Eleven failed to state the offense of aggravated identity theft predicated on wire fraud) because the DOE does not have a property right in the exclusive use of the information at issue because the information is not confidential under Puerto Rico law. (*Id.* at pp. 22-28). Ms. Keleher further argued that, in any event, the Supreme Court’s decision in *Kelly v. United States* forecloses the Superseding Indictment’s attempt to do an end-run around *Skilling v. United States*, 561 U.S. 358 (2010), by alleging money or property fraud in the absence of allegations of a bribe or kickback where the alleged object of the alleged scheme is confidential government information. The Supreme Court’s action in *Blazczack v. United States* provides significant support for this argument.

II. ANALYSIS

On December 30, 2019, the Second Circuit Court of Appeals affirmed the convictions of three defendants stemming from their respective participation in a scheme to misappropriate confidential nonpublic information from the Centers for Medicare and Medicaid Services (“CMS”) for the benefit of hedge funds who would trade on that information. *See id.* The government alleged that Blaszcak, a former CMS employee, would receive information regarding CMS’ contemplated rules and regulations from an insider and that he would, in turn, tip the information to his codefendants, who were employed by a healthcare-focused hedge fund, who would then trade on the basis of Blaszcaks’ information. *Id.* at 26.

On appeal, the defendants argued that CMS’ contemplated rules and regulations were not “property” for purposes of the wire fraud statute because the government’s interest in the information was “purely regulatory.” *Id.* at 31. The Second Circuit, relying on the Supreme Court’s decisions in *Cleveland v. United States*, 431 U.S. 12 (2000), and *Carpenter v. United States*, 484 U.S. 19, 26 (1987), affirmed the defendants’ convictions and held that CMS possessed a “right to exclude” the public from its contemplated rules and regulations and had a “property right in keeping confidential and making exclusive use of its nonpublic predecisional information.” *Id.* at 33 (citations and marks omitted). The Second Circuit found that *Cleveland* did not “establish any rigid criteria for defining property” and that it was “abundantly clear that the government agencies have strong interests –both regulatory and economic—in controlling whether, when, and how to disclose confidential information relating to their contemplated rules.” *Id.* at 34. The Circuit Court also considered the resources and time that CMS invested in maintaining the confidentiality of their proposed rules and regulations as creating an economic interest. *Id.*

On September 4, 2020, Blaszczyk filed a *Petition for a Writ of Certiorari* with the Supreme Court seeking to reverse the Second Circuit’s decision. *See* Exhibit 2 (“Petition”). The petition, filed after the Supreme Court’s *Kelly* decision, relied heavily on *Kelly* in arguing that the Second Circuit’s decision “constitutes an unprecedented and breathtaking expansion of criminal liability based on the exchange of information.” *Petition* at 18. Blaszczyk went on to argue, much like Ms. Keleher did in her Motion, that the *Kelly* decision “reaffirmed in no uncertain terms *Cleveland* and its principle that government regulatory matters are not the subject of ‘property’ rights . . . [and] [t]o be fraud, the very object of the scheme must be to obtain something of economic value to the government, like schemes to use the services of government employees for personal enrichment, for example for home renovations.” *Id.* at 21.¹

Blaszczyk argued that “CMS’s decisions about what to keep confidential and what to reveal are ‘quintessential’ regulatory decisions . . . [and] [t]he Second Circuit’s expansive ruling on the meaning of property under the fraud statutes directly contravenes *Cleveland* and *Kelly* and allows open-ended prosecution of government leaks as fraud and conversion.” *Id.* at 22. Finally, as if speaking directly to the Court here, Blaszczyk cautioned that, were the Supreme Court to adopt the Second Circuit’s expansive interpretation of property, “any leak of confidential government information that violates the agency’s ‘right to exclude’ and frustrates its employees’ efforts to keep the information confidential – in other words, any leak – can be prosecuted as fraud or conversion.” *Id.* at 23.

On January 11, 2021, the Supreme Court issued the requested writ, vacated the Second Circuit Court of Appeals’ decision, and remanded the case to the Second Circuit “for further

¹ For the Court’s convenience, Ms. Keleher also attaches the *National Association of Criminal Defense Lawyers’ Amicus Curiae Brief in Support of Petitioners* as Exhibit 3. The NACDL’s arguments in support of Petitioner’s brief apply with equal force to Ms. Keleher’s arguments in her Motion.

consideration in light of *Kelly v. United States*, 590 U. S. ____ (2020).” See Exhibit 1. The Supreme Court’s action sends a clear signal that the conduct alleged in Counts One through Eleven of the Superseding Indictment cannot be penalized under the wire fraud statute, as confidential government information is not “property” for purposes of the statute. Here, the DOE retained the information at issue and Ms. Keleher’s alleged disclosure of the information to Individual A no more deprived DOE of the information and transferred it to someone else than Blazczack deprived CMS of its confidential information and transferred it to someone else.

III. CONCLUSION

The import of the Supreme Court’s action is *Blazczack* is that a wire fraud offense is not committed by transferring confidential government information to someone outside of the government because such information is not “property.” Since the Superseding Indictment alleges wire fraud solely on this same flawed theory, it fails to state an offense.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests the Court take notice of this supplemental authority and dismiss Counts One through Eleven.

Respectfully submitted on this 11th day of February 2021, in San Juan, Puerto Rico.

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 provide access to all parties of record.

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