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11 IN THE UNITED STATES DISTRICT COURT  
12 DISTRICT OF ARIZONA

13 United States of America,  
14 Plaintiff,  
15 vs.  
16 Thomas Mario Costanzo, et al.,  
17 Defendant

No. CR-17-0585-01-PHX-JJT  
**MOTION TO DISMISS  
COUNTS 1 & 2 OF THE INDICTMENT  
(Oral Argument Requested)**

18 Defendant Thomas Mario Costanzo submits the attached memorandum of  
19 law in support of his First Motion to Dismiss Counts 1 & 2 of the Indictment, which  
20 charge him with operating an unlicensed money transmitting business in violation  
21 U.S.C. § 1960 and Conspiracy to do the same in violation of 18 U.S.C. § 371. Counts 1  
22 & 2 of the Indictment should be dismissed because the alleged substantive conduct does  
23 not constitute “money transmitting” as contemplated by 18 U.S.C. § 1960.

24 First, Congress has not defined Bitcoin as money or currency. The  
25 Government's attempt to use a dated statute to create a crime that Congress has not  
26 defined violates Due Process and Fundamental Fairness. Second, Counts 1 & 2 of the  
27 Indictment fail to state a claim because person-to-person exchanges of Bitcoin that do  
28 not involve a third party cannot constitute "transmitting" under § 1960.

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1 Excludable delay under 18 U.S.C. § 3161(h)(1)(D) may result from this  
2 motion or from an order based thereon.

3 Respectfully submitted: October 30, 2017.

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**MEMORANDUM**

**I. BACKGROUND**

As to the facts set forth in the Indictment in support of Counts 1 & 2, it is simply alleged that Mr. Costanzo and co-defendant Dr. Steinmetz operated a money transmitting business, that said business was not licensed or registered in the State of Arizona, and that the business model for said business was no more than to enable “customers to exchange cash for ‘virtual currencies,’ charging a fee for the[ ] service.” See Doc. 18, First Superseding Indictment, at ¶¶ 1-3.

**II. STANDARD OF REVIEW**

Rule 12 of the Federal Rules of Criminal Procedure provides that a defendant make seek dismissal of an indictment that fails to state an offense. Fed. R. Crim. P. (12)(b)(2) (“Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion”) and 12(b)(3)(B) (“[A]t any time while the case is pending, the court may hear a claim that the indictment or information fails to...state an offense.”). “In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.2002).

**III. DISCUSSION**

The Indictment in this matter is defective because it fails in two ways to allege conduct that meets the definition of “money transmitting” set forth in 18 U.S.C. § 1960: 1) Bitcoin is not “money” under the statute; and 2) operating a Bitcoin exchange is not “transmitting” under the statute. The Indictment’s assertion that Mr. Costanzo “operated a money transmitting business” by “enabling...customers to exchange cash for ‘virtual currencies,’ charging a fee for the[ ] service” is conclusory and does not survive analysis. See Doc. 18, at ¶¶ 1 & 3. A person-to-person exchange of cash for a privately created commodity that is not money is simply outside the regulatory sphere of “money transmitting businesses.”

**Bitcoin Is Not “Money.”**

1  
2 Under 18 U.S.C. § 1960, a defendant is guilty of an offense when he  
3 “knowingly conducts, controls, manages, supervises, directs, or owns all or part of an  
4 unlicensed money transmitting business.” The statute defines “money transmitting” to  
5 include “transferring funds on behalf of the public by any and all means including but  
6 not limited to transfers within this country or to locations abroad by wire, check, draft,  
7 facsimile, or courier.” 18 U.S.C. § 1960(b)(2). Accordingly, a defendant can be guilty of  
8 an offense under the statute only where the object he transmits is “money” or “funds.”  
9 The statute, however does not define the critical terms “money” or “funds.” *See* 18  
10 U.S.C. § 1960. For its part, the State of Arizona defines the term “money” as “a medium  
11 of exchange that is *authorized and adopted by a domestic or foreign government* as a  
12 part of its currency and that is *customarily used and accepted as a medium of exchange*  
13 *in the country of issuance.*” A.R.S. § 6-1201(9) (emphasis added). A definition of the  
14 term “funds” was not identified by undersigned counsel in the Arizona Revised Statutes.

15 In this matter, the object at issue—Bitcoin—is neither “money” nor  
16 “funds” under the federal statute. A logical, textual reading of the statute limits its  
17 application to “currency,” which does not include Bitcoin. To expand interpretation of  
18 the undefined terms “money” or “funds” beyond currency so as to shoehorn in recent  
19 developments such as Bitcoin would cause the statute to lose all rational limitations.  
20 Where Congress has not established legislative parameters to address recent  
21 developments such as Bitcoin and so-called “virtual currencies,” it is agency overreach  
22 for the Department of Justice to pursue prosecution under statutes that simply do not  
23 apply. It is the place of the judiciary to halt such trespasses upon the separation of  
24 powers whenever such may appear before it.

25 1. “Money” and “Funds” Under the Statute Mean Currency.

26 According to Black’s Law Dictionary, the terms “money” and “funds” are  
27 nearly coextensive. Indeed, Black’s defines “funds” to mean “[a] sum of money or other  
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1 liquid assets established for a specific purpose.” Black’s Law Dictionary (9th ed. 2009).  
2 Money is a somewhat less elusive term. Black’s Law Dictionary defines it in two  
3 primary ways: broadly, as “[a]ssets that can be easily converted to cash,” and narrowly,  
4 as “[t]he medium of exchange authorized or adopted by a government as part of its  
5 currency; esp. domestic currency.” *Id.*

6           The broad definition of money—convertible assets—cannot be applied to  
7 § 1960 without rendering the statute utterly meaningless. Indeed, if § 1960 were  
8 applicable to any asset with liquidity, it could encompass the business of moving almost  
9 any item (e.g., houses, cars, boats, stamp collections) and could make the transfer of  
10 such items a felony offense in certain circumstances. It is a well-established canon of  
11 construction that statutes are to be interpreted to avoid illogical or absurd results.  
12 Interpretations of a statute which would produce absurd results are to be avoided if  
13 alternative interpretations consistent with the legislative purpose are available. *See, e.g.,*  
14 *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing *United States v.*  
15 *American Trucking Assns., Inc.*, 310 U.S. 534, 542-543 (1940); *Haggar Co. v.*  
16 *Helvering*, 308 U.S. 389, 394 (1940)); *see also id.*, (citing *Crooks v. Harrelson*, 282  
17 U.S. 55, 60, (1930) (“[I]aws enacted with good intention, when put to the test,  
18 frequently, and to the surprise of the law maker himself, turn out to be mischievous,  
19 absurd or otherwise objectionable. But in such case the remedy lies with the law making  
20 authority, and not with the courts.”)). Accordingly, the broad definition of money  
21 advocated by the government by virtue of Counts 1 & 2 of the Indictment simply cannot  
22 apply to § 1960.

23           The narrow definition of money—currency—applies a more natural and  
24 appropriate limitation on the application of § 1960. Although the legislative history of  
25 § 1960 is not instructive, it is obvious that in 1992, when the statute was first enacted,  
26 Congress could not have contemplated its application to so-called “virtual currencies,”  
27 and the term “money” as used in the statute would likely have been synonymous with  
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1 the term “currency.” Indeed, the purpose of the statute—to ensure that those who  
2 transmit money for a business register with the federal government, obtain state  
3 licenses, and submit to applicable regulations—seems much more appropriately directed  
4 to those in the actual business of transmitting currency. *See* 18 U.S.C. § 1960(b)(1). The  
5 federal government has an obvious and substantial interest in currency: currency is  
6 issued by the federal government; it is printed by the federal government; and its value  
7 is regulated by federal monetary policy. *See, generally* U.S. CONST. art. 1, § 8, cl. 5  
8 (bestowing on the legislature the power “[t]o coin Money, [and] regulate the Value  
9 thereof”). The logical and textual interpretation of § 1960 as a statute that seeks to  
10 punish those who transmit currency for others for profit but fail to properly register or  
11 obtain applicable licenses is appropriate and makes sense. On the other hand, the  
12 government’s attempt to contort § 1960 so as to punish those who do not register or  
13 obtain licenses to transmit a virtual, internet-based commodity that is a completely de-  
14 centralized, private creation is far from apparent.

15 Bitcoin is not directly regulated by the federal government or any foreign  
16 government; it is not subject to domestic or international monetary policy. While  
17 Congress has not addressed Bitcoin or other virtual internet-based commodities as of  
18 yet, the executive branch, specifically, the Department of Treasury’s Financial Crimes  
19 Enforcement Network (“FinCEN”) issued interpretative guidance in March of 2013. *See*  
20 Exhibit A, FIN-2013-6001, *Application of FinCEN’s Regulations to Persons*  
21 *Administering, Exchanging, or Using Virtual Currencies*, Mar. 18, 2013. Notably,  
22 interpretative guidance is exempt from notice and comment requirements of the  
23 Administrative Procedure Act (“APA”). *Id.*; *see also* Exhibit B, Internal Revenue  
24 Manual, Part 32.1.1.2.6 (noting that interpretative rules are exempt from the APA’s  
25 notice and comment requirements). The Internal Revenue Manual explains that  
26 interpretative guidance does not require notice to or comment from the public as would  
27 otherwise be required by law for a substantive rulemaking because “the underlying  
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1 statute implemented by the regulation contains the necessary legal authority for the  
2 action taken and any effect of the regulation flows directly from that statute.” *Id.* For the  
3 reasons set forth above, such is not the case with the Treasury Department’s attempt at  
4 extra-legislative guidance regarding virtual internet-based commodities. *See, e.g.,*  
5 *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 536-37(2009) (citing *Mistretta v.*  
6 *United States*, 488 U.S. 361, 372-374 (1989) (“If agencies were permitted unbridled  
7 discretion, their actions might violate important constitutional principles of separation  
8 of powers and checks and balances. To that end the Constitution requires that Congress’  
9 delegation of lawmaking power to an agency must be ‘specific and detailed...’  
10 Congress must ‘clearly delineat[e] the general policy’ an agency is to achieve and must  
11 specify the ‘boundaries of [the] delegated authority....’ Congress must ‘lay down by  
12 legislative act an intelligible principle,’ and the agency must follow it.”)(internal  
13 quotations omitted).

14 Finally, had Congress intended the term “money” to be defined so  
15 expansively it would have explicitly and expressly done so; as much is abundantly clear  
16 via comparison to the federal money laundering statute, 18 U.S.C. § 1956. Section 1956  
17 does not rely on an expansive definition of “money” but instead expressly and broadly  
18 applies to, among other things, certain “financial transactions involving property  
19 represented to be the proceeds of specified unlawful activity, or property used to  
20 conduct or facilitate specified unlawful activity.” 18 U.S.C. § 1956(c)(2).

## 21 2. Bitcoin Is Not Currency.

22 The U.S. Government recognizes significant differences between  
23 “currency” and Bitcoin. FinCEN defines “currency as:

24 [t]he coin and paper money of the United States or of any other country  
25 that is designated as legal tender and that circulates and is customarily  
26 used and accepted as a medium of exchange in the country of issuance.

27 Currency includes U.S. silver certificates, U.S. notes, and Federal Reserve  
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1 notes. Currency also includes official foreign bank notes that are  
2 customarily used and accepted as a medium of exchange in a foreign  
3 country.

4 31 C.F.R. § 1010.100(m) (2014). Bitcoin clearly does not meet this definition and  
5 therefore is not “currency.”

6 FinCEN further distinguishes “currency (also referred to as ‘real  
7 currency’)” from so-called “virtual currency” which includes Bitcoin and is defined as  
8 “a medium of exchange that operates like a currency in some environments, but does  
9 not have all the attributes of real currency.” Exhibit A. FinCEN notes in particular that  
10 “virtual currency does not have legal tender status in any jurisdiction. *Id.* The significant  
11 differences between “currency” and “virtual currency” are further recognized by the  
12 Internal Revenue Service (“IRS”), which does not treat “virtual currency” as “currency”  
13 for purposes of determining whether a transaction results in foreign currency gain or  
14 loss under U.S. federal tax laws. *See* Exhibit C, Internal Revenue Service, Notice 2014-  
15 21.

### 16 3. Defining Bitcoin as “Money” Under § 1960 Raises Constitutional Problems.

17 In addition to the separation of powers issues referenced above,  
18 interpreting the terms “money” or “funds” under the statute to include a commodity  
19 such as Bitcoin raises concerns that § 1960 fails to “provide the kind of notice that will  
20 enable ordinary people to understand what conduct it prohibits.” *City of Chicago v.*  
21 *Morales*, 527 U.S. 41, 56 (1999). “[T]he legislative purpose is expressed by the ordinary  
22 meaning of words used.” *Richards v. United States*, 369 U.S. 1, 9 (1962). The ordinary  
23 understanding of “money” and “funds” is consistent with the definition offered above:  
24 currency, whether reflected in cash, coin, check, bank wire, or account balance. It does  
25 not include cars, real estate, baseball cards, Beanie Babies, Bitcoin, or other assets that,  
26 although valuable and potentially even a medium of exchange under certain  
27 circumstances, do not fall within the ordinary understanding of “money” or “funds.”  
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1 The Supreme Court has instructed courts, when confronted with a statute  
2 of ambiguous and potentially infinite reach, to interpret it in a manner consistent with  
3 the rule of lenity. That is, courts should “exercise[ ] restraint in assessing the reach of a  
4 federal criminal statute, both out of deference to the prerogatives of Congress, and out  
5 of concern that a fair warning should be given to the world in language that the common  
6 world will understand, or what the law intends to do if a certain line is passed.” *Arthur*  
7 *Andersen, LLP v. United States*, 544 U.S. 696, 703 (2005) (citations omitted). Here, the  
8 statutory terms “money” and “funds” can either be given the ordinary meaning of  
9 “currency” or they can be given a meaning so broad as to have no meaning at all. The  
10 District Court should show the concern for plain meaning and fair warning that the  
11 Supreme Court has instructed, and find that the Indictment fails to allege a transaction  
12 in “money” or “funds” and therefore fails to state an offense under either § 1960 or an  
13 alleged conspiracy to violate § 1960.

14 **A. The Indictment Fails to Allege that Costanzo Operated a “Money**  
15 **Transmitting Business” or Engaged in “Money Transmitting.”**

16 Counts One and Two of the Indictment should also be dismissed because  
17 the Indictment fails to allege that Costanzo operated a “money transmitting business” or  
18 engaged in “money transmitting” as contemplated by the statute.

19 1. Costanzo Did Not Operate a Money Transmitting Business.

20 Section 1960 prohibits the unlicensed operation of a “money transmitting  
21 business.” The use of the term “business” in the statute clearly requires that a defendant  
22 sell money transmitting services to others for a profit. Here, the Indictment fails to  
23 allege that Costanzo sold such services. Rather, he is alleged to have sold Bitcoin to  
24 customers who engaged him as a source of Bitcoin. To the extent Costanzo is alleged to  
25 have participated in other activities to secure Bitcoin to sell, such activities were purely  
26 incidental to the sale of Bitcoin and do not convert his small business into a money  
27 transmitting business. There is no allegation in the Indictment that customers asked for  
28 Costanzo to transmit Bitcoin to other locations or persons on their behalf. Rather it is  
simply alleged that customers paid Costanzo to provide them with Bitcoin.

1 A Seller of Bitcoin Does Not Meet the Definition of Money Transmitter Under the  
 2 Applicable Regulations.

3 The Indictment alleges Costanzo acted as a money transmitter by  
 4 operating a Bitcoin exchange. A seller of Bitcoin, however, is not included in FinCEN’s  
 5 definition of “money transmitter” and indeed such conduct is expressly excluded from  
 6 the definition. The regulations provide, in pertinent part:

7 (5) *Money transmitter—(i) In general.* (A) A person that provides  
 8 money transmission services. The term ‘money transmission  
 9 services’ means the acceptance of currency, funds, or other value  
 10 that substitutes for currency from one person and the transmission  
 11 of currency , funds, or other value that substitutes for currency *to*  
 12 *another location or person* by any means. . . .

13 (ii) Facts and circumstances; Limitations. Whether a person is a  
 14 money transmitter as described in this section is a matter of facts  
 15 and circumstances. The term “money transmitter” shall not include  
 16 a person that only: . . . .

17 (F) Accepts and transmits funds *only integral to the sale of goods*  
 18 *or the provision of services*, other than money transmission  
 19 services, by the person who is accepting and transmitting the funds.

20 31 C.F.R. § 1010.100(ff)(5)(ii)(F) (2014) (emphasis added). Here, the Indictment  
 21 alleges only that Costanzo sold Bitcoin to his customers. There is no allegation that  
 22 Costanzo transmitted Bitcoin to another location or person for his customers. Moreover,  
 23 since Bitcoins are “goods,” Costanzo’s alleged conduct is excluded from the definition  
 24 of the term “money transmitter.”

25 **B. Operation of a Money Transmitting Business Requires the Transmission**  
 26 **of Money to a Third Party or Location.**

27 Mr. Costanzo did not operate a money transmitting business because he  
 28 did not, nor was he instructed by his customers to, transfer money to a third party or

1 location. This is an issue of first impression in the Ninth Circuit. However, there is  
2 persuasive authority in the Second Circuit—where the majority of litigation involving  
3 18 U.S.C. § 1960 has occurred since at least 1999—for the proposition that transmission  
4 of monies or funds to third parties or locations on the customer’s behalf for a fee is an  
5 essential element of operating a money transmitting business. *See e.g., United States v.*  
6 *Banki*, 685 F.3d 88, 113 n.9 (2d Cir. 2012), as amended (Feb. 22, 2012) (“the business  
7 must transmit money to a recipient in a place the customer designates, for a fee paid by  
8 the customer” and holding that said description is “legally correct”); *United States v.*  
9 *Mazza-Alaluf*, 621 F.3d 205, 208 (2d Cir. 2010) (citing *United States v. Mazza-Alaluf*,  
10 607 F. Supp.2d 484, 489-90 (S.D.N.Y. 2009), which cites to a 1999 Second Circuit  
11 holding: “[a] money transmitting business receives money from a customer and then,  
12 for a fee paid by the customer, transmits that money to a recipient in a place that the  
13 customer designates...”); *United States v. Bah*, 574 F.3d 106, 110 (2d Cir. 2009)  
14 (describing government’s evidence that “certain customers came to Bah’s restaurant in  
15 the Bronx, delivered U.S. currency, and instructed Bah to deliver the equivalent value of  
16 local currency to recipients in West Africa”); *United States v. Elfgeeh*, 515 F.3d  
17 100,108 (2d Cir. 2008) (quoting testimony of an FBI agent who testified that a  
18 traditional money transmitting business “operates in a similar fashion to Western  
19 Union”); *United States v. Velastegui*, 199 F.3d 590, 592 (2d Cir. 1999), (“[a] money  
20 transmitting business receives money from a customer and then, for a fee paid by the  
21 customer, transmits that money to a recipient in a place that the customer designates...”)

22 The Fourth Circuit has expressed agreement with the Second Circuit’s  
23 analysis. *See United States v. Talebnejad*, 460 F.3d 563, 565 (4th Cir. 2006) (citing  
24 *Velastegui*, 199 F.3d at 592.).

25 The Seventh and Eighth Circuits, while not directly addressing the  
26 definition of a money transmitting business or the essential elements of a violation of  
27 § 1960, strongly suggest agreement with the Second Circuit in this regard. *See United*  
28

1 *States v. Dimitrov*, 460 F.3d 409, 411 (7th Cir. 2008)(noting evidence that defendant  
2 operated a money transmitting business through an institution known as the Bulgarian  
3 Cultural Center, which offered a number of services to include the transmission of  
4 monies from the United States to Bulgaria on behalf of customers who paid a fee);  
5 *United States v. Abdullahi*, 520 F.3d 890, 892 (8th Cir. 2008) (recounting that defendant  
6 accepted monies from Somalis living in the United States and sent the funds on their  
7 behalf to Somalia and other African countries).

8 In a forfeiture matter, the District of Oregon observed that a defendant  
9 “was operating an unlicensed money transmitting business by buying and selling metals  
10 to and from customers, storing the customer’s metals on site, keeping the customer’s  
11 cash on deposit and writing checks or wiring money on behalf of his customers directly  
12 to third parties.” *United States v. \$166,450.48 In United States Currency, et al.*, 2014  
13 WL 3891748 at \*1.

14 By contrast with the cases referenced above, Mr. Costanzo is only alleged  
15 to have sold his customers a valuable item—Bitcoin. His customers did not direct him  
16 to store their money for them or send it to third parties and he is not alleged to have  
17 offered such services. Mr. Costanzo was merely a retailer of Bitcoin who acquired it  
18 wholesale and then sold it to the public for a fee, much in the manner of sales of goods  
19 such as clothing, vehicles, and so forth.

20 On this point, it is useful to contrast the operation of Mr. Costanzo’s  
21 alleged Bitcoin exchange with the businesses at issue in both *United States v. Faiella et*  
22 *al.*, 39 F. Supp.3d 544 (S.D.N.Y. 2014) and *United States v. E-Gold, Ltd.*, 550 F. Supp.  
23 2d 82 (D.D.C. 2008).

24 1. The instant case as distinguished from *Faiella*.

25 In denying defendant’s motion to dismiss the § 1960 charge set forth in  
26 the indictment filed against him, the court in *Faiella* disagreed with defendant’s claim  
27 that he had “merely sold Bitcoin as a product in and of itself.” 39 F. Supp.3d at 546. The  
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1 court elaborated that the Indictment in fact alleged that “Faiella received cash deposits  
2 from his customers and then, after exchanging them for Bitcoins, transferred those funds  
3 [sic] to the customers’ accounts on Silk Road<sup>1</sup>,” *Id.* The court concluded that “...[t]hese  
4 were, in essence, transfer[s] to a third-party agent[, Silk Road.]” *Id.* In so finding, the  
5 court further noted that the charging document further alleged the “Silk Road users did  
6 not have full control over the Bitcoins transferred to their accounts...Silk Road  
7 administrators could block or seize user funds [sic].” *Id.* The indictment here does not  
8 allege any such third party transfer—this is a circumstance where the conduct at issue is  
9 simply a person-to-person exchange of cash for Bitcoin.

10 2. The instant case as distinguished from *E-Gold Ltd.*

11 *E-Gold Ltd.* involves another case where the trial court, here the District  
12 Court for the District of Columbia, denied a motion to dismiss § 1960 charges filed  
13 against an issuer of online virtual currency known as “e-gold.” Unlike the decentralized  
14 system responsible for Bitcoin, e-gold was created and operated by a single company.  
15 550 F. Supp. 2d at 85. The company’s business model was that “[f]or every transfer of  
16 e-gold from one e-gold account to another, e-gold collects a transaction fee.” *Id.*  
17 Critically, these transfers were conducted by the defendant, E-Gold, Ltd., at the  
18 direction of “the account holder [, who] can then use the e-gold to buy a good or pay for  
19 a service, or to transfer funds to someone else.” *Id.* The conduct Mr. Costanzo is alleged  
20 to have engaged in, by contrast, does not include the transmittal of funds from one party  
21 to another at the direction of a client. Mr. Costanzo is simply alleged to have bought and  
22 sold Bitcoin. To the extent he made any “transfer,” it was only the sort of transfer  
23 inherent and incidental to any purchase or sale, not the directed transmittal required by  
24 § 1960 ’s definition of “money transmitting.”

25  
26  
27 <sup>1</sup> For a brief explanation of the online criminal marketplace Silk Road, *see* Exhibit D,  
28 USAO, Southern District of New York, Press Release (May 29, 2015).

**CONCLUSION**

1  
2 Based on all of the arguments above, this Court should conclude that the  
3 Indictment fails to allege an offense under § 1960. Specifically, the facts and the law  
4 militate for this Court to conclude that: 1) Bitcoin is not money or currency, and 2) that  
5 a simple person-to-person Bitcoin exchange does not qualify as “money transmitting.”  
6 Should this Court so find for the defense on either or both of these two grounds, Counts  
7 1 & 2 must be dismissed.

8 Excludable delay under 18 U.S.C. § 3161(h)(1)(D) may result from this  
9 motion or from an order based thereon.

10 Respectfully submitted: October 30, 2017.

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1 Copy of the foregoing transmitted by ECF for filing October 30, 2017, to:

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