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11 UNITED STATES DISTRICT COURT

12 DISTRICT OF ARIZONA

13 United States of America, ) CR-17-0585-02-PHX-JJT  
14 )  
15 Plaintiff, ) **MOTION TO DISMISS COUNT 1-**  
16 ) **FAILURE TO ALLEGE AN OVERT**  
17 v. ) **ACT**  
18 )  
19 Peter Nathan Steinmetz, et al., )  
20 )  
21 Defendant. )  
22 )

23 Defendant Peter Nathan Steinmetz (hereafter “Dr. Steinmetz”) hereby moves to  
24 dismiss count one of the indictment, charging him with Conspiracy to Operate an  
25 Unlicensed Money Transmitting Business, in violation of 18 U.S.C. § 371, on the  
26 grounds that no overt act is alleged, thus rendering the indictment on count one defective.

27 **Background**

28 Dr. Steinmetz has been charged with two counts of an 8-count indictment. The  
charges he is facing are that he engaged in unlicensed money transmitting and that he  
conspired to do so. The indictment provides no detail as to how he violated either count  
one or count two, other than to say, in language preceding the Counts charged,



1 “Defendants . . . enabled their customers to exchange cash for ‘virtual currencies’  
2 charging a fee for their service.” [Indictment, Doc. 18, ¶ 3]

### 3 **Argument**

4 The law requires that where the government charges a conspiracy under 18 U.S.C.  
5 § 371, “[t]he government, to prevent the indictment from being found defective on its  
6 face, ‘must allege and prove the commission of at least one overt act by one of the  
7 conspirators.’” *United States v. Dolan*, 120 F. 3d 856, 864 (9th Cir. 1997) (emphasis  
8 added); *United States v. Garcia-Santana*, 774 F.3d 528, 535 (9th Cir. 2014) (“The federal  
9 government’s general conspiracy statute, which criminalizes conspiracies to commit any  
10 offense against the United States, or to defraud the United States also requires an overt  
11 act. 18 U.S.C. § 371.”); *see also* 9th Circuit Criminal Jury Instruction 8.20 Conspiracy –  
12 Elements (“Third, one of the members of the conspiracy performed at least one overt act .  
13 . . for the purpose of carrying out the conspiracy”); U.S. Attorneys’ Manual, Title 9,  
14 Section 923. 18 U.S.C. § 371 – Conspiracy to Defraud the United States (“Both offenses  
15 require the traditional elements of Section 371 conspiracy, including an illegal  
16 agreement, criminal intent, and proof of an overt act”) (emphasis added).<sup>1</sup>

17 The failure to allege any overt act is not merely technical; it is of both practical  
18 and constitutional significance. As a practical matter, the failure to allege the nature of  
19 the supposed agreement giving rise to the conspiracy charge handicaps the defendant in  
20 mounting a defense. *See Garcia-Santana*, 774 F. 3d at 537 (“The contemporary overt act  
21 requirement thus developed to guard against the punishment of evil intent alone, and to  
22 assure that a criminal agreement actually existed”). The failure is of constitutional  
23 magnitude too, because failing to allege any overt act violates the Sixth Amendment’s  
24 guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right . . .to be  
25 informed of the nature and cause of the accusation.” U.S. Const. amend VI; *see, e.g.,*  
26 *also Russell v. U.S.*, 369 U.S. 749, 760-63 (1962) (tracing constitutional roots of

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27 <sup>1</sup> Counsel for Dr. Steinmetz raised the issue of the failure of the indictment to allege an  
28 overt act with the AUSAs assigned to this matter. In response, the government stated its  
position that there was no defect in count one.

1 indictment requirements and noting that in addition to stating elements of offense, proper  
2 indictment must “sufficiently apprise the defendant of what he must be prepared to  
3 meet”).

4 Nowhere in the Indictment does it allege an overt act. That is important in this  
5 case, where there is no evidence that the defendants operated a business by doing things  
6 such as renting a location from which to conduct the business, printing business cards,  
7 registering a business name, having a telephone number or website, or any of the other  
8 traditional hallmarks of a business. This failure to allege any overt act in which Dr.  
9 Steinmetz supposedly engaged in furtherance of the charged conspiracy is fatal as a  
10 matter of law.

11 **Conclusion**

12 The Court should dismiss count one because it fails to allege an overt act.

13 RESPECTFULLY SUBMITTED on October 27, 2017.

14 MITCHELL | STEIN | CAREY | CHAPMAN, PC

15 By: /s/ Lee Stein

16 Lee Stein

17 Attorneys for Defendant

18 I certify that on October 27, 2017 I electronically transmitted a PDF version of this  
19 document to the Clerk of Court, using the CM/ECF System, for filing and for transmittal  
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