IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY MATHWICH,

Defendant.

OPINION AND ORDER

12-cr-70-wmc

On September 12, 2012, the grand jury returned a superseding indictment charging defendant Timothy Mathwich in 24 counts brought pursuant to four different felony statutes with engaging in a $1.9 million bank fraud scheme (Counts 1-11), a $57,505 mail fraud scheme (Counts 12-14), and a $5.6 million insurance embezzlement scheme (Counts 15-25). (dkt. 13). Perhaps as a matter of principle, Mathwich has filed a motion to dismiss the three mail fraud charges (which account for 0.7% of the alleged losses to the various victims) on the ground that the conduct charged did not defraud the alleged victim. (dkt. 16 at 4-5). The government opposes the motion, arguing that the indictment sufficiently charges the elements of "a classic mail fraud" and that the evidence at trial will establish the charged fraud. (dkt. 28 at 1-2).

Mathwich invokes in grocery list fashion the void-for-vagueness doctrine, the rule of lenity, the requirement that penal statutes be strictly construed, the abolition of common law crimes, the prohibition against judicially created offenses, "the related prohibition against *ex post facto* judicial decisions," and the "basic and fundamental premise of criminal law in American jurisprudence" that *nullum crimin [**sic**] sine lege, nulla poena sine lege*.[1] (dkt. 16 at 1-2). Mathwich

[1] Which would be more accurately characterized as a pair of related 19th Century continental European legal maxims (now seen most often in the context of international humanitarian law) that captures a notion similar to that of the Ex Post Facto Clause of the United States Constitution. *See Khulumain v. Barclay National Bank, Ltd.*, 504 F.3d 254, 326 (2nd Cir. 2007). Also, it's spelled "***nullum crimen***."

makes no attempt to explain why any of these legal maxims militates toward dismissing Counts 12-14. Mathwich *does* cite a few cases that discuss the void-for-vagueness doctrine, but he isn't arguing that the mail fraud statute, 18 U.S.C. § 1341, is unconstitutionally vague, so these citations are a non sequitur.

Mathwich also cites a few cases stating the three basic requirements of a criminal charge[2] but he doesn't argue that Counts 12-14 fail this test, at least not in his opening brief. Even a cursory reading of Counts 12-14 (*see* dkt. 13 at 10-13) reveals that the those counts allege that Mathwich (1) knowingly (2) devised a scheme to obtain money by false pretenses, and (3) for the purpose of executing this scheme mailed invoices contained false representations. These are the three elements of mail fraud, *See* Federal Criminal Jury Instructions of the Seventh Circuit (1999) at 259. In his reply brief, Mathwich focuses in on the statutorily undefined–and therefore "amorphous"–term "scheme to defraud." Mathwich cites the Seventh Circuit's concern that "the failure of the mail fraud statute to define 'fraud' invites prosecutorial overreaching," *United States v. Martin*, 195 F.3d 961, 965 (7th Cir. 1999), but the court's concern in *Martin* was whether the evidence at trial established that defendant deprived his government agency employer of its intangible right to defendant's loyal and honest services. The court found that it had, and upheld the conviction. *Id*. at 966.

Mathwich contends that the acts that he allegedly committed that form the basis of the charges in Counts 12-14 are simply sharp business practices that do not constitute fraud. As

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[2] The charge must: (1) state all elements of the crime charged; (2) adequately inform the defendant of the nature of the charge so he can defendant against it; and (3) allow the defendant to plead the judgment as a bar to future prosecution for the same offense, *United States v. Anderson*, 280 F.3d 1121, 1124 (7th Cir. 2002).

synopsized by Mathwich, the government alleges that Mathwich engaged in a scheme to defraud when, as an independent agent (with J.N. Manson Agency, Inc.) who sold policies for a mutual insurance company (Acuity), he caused padded invoices to be sent to a policy holder (Trapp Brothers, Inc.), which had the effect of causing Trapp to pay an increased amount for its premiums. According to Mathwich, he had no contract with and no duty to Trapp that made it improper, let alone illegal, not to disclose Acuity's pricing structure (and the hidden upcharges) to the customer. *See* dkt. 16 at 5.

As the Court of Appeals for the Seventh Circuit has noted (in a case that Mathwich does not cite),

> Not all conduct that strikes a court as sharp dealing or unethical conduct is a "scheme or artifice to defraud." Given the pervasive use of the mails and of telephone and related services in the business word, along with the ease of satisfying the mailing or wiring requirement, such a broad meaning of fraud for the mail and wire fraud statues would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute.
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> [Plaintiffs] have not cited any cases in which mere failure to disclose, absent something more, was held to be fraud under the mail and wire fraud statutes.
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> *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989).

On this basis, the court in *Reynolds* affirmed the grant of summary judgment in favor of defendants on plaintiff's civil RICO claims. *Id.* at 1254.

This holding segues to the fatal flaw in Mathwich's motion: "Summary judgment does not exist in criminal cases." *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998) (Easterbrook, J., concurring); *see also United States v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006).

Mathwich's argument in favor of dismissal is simply that the acts charged in the mail fraud counts are not fraudulent:

> Trapp Brothers, Inc. got exactly what they expected from Manson, at the price they expected to pay. There is no formal or implied duty on behalf of Manson to disclose its pricing structure to a customer. Trapp Brothers, Inc. Was free to pursue its options in terms of insurance coverage. It chose the policy with Acuity at the price billed by Manson. While there was a contract between Acuity and Manson as the terms and conditions of its respective policies, no such similar contract existed between Manson and Trapp Brothers, Inc. Manson did not violate any formal or implied duty vis a vis the Trapp Brothers, Inc.
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> Dkt. 15 at 6, citations omitted.

This might make a persuasive closing argument to the jury, but it is not a basis to dismiss Counts 12-14. As the government points out, when the court is asked to evaluate the sufficiency of an indictment, the court focuses on the indictment's allegations, which the court accepts as true. *United States v. Moore*, 563 F3d 583, 586 (7th Cir. 2009). "Challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence." *Id.*, quotation omitted. An indictment returned by a legally constituted grand jury, if valid on its face, is enough to call for a trial of the charge on its merits. *Costello v. United States*, 350 U.S. 359, 362 (1956). Here, there is no genuine doubt that Counts 12-14 are facially valid; Mathwich simply contends that the conduct charged therein is not a crime, at least not the crime of mail fraud. This is a question of fact that cannot be decided without a trial. *See United States v. Moore*, 563 F.3d at 586.

Nonetheless, the government defends its charging decision by proffering some of the facts underlying Counts 12-14 and pointing out that:

> [M]ail fraud applies broadly to schemes that deprives individuals of money by making a false statement, or providing a half truth that is misleading, expecting that individual to act upon it to his detriment. . . . [T]he omission or concealment of material information, even when a statute or regulation does not impose a duty to disclose, constitutes mail fraud.
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> *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998).

The government proffers that Wisconsin law, specifically Wis. Stat. § 628.32, imposed a duty on Mathwich and his company to disclose the concealed markups to his insurance customer, and that contrary to Mathwich's contention that the customer was a willing buyer at the agreed upon price, the customer did *not* expect or agree to pay secretly padded bills.[3] The government also presents as examples of what it intends to prove at trial an invoice for $95,173 from Acuity to Trapp Brothers, through Mathwich's agency, which Mathwich apparently discarded in favor of a self-generated invokce for $111,292.98. *See* dkt. 28, Exh. 1& 2. Mathwich replies that the Wisconsin statue is simply an administrative licensing statute that does not create a fiduciary relationship between Trapp Brothers and Mathwich or his insurance agency.

Duly noted in both directions, but these are matters to be adduced at trial. The only question before the court at the pretrial stage is whether Counts 12-14 fail to state the offense of mail fraud. At this stage, the court is to look at the contents of the three challenged mail

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[3] Wis. Stat. Sec. 628.32 provides that:

> (1) An intermediary may not accept compensation from an insured or from both an insured and another source due to the insured's purchase of insurance or for advice regarding the insured's insurance needs or coverage unless the intermediary, before the insured incurs an obligation to pay compensation, clearly and conspicuously and in writing discloses to the insured all of the following: (a) The amount of compensation to be paid by the insured, excluding commissions paid by the insurer to the intermediary.

fraud counts in their entirety, on a practical basis rather than in a hypertechnical manner. This means that the court must read the charges to include facts which are necessarily implied and construed according to common sense. *United States v. Palumbo*, 145 F.3d at 860. As set forth in ¶¶ 2-7 of Counts 12-14, the mail fraud counts allege that Mathwich knowingly and intentionally devised and engaged in a scheme to obtain money by false pretenses by causing the preparation and mailing of "fraudulent invoices"– namely invoices to which Mathwich added "unauthorized add-ons [ranging] from $12,505 to $15,000 per year," which "fraudulently caused Trapp Brothers, Inc., to pay an additional $57,505 in insurance premiums to Manson." *See* dkt. 13 at 11-12. These allegations set forth a fraud scheme sufficient to withstand Mathwich's pretrial motion to dismiss.

Mathwich closes his motion with a potshot at the government, claiming that the mail fraud charges against him "represent, once again, the historical tendency by the government to use the mail fraud statute beyond its scope." Dkt. 16 at 5. I infer that Mathwich takes umbrage at being charged with criminal fraud for having squeezed an extra $57,000 out of a trusting customer by covertly padding its bills. This is a puzzlingly thin-skinned grumble from someone who takes no issue with the superseding indictment's accusations that he cheated other people and entities out of an additional $7.5 million. In any event, it is irrelevant to the dismissal analysis. In sum, there is no basis to dismiss Counts 12-14 of the indictment.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the court deny defendant Timothy Mathwich's Motion to Dismiss Counts 12-14 of the superseding indictment.

Entered this 9th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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November 13, 2012

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Re: United States v. Timothy I. Mathwich
Case No. 12-cr-70-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 23, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 23, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**