IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD C. SEIDLING,

Defendant.

OPINION AND ORDER

11-cr-126-bbc

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This criminal case is before the court on defendant Bernard C. Seidling's motion for judgment of acquittal. Defendant is facing 50 counts of mail fraud under 18 U.S.C. § 1341. He is charged with executing a scheme to defraud by knowingly causing mail to be delivered to small claims courts in Wisconsin documents containing false statements about the alleged liabilities of a number of persons and hiding the filings of the actions from the persons named in the suits.

In an unusual move, the parties have agreed that the criminal charges can be resolved on the record without a trial. They have stipulated to the facts and dispute only the law that applies to those facts. The United States contends that the facts support a finding that defendant violated the statute; defendant maintains that it has not shown that his agreed-upon conduct satisfies the elements of the law.

The mail fraud statute has three elements: a scheme to defraud; use of the mails to

advance the scheme; and the defendant's participation in the scheme with the intent to defraud. Defendant does not deny that his conduct meets the second and third elements. He contends only that the government cannot establish the existence of a scheme to defraud because it cannot show the necessary convergence between the loss and the fraud, that is, that he had the intent to obtain money or other property from the same persons or entities he deceived. He acknowledges that he deceived small claims courts, clerks of court and process servers, but maintains that because he did not deceive not the actual victims of his scheme to defraud, he cannot be found guilty.

Defendant's theory of "convergence" is not one that the Court of Appeals for the Seventh Circuit has adopted. It has acquitted defendants charged with mail fraud who could not have reasonably foreseen that their fraud would require use of the mails, which is an entirely different situation from defendant's, but it has not required the government to prove that the defendant deceived the same persons he defrauded. Other circuits may have held to the contrary, as defendant argues, but this court is bound by the Seventh Circuit's view of the law. Accordingly, defendant's motion for a judgment of acquittal will be denied.

STIPULATED FACTS

A. Wisconsin Small Claims Courts

During the time relevant to this case (in or about 2003 and continuing through December 31, 2009), the Wisconsin court system operated small claims courts for the purpose of resolving smaller disputes (generally claims for money) more quickly and

inexpensively than they could be resolved in other court proceedings.

During the relevant time, Wisconsin law allowed a person to file a small claims action in any county in which the defendant resided, in which the claim allegedly arose, in which the defendant did a substantial amount of business or as otherwise provided by law. Wis. Stat. § 801.50(2). Any person 18 or older could bring suit in a small claims court and could do so without a lawyer.

A plaintiff could begin a small claims action by filing a summons and complaint, arranging for service of these documents on the defendant or, if the defendant could not be served, paying for publication of a notice of the complaint in a newspaper published in the area in which the defendant resided. The plaintiff had the obligation to serve the lawsuit on the defendant. If the plaintiff was unable to locate the defendant for service, the person could certify that fact to the court and the court would grant a default judgment to the plaintiff.

After judgment was granted in a small claims suit, the plaintiff could pay an additional fee to the clerk of court to have the judgment docketed in the county in which the case was filed. Once this was done, the electronic judgment against the defendant was added to the Wisconsin Circuit Court Access system. The plaintiff could then seek execution against defendant's nonexempt property in that county.

If the property was located in another county, the plaintiff could ask the court to issue (1) a transcript of judgment to the second county and (2) an execution against property to the sheriff of that county, directing the sheriff to collect any nonexempt real and personal

property to satisfy the judgment. The maximum judgment in a small claims court was $5000 and the judgment accrued interest at the rate of 12% from the date of judgment until satisfaction.

B. Relevant Filings

Defendant Bernard Seidling filed small claims actions in a number of counties (Iron, Eau Claire, Jackson, Sawyer, Dane, Barron, Chippewa, Dunn, Ashland and Polk), using a variety of business names (D&A Enterprises, Diverse Services, JVC Investments, MW Enterprises, A&B Enterprises, DD Enterprises, RJ Enterprises, Diversified Services, R&R Enterprises, Northland Group, Blanco Enterprises, Midwest, LP, and JDR Enterprises). Defendant filed small claims suits against a number of individuals and one entity. None of them lived at (or, in the case of the entity, did business at) the addresses listed in the small claims actions; none were ever served with the lawsuits or aware of any attempts to serve them; and none saw any notice of the suits published in newspapers because they did not live in the geographic area served by the publication.

C. Victims

1. Kenneth and Tamera McCormick

In 2002, the McCormicks lost their farm in Chippewa County to foreclosure. Trapman LLC by Daniel Marx, and Bluegrass Trust by defendant as trustee, bought the farm at the sheriff's sale and rented it back to the McCormicks. Sometime in 2003, the

McCormicks moved, and at some later time, a dispute regarding the property arose among the parties.

On January 15, 2008, defendant, d/b/a R&R Enterprises, filed a small claims lawsuit in Iron County against the McCormicks for $5,000. He listed their address as 12 Oak Street, Hurley, WI, 54534, and alleged as the cause of action: "Balance due for unpaid rent from May 2002 to Dec. 2002." On January 28, 2008, defendant filed an affidavit from an Iron County deputy sheriff, who stated that he had attempted to serve Tamera McCormick at the Hurley address, but had been unable to do so. On August 20, 2008, defendant filed a letter with the court, asking that the default judgment be docketed, that a judgment transcript issue to Chippewa County and that an Execution against Property be sent to the Chippewa County sheriff. On June 17, 2009, defendant filed a letter with the Iron County Clerk, seeking earnings garnishment of $5,141.79 from future wages to be paid to Kenneth McCormick by garnishee Mathy Construction.

In this instance and in all the others described below, all of the relevant documents and letters arrived at the court in the U.S. Mail and the small claims court relied on them to enter a default judgment for defendant.

At the time of the attempted garnishment, Kenneth McCormick no longer worked for American Materials/Mathy Construction. As a result, nothing was paid on the garnishment. In 2009, McCormick learned from a friend at American Materials of a 2008 Iron County small claims judgment obtained by defendant, d/b/a R&R Enterprises, and the attempted garnishment at American Materials.

The McCormicks never lived at the listed Hurley address. The property was in foreclosure at the time of the lawsuit in early 2008.

2. David Smith

In November 2005, Smith's company (St. Paul Plumbing & Heating) performed work for defendant at a property in St. Paul while defendant was in Florida. When the work was complete, a dispute arose over the bill. In 2006, defendant sued his credit card issuer and St. Paul Plumbing & Heating in Sawyer County, using Smith's correct business address in St. Paul. This lawsuit was dismissed because Smith's business was located in Minnesota and the work had been done in Minnesota.

On August 21, 2008, defendant, d/b/a RJ Enterprises, filed a small claims lawsuit in Eau Claire County against Smith, d/b/a St. Paul Plumbing & Heating, for $5,000. The lawsuit listed an address at 209 N. 3rd Street, River Falls, WI, 54022, and alleged as the cause of action: "Defendant by theft & fraud debited plaintiff's credit card account causing damages to plaintiff in the amount of $5,000." On September 11, 2008, defendant filed an affidavit from a Pierce County deputy sheriff stating that she had attempted to serve David Smith, d/b/a St. Paul Plumbing & Heating, in Pierce County. The deputy averred that "the landlord at this address stated that he didn't know a David Smith and that he has never lived at the given address; current address unknown." On October 15, 2008, defendant, d/b/a RJ Enterprises, filed an amended small claims lawsuit against Smith, d/b/a St. Paul Plumbing & Heating and MPLS Plumbing & Heating, in Eau Claire County, listing an

address at 744 Plum Street, Trailer 2, Eau Claire, WI, 54702, in which it alleged as the cause of action: "Defendant by theft & fraud, debited plaintiff's credit card account causing damages to Plaintiff in the amount of $5,000." On November 10, 2008, defendant filed an affidavit from an Eau Claire County deputy sheriff, averring that he had attempted to serve Smith with the amended summons and complaint at the Eau Claire address and had been unable to do so.

Smith has never lived in Wisconsin at either of the addresses defendant used and his business has never been located at either of the addresses.

3. David and Jezzeeca Lindquist

After moving from Minnesota to Ashland, Wisconsin, Jezzeeca Lindquist signed a land contract in October 2005 to purchase ten acres in Bayfield County from Mason Land Trust, by defendant as trustee. At the time, Jezzeeca Lindquist and her husband David were living in Ashland. Ultimately, Jezzeeca Lindquist attempted to withdraw from the contract. Defendant sued Jezzeeca and her husband in Bayfield for foreclosure of the land contract mortgage; the lawsuit was dismissed in September 2007 by the court at the request of both parties.

On September 24, 2008, defendant, d/b/a Northland Group, filed a small claims lawsuit in Jackson County against the Lindquists for $5,000. The lawsuit listed their address as 212 Main Street, Bigfork, MN, 56628, and alleged as the cause of action: "Balance due on contract - none of which has been pd. Defendants upon information and belief also

reside from time to time in Jackson Cty." On October 20, 2008, defendant filed an amended complaint, stating that the cause of action was "Balance due on contract - none of which has been pd. Contract entered into in Jackson County WI and upon information and belief, also resided in Jackson County before moving to Minnesota." On the same date, defendant also filed an affidavit from an Itasca County, Minnesota deputy sheriff, in which the deputy averred that she had attempted to serve the Lindquists within Itasca County and had been unable to do so. On November 3, 2008, defendant filed proof that he had published the small claims lawsuit in the Grand Rapids Herald-Review, published in Grand Rapids, Minnesota. On November 6, 2009, defendant wrote the clerk of the Jackson County small claims court, asking that the default judgment be docketed and a transcript of judgment issued to Eau Claire County.

Although the Lindquists have never lived in Bigfork, Minnesota, they had had a P.O. Box there at one time and had lived in nearby Effie, MN. They have never lived in Jackson County. "212 Main Street" in Bigfork is a non-existent address.

4. Steve Sletner

Sletner owned "TEC Design," an engineering firm that contracted with Four Star Properties, Inc., of which defendant was president, to do surveying and subdivision design on a housing development in Chippewa County. TEC Design stopped working on the project in 2002 and defendant threatened to sue Sletner.

On November 21, 2008, defendant, d/b/a D&A Enterprises, filed a small claims

lawsuit in Sawyer County against Sletner, d/b/a TEC Design, for $5,000. The lawsuit listed Sletner's address as 12806W Wild Wood West Lane, Hayward, WI, 54843, and alleged as the cause of action: "Balance due to plaintiff based upon theft by contractor for the year 2003."

On December 23, 2008, defendant, d/b/a D&A Enterprises, filed a second small claims lawsuit in Sawyer County against Sletner, d/b/a TEC Design, for $5,000. Again, the lawsuit listed Sletner's address as 12806W Wild Wood West Lane, Hayward, WI, 54843, and alleged as the cause of action: "Balance due to plaintiff from defendant based upon theft by contractor for the year 2004." On January 13, 2009, defendant filed an affidavit from an individual averring that she had attempted to serve Steve Sletner and TEC Design but had not found them at the listed address and had never served them. Sletner never lived at the Wild West Lane address in Hayward.

5. Sharmin Carlson, a/k/a Sharmin Hanson

Carlson and Rodney Staples leased a house near Webster, Wisconsin, from BW 39A Trust, of which defendant was the trustee. When Staples and Carlson failed to make the payments, they were evicted and left the premises uninhabitable, with significant clean-up costs for BW 39A Trust.

On February 6, 2009, defendant, d/b/a A&B Enterprises, filed a small claims lawsuit in Dane County against Carlson and Staples for $5,000. The lawsuit listed their address as 7850 Twin Flower Drive, Madison, WI, 53719, and alleged as the cause of action: "Balance

due based upon breach of contract, misrepresentation and fraud." Neither of the named defendants lived at this address in Madison. On March 2, 2009, defendant filed an affidavit from a process server, Donald Smock, in which Smock averred that he had personally attempted to serve the complaint on the named defendants at the Madison address; Smock stated that "[t]he house was completely empty with a 'For Sale' sign in the front yard." He did not serve either any of the defendants. On March 6, 2009, defendant filed proof that he had published this small claims lawsuit in the Wisconsin State Journal in Madison. On March 19, 2009, defendant asked the clerk of the Dane County Court to docket the default judgment and to issue a transcript of judgment to the Burnett County Clerk.

6. Mark Woychik

In approximately 2000, Mark Woychik purchased land in St. Croix Count from Four Star Properties, Inc., by defendant, president, on a land contract. Ultimately, a dispute over this property arose between Four Star and Woychik. On January 26, 2009, defendant, d/b/a DD Enterprises, filed a small claims lawsuit in Dane County against Woychik for $5,000. The lawsuit listed Woychik's address as 105 Weybridge Drive, Sun Prairie, WI, 53590, and alleged as the cause of action: "Balance due from defendant based upon malicious interference of contract." On February 17, 2009, defendant filed an affidavit from process server Donald Smock in which Smock averred that he had been unsuccessful in trying to serve Woychik at the Sun Prairie address. He added that "[t]he house at the address was completely empty with a 'For Sale' sign in the front yard." On that same date,

defendant filed with the court proof that he had published notice of the small claims lawsuit in the Wisconsin State Journal. On March 2, 2009, defendant mailed a request to the Dane County Clerk, asking that the default judgment in the small claims lawsuit be docketed, that a transcript of judgment be issued to St. Croix County and that a property writ for execution against property issue to the St. Croix County Sheriff. Mark Woychik never lived at 105 Weybridge Drive in Sun Prairie.

7. Footsmart

Footsmart is a catalog and web-based shoe retailer with its main business address in Norcross, Georgia. On May 5, 2009, defendant ordered shoes from Footsmart; on June 12, 2009, he returned the shoes to Footsmart and Footsmart sent them back again to defendant.

On July 14, 2009, defendant, d/b/a JDR Enterprises, filed a small claims lawsuit in Barron County against Footsmart for $5,000. The lawsuit listed Footsmart's address as 533 South Main Street, Chippewa Falls, WI, 54729, and alleged as the cause of action: "Defendant committed fraud, misrepresentation, and violated the WI Consumer Act causing damages to plaintiff." On July 21, 2009, defendant filed an affidavit signed by Gregg Beckley indicating that Beckley had attempted to serve Footsmart at the Chippewa Falls address and had been unable to do so. (Gregg Beckley is a handyman who did periodic projects for defendant. He signed affidavits in blank and never attempted to serve any of the individuals or the entity named in these lawsuits.) On July 31, 2009, defendant filed

proof that he had published notice of the lawsuit in The Chippewa Herald. At the time of this lawsuit, 533 South Main Street in Chippewa Falls was a property in foreclosure.

8. Nancy Drake

Nancy Drake was the Barron County Public Health Nurse. Her supervisor, Kaye Thompson was Director of Barron County Public Health. On July 8, 2009, defendant, d/b/a/ Hillsdale Trust, was notified by the Barron County Department of Health and Human Services that property owned by the Hillsdale Trust located in Hillsdale, Wisconsin, had been condemned as unfit for human habitation because of actions by the tenants. The condemnation order/placard listed Thompson's name; the condemnation legal notice mailed to defendant contained Drake's name.

On July 30, 2009, defendant, d/b/a MW Enterprises, filed an amended small claims lawsuit against Thompson, Drake, and Bruce and Nicole Stanford (the tenants at the condemned property) for $5,000. The lawsuit listed the defendants' address as 321 East Columbia Street, Chippewa Falls, WI, 54729, and alleged as the cause of action: "Defendants Standfords caused intentional and malicious damages to plaintiff's rental property. Defendants Thompson and Drake trespassed onto plaintiff's property after Stanfords vacated the property." On August 5, 2009, defendant filed an affidavit filed by Gregg Beckley indicating that Beckley had attempted to serve Drake and Thompson at the Chippewa Falls address and had been unable to do so. On September 11, 2009, defendant filed proof that he had published this lawsuit in The Chippewa Herald. Neither Drake nor

Thompson ever lived in Chippewa Falls.

9. Nicole Penegor

Nicole Penegor is a lawyer who works for the Legal Aid Society of Milwaukee. Georgia King and her son, Jerry Baskin, lived in a rental house owned by the Green Stone Trust, of which defendant was trustee. In 2008, a foreclosure action was commenced against the property. Penegor represented King as an intervener in the lawsuit. In 2009, acting Trustee for Green Stone Trust, defendant sued King and Baskin for eviction; Penegor represented King.

On September 11, 2009, defendant, d/b/a Diversified Services, filed a small claims lawsuit against Baskin and Penegor in Dunn County for $5,000. The lawsuit listed Baskin's and Penegor's address as 218 2nd Avenue, Chippewa Falls, WI, 54729, and alleged as a cause of action: "Defendant Baskin absconded without paying rent, sewer and water, plus other expenses of plaintiff from June 2008 to December 2008. Defendant Penegor interfered with plaintiff's contract with Baskin causing damages in total by defendants of $5,000." On September 15, 2009, defendant filed an affidavit signed by Gregg Beckley, in which Beckley averred that he had attempted to serve Baskin and Penegor at the Chippewa Falls address and had been unable to do so. On October 2, 2009, defendant filed proof that he had published this lawsuit in The Chippewa Herald.

Neither Baskin and Penegor ever lived in Chippewa Falls. 218 2nd Avenue in

Chippewa Falls was a property in foreclosure at the time defendant filed suit against Penegor and Baskin.

10. Clarence and Shirley Schielfelbein

In 2006, defendant, d/b/a Tex Mex Enterprises, sued the Schielfelbeins, their niece Shannon Haddeman, and her boyfriend James Gregory in the Circuit Court for Eau Claire County. Haddeman had lost her house in foreclosure; Four Star Properties, Inc., bought the house at a sheriff's sale and Haddeman then leased the house from Four Star with an option to purchase. The Schielfelbeins co-signed this lease. Haddeman missed payments and defendant brought a lawsuit against her in 2006 in the Circuit Court for Eau Claire County. The Schielfelbeins counterclaimed because they had not exercised the option to purchase. The lawsuit was dismissed and the Schielfelbeins paid approximately $3000 in costs to defendant.

On October 1, 2009, defendant, d/b/a Diverse Services, filed a small claims lawsuit for $5000 against the Schielfelbeins in Ashland County. The lawsuit listed their address as 63418 Butterworth Road, Ashland, WI, 54506, and alleged as the cause of action: "Balance due under contract which has not been paid." On October 7, 2009, defendant filed an affidavit signed by Gregg Beckley, in which Beckley averred that he had tried to serve Clarence and Shirley Schielfelbein at the Ashland address and had been unable to do so. On October 14, 2009, defendant filed proof that he had published this lawsuit in The Daily Press, a newspaper published in Ashland.

Following the entry of default judgment, on November 6, 2009, defendant mailed a letter to the Clerk of Court for Ashland County, requesting the docketing of the default judgment in the small claims lawsuit, the issuance of a transcript of judgment to the Eau Claire County Clerk of Court and the issuance of execution against property to the Ashland County Sheriff. The Schielfelbeins never lived at the Ashland address.

11. Neil and Marian O'Donnell

Marian O'Donnell and her first husband owned property near Siren, Wisconsin. After he died in February 1986, she married Neil O'Donnell. The O'Donnells moved to Missouri in 1987 or 1988; the property she had owned previously remained in her first husband's name on the Burnett County property records. Defendant paid the property taxes on this property and then sued the O'Donnells in 1994 in a St. Croix County small claims lawsuit seeking repayment of the property taxes. Defendant obtained a judgment for the taxes he had paid on behalf of the O'Donnells totaling $1,020 as of November 1994.

On November 9, 2009, defendant, d/b/a JVC Investments, filed a small claims lawsuit against Neil and Marian O'Donnell in Barron County for $5,000. The lawsuit listed their address as 536 E. Woodland Avenue, Barron, WI, 54812, and alleged as the cause of action: "Balance due through December 2004 none of which has been paid." On November 16, 2009, defendant filed an affidavit signed by Gregg Beckley, in which Beckley averred that he had attempted to serve the O'Donnells at the Barron address and had been unable to do so. On November 30, 2009, defendant filed proof that he had published the lawsuit in the

Barron News-Shield. The O'Donnells never lived at the Barron address. The property at 536 E. Woodland Avenue in Barron was in foreclosure at the time of this lawsuit.

12. Dori Stepan

Dori Stepan lived in Douglas County and had been involved in several lawsuits with defendant. In 2007, Defendant, d/b/a Raintree and Rain Tree Enterprises, sued Stepan for eviction. Stepan counterclaimed and was awarded $22,122 in damages.

On December 15, 2009, defendant, d/b/a Blanco Enterprises, filed a small claims action for $5000 against Stepan in Polk County. The lawsuit listed Stepan's address as 538 Round Lake Lane, Osceola, WI, 54020, and alleged as the cause of action: "Balance due for use of property from June 2006 to October 2006." On January 4, 2010, defendant filed an affidavit signed by Gregg Beckley, in which he averred that he had attempted to serve Stepan at the Osceola address and had been unable to do so. On January 4, 2010, defendant filed proof that he had published this lawsuit in The Inter-County Leader in Frederick, Wisconsin. Dori Stepan never lived in Osceola, Wisconsin.

13. Raymond and Jerrianne Closs; Jodi Clay; Leo Schuch

Kathleen Lees signed her husband's name to a warranty deed without his knowledge, and Jodi Clay notarized this deed without witnessing his signature. This warranty deed was used by Lees to transfer title to GF Land Trust, Bernard Seidling, trustee. The Lees rented the house back from GF Land Trust, but were evicted after they failed to pay rent. After

evicting the Lees, GF Land Trust rented the house to Raymond and Jerrianne Closs, through realtor Leo Schuch. Sometime later, Raymond and Jerrianne Closs broke the lease with GF Land Trust.

On October 1, 2009, defendant, d/b/a Midwest L.P., filed a small claims lawsuit in Sawyer County against Raymond and Jerrianne Closs for $5,000. The Sawyer County lawsuit listed their address as 16686 W. Pine Lane, Hayward, WI, 54843, and alleged as the cause of action: "Balance due per contract for rent, damages, unpaid sewer and water and repairs. Defendants absconded without paying rent, bills, etc. owe $5,000." On October 7, 2009, defendant filed an affidavit filed by Gregg Beckley, in which Beckley averred that he had attempted to serve Raymond and Jerrianne Closs at the Hayward address and had been unable to do so. On October 14, 2009, defendant filed proof that he had published notice of this lawsuit in The Sawyer County Record in Hayward.

On October 1, 2009, defendant, d/b/a Midwest, L.P., filed another small claims lawsuit in Sawyer County, this time naming Jodi Clay as the defendant and seeking $5,000. The lawsuit listed Clay's address as 5104 N. Crawford Street, Winter, WI, 54896, and alleged as the cause of action: "Defendant falsely and fraudulently notarized forged signature causing damages to plaintiff of $5,000." On October 7, 2009, defendant filed an affidavit signed by Gregg Beckley, in which Beckley averred that he had attempted to serve Clay at the Winter address and had been unable to do so. On October 14, 2009, defendant filed proof that he had published this lawsuit in The Sawyer County Record.

On October 1, 2009, defendant, d/b/a Diverse Services, filed a small claims lawsuit

in Barron County against Leo Schuch and Re/Max Realty County for $5,000. The lawsuit listed Schuch's address as 543 23rd Avenue, Cumberland, WI, 54829, and alleged as the cause of action: "Defendants were negligent in leasing plaintiff's property, failed to do background ck., qualify tenants, and absconded with (stole) plaintiff's security deposit. Total damages $5,000." On October 6, 2009, defendant filed an affidavit signed by Gregg Beckley, in which Beckley averred that he had attempted to serve Schuch at the Cumberland address and had been unable to do so. On October 13, 2009, defendant filed proof that he had published this lawsuit in The Barron News-Shield, in Barron.

Raymond and Jerrianne Closs live in Kenosha, Wisconsin, and have never lived in Hayward. Jodi Clay lives in Kenosha, Wisconsin, and has never lived in Winter, Wisconsin. Leo Schuch lives in Kenosha, Wisconsin, and has never lived in Cumberland, Wisconsin.

OPINION

The only issue in this case is a legal one: Does the mail fraud statute, 18 U.S.C. § 1341, apply to acts taken to deceive one party in order to obtain money or property from another? Or, as defendant argues, does the statute cover only situations in which the same party is both the one deceived and the one deprived of money or property?

Section 1341 prohibits the use of the mails to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The elements of the statute are three: "(1) a scheme to defraud, (2) use of the mails to advance the fraud, and (3) the defendant's participation with

intent to defraud." United States v. Stockheimer, 147 F.3d 1082, 1087 (7th Cir. 1998). A scheme to defraud requires "'the making of a false statement or material misrepresentation, or the concealment of [a] material fact.'" United States v. Sheneman, 682 F.3d 623, 629 (7th Cir. 2012) (quoting United States v. Powell, 576 F.3d 482, 490 (7th Cir. 2009)).

Defendant argues that materiality must have the natural tendency to influence (or to be capable of influencing) the intended victim, that is, inducing the victim of the fraud to part with money or property. Citing United States v. Walters, 997 F.2d 1219 (7th Cir. 1993), he argues that there must be a level of convergence between the loss and the fraud; in other words, the government must show that the defendant's intent was to obtain money or property from the one deceived. In his view, it is not enough for the government to prove that he deceived the small claim courts as part of a scheme to defraud the persons he sued in those courts; it must prove that he deceived the victims of his scheme.

Defendant reads too much into Walters. The case involved a scheme devised by a sports agent hoping to represent college athletes when they were negotiating for professional contracts. Walters signed up a number of college athletes as clients, but because he knew that they would be ineligible for scholarships if the schools learned of his contracts with them, he hid the existence of the contracts. He did not realize that colleges routinely mailed forms to prospective scholarship recipients, asking them to confirm their eligibility for the scholarships. This led to the unraveling of his scheme and charges of mail fraud based on the mailings of the forms by the colleges. On appeal, Walters's conviction was reversed after

the court of appeals found that he had not caused any mailings to be made. As the court found, the mailings were not "essential to his scheme"; in fact they threatened to scuttle it completely.

Although defendant cites Walters to support his theory of convergence, the case is entirely different from his own. The issue in Walters's case was not convergence, at least not in the sense in which defendant is using it in this case. Walters's conviction was overturned because the mailings were not foreseeable to him and did nothing to advance his scheme and because the universities were not his victims. It had never been his intent that the money they lost by granting scholarship to ineligible athletes who had signed with Walters would end up in his pocket. By contrast, in this case, defendant deceived the small claims courts as part of his attempt to defraud his victims, causing the courts to use the mails to carry out his scheme. He cannot deny knowing that the mails would be used; they were integral to his scheme to obtain money or other property from the persons he had sued.

Numerous cases support the government's position that § 1341 applies to situations in which a defendant deceives a third party as a means of defrauding a victim. In United States v. Cosentino, 869 F.2d 301 (7th Cir. 1989), for example, the deceived party was the state department of insurance to which the perpetrators of the fraud were mailing false reports about their insurance company's financial position. The mailings led the department to believe that the company was financially sound, enabling the defendants to skim off more of the company's money for their own use. Eventually the company folded, defrauding its policyholders and claimants. Defendants were convicted of eight fraud counts; the

convictions were upheld on appeal. The mailings satisfied the mail fraud statute because they "were integrally involved in the scheme to defraud, so that there was 'some link between the mailing and th e success of the scheme.'" id. at 308 (quoting United States v. Kwiat, 817 F.2d 440, 443 (7th Cir. 1987)).

Other circuits have reached similar conclusions. In United States v. Christopher, 142 F.3d 46, 54 (1st Cir. 1998), the Court of Appeals for the First Circuit upheld the conviction of a defendant who had deceived state insurance regulators, with the result that policyholders suffered losses. The court rejected the defendant's argument that the scheme was a form of indirect victimization without the necessary convergence required by the wire fraud statute (which differs from the mail fraud statute only as to the means used for the fraud). It said so specifically: "We reject Christopher's argument that this court has already adopted the convergence theory." Id. at 53. The court added that it saw "no reason to read into the statutes an invariable requirement that the person deceived be the same person deprived of the money or property by the fraud." Id. at 54.

In United States v. McMillian, 600 F.3d 434 (5th Cir. 2010), the court upheld the conviction of persons who misrepresented to the state the financial health of an HMO they owned or managed, leading eventually to the organization's failure. The defendants made the same argument defendant makes in this case: their misrepresentations were made to the state, but the state was not deprived of any money or other property. The court rejected this argument, holding that "[T]he misrepresentations in a mail fraud scheme need not be made directly to the scheme's victim." Id. at It distinguished the facts of the case before it from

those in Cleveland v. United States, 531 U.S. 12 (2000), in which the Supreme Court held that the mail fraud statute does not reach false statements made in applications for state licenses for permits to operate video poker games because the permits do not qualify as "property" under the statute. The Court made the point that the thing obtained must be property in the hands of the victim; the possibility that the thing may *become* property once it has been obtained is not enough. In the McMillian case, the perpetrators' goal was to obtain money from the HMO and its insureds in the form of management fees and premiums and to retain the money rather than pay it out to satisfy the claims of medical providers. The court held that this was sufficient to satisfy the requirement in Cleveland that the object of the fraud be actual money or property in the hands of the victim. Id. at 449.

In United States v. Ali, 620 F.3d 1062 (9th Cir. 2010), the court upheld the defendant's conviction under § 1341 for holding himself out as an Authorized Education Reseller, using his special status to buy software from Microsoft and then resell it at higher prices to non-educational users. It held that Microsoft had been defrauded of the opportunity to collect money from the non-educational users and it rejected Ali's argument that the government had not shown the necessary convergence between the victim and the fraud, saying that the statute does not require that property be taken directly from the victim; "depriving a victim of property rightfully due is enough." Id. at 1070. The court concluded that the scheme was intended to defraud Microsoft, even if no specific false statements were made to it. Id. at 1071. The defendants "need not have made a

misrepresentation directly to Microsoft in order to be guilty of wire and mail fraud." Id. at 1070.

Finally, Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008), supports the government's position in this case, although it was brought as a civil fraud action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c). In Bridge, the alleged fraud scheme was the making of false statements by defendants to county officials to preserve defendants' opportunities to purchase valuable tax liens on properties of delinquent taxpayers. Phoenix Bond brought suit against Bridge and others, alleging that they had violated RICO by engaging in a pattern of racketeering activity, namely mail fraud, to obtain a disproportionate share of liens by misrepresenting to the county its compliance with bidding rules. The district court dismissed the suit on the ground that the other bidders were not the recipients of the alleged misrepresentations but were at best only indirect victims of the alleged fraud. The court of appeals disagreed, saying that "[a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928, 932 (7th Cir. 2007). The Supreme Court agreed, saying that a person can be injured "by reason of" a pattern of mail fraud even if he has not relied on any misrepresentations, as in the case before it. Bridge, 553 U.S. at 649. "As a result of petitioners' fraud, respondents lost valuable liens they otherwise would have been awarded. And this is true even though they did not rely on petitioners' false attestations of compliance with the county's rules." Id. at 650.

In summary, I conclude that the government has shown that under the law in this circuit, the mail fraud statute applies to defendant's acts in this case. I find from the undisputed facts that defendant violated the statute by devising and carrying out a scheme to defraud individuals; defendant's scheme involved material misrepresentations made to the small claims courts as part of the scheme to defraud the persons named in the actions defendant brought in those courts; he used the mails and caused the use of the mails to carry out his scheme to defraud; and he participated in the scheme with the intent to obtain money or other property wrongfully from the persons against whom he filed the false claims by making them believe that they were liable to him or his alter ego companies.

ORDER

IT IS ORDERED that defendant Bernard C. Seidling's motion for judgment of acquittal is DENIED. I find and conclude that defendant is guilty of each of counts 1-50 charged against him in the indictment returned on November 9, 2011. No later than January 11, defendant may request a hearing in courtroom 260 for an in-person finding of guilt by this court.

The matter will be set for sentencing on March 21, 2013 at 1:00 p.m. The

presentence report is to be filed no later than February 4, 2013; objections are due no later than March 11, 2013.

Entered this 26th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge