

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-00036 (PJB)

**DEFENDANT LUISA INCLAN BIRD'S MOTION TO DISMISS  
COUNTS 10-21 (WIRE FRAUD)<sup>1</sup> AND INCORPORATED MEMORANDUM OF LAW**

Defendant, Luisa Inclan Bird, through undersigned counsel, hereby moves this Court to Dismiss Counts 10 through 21, inclusive, of the Superseding Indictment (the "Indictment") in this case for failure to state a prosecutable wire fraud crime. In particular, Defendant avers that the wire fraud counts on their face fail to meet the statutory requirement that the use of wires be "for the purpose of executing the alleged scheme or artifice to defraud". As grounds, Defendant states as follows:

Materiality is an element of a mail or wire fraud offense. See Neder v. United States, 527 U.S. 1, 25 (1999). See United States v. Rogers, 118 F.3d 466, 472 (6<sup>th</sup> Cir. 1997). Usually materiality is considered in the context of the alleged misrepresentations and omissions that make up the scheme or artifice to defraud. Neder, 527 U.S. at 16. And while it is well-established that the use of mails or wires charged as a violation of 18 U.S.C § 1341 or 18 U.S.C § 1343 need not by itself be an illegal act, see e.g. United States v. Hasson, 333 F.3d 1264 (11<sup>th</sup> Cir. 2003), nevertheless, the use of mail or wire cannot be an incidental or *de minimis* act, but

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<sup>1</sup> Co-Defendants Ramon Velasco Escardille and Ricardo Colon Padilla have joined in the instant motion.

rather must be in furtherance of and for the purpose of executing the scheme and artifice to defraud. In other words, we submit in this case, the use of wires that constitutes the 18 U.S.C. § 1343 offense must itself be material to the alleged scheme. United States v. Fermin Castillo, 829 F.2d 1194, 1199 (1<sup>st</sup> cir. 1987) (the communications must be more than peripheral and must have touched one or more of the core transactions of the plot).

In this case, Counts 10 through 21 of the Indictment charge Ms. Luisa Inclan Bird and five Co-Defendants with alleged violations of 18 U.S.C. § 1343. The Indictment describes the object of the scheme and artifice to defraud as “to obtain public campaign financing from the Puerto Rico Treasury Department” by “circumventing certain legal requirements required by the Commonwealth of Puerto Rico’s Public Campaign Financing laws.” Indictment at pp. 38-39. The Indictment sets out several “manner and means” by which the alleged scheme operated, including claims that individuals paid for campaign debts in a manner that avoided disclosure of those “payments in reports required to be filed with the State Electoral Commission and the Puerto Rico Treasury Department.” Indictment at 39 (emphasis added).

The use of wires for purported execution of the scheme, however, relates to only two Co-Defendants, Miguel Nazario Franco and Jose Gonzalez Freyre. Ms. Luisa Inclan Bird is accused of somehow acting as an aider and abettor. Counts 10-20 identify electronic e-mail messages between Co-Defendant Nazario and Lopito (“LIH”) agency people. It is noteworthy to point out that not one of these e-mails includes, mentions, nor suggests any connection with Ms. Luisa Inclan Bird. The e-mails apparently relate to campaign debts and payments. Count 21 describes an electronic e-mail message from Co-Defendant Gonzalez Freyre to his employees at Pan American Grain, relating to invoices. This e-mail likewise does not involve, mention, nor suggest any connection to Ms. Luisa Inclan Bird. The Indictment is completely silent as to what

relation , if any, Defendant Inclan Bird has with the use of wires as charged. The inference left is: absolutely nothing.

It is well established the use of the mails and wires must be closely related and important to the successful execution of a fraud charged as an 18 U.S.C. § 1343 violation. See e.g., United States v. Green, 786 F. 2d 247, 250 (7<sup>th</sup> Cir. 1986). See generally United States v. Morales-Rodriguez, 467 F.3d 1 (1<sup>st</sup> Cir. 2006) (sustaining mailings incident to essential aspect of scheme); United States v. Castile, 795 F.2d 1273 (6<sup>th</sup> Cir. 1986); (scheme's completion or prevention of its detection must depend in some way on charged mailing); United States v. Pietri-Giraldi, 864 F.2d 222 (1<sup>st</sup> Cir. 1982) (bank telexes confirming existence of sham certificates of deposit not sufficiently connected to fraud); United States v. Blecker, 657 F.2d 629 (4<sup>th</sup> Cir. 1981) (charged mailing must be important to scheme); United States v. Edwards, 458 F.2d 875 (5<sup>th</sup> Cir. 1972) (not enough if mailing merely collateral to scheme or incidental to it). In this case, the indictment on its face is silent as to how the e-mails described are closely related or otherwise important to the alleged scheme. In fact, the e-mails appear incidental and *de minimis* to the conduct otherwise described in the Indictment.

It is apparent that the gravamen of the instant prosecution in Counts 10-21 is non-disclosure of information in reports required to be filed under Puerto Rico law. The charged e-mails do not relate to Ms. Luisa Inclan Bird at all and have no direct relation to any reports submitted to the State Electoral Commission or the Puerto Rico Treasury Department.

Accordingly, Counts 10-21 should be dismissed.<sup>2</sup>

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<sup>2</sup> In addition, in considering the legal limits to a wire fraud prosecution, a consideration of the “legally compelled mailing doctrine” is instructive. The doctrine was first announced in 1960 in Parr v. United States, 363 U.S. 370 (1960). Nine individuals and two state banking corporations were indicted and convicted of mail fraud after scheming to defraud a school district, the State of Texas, and taxpayers of *ad valorem* tax collections and diverting tax money to private gain. The mailings that substantiated the mail fraud charges were letters, tax statements, checks and receipts related to the assessment and collection of the taxes. These mailed notices, as it turned out, were instrumental to the diversion of tax monies, although non-fraudulent and legal in themselves. The Supreme Court set aside the convictions in the case, holding that mailings made or caused to be made under the imperative command of duty imposed by state law are not criminal under the federal mail fraud statute. *Id.* at 391. The Court reasoned that the law violation in the case was actually a state law violation that was being bootstrapped into a federal violation because of use of the federal postal system. *Id.* at 385. Because the mailings were innocent in themselves and required under the state law as part of the state taxing process, the Court concluded these mailings could not qualify as mailings for the purpose of executing a fraudulent scheme under 18-1341.

In United States v. Schmuck, 489 U.S. 705 (1989), a divided Supreme Court in a 5-4 decision re-affirmed the compelled mailing doctrine but upheld the conviction of a used car distributor who, as part of a scheme to transfer title of cars whose odometers had been rolled back, mailed title transfer forms to the state department of transportation. The Court majority found the mailings to be in compliance with law but derivative of Schmuck’s scheme and because the mailings would not have occurred but for the scheme, they were sufficiently in furtherance to sustain the convictions. *Id.* at 713.

Recently, in United States v. Lake, 472 F.3d 1247 (10th Cir. 2007), the Tenth Circuit set aside the convictions of two Westar Energy executives. The prosecution had claimed these men had conducted a far-flung scheme to steal company money through a pattern of fraud and deceit. The gravamen of the alleged offenses were purported false filings with the SEC. It turned out that the defendants and their families had used company aircraft for personal travel while the flight logs recorded the trips as business expenses. The defendants failed to disclose their personal use of the corporate jet on the various filings the company was required to make to the SEC. The 10<sup>th</sup> Circuit found that Parr and the legally compelled mailing doctrine applied because Westar submitted the filings to the SEC under compulsion of federal law and the purpose of the reports submitted had nothing to do with the defendants’ alleged misconduct. *Id.* at 34. It appears here that like Parr and its progeny, the Government has seized on incidental e-mails and pointed to state election filings as a way of boot strapping what are at worst state law violations into violations of federal law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been filed via electronic mail with the Clerk of the Court by using CM/ECF System which will send a notice of electronic filing to the following on this 8<sup>th</sup> day of July, 2008.

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