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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-GMS

**ADDENDUM TO DKT. # 55,
DEFENDANT COSTANZO'S MOTION
TO DISMISS COUNTS 1 & 2 OF THE
FIRST SUPERSEDING INDICTMENT
FOR FAILURE TO STATE AN
OFFENSE**

18 Defendant Thomas Mario Costanzo submits this Addendum to his Motion
19 to Dismiss Counts 1 & 2 of the First Superseding Indictment for Failure to State an
20 Offense (Dkt. # 55) for the purpose of including a third basis for the relief requested.

21 Specifically, the present indictment's allegation that Mr. Costanzo
22 violated and conspired to violate 18 U.S.C. § 1960(b)(1)(B), which makes it a federal
23 crime to operate a money transmitting business that "fails to comply with the money
24 transmitting business registration requirements under section 5330 of title 31, United
25 States Code, or regulations prescribed under such section," fails to allege an essential
26 element or elements of the crime.

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ADDENDUM

An Indictment Alleging Violation of 18 U.S.C. § 1960(a) & (b)(1)(B) Requires that the Government Allege the Statutory and/or Regulatory Requirements of 31 U.S.C. § 5330 Allegedly Violated by Defendant.

In order to comply with the Grand Jury and Due Process clauses of the Fifth Amendment, an indictment alleging a violation of 18 U.S.C. § 1960(a) & (b)(1)(B) must state the specific statutory requirement of 31 U.S.C. § 5330 and/or associated regulatory requirement(s) defendant is accused of having violated. This is because 18 U.S.C. § 1960(a) criminalizes the operation of an unlicensed money transmitting business that “fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section.” 18 U.S.C. § 1960(b)(1)(B).

The language in the present indictment largely tracks the statute, alleging in pertinent part that defendant “failed to comply with the money transmitting business *regulations* under Title 31, United States Code, Section 5330, *and* the regulations prescribed thereunder” (emphasis added). See Dkt. #18, at ¶ 5. Such violation is also implied in Count 1. *Id.* at ¶ 4.

It appears this is a matter of first impression in the Ninth Circuit; no persuasive authority arising from other circuits has been identified. Notwithstanding this circumstance, the structure of § 1960(b)(1)(B) militates for the finding that a particularized and definite statement of the alleged violation—to wit, alleging the specific statutory or regulatory requirement alleged to have been violated—is necessary to comply with both Federal Rule of Criminal Procedure 7(c)(1) and the Fifth Amendment.

In defining the criminal offense of operating an unlicensed money transmitting business, § 1960(b)(1)(B) refers to and incorporates another statute, 31 U.S.C. § 5330. Title 31 U.S.C. § 5330 in turn refers to and incorporates yet another

1 Statute, 31 U.S.C. §5313, in its own definition of a money transmitting business, which,
2 in pertinent part, is a business “required to file reports under section 5313.” 31 U.S.C.
3 § 5330(d)(1)(B). Section 5313 generally pertains to requirements for a domestic
4 financial institution to file a report in a manner determined by the Secretary of the
5 Treasury when said domestic financial institution is involved in a transaction for the
6 payment, receipt or transfer of U.S. coins or currency (or other monetary instruments
7 the Secretary designates), in an amount determined by the Secretary. 31 U.S.C. §
8 5313(a). Regulations promulgated under both § 5330 and § 5313 are published in the
9 Federal Register and codified in the Code of Federal Regulations. As such, defendant is
10 confronted with a raft of requirements—both statutory and regulatory—that may or may
11 not form the basis for the charges in the indictment. If it is the government’s position
12 that defendant’s conduct violated one or more of the many regulations promulgated by
13 the Department of the Treasury to implement § 5330, then the government must
14 expressly so allege in the charging document.

15 The government did not so allege. Therefore, Counts 1 & 2 must be
16 dismissed. The charges in their current form are not concise or definite and utterly fail
17 to provide defendant with the required “essential facts constituting the offense.” Fed. R.
18 Crim. P. 7(c)(1). It is thus also impossible to ensure that defendant is prosecuted only on
19 the basis of facts presented to the grand jury, as required by the Fifth Amendment.
20 *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994).

21 Counts 1 & 2 must be dismissed for failing to state an offense and thus
22 failing to sufficiently apprise the defendant of what he must be prepared to meet at trial.
23 *Russell v. United States*, 369 U.S. 749, 763 (1962).

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

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1 Respectfully submitted: November 2, 2017.

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3 Federal Public Defender

4 s/Maria Teresa Weidner
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6 Asst. Federal Public Defender

7 Copy of the foregoing transmitted by ECF for filing November 2, 2017, to:

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