

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**THE UNITED STATES OF AMERICA**

**vs.**

**PETER BISTRIAN**

:  
:  
:  
:  
:  
:  
:  
:  
:

**CRIM. NO. 03-757-01**

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, this 1<sup>st</sup> day of March, 2005, upon consideration of defendant's Motion to Dismiss the Indictment (Document No. 71, filed January 12, 2005), Government's Memorandum of Law in Response to Defendant's Motion to Dismiss the Indictment (Document No. 73, filed February 16, 2005), and Defendant's Reply to Government's Response to Defendant's Motion to Dismiss the Indictment (Document No. 75, filed February 18, 2005), for the reasons set forth in the attached Memorandum, **IT IS HEREBY ORDERED** that defendant's Motion to Dismiss the Indictment is **DENIED**.

**MEMORANDUM**

Before the Court is defendant Peter Bistran's Motion to Dismiss Indictment charging wire fraud and aiding and abetting in violation of 18 U.S.C. §§ 1343 and 2(a) on the ground that the insufficient funds checks he allegedly passed to car dealerships are not themselves misrepresentations and cannot support the Indictment. Because the Indictment sufficiently alleges that defendant devised or intended to devise a scheme to defraud by means of wire communications under 18 U.S.C. § 1343 which does not require a misrepresentation, the Court denies defendant's motion.

## **I. BACKGROUND**

On November 13, 2003, a grand jury returned the instant Indictment against defendant and Sandy Glucksman, charging them with two counts of wire fraud and aiding and abetting in violation of 18 U.S.C. §§ 1343 and 2(a). According to the Indictment, defendant and Glucksman devised and intended to devise a scheme to defraud the Penmark Auto Group and to obtain luxury automobiles by means of false and fraudulent pretenses, representations, and promises. (Indictment at ¶¶ 3-4).

Defendant and Glucksman allegedly entered into retail purchase contracts for four luxury automobiles – two 2001 Mercedes Benz S500 automobiles, a Mercedes Benz SL500 automobile, and a 2001 Porsche 911 Cabriolet automobile – with Brandywine Motors and Brandywine Porsche, members of the Penmark Auto Group. (Indictment at ¶ 4). Defendants wrote checks to cover the cost of these automobiles knowing that they did not have sufficient funds to cover the checks. (Indictment at ¶¶ 1, 5). Defendant and Glucksman also allegedly promised, but did not send, wire transfer funds to Brandywine Motors and Brandywine Porsche to pay for these automobiles. (Indictment at ¶ 5). In addition, defendant and Glucksman sent e-mail messages to a salesman for Brandywine Motors and Brandywine Porsche “falsely assuring [the salesman] that compensation would be made for the luxury automobiles.” (Indictment at ¶ 5).

The Indictment is based on several transactions between defendant, Glucksman, and Penmark Auto Group. The first of these transactions took place on or about December 30, 2000, when defendant entered into a retail purchase contract with Brandywine Motors for a 2001 Mercedes Benz S500 automobile with a purchase price of \$97,663.40. (Indictment at ¶ 6). On or about January 4, 2001, defendant presented Brandywine Motors with a check for \$97,163.40 drawn on the general account of Nika Holdings, L.P., knowing that there were insufficient funds

in that account to cover the check, and took possession of the automobile. (Indictment at ¶ 7).

On or about March 1, 2001, defendant presented Brandywine Motors with a check for \$3,553.44 drawn on the operating account of Nika Holdings, L.P., knowing that there were insufficient funds in that account to cover the check. (Indictment ¶ 8).

On or about January 4, 2001, defendant entered into a retail purchase contract with Brandywine Motors to purchase a Mercedes Benz SL500 automobile with a purchase price of \$93,629.96. (Indictment at ¶ 9). On or about January 9, 2001, Glucksman entered into a retail purchase contract with Brandywine Motors for the purchase of a 2001 Mercedes Benz S500 automobile with a purchase price of \$103,390. (Indictment at ¶¶ 9-10). On or about the latter date, Glucksman presented Brandywine Motors with a check for \$197,019.96 drawn on an account at the Royal Bank of Scotland to pay for both of these automobiles, knowing that there were insufficient funds in the account to cover that check. (Indictment at ¶ 11). Glucksman took possession of the automobile she purchased; the automobile that defendant had purchased was not delivered. (Indictment at ¶ 11).

Finally, on or about January 25, 2001, Glucksman entered into a retail purchase contract with Brandywine Porsche for the purchase of a 2001 Porsche 911 Cabriolet automobile with a purchase price of \$97,690.50. On that date, Glucksman took possession of the automobile and promised to wire funds to pay for the automobile. (Indictment at ¶¶ 12-13).

On or about February 27, 2001 and March 4, 2001, defendant sent e-mail messages to a salesman at Penmark Auto Group to assure the salesman that payment would be made on the purchased automobiles in order to further the scheme to obtain the luxury automobiles, with each e-mail constituting a separate count of the Indictment. (Indictment at ¶¶ 5, 14).

## II. DISCUSSION

The wire fraud statute, 18 U.S.C. § 1343, reads in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall [be guilty of a crime].

The statute criminalizes two categories of conduct – schemes or artifices to defraud and schemes or artifices to obtain money or property by false or fraudulent pretenses, representations, or promises. In applying the wire fraud statute, the Third Circuit distinguished between schemes to defraud and schemes to obtain money or property by misrepresentations and stated that the statute is to be read “in the disjunctive”, such that a scheme to defraud need not be executed by means of misrepresentations. *United States v. Rafsky*, 803 F.2d 105, 108 (3d Cir. 1989); *United States v. Frankel*, 721 F.2d 917, 921 (3d Cir. 1983) (approving of disjunctive reading of statute and noting that “[s]chemes to defraud come within the scope of the statute even absent a false representation”).<sup>1</sup>

Defendant argues that his Indictment should be dismissed based on *Frankel*. In *Frankel*, the Third Circuit upheld the district court’s dismissal of an indictment for mail fraud based on the implied representation made in passing an insufficient funds check on the ground that, under *Williams v. United States*, 458 U.S. 279 (1982), an insufficient funds check did not constitute a false representation. 721 F.2d at 919. The *Frankel* court concluded that the indictment was

---

<sup>1</sup>While *Frankel* dealt with the mail fraud statute, the reasoning in *Frankel* is applicable to this case because the mail and wire fraud statutes are construed identically. *United States v. Frey*, 42 F.3d 795, 797 n. 2 (3d Cir. 1994) (citing *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977)).

properly dismissed because it was based on a misrepresentation theory that could not be supported because the insufficient funds checks at issue were not themselves misrepresentations. *Id.* at 921. In dismissing the indictment, the *Frankel* court noted that it did not decide the issue whether the prosecution in the case could secure a valid superceding indictment premised on a different theory. *Id.*

Defendant argues that, under *Frankel*, the Indictment should be dismissed because the insufficient funds checks in this case are not themselves misrepresentations and cannot therefore support the Indictment because the Indictment relies on a misrepresentation theory. *Frankel* does not support that argument under the charges in this case – two counts of violating 13 U.S.C. § 1343 for devising or intending to devise a scheme to defraud. As the Third Circuit stated in *Frankel*, schemes to defraud violate the mail fraud statute even without false representations. *Frankel*, 721 F.2d at 921; *see also Rafsky*, 803 F.2d at 108.

In this case, the Indictment alleges schemes both to defraud and for obtaining property by false and fraudulent pretenses or representations. (Indictment at ¶ 3). The Government can thus obtain a conviction by establishing that defendant devised or intended to devise a scheme to defraud; it need not prove that the defendant also engaged in misrepresentations. *Rafsky*, 803 F.2d at 108. Accordingly, the fact that the insufficient funds checks are not themselves misrepresentations is not fatal to the Indictment.

To support the charge that defendant devised or intended to devise a scheme to defraud, the Indictment in this case focuses on defendant's knowledge at the time of passing the insufficient funds checks to the Penmark Auto Group. The reasoning in *United States v. Schwartz*, 899 F.2d 243 (3d Cir. 1990), is instructive in addressing the sufficiency of this charge against defendant. Although *Schwartz* involved charges under the bank fraud statute, 18 U.S.C.

§ 1344, the *Schwartz* analysis is helpful in construing the wire fraud statute at issue in this case. See *United States v. Bonnett*, 877 F.2d 1450, 1454 (10th Cir. 1989) (noting that bank fraud statute was modeled on mail and wire fraud statutes and finding that “mail and wire fraud statutes make the same distinction as [18 U.S.C.] § 1344 between schemes to defraud and schemes to obtain property by false or fraudulent pretenses”).

In *Schwartz*, the Third Circuit observed that the bank fraud statute criminalizes the execution of a scheme to defraud a federally chartered or insured institution or to obtain money from such an institution by means of false or fraudulent pretenses, representations, or promises. 899 F.2d at 246. The *Schwartz* court stated that the two provisions of the bank fraud statute are “clearly disjunctive”, and that a person may commit bank fraud without making false representations. *Id.* A person indicted under both clauses of the statute could therefore be convicted of bank fraud upon proof that he is guilty of violating either of the clauses. *Id.*

The defendant in *Schwartz* was charged with violating the bank fraud statute by passing insufficient funds checks. *Id.* at 245. Affirming the defendant’s conviction and reading the bank fraud statute disjunctively, the Third Circuit determined that because the indictment in *Schwartz* charged the defendant under both clauses of the bank fraud offense, the defendant could be convicted upon a showing that he was guilty of violating either of those clauses. *Id.* at 246. The *Schwartz* court then upheld the defendant’s conviction for passing insufficient funds checks, finding that the defendant’s activity was fraudulent without regard for any representations he may have made by depositing the checks. *Id.* at 247. The *Schwartz* court also noted that the indictment did not charge that the defendant made any representations regarding the insufficient funds checks; what it charged on that issue was that the defendant knew at the time of deposit that there were insufficient funds available to cover those checks. *Id.*

In this case, the Indictment similarly alleges both that defendant devised or intended to devise a scheme to defraud and a scheme to obtain property through misrepresentations and that defendant knowingly passed insufficient funds checks to the car dealerships. The Indictment does not charge that these insufficient funds checks themselves constituted misrepresentations. (Indictment at ¶¶ 5, 7, 8, 11). So long as the Government can prove that defendant devised or intended to devise a scheme to defraud, the Government need not also prove that defendant engaged in misrepresentations. *Rafsky*, 803 F.2d at 108; *c.f. Bonnett*, 877 F.2d at 1455.

Furthermore, the Indictment provides adequate notice of the charges against defendant. An indictment is sufficient if it (1) contains the elements of the offenses charged and fairly informs a defendant of the charges against which he must defend, and (2) enables the defendant to avoid subsequent prosecution for the same offense. *United States v. West*, 312 F. Supp. 2d 605, 614-15 (D. Del. 2004) (citing *United States v. Hodge*, 211 F.3d 74, 76 (3d Cir. 2000)). In this case, the Indictment properly charges that defendant engaged in a scheme to defraud the Penmark Auto Group. The Indictment describes the objective of the scheme (obtaining luxury automobiles), sets forth the manner of executing the scheme, and alleges a series of acts by defendant (knowing delivery of insufficient funds checks and use of e-mails) to effect the objective of the scheme. *United States v. Clark*, 88 F. Supp. 2d 417, 420 (D.V.I. 2000). The wire communications (e-mails) needed to invoke the wire fraud statute are specifically charged as Counts One and Two of the Indictment. *E.g., United States v. Shepard*, No. 01-10116-02-JTM, 2004 WL 1752592, at \*3 (D. Kan. Aug. 3, 2004) (finding that email correspondence satisfies “use of the wires” element of wire fraud). Accordingly, the Court concludes that the Indictment sufficiently charges defendant with violations of 18 U.S.C. § 1343.

### **III. CONCLUSION**

The Court concludes that the Indictment in this case properly charges that the defendants devised or intended to devise a scheme to defraud by means of wire communications and aided and abetted such crimes in violation of 18 U.S.C. §§ 1343 and 2(a). Accordingly, the Court denies defendant's Motion to Dismiss the Indictment.

**BY THE COURT:**

---

**JAN E. DUBOIS, J.**