No. 19-2386
Criminal

In the United States Court of Appeals
For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

V.

PAUL R. HANSMEIER,

APPELLANT.

Appeal from the
United States District Court for the
District of Minnesota

BRIEF OF APPELLEE

ERICA H. MACDONALD
United States Attorney

LISA D. KIRKPATRICK
Assistant U.S. Attorney

U.S. Attorney's Office
District of Minnesota
404 U.S. Courthouse
316 North Robert Street
Saint Paul, MN 55101
(651) 848-1950

Attorneys for Appellee

SUMMARY OF THE CASE

Former Minnesota attorney, Defendant Paul Hansmeier, defrauded courts across the county into issuing orders that enabled him to extort millions of dollars from thousands of people by lying to those people and threatening to humiliate them if they did not pay him money. Hansmeier's scheme, as described in the indictment, involved encouraging and enticing people to download copyrighted pornography and then shaking down those same people for settlement payments.

Hansmeier pleaded guilty to conspiring to commit mail and wire fraud and conspiring to commit money laundering. He reserved his right to appeal the district court's denial of his motion to dismiss the indictment and, in this appeal, argues his scheme falls outside the scope of the mail and wire fraud statutes and that his prosecution threatens to chill the process of civil litigation. He also appeals the restitution order issued against him.

Hansmeier's arguments are without merit and ignore the legal standard that requires the allegations in the indictment to be accepted as true. If oral argument is scheduled, ten minutes should suffice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

I. The government alleged that the defendant and his co-defendant engaged in a scheme to defraud by systematically deceiving courts by filing fraudulent lawsuits in order to access early discovery and then using the threat of litigation to shakedown victims who they accused of unlawfully downloading copyrighted pornographic movies by threatening significant financial and reputational harm, all based on a mountain of lies and material omissions to the victims and to the courts. Did the district court properly deny the defendant's motion to dismiss the indictment for failure to state an offense?

Fed. R. Cr. P. 12(b)(3)
United States v. Steffen, 687 F.3d 1104 (8th Cir. 2012)
United States v. Leahy, 464 F.3d 773 (7th Cir. 2006)
United States v. Frost, 321 F.3d 738 (8th Cir. 2003)

II. The defendant agreed in his plea agreement that restitution was mandatory and that he received over $3 million in fraudulent proceeds from his fraud scheme. Did the defendant waive his ability to challenge the application of the Mandatory Victims Restitution Act where he stipulated it applied but now argues the victims are not victims because, he complains, they infringed copyrights? And did the district court clearly err in ordering $1.5 million in restitution to those victims where the co-defendant confirmed the identities of the victims and that the settlement fees those victims paid were part of the fraud scheme?

18 U.S.C. § 3663A
United States v. Lester, 200 F.3d 1179 (8th Cir. 2000)
United States v. Bartsh, 985 F.2d 930 (8th Cir. 1993)
United States v. Frazier, 651 F.3d 899 (8th Cir. 2011)

STATEMENT OF THE CASE

Nearly eighty years ago, Justice Holmes observed that "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941). This case proves that true.

Former attorney, Defendant Paul Hansmeier, built a career suing thousands of people across the country for illegally downloading pornography that he and his co-conspirators placed on the internet to lure people to download. They then filed vexatious "John Doe" lawsuits claiming copyright infringement, used the court's process to identify the internet subscribers associated with the downloaders, then shook down those subscribers for settlement payments using lies and deceit. Ultimately, Hansmeier and his co-defendant raked in millions of dollars using this scheme. Hansmeier pleaded guilty to conspiring to commit mail fraud, wire fraud, and money laundering but appeals the district court's denial of his motion to dismiss the indictment for failure to state an offense and the restitution order issued against him.

I. The first fraud scheme: Fraudulent copyright infringement suits

The indictment[1] describes Hansmeier's fraud scheme as encouraging and enticing people to use BitTorrent software to download copyrighted pornography and then shaking down those people for settlement payments, using lies and deceit pertaining to supposed litigation against them.[2] (DCD 1–Ind. at ¶¶ 1 "Overview", 17.) Hansmeier accomplished this scheme together with his law partner and co-defendant, John Steele. They employed a host of other accomplices, including Hansmeier's brother, to execute their scheme using peer-to-peer file sharing software, hundreds of lawsuits filed across the nation against John Doe defendants, court-sanctioned discovery processes, and fraudulent demand letters. The indictment lays out in detail the steps Hansmeier and Steele took to accomplish their extortion. The first scheme, which they utilized until courts grew suspicious, is described in the indictment as follows:

---

[1] The indictment, filed at district court docket number 1, is contained in the government's appendix.

[2] For another description of Hansmeier's scheme, see the D.C. Circuit's opinion in *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014), as well as cases cited therein.

1. Baiting the Trap. Hansmeier hired P.H.[3] to upload "torrent files" to "BitTorrent" file-sharing websites such as the Pirate Bay to affirmatively induce people to steal copyrighted pornographic movies. (*Id.* at ¶¶ 20, 27.) This baiting of the trap is often called "seeding." (*Id.* at ¶¶ 6-7, 20.) As alleged in the indictment, Hansmeier's conduct impliedly authorized the downloading of the seeded movies. (*Id.* ¶¶ 20, 28.) In fact, Hansmeier directed the copyrighted materials to be uploaded on BitTorrent websites specifically because he knew that those websites "were specifically designed to allow users to share files, including movies, without paying any fees to the copyright holders." (*Id.* ¶ 20.)

By way of background, under the BitTorrent protocol, an initial "seeder" uses BitTorrent software to divide a video file into small pieces and creates a torrent file, which contains metadata about the file. (*Id.* at ¶ 7.) The seeder then uploads the torrent file to a file-sharing website, like Pirate Bay, and makes the pieces of the video available to other users. (*Id.*) Users who want to download the video first download the torrent file and then open the torrent file with

[3] P.H. is the defendant's brother. (PSR ¶ 11.)

BitTorrent software. (*Id.*) The BitTorrent software seeks out the pieces of the video that are dispersed among multiple users. (*Id.*) In this way, the seeder does not actually upload the copyrighted video to a website but instead uploads a torrent file that makes it possible for others to obtain the video. (*Id.*)

2. Watching the Trap. After baiting the trap by uploading (that is, seeding) torrent files of copyrighted material, Hansmeier and Steele employed P.H. to monitor file-sharing websites to obtain the internet protocol addresses of people using BitTorrent software to download the seeded materials. (*Id.* at ¶¶ 12, 18.) However, an IP address alone is not associated with any particular person. (*See id.* ¶ 1.) Hansmeier needed the courts and subpoena power to connect a name with those IP addresses.

3. Filing the Fraudulent Copyright Infringement Lawsuits. Hansmeier filed hundreds of lawsuits against thousands of "John Does" in order to obtain subpoenas to serve on internet service providers (like Comcast or AT&T) to get subscriber information associated the IP addresses that Hansmerier had identified as having

downloaded the seeded pornographic videos. (*See id.* at ¶ ¶ 1, 17-18.) As will be explained, each of those lawsuits was fraudulent.

4. Extorting Settlements from the Subscribers Using Lies and Deception Intended to Extract Quick Payments. Hansmeier then sent demand letters to the subscribers threatening great pecuniary and reputational harm if they did not pay a settlement amount of approximately $4,000. (*Id.* ¶ 19.) The demand letters were replete with lies and material omissions. For instance, Hansmeier lied to subscribers and claimed he had a legitimate copyright infringement claim when, in fact, he knew that his conduct in seeding the materials impliedly authorized the downloading of those materials. (*E.g., id.*) Further, he also represented to subscribers that, absent a settlement, the subscriber risked penalties upwards of $150,000 and their identity being made public. (*Id.* at ¶¶ 17-18.) However, those were lies, too, because, if a subscriber "did fight back, [Hansmeier and Steele] dismissed the lawsuits rather than risk their scheme being unearthed." (*Id.* at ¶ 17.) Hansmeier and Steele had no intention of following through with their threats and pursuing litigation. (*Id.* at 22.)

Similarly, the demand letters lied by omission. As they did with their court filings, Hansmeier and Steele concealed their role in seeding the copyrighted movies and their personal stake in the outcome of the litigation. (*Id.* at ¶ 17.) Moreover, they claimed to be lawyers representing clients and did not disclose their clients were sham entities created for the sole purpose of concealing their role in the copyright infringement scheme. (*See id.* ¶¶ 24-26, 36 (outlining counts and detailing letters sent).)

In the face of these false and threatening claims, most of the subscribers, whether the downloaders or not, chose to settle for reasons well summarized by Judge Otis Wright, United States District Judge for the Central District of California:

> [Hansmeier has] discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And [he] exploit[s] this anomaly by accusing individuals of illegally downloading a single pornographic video. Then [Hansmeier] offer[s] to settle – for a sum calculated to be just below the cost of a bare-bones defense. For these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn.

Ingenuity 13 LLC v. Doe, 12-cv-08333 (ODW-JC), ECF No. 130; *see also* DCD 1–Ind. ¶ 19.

5. Dismissing the Suits After Obtaining Discovery. Hansmeier simply dismissed the lawsuits after getting what he wanted—the names of victims to shakedown and extort. (*See* DCD 1–Ind. ¶¶ 1, 22.) The scheme as alleged in the indictment establishes that Hansmeier never intended to bring any of these lawsuits to trial because their sole purpose was to extort settlements. (*E.g.*, *id.* at ¶ 22.) Hansmeier extorted millions of dollars from thousands of people throughout the United States. (*Id.* at ¶ 34.)

6. Perjury and Obfuscation. When courts began scrutinizing Hansmeier and Steele's practices and questioned their role and personal interest in the litigation, Hansmeier and Steele made numerous attempts to distance themselves from the fraudulent copyright infringement suits. (*Id.* at ¶ 25.) First, they created sham entities and concealed their involvement in them. (*See id.* at ¶¶ 25-26.) Next, they perjured themselves, and caused others to perjure themselves, when courts spotted red flags and sought answers. (*Id.* at ¶¶ 32-33.) The indictment alleged that those attempts to cover up their fraud in order to evade detection was part of their scheme. (*Id.* at ¶ 33.)

II. The second fraud scheme: Blatantly fraudulent hacking lawsuits

Hansmeier utilized his fraudulent copyright infringement lawsuit scheme from about 2010 until 2012. In 2012, courts around the country grew wary of Hansmeier's mass John Doe infringement suits and began imposing restrictions upon his requests for subpoena authority. (*Id.*at ¶ 29.) This interfered with Hansmeier's business model because it impeded his ability to connect an IP address with a person to extort.

As a result, Hansmeier began falsely alleging that persons associated with IP addresses that had downloaded seeded pornography had, instead, engaged in an entirely different kind of misconduct—specifically, hacking into the computer system of an entity called "Guava, LLC." (*See id.*) The story was that Guava, a company controlled through Hansmeier and Steele but nominally owned by someone else (*id.* at ¶ 14), had computers that contained adult content and had paying members. (*Id.* at ¶ 29.)

In his lawsuits, Hansmeier sued ruse defendants. (*Id.* at ¶ 31.) Those defendants had been caught downloading seeded pornography and agreed to be sued as part of the hacking lawsuit scheme in

exchange for Hansmeier waiving a settlement payment for copyright infringement. (*Id.*) Of course, the copyright infringement lawsuits were themselves a sham because Hansmeier permitted the very conduct he claimed was infringement, so in order to recruit the ruse defendants, Hansmeier again lied by representing that he had legitimate copyright infringement claims against the ruse defendants when he well knew that he did not. (*See id.*)

In the hacking lawsuits, Hansmeier alleged that Guava's copyrighted pornography videos and the personal identification information of Guava's paying members were being stolen by large numbers of conspiratorial hackers. (*Id.*) Hansmeier initiated the lawsuits against the ruse defendants and then asked courts for subpoena authority to identify the other "hackers" conspiring with the ruse defendants, knowing that the identities they sought were not those of hackers but merely shakedown victims. (*Id.*)

To be sure, Guava did not have any computer systems or paying customers. (*Id.*) Indeed, it did not even own the copyrights to the downloaded materials identified in the lawsuits. (*Id.*) Guava was a

sham entity created and controlled by Hansmeier and Steele for the sole purpose of obtaining lawsuit settlements. (*Id.* at ¶ 14.)

III. The scheme unravels, and Hansmeier is convicted.

In early 2013, several judges presiding over fraudulent lawsuits brought by Hansmeier and Steele began asking questions about the true nature of those lawsuits. On March 14, 2013, United States District Judge Otis Wright from the Central District of California issued an Order to Show Cause requiring Hansmeier and Steele (and others) to appear and explain "[w]hy they should not be sanctioned for defrauding the Court." *Ingenuity 13, LLC v. Doe*, 2:12-cv-8333 (ODW), DCD 86. Two months later, Judge Wright issued an order imposing sanctions against Hansmeier and Steele (among others), and he referred the matter for investigation to the United States Attorney for the Central District of California and the Criminal Investigation Division of the Internal Revenue Service. *Id.* at DCD 130. Similarly, on November 6, 2013, United States Magistrate Judge Franklin Noel, responding to similar concerns as those raised by Judge Wright, referred Hansmeier and Steele to the United States Attorney's Office

for the District of Minnesota for investigation. *See AF Holdings, LLC, v. Does*, 12-cv-1445 (JNE/FLN), at DCD 67.

Hansmeier and Steele were indicted by a federal grand jury in the District of Minnesota in December of 2016. (DCD 1–Ind.) The indictment charged:

> **Count 1**: Conspiracy to Commit Mail Fraud and Wire Fraud between 2011 and 2014, in violation of 18 U.S.C. § 1349;
>
> **Counts 2 through 6**: Mail Fraud, in violation of 18 U.S.C. § 1341
>
> **Counts 7 through 16**: Wire Fraud, in violation of 18 U.S.C. § 1343;
>
> **Count 17**: Conspiracy to commit Money Laundering, in violation of 18 U.S.C. § 1956(h); and
>
> **Count 18**: Conspiracy to Commit and Suborn Perjury, in violation of 18 U.S.C. § 371.

Steele pleaded guilty in March 2017. The next month, Hansmeier moved to dismiss Counts 1 through 17 of the indictment. (DCD 48.) Misapprehending the nature of the charges, he argued that "[p]rosecutors ought not be allowed to ground criminal fraud or analogous charges upon someone's exercise of constitutionally protected civil litigation activities." (DCD 49–Def. Mem. in Support at (i).) At bottom, Hansmeier complained that the allegations against

him did not state an offense. In support, he attempted to isolate each facet of the fraud scheme and argued that, standing alone, each facet could not state a fraudulent offense.

The district court properly rejected that divide-and-conquer approach and denied Hansmeier's motion. (DCD 76—Order, *contained in* Def. Add. C at 26-31.) Like United States Magistrate Judge Katherine Menendez, who recommended the motion be denied, United States District Judge Joan E. Erickson, recognized that Hansmeier's "primary tactic is to isolate particular allegations and argue that, viewed alone, an alleged act is not fraudulent or illegal." (*Id.* at 3.) But such an approach, concluded the district court, is not countenanced by case law. Instead, the allegations must be viewed as a whole in evaluating the sufficiency of an indictment. (*Id.*)

Moreover, the court rejected Hansmeier's claim that the demand letters to subscribers could not be considered part of the fraudulent scheme because he had—or so he argued—legitimate copyright claims against them. (*Id.* at 4.) Pointing out that Hansmeier's arguments exceeded the bounds of a motion to dismiss because he presumed facts not alleged in the indictment, the court nonetheless recognized that

the indictment did, in fact, allege misrepresentations directly to the subscribers in order to exact quick settlement payments from them. (*Id.*)

Finally, the court rejected the notion that Hansmeier enjoyed a constitutional right to engage in deceptive, predatory civil litigation premised on fraudulent misrepresentations to the court and to litigants. (*Id.* at 5.) Accordingly, the district court overruled Hansmeier's objections to the R&R and adopted the R&R's reasoning as supplemented by the court's own order. (*Id.* at 6.)

Three weeks before his scheduled trial date, Hansmeier entered into a plea agreement with the government and pleaded guilty to Count 1 (charging Conspiracy To Commit Mail and Wire Fraud) and Count 17 (charging Conspiracy To Commit Money Laundering) of the indictment. (DCD 103–Plea Agr't, *contained in* Def. Add. 33-43.) As part of his plea agreement, Hansmeier reserved the ability to appeal the denial of his motion to dismiss. (DCD 43 at ¶ 2.)

Hansmeier appeared for sentencing in June 2019. The district court determined Hansmeier's Guidelines range was 135 to 168 months' imprisonment. (DCD 147–Sent. Tr. at 12.) The district court

carefully weighed the § 3553(a) factors and imposed a 168-month sentence, finding "anything less . . . would not be reasonable, whatever the guidelines may be." (Sent. Tr. 65.)

The court did not impose a fine but did order restitution. Though Hansmeier agreed in his plea agreement that restitution was mandatory under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, and that the court would order restitution for the entire loss, he disputed the amount of the restitution request at sentencing. (*See* Plea Agr't at ¶ 9.) The United States, therefore, called FBI Special Agent Jared Kary to testify. Special Agent Kary testified that Hansmeier and Steele typically demanded between $2500 and $3400 to settle their fraudulent lawsuits. (Sent. Tr. at 15.) FBI obtained records that showed that, from 2010 through 2013, Hansmeier and Steele collected over $6 million in settlement payments. (*Id.* at 17.)

Despite that, the government sought restitution totaling just $1.5 million. The request was limited to only settlement payments made after April 1, 2011, the date on which Hansmeier's brother confirmed he uploaded a particular movie to Pirate Bay (Sent. Tr. 21, 43), and to the 704 people who made settlement payments and could

be identified by name in Hansmeier and Steele's financial records (Sent. Tr. 24, 32). (*See also* DCD 158–Gov't Ex. 1 (redacted), admitted at Sent. Tr. 29.) The request also included approximately $35,000 to people who responded to the Department of Justice's inquiry after the Department set up a website to gather information from victims who were not yet known to agents. (Sent. Tr. 26; *see also* DCD 159–Gov't Ex. 2 (redacted) admitted at Sent. Tr. 29.) Special Agent Kary made restitution requests only on behalf of those people who could prove they actually paid Hansmeier. (Sent. Tr. 27.)

Special Agent Kary explained that he reviewed financial records related to entities controlled by Hansmeier and Steele and, specifically, from the website, BluePay. (Sent. Tr. 15-16.) BluePay is an online credit card processing company that Hansmeier and Steele used to process credit card settlement payments from their victims. (*Id.* at 16.) The records showed that, between 2010 and 2013, Hansmeier and Steele collected over $6 million from the settlements of their fraudulent lawsuit schemes. (*Id.* at 17.)

Special Agent Kary confirmed that Steele told investigators that the only income received into those accounts was from settlements for

the fraudulent lawsuits. (*Id.* at 17-18) However, Special Agent Kary explained that investigators were not able to confirm the identity of all the payers into those accounts because some victims chose to obscure their identity. (*Id.* at 24.) So, even though the records showed that a victim of the fraud scheme had paid Hansmeier and Steele, there were some instances where investigators were unable to identify the victim. (*Id.*) When that was the case, Special Agent Kary did not include that payment in the restitution request. (*Id.*) Thus, the request was limited to only those victims who could be identified by name. (*Id.*)

Nevertheless, Hansmeier complained that restitution was inapplicable because there was no way to determine which settlement payments were for so-called "legitimate" lawsuits. (Sent. Tr. 48.) Special Agent Kary agreed that, early on, perhaps there may have been some legitimate lawsuits, but by April 2011, there were no such lawsuits. (*See* Sent. Tr. 31, 36; *see also id.* at 43.) The government's request was, again, limited to settlement payments received after April 1, 2011.

The Presentence Investigation Report outlines the evolution of the Steele Hansmeier law firm. (PSR ¶¶ 8-10.) The firm initially

represented owners of copyrighted pornographic movies when it formed in 2010, but by April 2011, they had begun their fraudulent seeding scheme. (*Id.*) And in fact, Hansmeier agreed in his plea agreement that, between 2011 and 2014, he and Steele had "received more than $3,000,000 in fraudulent proceeds from the lawsuits." (Plea Agr't ¶ 6) (emphasis added).

The district court ordered $1.5 million in restitution to the identified victims and found that any legitimate money earned by Hansmeier and Steele was "negligible." (Sent. Tr. 49.) It, further, characterized the $1.5 million restitution award as "conservative." (*Id.*)

Hansmeier appeals the denial of his motion to dismiss and the order for restitution.

SUMMARY OF THE ARGUMENT

Hansmeier initiated fraudulent copyright infringement lawsuits. He withheld from courts that he owned the copyrights at issue, that he controlled the entities of both the plaintiff's law firm and the plaintiff, that he authorized the downloading of copyrighted materials that he claimed was infringed, and that he suffered harm as a result of the infringement. Hansmeier made these misrepresentations and omissions all in order to access early discovery so that he could identify victims because, without subpoena power, he could identify only IP addresses, not names. After getting those names, he made a number of misrepresentations and omissions to the victims calculated to exact quick settlement payments. In addition to the lies and omissions to the courts, which he repeated, Hansmeier represented to victims that he had a legitimate copyright infringement claim (he did not) that he intended to pursue (he did not) unless the victim paid him a settlement fee.

When courts grew suspicious of Hansmeier's lawsuits, he changed course and began filing blatantly fraudulent lawsuits that alleged ruse defendants hacked into Hansmeier's client's computer

systems and stole paying members' protected information and downloaded copyrighted materials. He again sought subpoena power and used the same lies and omissions to extort his victims. In reality, there were no hackers, there were no computer systems, and the purported plaintiff did not own any copyrights.

When courts tried to hold Hansmeier and his associates accountable for their conduct, they used more lies and obfuscations. They created sham entities to distance themselves from the litigation and they committed numerous instances of perjury to cover up their criminal conduct.

In the face of these facts, Hansmeier claims that the indictment fails to state a "scheme to defraud." He complains that he engaged in aggressive civil litigation and may have abused court process but did not commit a crime. In support, he alleges that the copyright defendants were legitimate targets of infringement suits because they infringed copyrights by illegally downloading pornographic materials.

Hansmeier's argument is premised on a misunderstanding of the scheme alleged in the indictment. Contrary to his claims, the

indictment does not charge that the only lies in this case were made to courts. Far from it.

Instead, Hansmeier's lawsuits were fraudulent from the start. His scheme entailed lying to courts and using the courts to execute his scheme to defraud victims and making explicit misrepresentations and material omissions to those victims in order to exact quick settlement payments. Even if theoretically those victims could be sued for copyright infringement, Hansmeier still misrepresented the nature of *his lawsuits* in order to exact payments. It was part of his scheme to use litigation to create the illusion of a legitimate civil action environment when, in reality, the entirety of the litigation was a scam and was intended to facilitate his shakedown.

With regard to his appeal of the $1.5 million restitution order, Hansmeier waived his ability to argue that the Mandatory Victims Restitution Act does not apply because the victims infringed copyrights and, therefore, cannot be said to be victims. In his plea agreement, he stipulated the MVRA applies and that, as part of his scheme, he received over $3 million in payments from fraud victims.

To the extent he appeals the basis for the district court's award, the order should be affirmed. The government submitted a restitution request listing hundreds of victims and specifying the settlement fee each paid to Hansmeier and his co-defendant. In fact, the co-defendant reviewed the list and confirmed that each person on the list was a fraud scheme victim and that the settlement fees related to the fraudulent lawsuits. There was no clear error in awarding restitution to those victims.

ARGUMENT

I. The Indictment Sufficiently Charged a Scheme To Defraud that Included Lies and Omissions to Victims and to Courts.

Hansmeier moved to dismiss the indictment on the ground that it stated no mail or wire fraud offense. In support of his motion, he sought to isolate each step of his elaborate scheme of extortion, and he argued that, standing alone, none of the steps of his scheme could support a fraud charge. The district court, though, properly rejected that reductionist approach, viewed the indictment as a whole, and denied Hansmeier's motion to dismiss the indictment. Hansmeier's scheme, together with his fraudulent intent, falls well within the bounds of the mail and wire fraud statutes. The judgment of the district court should be affirmed.

A. Standard of review for reviewing the sufficiency of an indictment

"The standard of review on a ruling regarding a motion to dismiss an indictment varies based on the grounds for dismissal." *United States v. Williams*, 720 F.3d 674, 700 (8th Cir. 2013). Hansmeier's motion to dismiss was made pursuant to Fed. R. Crim. P. 12(b)(3)(B) and alleged that the indictment failed to state an offense.

(DCD 48). This Court reviews a challenge to the sufficiency of an indictment de novo. *E.g.*, *United States v. White*, 241 F.3d 1015, 1020 (8th Cir. 2001). In doing so, this Court employs a well-worn standard: "[A]n 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." *Hameling v. United States*, 418 U.S. 87, 117 (1974). That standard is easily met here.

B. The mail and wire fraud statutes encompass a broad array of schemes in which a defendant uses deception to obtain money or property.

Mail fraud and wire fraud were specifically designed, and have consistently been interpreted, to cover a broad swath of dishonest activity affecting victims' property rights. "Mail and wire fraud are substantive offenses which do not depend on the violation of another statute." *United States v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995). The essential elements are: "(1) the existence of a scheme to defraud, and (2) the use of the mails or wires for purposes of executing the scheme." *Id*. At issue here is whether the indictment alleges a scheme

to defraud or, as Hansmeier would have it, criminalizes aggressive but legitimate civil litigation tactics.

This Court has made clear that mail and wire fraud are expansive and cover any scheme in which a defendant uses deception to deprive a victim of his money or property:

> [T]he crime of mail fraud is broad in scope.* * * The fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard.* * * Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society." This is indeed broad.

United States v. Bishop, 825 F.2d 1278, 1280 (8th Cir. 1987) (citations omitted).

Generally, "the mail and wire fraud statutes broadly apply to any scheme 'where in order to get money or something else of monetizable value from someone you make a statement to him that you know to be false, or a half truth that you know to be misleading, expecting him to act upon it to your benefit and his detriment.'" *United States v. Morris*, 80 F.3d 1151, 1160 (7th Cir. 1996) (quoting *Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995)). The statutes apply not only to false or fraudulent representations, but also to the omission or

concealment of material information "if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled." *Id.* at 1161 (quotations omitted). Thus, "[s]chemes using deceptive practices to induce the unwary to give up money or some other tangible property interest are within the scope of [the mail fraud and wire fraud statutes]." *Atlas Pile Driving Co. v. Dicon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989).

And although a scheme to defraud invariably involves deception, there is no requirement that the person whose money or property is the object of the scheme was the one who was deceived. *See*, *e.g.*, *United States v. Greenberg*, 835 F.3d 295, 306 (2d Cir. 2016) ("[W]e agree with the First Circuit that the statutory language in both the mail and wire fraud statutes 'is broad enough to include a wide variety of deceptions intended to deprive another of money or property' and '[w]e see 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.'") (quoting *United States v. Christopher*, 142 F.3d 46, 54 (1st Cir. 1998)); *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) (concluding that "a defendant who makes false

representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant's scheme to obtain money or property from others is guilty [of violating the mail fraud statute]" even though it was the policyholders who incurred the financial losses). Thus, where a defendant deceives one party in order to obtain money or property from another party, mail and wire fraud are properly alleged.

C. The facts must be accepted as true and the scheme viewed as a whole.

In reviewing the sufficiency of an indictment, the allegations contained in the indictment must be accepted as true. *United States v. Steffen*, 687 F.3d 1104, 1107 n.2 (8th Cir. 2012) (citing *United States v. Farm & Home Sav. Ass'n*, 932 F.2d 1256, 1259 n.3 (8th Cir. 1991)); *see also United States v. Sampson*, 371 U.S. 75, 78-79 (1962) ("Of course, none of these charges have been established by evidence, but at this stage of the proceedings the indictment must be tested by its sufficiency to charge an offense."). Moreover, because the mail and wire fraud statutes proscribe "schemes" to defraud, not discrete acts, those schemes must be viewed as a whole. *See United States v. Schmitz*, 634 F.3d 1247, 1259 (11th Cir. 2011) ("In determining

whether an indictment is sufficient, we read it as a whole and give it a common sense construction.") (internal quotation and citation omitted). That makes sense, of course, because "the mail and wire fraud statutes do not penalize the victimization of specific persons; rather, they are directed at the instrumentalities of fraud." *United States v. Monostra*, 125 F.3d 183, 187 (3d Cir. 1997) (internal citations and quotations marks omitted)); *United States v. Alston*, 609 F.2d 531, 535-36 (D.C. Cir. 1979) ("The focus of [the mail and wire fraud statutes] is upon the misuse of the instrumentality of communication").

D. The indictment in this case is more than sufficient.

The indictment in this case details dozens of acts and omissions that, together, constitute a scheme to defraud in order to extort settlement payments from internet users associated with IP addresses that downloaded copyrighted materials. Hansmeier and Steele used various means—summarized below—to deceive state and federal judges, as well as numerous individuals they threatened to sue, into believing that they were merely attorneys representing the producers of adult film content who had detected people illegally distributing

their clients' copyright-protected works. On the contrary, as alleged in the indictment (DCD 1), the defendants:

1. owned and controlled their clients, which they concealed through the use of various sham entities and other lawyers (¶¶ 1, 9-14, 17, 25-26, 28-31, 33);
2. used the names of their associates as representatives of their "clients" to further conceal their interest in the underlying pornographic movies (¶¶ 9-14, 25-26);
3. filmed and obtained copyrights to pornographic "works" for the sole purpose of generating settlement fees, but assigned the copyrights to "clients" to conceal their ownership (¶¶ 27-28);
4. uploaded their own copyrighted movies to BitTorrent websites knowing that BitTorrent websites exist to facilitate copyright theft (¶¶ 1, 20, 24, 27-28);
5. filed lawsuits alleging that individuals associated with certain IP addresses downloaded their clients' works without authorization or consent, concealing from the court and from the people who they sued their own involvement

in the purported copyright infringement as well as the fact that they had no intent to pursue the litigation beyond obtaining early discovery (¶¶ 1, 17, 19, 21-24);

6. sent communications and placed telephone calls to victims wherein they deceived the victims into believing that their copyright infringement claims were legitimate and leveraged the copyright statutory damages in order to extract quick settlements from the victims and avoid litigation that might unearth their scheme (¶¶ 1, 17, 19, 21-24);
7. invented from whole cloth knowingly false allegations of a hacking scheme that targets their "clients" when courts refused to grant them mass discovery (¶¶ 29-31);
8. recruited individuals to falsely pose as civil defendants in these "hacking" lawsuits so that they could conduct broad early discovery without opposition (¶¶ 29-31); and
9. systematically perjured themselves and caused their associates to perjure themselves in order to carry out and cover up their scheme (¶¶ 32-33).

Relying on Hansmeier and Steele's falsities, courts authorized them to conduct early discovery to learn the identities of the individuals who controlled the IP addresses identified by the defendants. (*Id.* at ¶ 5, 17-19, 22-24.) Those individuals, unaware that defendants had themselves distributed the copyrighted movies and led to believe litigation carrying the risk of significant penalties and embarrassment might follow, paid millions of dollars in settlement fees to the defendants. (*E.g.*, *id.* at ¶ 24, 34.) Thus, Hansmeier and Steele deceived judges and internet subscribers to obtain money in the form of settlement payments.

The government's allegations in the indictment clearly set forth a scheme to defraud, and the judgment of the district court should be affirmed.

Hansmeier's scheme was, in substance, no different than, for example, the scheme in *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006). There, the defendant obtained preferred status by misrepresenting that his business were either minority-owned (MBE) or women-owned (WBE). Because of those statuses, he won public contracts for work. *Id.* at 780-82. His businesses, however, were

neither women- nor minority-owned, though he made a number of false representations that they were. *Id.* After winning millions of dollars' worth of contracts by representing his companies were either MBEs or WBEs, the defendant was charged with and convicted of mail and wire fraud. *Id.* at 785. The Seventh Circuit sustained the convictions, stating that the indictment alleged "a scheme to defraud the city of money by obtaining contracts through false pretenses. . . . [The contracts] would not have been awarded in the absence of MBE/WBE certifications obtained through fraud." *Id.* at 788-89.

Similarly, the indictment here alleges a scheme wherein courts would not have authorized subpoenas and internet subscribers would not have agreed to settlements in the absence of the mountain of lies Hansmeier's suits were built on. It does not matter that Hansmeier's lawsuits arguably had some merit, though they did not. For instance, in *United States v. Frost*, 321 F.3d 738, 740 (8th Cir. 2003), the defendant was convicted of mail wire fraud after he withdrew money from a trust for which he was one of two trustees. As part of his scheme, he made a number of false representations, including forging

the other trustee's signature on checks written to himself and telling the IRS that trustees would not be paid from the trust. *Id.* On appeal, he argued that state law authorized his use of trust money to compensate himself and so he did not do anything illegal. *Id.*

This Court quickly dispensed with that argument. *Id.* at 741. Focusing on the elements of the offense, the court explained the evidence showed the existence of a scheme to defraud the trust, that the defendant intended to defraud the trust, and that he used the mails and wires to implement the scheme. *Id.* Further, the court held that "[w]e do not agree that the government, having proved beyond a reasonable doubt each element of the offense, must also prove a violation of [state] law." *Id.* (citing *United States v. Williams*, 545 F.2d 47, 50 (8th Cir. 1976) (per curiam)).

Likewise, the indictment here alleges a sophisticated scheme involving myriad misrepresentations and the creation of sham entities to extract settlement payments from people who were associated with IP addresses that downloaded copyrighted materials. The issue is not whether downloaders infringed anyone's copyrights or, as in *Frost*, the law arguably permitted the conduct alleged to be part of the fraud

scheme. Instead, the issue is whether Hansmeier lied and made material omissions that were intended to deceive others into paying him. There is no question the indictment alleges such a scheme. Hansmeier lied to courts. He lied to victims. And he went to extraordinary lengths to conceal his fraud. The scheme as alleged in the indictment shows fraudulent conduct coupled with an intent to defraud and the use of the mails and wires to carry out the scheme. The judgment of the district court denying Hansmeier's motion to dismiss should be affirmed.

E. Hansmeier mischaracterizes the scheme.

Hansmeier's primary complaint on appeal is that the victims of his scheme downloaded copyrighted materials and, thus, were legitimately sued for copyright infringement. As explained above, his argument is beside the point where he deployed a fraudulent scheme with the intent to extort money from his victims under false pretenses. In addition, though, his argument presupposes some legitimacy to his copyright infringement lawsuits where there was none, and he ignores that he lied directly to the victims.

1. Hansmeier ignores that he lied to victims.

Hansmeier's arguments in this appeal ignore that he and Steele lied to the victims of his scheme in order to exact quick settlement payments. Going well outside the bounds of the allegations in the indictment, he points to the demand letters he and Steele sent to victims and tells this Court that the letters were "truthful and accurate" and that the victims were not deceived because they were liable for copyright infringement. (Def. Br. 54.)

The letters, though, were neither truthful nor accurate but instead were replete with lies and material omissions intended to exact quick settlement payments. The district court in this case recognized that in denying Hansmeier's motion to dismiss. (DCD 76–Order at 4.) In rejecting Hansmeier's argument that "the people who paid out settlement fees were not defrauded because they knew that they did download the file as accused in the letters . . . , and they willingly decided to settle the case rather than face litigation," the court found that "the Indictment alleges that Hansmeier and his associates made misleading statements directly to these individuals." (*Id.*)

But more to the point, even if theoretically the victims of Hansmeier's scheme could be sued for copyright infringement, the flaw in Hansmeier's argument is that he misrepresented the nature of *these* particular lawsuits. The indictment explains that Hansmeier's lawsuits were a sham for a number of reasons. Among those reasons, Hansmeier colluded in the copyright infringement by placing copyrighted materials where he knew and intended infringement to occur. The lawsuits he filed claimed copyright infringement, but Hansmeier well knew that he "purposely allowed and authorized the BitTorrent users to obtain" the materials. (*Id.* at ¶ 20.) He "falsely represented to the subscribers that [he and Steele] and their clients had legitimate copyright infringement claims against the subscriber when, in fact and as defendants knew, they had uploaded to the BitTorrent website the very movie that they now threatened to sue the subscriber for downloading." (*Id.* at ¶ 24.) By that conduct, representing that he was merely an attorney representing the producers of adult film content who had detected people illegally distributing their clients' copyright-protected works, Hansmeier

misrepresented the nature of the litigation and, in doing that, engaged in a scheme or artifice to defraud.

Further, the purpose of the lawsuits was not to enforce his copyrights but to access discovery in order to connect an IP address to a specific person who Hansmeier and Steele could shakedown for a settlement payment. (*Id.* at ¶ 17.) Hansmeier and Steele did not intend to follow through on any of their lawsuits. (*Id.* at ¶ 22.) The indictment explains that, once they obtained the subscriber information through the subpoena process, Hansmeier and Steele dismissed the lawsuits, representing to the court that the dismissal allowed them to engage in settlement efforts. (*Id.* at ¶ 22.) Indeed, the indictment alleges that when the John Doe defendants mounted resistance, Hansmeier and Steele "dismissed the lawsuits rather than risk their scheme being unearthed." (*Id.* at ¶ 17.) Hansmeier's concealment of that information was a material omission that rendered his lawsuits fraudulent whether or not the victims in fact downloaded his seeded movies. Had subscribers not been lied to, they would not have paid Hansmeier anything.

Moreover, the demand letters, which are not contained in the indictment but that Hansmeier argues were entirely accurate, contain a number of explicit falsehoods intended to deceive. For instance, Hansmeier included a sample demand letter in his addendum at E. The letter purports to be from Prenda Law, which claims to have been retained by AF Holdings. That was not true. As the indictment explains, Prenda Law and AF Holdings were both entities owned and controlled by Hansmeier and Steele. (DCD 1–¶¶ 9, 13.) AF Holdings was a "sham client" that did not retain Prenda Law to do anything. (*Id.* at ¶ 13.)

Next, the letter indicates that AF Holdings was prepared to proceed with the lawsuit "if our settlement efforts fail" and that, if the subscriber does not settle, "we will have a computer forensic expert inspect [the letter recipient's] computers in an effort to locate the subject content and to determine if you have deleted any content," which would could give rise to an additional "spoilation of evidence claim." (Def. Add. E.) None of that was not true, either. (DCD 1–Ind. ¶ 24.) Hansmeier never intended to follow through on any of his threats. (*Id.* at ¶ 22.) The lawsuits were brought to obtain discovery

and to use the specter of legitimate litigation as a weapon to extort settlement fees. (*Id.* at ¶ 1, 17, 19, 24.)

Further, the demand letter also alleges that AF Holdings sought to "recover damages for the harm caused by the illegal downloading." There was no harm and there were no damages because, as the indictment alleges, the sole purpose of obtaining copyrights was to initiate lawsuits. (*See, e.g.*, *id.* at ¶ 28) (averring that false representations included that "client" had "had suffered damages as a result of the John Does' conduct, when in fact the John Does' conduct had been the entire purpose of Ingenuity 13's existence"). And, of course, there is the fact that the settlement letter on which Hansmeier relies in his brief conceals Hansmeier's involvement and interest in the lawsuit by using another lawyer as the letter's author, in addition to the use of a sham law firm nominally owned by that lawyer but controlled by Hansmeier and Steele. (*See id.* at ¶ 9 (Prenda Law nominally owned by P.D., the author of the letter, but "in fact substantially controlled and beneficially owned by defendants"); ¶ 22 (copyright-protected work, Sexual Obsession, uploaded by defendants in April 2011); ¶ 26(a) (AF Holdings owned and controlled

by Steele and Hansmeier though nominally owned by someone else in order to "obscure their ownership and control over the company" and owner of allegedly infringed movie, Sexual Obsession, since 2011).)

Each of those misrepresentations and concealed facts were material and were aimed at depriving victim of money. That is a scheme to defraud and is actionable under the fraud statutes.

2. The facts alleged in the indictment must be viewed as true.

Furthermore, throughout his brief, Hansmeier claims that the government agrees that the copyright infringement John Doe defendants committed actionable violations of federal copyright law. (*E.g.*, Def. Br. 23.) On the contrary, the indictment—the facts of which must be accepted as true on a motion to dismiss—alleges that Hansmeier and Steele sued and threatened internet "subscribers," not downloaders. (DCD 1–Ind. ¶¶ 1, 17, 19, 24.) The subscriber and the downloader are not necessarily the same person, but Hansmeier assumes they are. (*See* Def. Br. 38-39); *see also In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y.), *report and recommendation adopted sub nom. Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012) ("[T]he assumption that the

person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film is tenuous, and one that has grown more so over time. An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones. . . . Thus, it is no more likely that the subscriber to an IP address carried out a particular computer function—here the purported illegal downloading of a single pornographic film—than to say an individual who pays the telephone bill made a specific telephone call.").

It is simply not true that the government agrees that the copyright infringement defendants violated copyright law and were legitimate targets of infringement suits. But disagreement aside, Hansmeier's claim about what the government does and does not concede goes outside the indictment. A motion to dismiss based on the sufficiency of the evidence is not a test of the government's proof; as the magistrate judge in this case explained, "a motion to dismiss is not the appropriate vehicle to challenge the veracity of the facts alleged or to critique the strength of the government's theory of the case. The

indictment need do no more than set forth the charges and enough facts . . . to support them." (DCD 66–R&R at 5, *contained in* Def. Add. B.) Hansmeier's attempt to skew the facts in his favor is contrary to that legal standard. *See, e.g.*, *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16 (1952) ("This case is here to review the granting of a motion to dismiss the indictment. It should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true.").

Moreover, Hansmeier's characterization of his fraud scheme asks this Court to turn a blind eye on the hacking lawsuits. Once Hansmeier's scheme evolved from copyright infringement lawsuits to baseless allegations of hacking in late 2012, there was no legitimacy whatsoever to the lawsuits. The indictment alleges that "[t]he entirety of defendants' hacking lawsuits was a lie." (DCD 1–Ind. ¶ 29.) That was so because Guava, the alleged victim of the hacking scheme, was not hacked and, in fact, had no computer systems to hack, nor did it own the copyrights to the materials Hansmeier claimed had been illegally downloaded. (*Id.* at ¶¶ 29-31.) What is more, the named defendants in the hacking lawsuits had never hacked anything but

instead were ruse defendants who had been caught downloading seeded videos. (*Id.* at ¶ 31.) The hacking lawsuits were brought for "the sole purpose of obtaining lawsuit settlements." (*Id.* at ¶ 29.)

All told, Hansmeier's reliance on the so-called legitimacy of his lawsuits to support his motion to dismiss the indictment for failure to state a claim is fatally flawed and based on a gross mischaracterization of the scheme alleged. The facts alleged in the indictment viewed in the light most favorable to the government show that there was no such legitimacy underlying any of Hansmeier's lawsuits making each representation to the contrary fraudulent. His scheme was creating the appearance of a legitimate litigation environment when in reality the purported litigation was a scam from the outset. He used that illusion to extort victims, and the motion to dismiss was properly denied as a result.

F. Hansmeier's attempt to seek shelter behind copyright law is a nonstarter.

Hansmeier strives mightily in his brief to legitimize his conduct, arguing that, as the copyright owner, he was free to do anything he wanted with his works, even to lure people into violating copyright law so he could sue them. (Def. Br. 31-38.) Hansmeier devotes several

pages of his brief to copyright law, but his efforts are largely beside the point because the facts alleged in the indictment must be viewed as true, and those facts allege that, through his conduct in seeding copyrighted materials, he authorized others to download the materials and then sued people for doing so.[4]

The indictment alleges that Hansmeier directed the seeding of copyrighted works in places he knew "were specifically designed to allow users to share files, including movies, without paying any fees to the copyright holders." (DCD 1–Ind. ¶ 20.) In doing so, he "hop[ed] to lure people into downloading [his and Steele's] movies." (*Id.* at ¶ 17.)

---

[4] Even if copyright law played some role in the analysis—which it does not because, as explained throughout, the scheme alleged in the indictment is that Hansmeier made myriad misrepresentations concerning the nature of his lawsuits in order to defraud victims—to the extent copyright law is relevant, the indictment here alleges sufficient facts for a jury to find an implied license. An implied nonexclusive license to use copyrighted works may "be implied from conduct. When the totality of the parties' conduct indicates an intent to grant such permission, the result is a nonexclusive license." 3 Melville B. Nimmer & David Nimmer, Nimmer On Copyright § 10.03; *see also Karlson v. Red Door Homes, LLC*, 611 F. App'x 566, 569 (11th Cir. 2015) ("The grant of a nonexclusive license does not require a writing under the Copyright Act, and it may occur orally or may be implied from the copyright owner's conduct.") (citing *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010); 17 U.S.C. §§ 101, 204(a)).

Then, despite his own collusion in the downloading, he filed lawsuits claiming that the John Doe defendants did not have authorization or consent to download the movies. (*Id.* at ¶¶ 21, 28.)

Hansmeier's conduct is really no different than placing furniture on the curb with a "free" sign and then suing the neighbor who took the furniture. That laws exist prohibiting theft is irrelevant under those facts. Copyright law, likewise, is irrelevant here. The indictment alleges a scheme to defraud that begins with Hansmeier authorizing people to download his movies and then suing them for doing so. The allegations in the indictment must be accepted as true, and those allegations suffice here because his lawsuits alleging copyright infringement were a sham premised on the false and misleading representation that people downloaded protected materials without authorization. Hansmeier lied to the courts to execute his fraudulent scheme and used the illusion of legitimacy surrounding litigation to further lie to victims and demand payment.

Despite the irrelevance of copyright law under that scenario, Hansmeier cites several district court cases where he claims courts have not "endorsed" or "have been unreceptive" to copyright

infringement defendants' ability to raise authorization as an affirmative defense. (Def. Br. 32-37.) But each of those courts expressly left open the possibility of defending based on implied authority, so it is unclear how those cases support Hansmeier's argument. In *Malibu Media, LLC v. Doe*, 2014 WL 2581168 (N.D. Ill. June 9, 2014), the copyright holder/plaintiff retained an investigator who successfully uploaded copyrighted materials using BitTorrent. The defendant lodged a counterclaim and alleged that Malibu Media did exactly what Hansmeier did—"Malibu has made a business model out of pornographic copyright infringement litigation . . . [and] has been systematically suing John Doe defendants for infringement, and then seeking settlements, on a scale seldom seen in the history of federal litigation." *Id.* at *2 (quoting complaint) (omission and alteration in original).

Doe sought to assert several affirmative defenses, including copyright misuse. *Id.* The court struck that defense but stated "Doe's allegation that Malibu is itself 'seeding' its copyrighted content onto BitTorrent sites and in effect encouraging its distribution there might give rise to a separate affirmative defense . . . ." *Id.* at *3. Indeed, the

court declined to strike Doe's implied license affirmative defense, holding that "at this stage of the proceedings [on a motion to dismiss], the Court is unprepared to rule out the possibility that Doe can establish an implied license defense based on 'seeding' by Malibu onto BitTorrent of the particular films upon which its claim against Doe is based." *Id.* at *5.

In *Malibu Media, LLC v. Thal*, another case on which Hansmeier relies, the copyright infringement defendant did not assert the affirmative defense of implied license. 2016 WL 7240764 (N.D. Ill. Dec. 15, 2016). He did, however, allege that Malibu seeded the copyrighted works to entrap unwary internet users, and he made a counterclaim alleging violation of Illinois' consumer protection laws. *Id.* The district court dismissed Thal's counterclaim. However, it also stated that Thal's allegation "that Malibu Media makes its own content available on BitTorrent and then 'waits and watches BitTorrent use' until a given IP address commits 'threshold infringement'" in order to bring suit and to "'leverage[] the inherent cost of federal litigation, combined with the potential embarrassment of defendants' to obtain favorable outcomes from the litigation'" "may have stated a viable affirmative

defense in the form of an implied license. *Id.* at *3 citing (*Malibu Media, LLC*, 2014 WL 2581168 (stating that "[a] non-exclusive license may be implied by the conduct of the copyright holder" and refusing to strike an affirmative defense of implied license when the defendant alleges that an agent of Malibu Media " 'seeded' Malibu's content onto BitTorrent and thereby invited others to download it")).

G. The fact Hansmeier's scheme involves civil lawsuits does not change the analysis.

Hansmeier claims that the indictment in this case fails to state a claim because it criminalizes civil litigation tactics. (Def. Br. 57.) Again, he misapprehends the scheme alleged. The scheme involved much more than Hansmeier's use of the courts. The scheme involved multiple fraudulent acts that were entirely external to his civil litigation activities, including, among other things, concocting "fake evidence"—*e.g.*, copyrights in the name of sham entities; concealing his ownership of so-called "clients"; affidavits deceptively detailing "detection" of infringing activities, to name but a few.

Even so, courts have not immunized the practice of civil law from fraud charges as Hansmeier would have it. In rejecting Hansmeier's argument, the district court used perjury charges as one example that

undermined Hansmeier's argument. (DCD 76–Order at 5) ("He urges that the possibility of criminal prosecution for aggressive civil litigation techniques could chill access to the courts. But although criminal prosecution for perjury in civil litigation could likewise arguably chill civil litigants' use of the courts, he sensibly does not challenge perjury prosecutions as unconstitutional.") (citing *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.").)

By way of another example, in *United States v. Eisen*, the government charged a mail fraud scheme alleging that multiple lawyers and private investigators filed numerous false lawsuits using perjured testimony and fake evidence. 974 F.2d 246, 251 (2d Cir. 1992). The Second Circuit upheld the government's reliance, almost exclusively, on civil litigation activities as the premise for the scheme to defraud. *Id.* at 253-54.

Indeed, no court has excluded false and deceptive civil litigation activities from forming a part—even a significant part—of a scheme to defraud in a fraud charge. On the contrary, conduct in civil lawsuits

has repeatedly passed muster as the basis for criminal charges. *See United States v. Lee*, 427 F.3d 881, 890-91 (11th Cir. 2005) (affirming mail fraud charges based on conduct in civil lawsuit and stating, "Ultimately, it was due to the absence of an intent to deceive, and not upon any policy concerns relating to using the mails in connection with litigation, that we held that the mail fraud indictment failed to charge an offense as a matter of law.") (citing *United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002)); *United States v. DeGeorge*, 380 F.3d 1203, 1218-19 (9th Cir. 2004) (affirming perjury and mail fraud convictions based on conduct in a civil lawsuit); *United States v. Goodstein*, 883 F.2d 1362, 1372 (7th Cir. 1989) (affirming mail and wire fraud convictions, among others, based on defendant's misconduct in bankruptcy proceedings); *United States v. Coven*, 662 F.2d 162, 166, 175-76 (2d Cir. 1981) (affirming mail and wire fraud convictions related to an attempt to defraud federal district court and receiver in ongoing receivership proceedings). The public policy of encouraging citizens to utilize the civil court system to resolve disputes is not implicated by holding Hansmeier responsible for, among other things, systematically deceiving judges and putative

defendants in order to extort his victims. That is especially true where, as the district court observed, "the activities alleged in the Indictment extend beyond aggressive litigation tactics and include deceptive, predatory acts, including alleged fraud on the courts." (DCD 76–Order at 5.)

H. Hansmeier's three-legged stool metaphor is inapt.

Throughout his brief, Hansmeier seeks to analogize the government's case to a three-legged stool and argues that, if one leg topples, the entire stool topples with it. (Def. Br. 30.) His analogy, though, is an ill fit and, instead, highlights his misapprehension of the scheme alleged in the indictment.

Hansmeier identifies the three "legs" of the scheme to defraud as: (1) the seeding of copyrighted materials, (2) the omissions to courts concerning his interest in the lawsuits, and (3) his mailing of demand letters. (Def. Br. 30.) His approach ignores entirely the myriad other acts identified as part of the scheme, such as obtaining copyrights with the sole purpose to seed them and encourage infringement; the creation and use of sham entities to conceal his involvement in the scheme; his false and misleading statements to courts and to litigants

about the nature of his lawsuits and his stake in them; his use of ruse defendants in the bogus hacker lawsuit scheme; his perjury and causing of others to commit perjury; and his use of third party lawyers to conceal his involvement in litigation, to name a few.

Moreover, the fraud statutes criminalize schemes, not acts. Hansmeier's analogy is just another attempt to isolate the component parts of the scheme (that is, the acts) to detract from the overall scheme. The district court rejected that approach, and this Court should, too.

In its Order denying Hansmeier's motion to dismiss, the district court recognized that Hansmeier's "primary tactic is to isolate particular allegations and argue that, viewed alone, an alleged act is not fraudulent or illegal." (DCD 76–Order at 3.) But case law does not countenance such a reductionist approach. On the contrary, the allegations in an indictment must be viewed as a whole. (*Id.*) This is so because, although a scheme to defraud "must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension," it "need not be fraudulent on its face." *United States v. Goodman*, 984 F.2d 235,

237 (8th Cir. 1993) (citation omitted); *see also United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987) (rejecting defendants' characterization of their actions as mere "hard bargaining" and finding that the indictment alleged acts that could constitute a fraudulent scheme within the meaning of the mail fraud statute). In fact, as to the conspiracy allegations in the indictment, it is well established that acts in furtherance of a conspiracy need not be illegal acts at all. *See, e.g.*, *United States v. Donahue*, 539 F.2d 1131, 1136 (8th Cir. 1976) ("[A]n overt act performed in order to effect the object of a conspiracy may be perfectly innocent in itself. Obviously, the successful carrying out of a conspiracy to defraud by use of the mails . . . may involve the commission of a number of acts of various kinds and having different purposes . . . .").

Here, each of the so-called legs was fraudulent, as explained throughout. But more to the point, the scheme itself was intended to defraud and involved numerous fraudulent acts and omissions. Hansmeier and Steele never intended to litigate their copyright infringement claims. They had no interest in a court determining the validity of their copyright; in fact, they never proceeded past the initial

pleading stages of a copyright infringement case (except when forced to defend sanctions orders), invariably dismissing cases as soon as a defendant fought back.

What they deceptively extracted from courts was the ability to subpoena internet service providers for the identities of subscribers. Hansmeier and Steele disguised the true nature of their enterprise from courts when applying for early discovery. They hid the fact that they actually owned and controlled the clients; they obscured their role in filming pornography and obtaining copyrights for the sole purpose of abusing the court system to obtain settlement fees; they concealed the fact that they had uploaded those same movies onto file-sharing websites to lure people to download the movies; and they falsely indicated their desire to litigate their copyright claims in court when, in fact, all they wanted was the court's subpoena power. Then, they used the illusion of legitimacy that their lawsuits gave them and made many of the same material lies and omissions to their victims in order to get a quick settlement.

There can be no question that these lies and omissions were material and intended to defraud. In fact, the scheme was largely

successful. Through these lies and omissions, Hansmeier and Steele obtained subscriber information and received over $6 million in settlement fees from John Doe defendants who did not know any of those facts.

For that reason, Hansmeier's reliance (Def. Br. 27-28, 46) on *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007), is misplaced. There, the court stated that "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid" do not violate the mail and wire fraud statutes, but "schemes that depend for their completion on a misrepresentation of an essential element of the bargain" do. *Id.* at 108. Unquestionably, Hansmeier's scheme falls into the latter category for all the reasons discussed above. The victims would not have paid a dime if they had known the true nature of Hansmeier's lawsuits.

Similarly, *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), relied on by Hansmeier, is inapposite. The case simply stands for the noncontroversial proposition that fraud statutes require more than lies; they require intent to defraud. That intent was present here.

In *Takhalov*, the defendants used deceptive tactics to lure people into nightclubs. *Id.* at 1310. The defendants paid women to pose as tourists, hoping the women's presence would lure more patrons. *Id.* The defendants were charged with fraud based on their deception, but the Eleventh Circuit reversed based on the district court's refusal to give a jury instruction defining the term "defraud." The court explained that "there is a difference between deceiving and defrauding: to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all." *Id.* at 1312.

There is no question here that the indictment allege a scheme in which Hansmeier intended to cause harm—the indictment alleges a scheme to defraud using interstate wires and the mail, all with the intent to deceive courts and to defraud victims. Again, the victims here would not have paid Hansmeier had they known the lawsuits were shams, that Hansmeier authorized them to download the very movies they were being accused of infringing, that Hansmeier himself owned the copyrights at issue, and that Hansmeier had no intention of engaging in litigation beyond sending a demand letter. Hansmeier lied

to the courts and he lied to victims with the intent to exact settlement fees. The district court properly denied Hansmeier's motion to dismiss, and the court's judgment should be affirmed.

II. Hansmeier agreed restitution was due and owing in the amount of at least $3 million and cannot now complain that the restitution order is not based on sufficient evidence nor that there were no victims.

The district court imposed restitution in the amount of approximately $1.5 million under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. Hansmeier challenges the application of the MVRA despite agreeing in his plea agreement that it applies. He has waived his challenge here. He also complains that the government's evidence did not prove that the payments he collected, which formed the basis for the restitution order, were not for legitimate legal work. That argument, though, misapprehends the record. The judgment of the district court should be affirmed.

A. Standard of review

This Court reviews the district court's decision to order restitution for abuse of discretion and its underlying fact determinations for clear error. *United States v. Frazier*, 651 F.3d 899, 903 (8th Cir. 2011) (internal quotation marks and citation omitted).

"To the extent the district court's interpreted the MVRA to determine its obligations in awarding restitution, [this Court] review[s] those interpretations de novo." *Id.*

B. Hansmeier waived any challenge to the district court's application of the MVRA.

Hansmeier first challenge to the restitution order is to the application of the MVRA. (Def. Br. 60.) He claims that "the question is fully preserved for this Court's review" because he objected at sentencing. (*Id.* at 59.) That mischaracterizes the state of the record. Instead, Hansmeier waived the challenge to the application of the MVRA, so no question is properly before this Court on appeal as to that issue.

In *United States v. Lester*, 200 F.3d 1179, 1179 (8th Cir. 2000), this Court held that an agreement "to pay any restitution ordered by the District Court" barred an appeal of a restitution order. And in *United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993), this Court affirmed a restitution order after a defendant specifically agreed that the district court could enter restitution up to a certain dollar amount.

Here, Hansmeier agreed that the MVRA "applies and that the Court is required to order the defendant to pay the maximum

restitution to the victims of his crimes as provided by law." (DCD 103–Plea Agr't ¶ 9, *contained in* Def. Add. D at 43.) He further agreed "that the Court will order him to make restitution for the entire loss caused by his fraud scheme and that the restitution order will not be limited to the counts of conviction." (*Id.*) In stipulating to the factual basis for his plea of guilty, he acknowledged that "between 2011 and 2014, [Hansmeier and Steele] and their entities received more than $3,000,000 in fraudulent proceeds from the lawsuits described above." (*Id.* at ¶ 3, *contained in* Def. Add. D at 38) (emphasis added).[5]

Together, these stipulations waived any ability to contest a restitution order to fraud-scheme victims of up to $3 million. *See Bartsh*, 985 F.2d at 933. When a defendant has affirmatively waived an issue, as opposed to forfeiting it, this Court does not consider it. Because Hansmeier agreed the MVRA applied and that the district court could order restitution to any victim of his fraud scheme, for

[5] Hansmeier's stipulation as to having received over $3 million in fraud proceeds is separate from his stipulation as to the loss amount under the Guidelines. *Compare* DCD 103–Plea Agr't ¶ 3 (outlining factual basis for guilty plea to include having "received more than $3,000,000 in fraudulent proceeds from the lawsuits described above"), *with id.* at ¶ 6 (Guidelines calculations and stipulating to loss amount of between $1.5 and $3.5 million).

which he admitted receiving from victims at least $3 million in "fraudulent proceeds" (DCD 103–Plea Agr't ¶ 3), he cannot now argue the district court erred in applying the MVRA. The judgment should be affirmed.

Echoing the thrust of his challenge to the indictment, Hansmeier's argument is premised on the misconception that the restitution payees are not victims because they infringed copyrights and, thus, were legitimate copyright infringement targets. As explained in Argument Section I, those were victims because they were lied to as part of the scheme to defraud in order to exact settlement payments from them. But more to the point, Hansmeier's plea agreement precludes the argument that the MVRA does not apply because the payees were not victims. He stipulated that he "received more than $3,000,000 in fraudulent proceeds from the lawsuits." (Plea Agr't ¶ 3) (emphasis added). Thus, he agreed that the people who paid him as a result of his copyright infringement lawsuits were fraud victims by acknowledging that the amounts they paid him were "fraudulent proceeds." He cannot now say that they were not.

Hansmeier waived any contrary argument to application of the MVRA.

C. There was no clear error, either.

In the alternative, Hansmeier argues that the restitution order should be reversed because, he complains, the government failed to show that the payments to Hansmeier and Steele that formed the basis for the restitution award were not legitimate settlement payments, as opposed to payments for the fraud scheme to which he pleaded guilty. The order should be affirmed because there was no clear error in the district court's findings.

The MVRA states a sentencing court "shall order . . . the defendant [to] make restitution to the victim" of certain offenses, including offenses that involve fraud or deceit. 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). Under the MVRA, a "victim" is "a person directly and proximately harmed as a result of the commission of an offense." 18 U.S.C. § 3663A(a)(2).

As explained throughout, the subjects of Hansmeier's fraud scheme were victims because he used material lies and omissions to extort settlement payments from them. In his plea agreement,

Hansmeier agreed, leaving the only task for the district court to determine the amount of restitution due and owing. Special Agent Kary testified that Steele told agents that every penny that went through the BluePay accounts were proceeds from the fraud scheme. (Sent. Tr. 17-18.)

And while Hansmeier argues that some of that money may have been from "legitimate" work, the government's limitation of its restitution request to only settlement fees received after April 1, 2011, disposes of that argument. On that date, Hansmeier directed the seeding of a particular video, "Sexual Obsession." (*Id.* at 21.) Steele explained to investigators that that movie was the scheme's "go-to movie as far as gaining settlements from individuals." (*Id.*) He also indicated that the income from any other movies "wasn't a significant amount" and would only be "trickling in here and there." (*Id.* at 22; *see also* PSR ¶ 18 ("Between April 2011 and approximately December 2021, the defendants caused at least 200 fraudulent copyright infringement lawsuits to be filed in various courts throughout the United States seeking subscriber information associated with more than 3,000 IP addresses. . . ."). And, in fact, Special Agent Kary

explained that Steele reviewed the government's list of victims and confirmed that each one included in the government's ultimate request was a victim of the fraud scheme. (Sent. Tr. at 28.) Under those facts, the district court did not clearly err in finding any legitimate income, if there was any, was "negligible." (*Id.* at 49.)

Hansmeier mischaracterizes Special Agent Kary's testimony at the hearing. Special Agent Kary never conceded that any portion of the government's restitution request might be based on legitimate legal work, as Hansmeier claims. (Def. Br. 61.) Instead, Special Agent Kary testified that, "early on," Hansmeier and Steele may have had some legitimate work. (Sent. Tr. 31.) But by April 2011, all their settlements stemmed from their fraudulent scheme. (*E.g.*, *id.* at 23.) Indeed, defense counsel's own question about legitimate lawsuits that prompted Special Agent Kary's response pertained to September of 2010 (*id.* at 31), which is when Hansmeier and Steele first established their law firm, at which time they represented copyright holders. (PSR ¶¶ 8-9.) Their fraud scheme began in April 2011. (*Id.* at ¶ 10.)

Special Agent Kary also testified about the information Steele provided to law enforcement agents. Steele confirmed that and that all

of the money that passed through the BluePay accounts was proceeds from the fraudulent scheme, and he confirmed the identities of the victims. (Sent. Tr. at 28.) Special Agent Kary explained that he shared the restitution request with Steele, and Steele "reviewed it in its entirety" to determine if all the people included on the list were, in fact, fraud victims. (*Id.*) Steele removed one person from the list. (*Id.*) Hansmeier's attempt to take Special Agent Kary's testimony out of context and to ignore Steele's explanation of the proceeds and identification of the victims rings hollow in his attack on the restitution order.

The district court did not clearly err when it ordered approximately $1.5 million in restitution to the victims identified in the government's restitution request where the evidence showed that, after April 1, 2011, Hansmeier and Steele's fraud scheme resulted in payments of over $1.5 million from identifiable victims, who Steele, a co-defendant with firsthand knowledge, confirmed were victims. (*See* DCD 158-159 (Gov't Sent. Exs. 1& 2). The restitution order should be affirmed.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 12,271 words, proportionally spaced. The brief was prepared using Microsoft Word 2016.

Dated: January 24, 2020

ERICA H. MacDONALD
United States Attorney

/s/ *Lisa D. Kirkpatrick*

By: LISA D. KIRKPATRICK
Assistant U.S. Attorney

Attorneys for Appellee