UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al. Defendants.	CRIMINAL NO. 19-431 (PAD)

CONSOLIDATED RESPONSE TO DEFENDANTS MOTIONS TO DISMISS COUNTS RELATING TO A DEPRIVATION OF CONFIDENTIAL INFORMATION[1]
[Docket Nos. 412, 425, 451, 447, 429, 444]

All of the wire fraud counts grounded on schemes to deprive an agency of the exclusive use of its confidential information (the "confidential information counts") allege: (1) a scheme to defraud and deprive of property using false or fraudulent pretenses; (2) each charged defendant's knowing and willing participation in the scheme with the intent to defraud; and (3) the use of interstate wires in furtherance of the scheme. *See* Docket No. 384 at Counts 1-8; 72-81; 82-84; 85-90. These counts not only track the language of the wire fraud statute, 18 U.S.C. § 1343, but also contain sufficient detail both to inform the defendants of the charges against which they must defend, and to enable them to plead an acquittal or conviction in bar of future prosecutions. Consequently, the motions requesting dismissal of the confidential information counts which Defendants Julia Beatrice Keleher (Docket No. 429), Angela Avila-Marrero (Docket No. 447), Alberto Velazquez-Piñol (Docket No. 444), and Aníbal Jover-Pages (Docket No. 412), have respectively filed should be denied.

[1] Because the United States has requested the dismissal of Counts 82-84 as to Defendant Fernando Scherrer-Caillet, the United States will address only those arguments which Defendants Keleher, Avila, Velazquez, and Jover have raised in connection with the confidential information counts.

I. APPLICABLE LAW

The Supreme Court has stated that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The Federal Rules of Criminal Procedure require that an indictment satisfy this standard not with an exhaustive statement of the evidence against a defendant, but rather with "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment, therefore, "is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and enables him to enter a plea without fear of double jeopardy." *United States v. Chardón-Sierra*, No. 19-153 (FAB), 2019 U.S. Dist. LEXIS 119847, at *5 (D.P.R. July 16, 2019) (Besosa, J.) (internal quotation marks and citation omitted); *see also United States v. Flaharty*, 295 F.3d 182, 198 (2d Cir. 2002) ("[A]n indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms.").

The First Circuit has observed that "[w]hen a federal court uses its supervisory power to dismiss an indictment it directly encroaches upon the fundamental role of the grand jury. That power is appropriately reserved, therefore, for *extreme limited circumstances*." *Whitehouse v. United States District Court*, 53 F.3d 1349, 1360 (1st Cir. 1995) (emphasis added); *see also United States v. Stokes*, 124 F.3d 39, 44 (1st Cir. 1997) ("Because the public maintains an abiding interest in the administration of criminal justice, dismissing an indictment is an extraordinary step."). This is why "courts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations." *See United States v. Guerrier*, 669 F.3d 1, 4 (1st Cir. 2011).

"[I]n ruling on a motion to dismiss the indictment, the Court may neither assume nor find facts, and it certainly may not do so based merely on blanket factual assertions in the memorandum of defense counsel." *United States v. Crosby*, No. 1:17-cr-00123-JAW-1, 2018 U.S. Dist. LEXIS 117743, at *13 (D. Me. July 16, 2018).

II. DISCUSSION[2]

In requesting the dismissal of the confidential information counts, all moving defendants argue: (a) that *Kelly v. United States*, 140 S. Ct. 1565 (2020) should compel the Court to conclude that there is no cognizable property interest in confidential information, and (b) the information which the superseding indictment alleges is confidential is not actually confidential. Neither argument offers a legally compelling reason to dismiss any of the confidential information counts because: (1) nothing in *Kelly* changed the well settled legal principle that confidential information is cognizable as a property right for purposes of the wire fraud statute; (2) the superseding indictment adequately alleges that information internal to the Puerto Rico Department of Education ("PRDE") and the *Administración de Seguros de Salud de Puerto Rico* ("ASES") was confidential; and (3) whether the defendants schemed to deprive any government entity of the exclusive use of its confidential information as charged in the superseding indictment is ultimately a question for

[2] The United States is well aware that fraud statutes may not be used to establish "standards of disclosure and good government for local and state officials," or to otherwise punish deceitful acts that merely deprive citizens of "their intangible rights to honest and impartial government" without violating any other statute. *See Kelly*, 140 S. Ct. at 1571-72. But that is not what the United States is doing here. And if the Court concludes otherwise after considering the evidence presented at trial, it is entitled to acquit the defendants under Federal Rule of Criminal Procedure 29. The arguments raised in favor of dismissal represent a transparent effort to seek something akin to summary judgment in a civil case (something not contemplated under the Federal Rules of Criminal Procedure), or a judgment of acquittal under Rule 29 before any evidence has even been presented. *See, e.g.*, *United States v. O'Brien*, 994 F. Supp. 2d 167, 173 (D. Mass. 2014) ("There is no summary judgment procedure in criminal cases. Likewise, the trial court cannot make a pretrial determination as to the sufficiency of the evidence.").

the jury.

A. *Kelly* does not compel the Court to dismiss any of the confidential information counts

As an initial matter, *Kelly* has nothing whatsoever to do with the sufficiency of an indictment's allegations, or with the necessary pleading requirements to allege a wire fraud offense. *Kelly* involved state government officials who devised a scheme to retaliate against the mayor of Fort Lee, New Jersey for failing to endorse then-incumbent Governor Chris Christie in his bid for reelection. To punish the mayor, the defendants devised a scheme to close traffic lanes from Fort Lee, New Jersey to the George Washington Bridge for four days under the guise of conducting a traffic study which turned out to be a sham. The officials were charged with wire fraud, and the prosecution proceeded under the theory that the government was deprived of property inasmuch as the defendants commandeered traffic lanes, and caused the government to incur expenditures in the form of payments to employees of the Port Authority of New York and New Jersey, the entity charged with administering the George Washington Bridge. Reversing the defendants' *trial* convictions, the Supreme Court held that the "time and labor of Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's access lanes" for political payback. *See Kelly*, 140 S. Ct. at 1574. Put differently, the Supreme Court determined that neither money nor property constituted the *object* of the fraud, something that is required to sustain a property wire fraud conviction. *See id.* at 1573.

Notably, the *Kelly* court had the benefit of a fully developed trial record before deciding that no money or property constituted the object of the alleged scheme to defraud; this Court has no such benefit at this time. *Kelly* is distinguishable on this basis alone.

More to the point, for over three decades the Supreme Court has recognized that the mail

and wire fraud statutes[3] criminalize schemes to deprive others of intangible as well as tangible property rights. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (recognizing that a company has an intangible property right in the exclusive use of its own confidential information for purposes of the mail and wire fraud statutes, while observing both that "confidential business information and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes," and that "exclusivity is an important aspect of confidential business information and most private property for that matter."); *id.* at 27 (observing that in an earlier decision "grounded in the provisions of a written trust agreement prohibiting the unapproved use of confidential *Government information*" the Supreme Court noted that '"even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.'") (quoting *Snepp v. United States*, 444 U.S. 507, 515 n.11 (1980) (emphasis added)).

Indeed, nothing in *Kelly* or any other Supreme Court decision post-*Carpenter* has altered *Carpenter*'s holding.[4] *See generally Kelly*, 140 S. Ct. 1565 (not making any reference to *Carpenter* at all); *cf. Cleveland v. United States*, 531 U.S. 12 (2000) (holding that unissued state video poker license does not qualify as property for purposes of mail and wire fraud statutes, yet restating that "confidential business information has long been recognized as property.") (citation omitted). Nor did *Kelly* make "clear that a 'property right' should be narrowly construed" as Defendant Keleher

[3] Because the Supreme Court "construe[s] identical language in the wire and mail fraud statutes *in pari materia*," *Pasquantino v. United States,* 544 U.S. 349, 355 n.2 (2005), "caselaw construing the mail fraud statute is instructive for purposes of § 1343," *United States v. Castillo*, 829 F.2d 1194, 1198 (1st Cir. 1987).

[4] Little need be said in response to Defendant Keleher's argument that the "intangible right to the exclusive use of confidential information is not one that has historically been recognized as property," other than that this statement is contrary to *Carpenter*, 484 U.S. at 26-27.

argues. Docket No. 429 at 23. Quite the opposite, the Supreme Court has recognized for well over a century that "the phrase 'any scheme or artifice to defraud…is to be interpreted *broadly* insofar as property rights are concerned." *McNally v. United States*, 483 U.S. 350, 356 (1987) (citing *Durland v. United States*, 161 U.S. 306 (1896)) (emphasis added).[5] The First Circuit has faithfully applied this principle, consistently recognizing that the mail and wire fraud statutes embrace a cognizable property interest both in intangible property rights generally, and confidential information specifically. *See, e.g.*, *United States v. Rosen*, 130 F.3d 5, 9 (1st Cir. 1997) (explaining that the mail fraud statute protects "a wide variety of tangible *and intangible* property interests") (emphasis added); *United States v. Czubinski*, 106 F.3d 1069, 1074-75 (1st Cir. 1997) (observing that "confidential information [of the IRS] may constitute intangible 'property' and that its unauthorized dissemination or other use may deprive the owner of its property right"); *United States v. Martin*, 228 F.3d 1, 16 (1st Cir. 2000) ("Confidential information may be considered property for the purposes of §§ 1341 and 1343. Where such information is obtained – thus depriving the rightful owner of its property rights – through dishonest or deceitful means, the wire and mail fraud statutes may be violated.");[6] *see also United States v. Kernell*, No. 3:08-CR-142, 2010 U.S. Dist.

[5] The Supreme Court is, of course, free to overturn its own precedent. But it generally does not do so in ambiguous terms. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (explicitly holding that precedent "should be and now is overruled."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (explicitly rejecting *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Lawrence v. Texas*, 539 U.S. 558 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent…[and] should be and now is overruled."). There is no reason for this Court to conclude that *Kelly* overruled *Carpenter*, or that in light of *Kelly* it should either disregard the First Circuit's reasoning in *Czubinski*, or the Supreme Court's admonition to interpret property rights broadly, *see, e.g.*, *McNally*, 483 U.S. at 356.

[6] An affirmatively false misrepresentation is not required to prove a wire fraud. "The wire fraud statute proscribes not only false statements and affirmative misrepresentations but also the omission or concealment of material information, even absent an affirmative duty to disclose, if the omission was intended to induce a false belief and action to the advantage of the schemer and

LEXIS 36477, at *15 (E.D. Tenn. Mar. 17, 2010) (denying motion to dismiss indictment that alleged that the defendant "gained a property right in that he acquired exclusive control of Governor Palin's [email] account and disclosed the information therein to third parties" while rejecting the argument that defendant could not have committed wire fraud on the basis that none of the information in the email account constituted "confidential business information" with "any economic value").

Even post-*Kelly*, courts have continued to recognize that the mail and wire fraud statutes cover intangible property rights, and that the property rights covered under these statutes should be read *broadly*. *See, e.g., United States v. Sidoo*, 468 F. Supp. 3d 428, 443 (D. Mass. 2020) (holding that university admission slots and accurate test scores constitute cognizable property interest under wire fraud statutes, while observing that "the wire fraud statute should be read broadly");[7] *Medina-Rodríguez v. $3,072,266.59 in United States Currency*, 471 F. Supp. 3d 465, 477-78 (D.P.R. 2020) (Besosa, J.) (noting that "[c]ourts have placed the 'right to control' within the scope of the federal fraud statutes," while observing that "[t]he wire fraud statute protects tangible *and* intangible property."); *United States v. Abouammo*, No. 19-cr-00621, 2021 U.S. Dist. LEXIS 34725 (N.D. Cal. Feb. 24, 2021) (recognizing that Twitter's confidential user account information may constitute property for purposes of wire fraud statute in denying defendant's motion to dismiss wire fraud charges); *United States v. Eury*, No. 1:20CR38-1, 2021 U.S. Dist. LEXIS 15128, at *12 (M.D.N.C. Jan. 27, 2021) (observing that "courts take a *broad view* on what qualifies as property under the federal fraud statutes").

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the disadvantage of the victim." *United States v. Vorley*, 420 F. Supp. 3d 784, 790-91 (N.D. Ill. 2019).

[7] *But see United States v. Ernst*, No. 19-10081-IT, 2020 U.S. Dist. LEXIS 218928 (D. Mass. Nov. 23, 2000) (concluding that university admission slots are not property in light of *Kelly*)

The United States acknowledges that *Kelly* reaffirmed that the government's "exercise of regulatory power … fails to meet the statute's property requirement." *Kelly*, 140 S. Ct. at 1568-69. But nothing in *Kelly* suggests that a government entity's interest in its tangible and intangible property is any less than that of a private entity for purposes of the mail and wire fraud statutes. Indeed, both the Supreme Court and the First Circuit have recognized the opposite. *See Czubinski*, 106 F.3d at 1075 (recognizing that IRS had property interest in its confidential information, yet vacating wire fraud conviction of IRS employee who merely obtained unauthorized access to confidential taxpayer information *only* because the evidence at trial was insufficient to prove that the defendant intended to deprive the IRS of its property by making use of it, or disseminating it to others); *Pasquantino*, 544 U.S. at 356 (holding that scheme to defraud Canadian government of liquor tax revenue violated wire fraud statute, while observing that "the fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury"); *see also United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (concluding that "the [g]overnment has a property interest in certain of its private records," including information contained in those records);[8] *United States v. Middendorf*, No. 18-CR-36 (JPO), 2018 U.S. Dist. LEXIS 118850, at

[8] As Defendant Keleher stated in her "Notice of Supplemental Authority," Docket No. 465, the Second Circuit recently affirmed the wire fraud convictions of defendants who participated in a scheme involving the misappropriation of a government entity's confidential information for the benefit of hedge funds, which used that information to obtain a competitive advantage in trading stocks. *See generally Blaszczak v. United States*, 947 F.3d 19 (2d Cir. 2019). Defendant Keleher correctly pointed out that the Supreme Court granted certiorari, vacated the Second Circuit's decision, and remanded the case for further consideration in light of *Kelly*. Docket No. 465. What Defendant Keleher omitted, however, is that the Supreme Court did so at the request of the Office of the Solicitor General. In any case, "it is well-settled that a GVR [*i.e.*, a grant of *certiorari*, vacatur, and remand] has no precedential weight and does not dictate how the lower court should rule on remand." *Texas v. United States*, 798 F.3d 1108, 1116 (D.C. Cir. 2015) (citing *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001)). To date, the case remains pending before the Second Circuit. The parties will, no doubt, keep this Court apprised of any developments in the *Blaszczak* case.

*26 (S.D.N.Y. July 17, 2018) ("[T]he fact that confidential information is intangible does not make it not-property; and … the fact that property is in the hands of the government (or some other regulatory entity) does not make it not property.") (internal citations omitted); *United States v. Perholtz*, 842 F.2d 343, 367 (D.C. Cir. 1988) (affirming mail fraud conviction of government employee who took confidential building plans from Post Office for the benefit of giving a contractor a competitive advantage).

Succinctly put, in urging this Court to rule that neither the PRDE nor ASES had a cognizable property interest in the exclusive use of confidential information in light of *Kelly*, the defendants invite this Court to turn a blind eye to binding Supreme Court and First Circuit precedent which *Kelly* has not overruled. The Court should decline the defendants' invitation.[9]

B. <u>The confidential information counts are adequately alleged</u>

Tellingly, Defendant Keleher neither takes issue with the manner in which the confidential information counts are drafted, nor does she dispute that the confidential information counts adequately allege the elements of a wire fraud offense. On the other hand, Defendants Avila, Velazquez, and Jover urge the Court to dismiss the confidential information counts because they are inadequately alleged. They are wrong.

"The well-established elements of wire fraud are: "(1) a scheme or artifice to defraud using false or fraudulent pretenses; (2) the defendant's knowing and willing participation in the scheme

[9] Defendant Keleher's argument suggesting that the confidential information counts should be dismissed because the PRDE retained the information at issue turns the intangible property theory of wire fraud on its head. Unlike physical property, intangible property (like information) need not have any physical properties and need not physically move. *See Carpenter*, 484 U.S. at 25. And the deprivation of confidential information is cognizable under the fraud statutes regardless of whether it causes an economic loss because "exclusivity is an important aspect of confidential business information." *Id.* at 25-27.

or artifice with the intent to defraud; and (3) the use of the interstate wires in furtherance of the scheme." *United States v. Arif*, 897 F.3d 1, 9 (1st Cir. 2018) (citing *United States v. Appolon*, 715 F.3d 362, 367 (1st Cir. 2013)). "A scheme or artifice to defraud is defined to include any plan, pattern or [course] of action . . . intended to deceive others in order to obtain something of value." *United States v. Colón-Muñoz*, 192 F.3d 210, 221 (1st Cir. 1999) (citations omitted) (bracketed text in original) (emphasis added). A deprivation of confidential information "through dishonest or deceitful means" constitutes a "'scheme to defraud,' within the meaning of the wire fraud statute." *Czubinski*, 106 F.3d at 1074.

"The term 'false or fraudulent pretenses' means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as *halftruths* and the *knowing concealment* of facts." *E.g.*, First Circuit Pattern Criminal Jury Instruction 4.18.1343 (emphasis added). Any fraudulent representation or omission must be material; that is, it must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Appolon*, 715 F.3d at 368 (quoting *Neder v. United States*, 527 U.S. 1, 25 (1999)). The United States is not, however, required to prove that any false statement or material omission was actually relied upon or resulted in monetary loss. *See id.* Materiality raises a factual question for the jury to decide. *See id.*

In this case, Defendants Avila and Jover suggest that the confidential information counts must exhaustively state in more precise language what the United States intends to prove at trial rather than set forth a plain statement of the essential facts constituting the bases for the offenses charged, *see* Fed. R. Crim. P. 7(c)(1). Indictments simply do not require the level of detail which the defendants would like. As Judge Barbadoro observed in a high-profile case tried in this district

involving a then-incumbent governor, "[t]he requirements of an indictment are *simple* and *few*: it must set forth the elements of the offense charged, alert the defendant to what he is facing, and show the defendant to what extent he may plead double jeopardy. If those requirements are met, then an indictment, valid on its face, returned by a legally constituted grand jury, calls for a trial on the merits." *United States v. Vila*, No. 3:08-cr-297-PJB, 2009 U.S. Dist. LEXIS 2729, at *6-7 (D.P.R. Jan. 9, 2009) (internal quotation marks and citations omitted) (emphasis added).

The confidential information counts alleged against Defendants Avila and Velazquez (Counts 72-84), and those alleged against Avila, Velazquez, and Jover (Counts 85-90), respectively, state that the defendants "schemed to defraud and deprive ASES of the right to the exclusive use of its confidential information through *deceptive means* in that Defendant Avila used her position as Director of ASES for the purpose of obtaining, disclosing and converting ASES confidential information for the use of a third party[10]…causing the transmission of interstate electronic mail communications…by means of materially false and fraudulent pretenses, representations, and promises…for the purpose of executing such scheme."[11]

[10] Counts 72-84 identify Defendants Velazquez and Scherrer as the third parties for whose benefit Defendant Avila allegedly deprived ASES of its confidential information; Counts 85-90 identify Defendant Jover.

[11] Although she does not argue otherwise, it bears mention that the confidential information counts alleged against Defendant Keleher adequately state that she "schemed to defraud and deprive PRDE of the right to the exclusive use of its confidential information through deceptive means in that she used her position as Secretary of PRDE for the purpose of obtaining, disclosing, and converting PRDE confidential information for the use of a third party…causing the transmission of interstate electronic mail communications…by means of materially false and fraudulent pretenses, representations, and promises…for the purpose of executing such scheme." Docket No. 368 at Counts 1-8. As she does not contest the adequacy of the text contained in the confidential information counts, but rather the legal premises underlying these counts, Section II.B addresses only those arguments which Defendants Avila and Jover have raised.

Contrary to what Defendants Avila and Jover suggest, it is not necessary that the superseding indictment allege, or that the United States ultimately prove, that *each* defendant made any particular false statement or false representation. *See, e.g.*, *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990) ("[N]o misrepresentation of fact is required in order to establish a scheme to defraud."); *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003) (stating that "[i]f a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single existing fact is immaterial."). This is particularly so because the confidential information counts are explicitly predicated on an aiding and abetting theory, and the jury would be entitled to convict a defendant even without finding that that particular defendant made any false utterance. *United States v. Svirskiy*, No. 14-10363-RGS, 2019 U.S. Dist. LEXIS 63735, at *5 (D. Mass. Apr. 12, 2019) ("Under the law . . . a multi-member mail fraud is itself treated like a conspiracy . . . and is subject to the same rules of imputed liability…Thus, the question is not whether [the defendant] made direct misrepresentations to customers but whether he was a knowing participant in a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses.") (internal quotation marks and citations omitted); *United States v. Preston*, 634 F.2d 1285, 1291-92 (10th Cir. 1980) ("Mail fraud in which two or more defendants engage in the execution of a scheme to defraud, is similar to a conspiracy. Once the existence of the scheme has been established by independent evidence the statements and acts of one defendant in furtherance of the scheme are admissible against the others"); *United States v. Kim*, No. 09 Cr.1160, 2010 U.S. Dist. LEXIS 43454, at *7 (S.D.N.Y. May 4, 2010) (denying motion to dismiss wire fraud conspiracy charge because "[a]s a matter of substantive law . . . it is not necessary that each of the conspirators personally utter a false statement, that an "overt act" committed as part of the conspiracy be itself a criminal act, or that an

overt act in furtherance of the conspiracy be committed by the defendant himself (as opposed to a coconspirator)."); *Hastings v. Fid. Mortg. Decisions Corp*., 984 F. Supp. 600, 608 (N.D. Ill. 1997); ("It is true that *the scheme* must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence but it is not necessary for every participant in the scheme to make them.") (civil RICO claim partly predicated on mail fraud); *United States v. Maike*, No. 4:17CR-00012-JHM, 2020 U.S. Dist. LEXIS 85894, at *20-21 (W.D. Ky. May 15, 2020) (rejecting argument "that each defendant must have knowledge of every false statement made by co-conspirators in furtherance of the mail fraud conspiracy," noting that it suffices "to prove that [the Defendant] knowingly joined an agreement to commit . . . mail fraud and that a party to the agreement took an overt act in support of it.").

In any case, the superseding indictment makes clear that Defendant Avila was a public official. *See, e.g.*, Docket No. 368 at ¶ 2. As such, she owed a fiduciary duty both to ASES and to the public not only under Puerto Rico law, but under federal law as well. *See, e.g.*, Docket No. 368 at ¶¶ 11(d) (explaining that public servants must refrain from disclosing confidential information for self-benefit or the benefit of another under Puerto Rico law); *see also United States v. Woodward*, 149 F.3d 46, 62 (1st Cir. 1998) ("A public official has an affirmative duty to disclose material information to the public employer.") (citation omitted); *United States v. Sawyer*, 85 F.3d 713, 732 (1st Cir. 1996) (observing that duty to disclose arises from public official's "fiduciary relationship to [the public].") (bracketed text in original). The deceptive conduct described in the superseding indictment is the use of "her position of Director of ASES for the purpose of obtaining, disclosing and converting ASES confidential information for the use of a third parties…" *See* Docket No. 368 at ¶¶ 98, 106, 113. To the extent that any defendant charged with Defendant Avila in a confidential information count wishes to argue that such conduct is not deceptive or fraudulent,

the argument should go to the jury at the close of the evidence, or to the Court on a motion for a judgment of acquittal under Rule 29.

Defendant Jover relies primarily on two cases which he claims support the proposition that more detail is required for the superseding indictment to survive. *See United States v. Yefsky*, 994 F.2d 885, 893-94 (1st Cir. 1993) (holding that count that merely alleged that defendant "obtained money through false pretenses" was insufficient, but finding the error harmless); *United States v. Curtis*, 506 F.2d 985 (10th Cir. 1974) (holding that indictment was insufficient where it did "little more than [plead] the statutory language without any fair indication of the nature or character of the scheme or artifice relied upon, or the false pretenses, misrepresentations or promises forming part of it."). The superseding indictment at issue here, unlike those at issue in *Yefsky* and *Curtis*, respectively, specifies the object of the fraud—confidential information; the purpose of the fraud—to benefit specifically named third parties; the deceptive means—Avila's use of her position as Director of ASES to whom she owes a fiduciary duty under both federal law and state law, and whose confidential information she was consequently entrusted to protect; and the emails transmitted to further the scheme's end.

The confidential information counts meet the "simple and few" requirements to satisfy Federal Rule of Criminal Procedure 7(c)—they allege the elements of the offense, and provide an ample amount of detail to advise the defendants of the factual bases underlying the offenses of which they are charged. *See Vila*, 2009 U.S. Dist. LEXIS 2729, at *6-7.

C. Whether the defendants schemed to deprive a public entity of confidential information raises a factual jury question

In considering the merits of the motions to dismiss the confidential information counts, the Court must presume the allegations in the superseding indictment to be true. *See United States v.*

Bohai Trading Co., Inc., 45 F.3d 577, 578 n.1 (1st Cir. 1995) (citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952)). All defendants argue that the information which the superseding indictment describes as confidential is not actually confidential. This is the type of inappropriate fact-based challenge to the weight of the evidence that courts routinely rebuff when considering motions to dismiss. *See Guerrier*, 669 F.3d at 4.

Whether any of the information was actually confidential, and whether the PRDE and ASES were deprived of the exclusive use of their confidential information, respectively, represent factual questions for the jury to resolve at trial, not legal ones for this Court to resolve on a motion to dismiss. *See Eury*, 2021 U.S. Dist. LEXIS 15128, at *12-13 (M.D.N.C. Jan. 27, 2021) (recognizing that software programs could constitute property under the "broad view" of "what qualifies as property under the federal fraud statutes," and denying motion to dismiss wire fraud counts premised on alleged deprivation of confidential information because whether database was sufficiently proprietary or confidential raised a factual dispute that "was not amenable to Rule 12(b)(1) resolution.").

More importantly, all confidential information counts allege that the defendants participated in a "*scheme to defraud*[12] *and deprive* [PRDE/ASES] of the right to the exclusive use of its confidential information through deceptive means." (emphasis added). As the Supreme Court and the First Circuit have stated, "[t]he wire fraud statute punishes the scheme, not its success." *Pasquantino*, 544 U.S. at 371; *see also United States v. Pimental*, 228 F.3d 1, 16 (1st Cir. 2000) ("success in scheme is not needed to support mail fraud conviction.") (citing *Martin*, 228 F.3d at 16)). In light of this settled legal principle, a jury would be entitled to convict the defendants of the

[12] "The words 'to defraud' in the mail fraud statute have the 'comon understanding of wronging one in his property rights by dishonest methods or schemes….'" *Carpenter*, 484 U.S. at 27.

confidential information counts regardless of whether any defendant *actually* deprived the PRDE or ASES of the exclusive use of its confidential information so long as the jury is convinced beyond a reasonable doubt that that defendants participated in the scheme to do so. *United States v. Cherif*, 943 F.2d 692, 698-99 (7th Cir. 1991) aptly illustrates why this is so.

Cherif involved a defendant convicted of mail and wire fraud. After having been terminated from his employment at a bank, the defendant retained his keycard without authorization, and entered the bank multiple times. 943 F.2d at 694. Once inside, he reviewed information which "included publicly available information," and documents which the bank generated such as deal memos for various transactions. *Id.* The bank treated all this information as confidential, and the defendant signed a document several times by which he agreed not to disclose confidential information to unauthorized people." *Id.* at 694. The defendant used the information he obtained from the bank to trade on it, and was later charged with mail and wire fraud. *Id.* at 695-96.

Rejecting the defendant's argument that he did not deprive his employer of confidential property of any value to the bank, the Seventh Circuit made several salient points: (1) that the information at issue may not have been the bank's "only stock in trade" did not matter because it produced its '"product' (financing services)" from this "raw material"; (2) the confidentiality of the information was valuable to both the bank and its customers; (3) that prosecution's failure to prove what specific confidential information the defendant obtained was of no moment because: (a) no "loss or damage to the victim of the crime" is an element of wire fraud; (b) "the scheme did not have to be successful to violate the law"; or (c) the defendant "schemed to take information from the bank and use it to trade in the stock market," and it was therefore "reasonable to infer that [the defendant wanted confidential information…since it would give him a trading advantage over those who could rely on public information, [and] if the defendant wanted public information, there were

plenty of places for him to find it." *Id.* at 698. The Seventh Circuit went on to state that "[i]f the information [the defendant] obtained turned out not to be confidential business information, that means only that [the defendant's] scheme was unsuccessful." *Id.* at 698. Put differently, "[t]o say that [the defendant may have obtained only public information (when he sought to obtain confidential information) is to say that [the defendant] was unlucky or a bad judge of the value of information, *not that he did not commit wire fraud*." *Id.* (emphasis added).

Like the Supreme Court in *Kelly*, the Seventh Circuit in *Cherif* had the advantage of a fully developed trial record before considering the fact-based arguments tailored to a post-trial challenge to the sufficiency of the evidence. The defendants in this case are asking the Court to dismiss the confidential information counts in a factual vacuum. In so doing, they ask the Court to declare the non-confidentiality of the information at issue, and to conclude that they could not have schemed to deprive the PRDE or ASES of the right to the exclusive use of either entity's confidential information. The Court should deny the defendants' request because, as previously discussed, they require factual findings which the Court is not in a position to make before the United States has so much as presented a single item of evidence to a jury. A more important reason to deny the defendants' request is that the entire premise of their argument is flawed because the United States bears no burden of proving the *actual* deprivation of *actually* confidential information. *See generally Cherif*, 943 F.2d 692. This is so because the success of a scheme to defraud is not an element of a wire fraud offense. *See, e.g.*, *Pasquantino*, 544 U.S. at 371 (noting that the scheme to defraud, not its success, is punishable); *Pimental*, 228 F.3d at 16 (same). Under such circumstances, factual impossibility is not a legitimate defense of which any defendant may avail him or herself. *United States v. Colburn*, 475 F. Supp. 3d 18, 25-26 (D. Mass. 2020) (holding that factual impossibility was not a defense to wire fraud charge because its elements "do not require that the

unlawful goal be achieved") (quoting *United States v. Dixon*, 449 F.3d 194, 202 (1st Cir. 2006)); *see also United States Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (that a plan to deceive victim using interstate wire communications became an impossibility was "of no consequence" to a finding that the defendants committed wire fraud).

D. Nothing under Puerto Rico law should alter the Court's analysis, or compel the Court to dismiss any of the confidential information counts

As factual impossibility is not a legitimate defense, any argument that Puerto Rico law precludes a finding that the confidential information at issue in the confidential information counts is a smokescreen with which this Court need not bother in considering the merits of the defendants' motions. Be that as it may, for the sake of thoroughness, the United States will briefly address the defendants' arguments based on their interpretation of Puerto Rico law.

Puerto Rico government agencies, such as the PRDE and ASES, have an interest in controlling their internal and confidential information, including that which is stored in its internal computer systems. This is among the reasons why, as further discussed below, Puerto Rico law explicitly defines confidential information, Docket No. 368 at ¶ 11(b), and prohibits public employees from disclosing confidential information for their own personal benefit or that of third parties, *id.* at ¶ 11(d). This is also why public servants, like Defendants Keleher and Avila, signed agreements not to disclose confidential information, *see id.* at ¶¶ 13, 94.

Under Puerto Rico law, the state may validly claim the confidentiality of information in its possession when (1) a law so declares it; (2) the communication is protected by any evidentiary privileges that citizens may invoke; (3) revealing the information can harm fundamental rights of third parties; (4) revealing the information would identify a confidential source; and (5) when it is "official information" pursuant to Rule 514 of the Rules of Evidence (32 L.P.R.A. Ap. IV). *See,*

e.g., *Colón Cabrera v. Caribbean Petroleum,* 170 D.P.R. 582 (2007) (cited in *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59 (2017)). The phrase "when a law so declares it," also encompasses any applicable regulations. See *Nieves Falcon v. Junta*, 160 D.P.R. 97 (2003).

The Puerto Rico Supreme Court has recognized that a report, memorandum or writing prepared by an employee in the exercise of his or her position or employment for his or her superior or for internal purposes of the agency's decisions and actions, were not public documents which, pursuant to Article 47 of the Law of Evidence, all citizens have a right to inspect. *Pueblo v. Tribunal Superior*, 96 D.P.R. 746, 755 (1968). The Puerto Rico Supreme Court so held to promote public order, reasoning that announcing a contrary rule would affect the effective functioning of the government by preventing public officials from acting with full freedom and conscience, without fear or inhibition in the preparation of reports, memorandums or other expressions or communications during the course of their duties. *See id.*

Decades later, in *Santiago v. Bobb*, 117 D.P.R. 153 (1986), the Puerto Rico Supreme Court again recognized that the public's right to access government records is not absolute. Specifically, the Puerto Rico Supreme Court recognized that the public is foreclosed from accessing "official information," defined under what was then Rule 31 of the Rules of Evidence as "information acquired in confidence by a public officer or employee in the course of his duty and not open or officially disclosed to the public prior to the time the claim of privilege is made." *Santiago*, 117 D.P.R. at 192 (citing E. Morgan and J. Weinstein, Basic Problems of State and Federal Evidence, 133, Philadelphia, ALI ABA (5th ed. 1976)). "To determine if a given information was acquired in confidence, the court may consider the type of document involved, such as: internal memoranda, the testimony of the parties, the usual procedures of the agency when it receives such type of information, and also, *the very nature of the information*." *Id.* at 193.

As recently as 2012, the Puerto Rico government recognized the legitimacy of maintaining certain information confidential. Specifically, the Puerto Rico Government Ethics Act (known in Spanish as the *Ley de Etica Gubernamental de Puerto Rico*) (hereafter the "Act"), which was enacted on June 3, 2012, defines "confidential information or document" as follows:[13]

Original Spanish text	**English translation**
"Información o documento confidencial *— aquel así declarado por ley; el que está protegido por alguno de los privilegios de Derecho Probatorio; el que, si se revela, puede lesionar los derechos fundamentales de terceros o el derecho a la intimidad y a la vida privada de los servidores públicos; cuando revelarlos pueda constituir una violación del privilegio ejecutivo; cuando el documento o la información sea parte del proceso deliberativo en la formulación de la política pública y, cuando divulgarla, pueda poner en peligro la vida o la integridad física del servidor público o de otra persona, la seguridad del país o afectar transacciones de negocios o gestiones oficiales del Estado que están en proceso durante la solicitud. Incluye informes, memorandos o cualquier escrito preparado por un servidor público en el ejercicio de su cargo o empleo para su superior o para fines internos de las decisiones y de las actuaciones departamentales."*	**"Confidential information or document --** That which is so declared by law; that which is protected by any of the privileges of the Law of Evidence; that which, if revealed, could harm the fundamental rights of third parties or the right to privacy and private life of public officials; when revealing them may constitute a violation of the executive privilege; when the document or the information are part of the deliberative process in the formulation of public policy and, when disclosing it, may place in danger the life or physical integrity of a public official or of another person, the security of the country or affect business transactions or official dealings of the State that are in process during the request. It includes reports, memoranda or any writing prepared by a public servant in the exercise of his or her position or employment for his or her superior or for internal purposes of departmental decisions and actions."

Even more recently, the Puerto Rico Supreme Court recognized that emails generated through a government agency's email server are property of that agency. *See In re Hon. Cesar Mercado Santaella, Juez Superior*, 197 D.P.R. 1032 (2017) (removing judge from office for transmitting inappropriate emails through the network of the judicial branch, that is, for inadequate

[13] The superseding indictment cites this provision of the Act which is at Section 1.2(s). Docket No. 368 at ¶ 11(b). The superseding indictment also cites Section 4.2(b) of the Act, which requires public servants to refrain from revealing or using "confidential information or documents obtained as a result of his/her employment to obtain, directly, or directly, any benefit for him/herself or any other person or business," Docket No. 368 at ¶ 11(d).

use of the property of the judicial branch). It follows, therefore, that all emails generated through a government entity's servers, such as those of the PRDE or ASES, constitute property of that entity.

With this legal framework in mind, the United States proceeds first to address Defendant Keleher's arguments pertaining to the confidentiality of the information at issue in Counts 1-8, and then proceeds to address the arguments of Defendants Avila and Jover pertaining to the confidentiality of the information at issue in Counts 72-90.

1. Defendant Keleher is properly charged with sheming to deprive the PRDE of the right to the exclusive use of its confidential information

As alleged in Counts 1-8, Defendant Keleher "schemed to defraud and deprive the PRDE of the right to the exclusive use of its confidential information through deceptive means" and caused the transmission of eight emails in furtherance of that scheme. All but two of these emails (those described in Counts 5-6) contained attachments with such data as personnel lists, teachers' names and salaries, school performance metrics, to list just a few examples. The two emails that do not contain an attachment, like all the other six emails, originated from Defendant Keleher's PRDE account, and memorialize communication between a PRDE employee and a superior (*i.e.*, the Secretary of Education), PRDE-related matters.

Applying the law articulated in the beginning of this section should compel the Court to conclude that there is no basis to rule that these documents constitute non-confidential information in which the PRDE had no property interest. This is particularly so because Section II.A of the Procedures Manual for the Use of Internet, Electronic Mail and Other Technology Resources of the Department of Education of Puerto Rico[14] provides that:

[14] In Spanish, this document is titled *Manual de Procedimientos para el Uso de Internet, Correo Electrónico, y Otros Recursos de Tecnología del Departamento de Educación de Puerto Rico*.

Original Spanish Text	English Translation
"**Todos los documentos, datos e información creados, almacenados, transmitidos y procesados en la red del DE o por medio de otros recursos informáticos son propiedad del DE** y estarán sujetos a búsqueda, modificación, copia, divulgación o eliminación por el DE en cualquier momento y por cualquier razón, sin previo aviso o consentimiento. Los derechos de propiedad del DE permanecerán en pleno vigor y efecto aunque los estudiantes ya no estén matriculados o activos en el sistema de escuelas públicas. Esto aplica a personal cuando ocurra una terminación de empleo o contrato, jubilación o cualquier otra causa de separación permanente de las funciones). Los estudiantes y el personal serán responsables de garantizar que su acceso y uso de los documentos, datos e información cumpla con los términos de este manual." (énfasis añadido)	"**All the documents, data and information created, stored, transmitted and processed in the DE web or by means of other computer resources are property of the DE** and shall be subject to search, modification, copying, disclosure or deletion by the DE at any time and for any reason without prior notice or consent. The property rights of the DE shall remain in full force and effect even though the students may not be enrolled or active in the public school system. This applies to personnel when a termination of employment or contract occurs, retirement or any other cause of permanent separation from duties. The students and personnel shall be responsible for guaranteeing that their access and use of the documents, data and information complies with the terms of this manual." (emphasis added)

Turning to Defendant Keleher's arguments that none of the information at issue in Counts 1-8 was confidential, four points are in order. First, the argument is inconsistent with the provisions of the manual quoted above.

Second, *all* of these emails included a Confidentiality Notice, which reads as follows:

> **CONFIDENTIALITY NOTE**: The **text and documents accompanying this electronic mail** are intended only for the use of the individuals or entities named above. If you are not one of the intended recipients, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance of the contents of this electronic information is strictly prohibited. If you have received this electronic mail by error, please immediately notify and return the original electronic mail to the sender." (emphasis added)[15]

[15] To the extent that Defendant Keleher may argue that this is boilerplate language common in the emails of all types of businesses and that it establishes nothing of relevance, such an argument would merely underscore why it would be improper for the Court to dismiss the confidential information counts at this time as the argument would illustrate why there are factual issues that require a trial resolution.

Third, that some of the information Defendant Keleher is alleged to have disclosed to Individual A may have existed in the public domain does not preclude the United States from proving that Defendant Keleher *schemed* to defraud and deprive the PRDE of the right to the exclusive use of its confidential information. *See, e.g.*, *Cherif*, 943 F.2d at 698. If, in fact, the information was public in the form it was prepared by PRDE employees and disclosed by Defendant Keleher (a matter of dispute), a jury would be entitled to find that, like the defendant in *Cherif*, Defendant Keleher failed to reach the objective of her scheme; such a failure, however, would not absolve her of a wire fraud offense. *See id.*

Fourth, Defendant Keleher's arguments overlook the manner in which the information was compiled and disclosed. As alleged in the indictment, and as the United States intends to prove at trial, Defendant Keleher requested information from a subordinate employee of the PRDE using her official PRDE account; once Defendant Keleher received the information, she forwarded it to her personal Gmail account before then sending it to Individual A. Inasmuch as Defendant Keleher disputes that these facts are probative of any criminal wrongdoing, she should do so before a jury.

Finally, Defendant Keleher's reliance on a Puerto Rico Superior Court decision to support her proposition that none of the information at issue was confidential is misplaced. *Prado-Rodriguez v. Rivera-Schatz*, et al., Civil Num. 2SJ2020CV05245, involved plaintiffs requesting access to information pertaining to public officials through a legally recognized process (i.e., *mandamus*). This case, by contrast, involves the unilateral decision of an agency head to use the labor of PRDE employees to compile data for her in a specific manner, so that she could in turn provide that data to her close friend to facilitate his obtaining a contract. Put another way, Defendant Keleher used the time of public employees to confer a personal benefit. *See Kelly*, 140

S. Ct. at 1573 (observing that "[a] government's right to its employees' time and labor…can undergird a property fraud prosecution.").

To conclude, the superseding indictment alleges that Defendant Keleher disclosed confidential PRDE information to Individual A; describes the false pretenses under which she obtained the information in breach of her fiduciary duty, *see* Docket No. 368 at ¶ 15; and describes with particularity the property interest that was the object of the fraud—the PRDE's "right to the exclusive use of its confidential information," *id.* at ¶ 19, for the economic benefit of Individual A, *id.* at ¶ 14. Under these circumstances, there is no legal reason for the Court to conclude that dismissal is warranted.

2. Defendants Avila, Velazquez, and Jover are properly charged with scheming to deprive ASES of the right to the exclusive use of its confidential information

Law 18 of October 30, 1975, as amended, requires all departments, agencies and instrumentalities and municipal governments to maintain and send copies of the contracts that they grant to the Office of the Comptroller of Puerto Rico, who shall maintain a Registry of Contracts and publish all such contracts to the general public.[16] Law 18 makes clear that contracts awarded

[16] Article 1 of Law 18 reads:

Original Spanish text	English translation
"**Artículo 1. – Copias de contratos, escritos y documentos** (a) Las entidades gubernamentales y las entidades municipales del Estado Libre Asociado de Puerto Rico, sin excepción alguna, mantendrán un registro de todos los **contratos** que otorguen, incluyendo enmiendas a los mismos, y deberán remitir copia de éstos a la Oficina del Contralor dentro de los quince (15) días siguientes a la fecha de otorgamiento del contrato o la enmienda. Este período será extendido a treinta (30) días cuando el contrato se otorgue fuera de Puerto Rico. **Cuando se otorguen escrituras sobre la adquisición o disposición de bienes raíces se le enviará también al Contralor, copia de todo escrito y documento relacionado con la negociación**. Se extenderá el período de quince (15) o treinta (30) días, según aplique, por quince (15) días adicionales siempre que se demuestre causa justificada y así lo determine la Oficina del Contralor."	**"Article 1. – Copies of contracts, writings and documents** The government entities and municipal entities of the Commonwealth of Puerto Rico, without any exception, shall maintain a register of all the **contracts** that they award, including amendments to the same, and shall send copy of these to the Office of the Comptroller within the fifteen (15) from the date of the awarding of the contract or amendment. This period shall be extended to thirty (30) days when the contract is awarded outside of Puerto Rico. **When deeds are awarded over the acquisition or disposition of real estate the Comptroller shall also be sent copy of all writing and document related with the negotiation. Comptroller."**

by a government agency must be maintained and sent to the Comptroller's Office. The law makes reference to "writings and documents" that must also be registered with the Comptroller's Office; these pertain to deeds involving the disposition of real estate. As to professional service contracts with a government agency, Law 18 requires only that a copy of the contract be sent to the Comptroller's Office. The law does not mention the word "*propuesta*" ("proposal," in English) at all. Thus, while public contracts may exist in the public domain, that is not necessarily true with respect to contract proposals.

Of particular relevance, ASES promulgated a privacy policy on January 16, 2017 pertaining to the use of its electronic mail system. In pertinent part, the policy states:

Original Spanish Text	**English Translation**
"ASES debe asegurar el uso adecuado y seguro del sistema de correo electrónico, y todo empleado, representante y asociado de negocios es responsable de instrumentar la política de uso aceptable y seguro del correo electrónico, conforme a lo siguiente:	"ASES shall ensure the adequate and safe use of the electronic mail system, and all employee, representative and business associate is responsible of implementing the acceptable and safe use policy of electronic mail, as follows:
1. *Toda dirección de correo electrónico debe ser de ASES, es decir empleado@asespr.org, y la utilización del mismo debe ser consistente a las políticas, procesos, conductas éticas y practicas seguras, en cumplimiento con la regulación aplicable según su contenido.*	1. All electronic mail address must be of ASES, that is employee@ases.org, and the use of the same must be consistent with the policies, processes, ethical conduct and safe practices, in compliance with the applicable regulation according to its content.
2. *El sistema de correo electrónico es para uso de asuntos laborales, comunicaciones personales no deben ser enviadas a través del sistema de correos electr6nicos de ASES.*	2. The electronic mail system is for use of work matters, personal communications shall not be sent through the ASES's electronic mail system.
3. *El empleado(a), representantes o asociado de negocios NO tiene expectativa alguna de privacidad en toda comunicación que realice utilizando el sistema de correo electr6nico de ASES.*	3. The employee, representative or business associate DOES NOT have any privacy expectancy in all communication that made using ASES's electronic mail system.
4. *Toda información que se comunique a través de los correos electrónicos así como sus anejos, y que contengan información protegida, sensitiva o confidencial, tienen que estar cifrados.*	4. All information the is communicated through the electronic mail systems, as well as its attachments, and which contain protected, sensitive or confidential information, has to be ciphered.
5. *Toda comunicaci6n que se realiza a través del sistema de correo electrónico de ASES, **es propiedad de ASES,** y puede convertirse o, constituye, en parte, o en su totalidad, un expediente (record} sujeto a utilizarse como evidencia, según definido en las Reglas de Evidencia de Puerto Rico y Federal.*	5. All communication that is made through ASES's electronic mail system, ***is property of ASES***, and may be converted or, constitute, in part, or in whole, a file (record) subject to be used as evidence, as defined in the Puerto Rico and Federal Rules of Evidence.
... ...	

8. *El uso de sistemas de correos electrónicos de terceras personas o entidades, tales como, sin limitarse a Yahoo, Gmail MSN, Hotmail, otros, y su capacidad de almacenaje, NO esta permitido para ninguna comunicación oficial de ASES. El uso de estos sistemas para, crear comunicaciones, realizar transacciones de tipo alguno o para formalizar alianzas o contratos a nombre de ASES, NO está autorizado."*	… … … 8. The use of third person electronic mail systems, such as, but not limited to Yahoo, Gmail, MSN, Hotmail, others, and its storage capacity, IS NOT allowed for any ASES official communication. The use of these systems for, creating communications, performing any kind of transaction or to formalize alliances or contracts on behalf of ASES, IS NOT authorized."

Against this legal backdrop, the United States will address each defendants' arguments as they pertain to the confidential information counts involving ASES.

a. Defendant Scherrer's arguments

Although Defendant Scherrer will no longer be charged in the confidential information counts should the Court grant the United States' request to dismiss these counts as to him, Defendants Avila, Velazquez, and Jover have asked to "join" his arguments. Thus, the United States will briefly address these arguments.

First, the notion that any count should be dismissed because the confidential information at issue does not involve "proprietary work that ASES developed, such as a patent or trade secret" is of no moment. A scheme to deprive someone of the right to the exclusive use of confidential information does not have as an element that the information at issue be proprietary work akin to a trade secret or patent, and Defendant Scherrer cites no authority supporting otherwise, Docket No. 415 at 30. *See, e.g.*, *Abouammo*, 2021 U.S. 34725, at *19-20 (recognizing Twitter user account information as Twitter's property where California law provided that 'everything which an employee acquires by virtue of his employment….belongs to the employer….'). While the United States does not dispute that a trade secret or patent may constitute confidential information for purposes of the wire fraud statute, it is not a necessary condition, particularly when state law provides a definition of "confidential information," as it does here *See* Docket No. 368 at ¶ 11(d) (quoting Section 1.2(s) of the Act).

The remainder of Defendant Scherrer's arguments are either factual, *see* Docket No. 415 at 30-31; rehash uncontroverted legal propositions that do not require a response—for example, that

a scheme to defraud must have property as its object, *id.* at 32; or claim that "the prosecution alleges no deprivation of a tangible property, *id.* at 33. These points are easily addressed: (1) factual disputes are not ripe to resolve on a motion to dismiss an indictment, *see Guerrier*, 669 F.3d at 4; (2) the United States agrees that property or money must generally be the object of a scheme to defraud (unless the theory of fraud is premised on a deprivation of honest services—something not at issue here); and (3) property rights are not limited to *tangible* property rights, *e.g.*, *Carpenter*, 484 U.S. at 25-27.

b. Defendant Avila's arguments

Defendant Avila's motions to dismiss Counts 72-84, Docket no. 451, and Counts 85-90, Docket No. 447, are largely bereft of legal analysis, and contain self-serving factual assertions that are an improper basis upon which to predicate a pretrial motion to dismiss an indictment. Merely to illustrate, in moving to dismiss Counts 72-84, Avila claims that: (1) ASES was not deprived of any property; (2) ASES was not deprived of property because "exclusive right of use of confidential information is not cognizable property"; and (3) the superseding indictment fails to allege that Defendant Avila engaged in "any deceptive means, false premises nor promises in disclosing the information." Docket Nos. 451. And in moving to dismiss Counts 85-90, Defendant Avila alleges that the superseding indictment fails to allege any illegal conduct, citing *Kelly*, *Cleveland*, *McNally*, and *Skilling* without specifically explaining why the legal principles articulated in those cases compel the dismissal of any of the confidential information counts. These arguments are addressed in earlier parts of this response, and the United States will not burden the Court with repetitious argument.

The United States will merely highlight the following points to illustrate why Defendant Avila's motions lack merit:

- Count 72 describes an email that Defendant Avila forwarded from her ASES account to her personal Yahoo account. The email contains a spreadsheet showing information as to all ASES contracts as of December 31, 2015, including the value of the balances of these contracts.

- Count 74 describes an email that Defendant Avila forwarded to herself from her official ASES account to her personal Yahoo account. This email contained Company C's professional services contract proposal to ASES.

Both emails described in Counts 72 and 74 contained a confidentiality note stating as follows:

> "The Puerto Rico Health Insurance Administration (PRHIA) as an instrumentality of the Commonwealth of Puerto Rico and as a covered entity, as determined by the federal regulations, is responsible for the proper administration of certain information protected by law. This message and its attachments may contain or contains information protected by law, confidential information, attorney-client data communication or may constitute intellectual work product of the sender, and is intended only for the individual named like receiver. Access to such information by unauthorized parties thereto may constitute violation of certain rights and / or privileges, which are not waived by the sender and PRHIA. If you are not the intended recipient you are warned that you may not disclose, distribute, archive or copy this email. Please notify the sender immediately, through the contact number that appears under the signature of the sender, or email that you have received this message by mistake. Is necessary that you delete this email from your system. PRHIA has taken all reasonable precautions to ensure no viruses are present in this email. PRHIA does not assumes responsibility for any loss or damage arising from the use of this email or its attachments. PRHIA does not necessarily assumes responsibility and / or endorse, approve views, opinions, conclusions and / or other information expressed in this email."

What is more, the contract proposal of Company B that Defendant Avila sent to Defendant Velazquez (Count 74) contained the following clause at Paragraph 12:

> "Neither this Agreement, nor the services to be provided hereunder, may be assigned or[17] subcontracted without the written approval of ASES. The request to contract a third party must specify the matters in which he/she will intervene and must be submitted in writing. **SECOND PARTY acknowledges the proprietary and confidential nature of all internal, non-public, information systems, financial and business information relating to ASES, Commonwealth of Puerto Rico, its agencies, corporations, and municipalities**

[17] ASES's contract with Company A, also has the abovementioned language in English. Said contract and proposal are referenced in Counts 87 and 88.

> **and personnel. SECOND PARTY and its employees shall keep in strict confidence all such information and shall not make public or disclose any said materials without the previous written consent of ASES. SECOND PARTY wi11 ensure that any authorized subcontractor or expert is subject to this confidentiality obligation**. (Emphasis added.)

Inasmuch as Defendant Avila wishes to argue that she did not participate in a *scheme* to deprive ASES of its right to the exclusive use of its confidential information, she should do so before a jury.[18]

c. Defendant Jover's arguments

Defendant Jover's arguments represent an amalgam of vituperative attack, and factual arguments that have no place in a pretrial motion to dismiss an indictment.[19] Most of the arguments which Defendant Jover has raised have previously been addressed. To the extent Jover has chose to make factual arguments, the United States will not engage—trials, not pretrial motions, are where factual disputes should be aired.

As to Defendant Jover's point that the Puerto Rico Government Ethics Act is unconstitutional "as applied" to him, the argument is not legally developed because he cites no legal authority for any asserted proposition, and is meritless in any event. The United States will merely note that the basis of Defendant Jover's criminal liability does not lie in his own particular breach

[18] Any suggestion that Defendant Avila cannot be held liable for a wire communication that she did not personally transmit is meritless because there is no requirement that the United States prove that Defendant Avila "personally use[d] the wires as long as such use was a reasonably foreseeable part of the scheme in which she participated." *United States v. Woodward*, 149 F.3d 46, 63 (1st Cir. 1998) (citations omitted).

[19] Two examples suffice to make the point: "[I]nformation … does not *magically* become 'confidential information' just because a federal prosecutor *arbitrarily* provides such classification in an indictment," Docket No. 412 at 8; "The government's *disingenuous* intent to frame Counts 85 to 90 under *Carpenter* is simply *preposterous*," *id.* at 16. The use of hyperbole, and accusing counsel for the United States of acting *arbitrarily* do not assist the Court in resolving the legal issues before it.

of a provision of Puerto Rico Government Ethics Act. Rather, the basis of his alleged criminal liability lies in having participated and aided and abetted the participation of others in a scheme whereby at least one of the co-participants (i.e., Defendant Avila) used deceptive means (i.e., her position as Director of ASES, an entity to which she owed a fiduciary duty) to deprive ASES of the right to the exclusive use of its confidential information.

With respect to Defendant Jover's claim that the contract proposals described in Counts 85-89 were in the public domain, the United States is at a loss as to how to respond. Although the contracts of Companies A, B, and C appear on the Comptroller's website, the contract proposals do not. A certification from the Puerto Rico Comptroller's Office establishing that the proposals for Companies A, B, and C have never appeared on the Comptroller's website is attached.[20] Accordingly, Defendant Jover's claim as to the public nature of the contract proposals is not only irrelevant for purposes of considering the merits of a pretrial motion to dismiss, but is also factually inaccurate.

The last point specific to Defendant Jover which the United States will address concerns his claim about the public's "fundamental right of access to government public information." Docket No. 412 at 8-12. By Defendant Jover's logic, Section 1.2(s) of the Puerto Rico Government Ethics Act, is superfluous because "Puerto Rico citizens have a right to know, asses [sic] and judge the affairs of the State." Docket No. 412 at 9. This argument is untenable. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (observing that "courts should disfavor interpretations of statutes that render language superfluous"). If it were otherwise, anyone would be able to walk into the office of any public official (*e.g.*, governor, judge, legislator) and rummage through documents

[20] A translation is also attached.

merely to ensure accountability.

d. Defendant Velazquez's arguments

Defendant Velazquez's motion merely adopts the arguments which other defendants have made, and sets forth the general legal standard applicable to motions to dismiss. *See generally* Docket No. 444. Accordingly, the United States sees no need to craft a response specifically tailored to him.

III. CONCLUSION

For the foregoing reasons, the Court should deny the motions requesting dismissal of the confidential information counts filed by Defendants Keleher, Avila, Velazquez, and Jover at Docket Nos. 412, 425, 451, 447, 429, 444.

In San Juan, Puerto Rico, this 26th day of March, 2021.

W. STEPHEN MULDROW
UNITED STATES ATTORNEY

s/Alexander L. Alum
Alexander L. Alum
Assistant U.S. Attorney

s/Jose A. Ruiz-Santiago
Jose A. Ruiz-Santiago
Assistant U.S. Attorney

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 the same to counsel for defendant.

W. STEPHEN MULDROW
UNITED STATES ATTORNEY

s/Alexander L. Alum
Alexander L. Alum
Assistant U.S. Attorney

s/Jose A. Ruiz-Santiago
Jose A. Ruiz-Santiago
Assistant U.S. Attorney