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18
19 IN THE UNITED STATES DISTRICT COURT
20 FOR THE DISTRICT OF ARIZONA

21 United States of America,
22
23 Plaintiff,

24 vs.

25 Thomas Mario Costanzo,
26
27 Defendant.

28 CR-17-00585-PHX-GMS

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE FROM THE
APRIL 20, 2017 SEARCH OF
COSTANZO'S RESIDENCE**

29 Now comes the United States of America, by and through its undersigned attorneys,
30 and responds to Defendant's motion seeking to suppress all evidence from the search of
31 Defendant's residence. Defendant's first argument in support of a *Franks* hearing is
32 without merit as Defendant fails to sufficiently demonstrate how any statements in the
33 Affidavit are intentionally or recklessly misleading, and material to a finding of probable
34 cause. Defendant's second argument insinuating the Search Warrant is overbroad and
35 invalid is completely undermined by the facts of the investigation, training and experience
36 of the Affiant, and the totality of the circumstance summarized in the Affidavit. Thus, the
37 United States request the Court deny Defendant's motion, as supported by the following
38 Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. Introduction

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A. Factual Background

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In March 2015, agents from the Internal Revenue Service (IRS) in Phoenix, Arizona began investigating an open source website called localbitcoins.com that facilitates the purchase and sale of Bitcoin by allowing exchangers to market their services. (*See* Ex. A, Affidavit, ¶ 27.) An individual named Morpheus Titania was listed as the top-rated Bitcoin exchanger in Phoenix at the time. (*Id.* at ¶ 28.) He created his online profile on March 12, 2013, where he advertised the sale of Bitcoin, provided his telephone number, and included statements such as “I will get you Bitcoins immediately and discretely!” and “All transactions are done complete anonymity. The only record of the transaction is the blockchain.” (*Id.* at ¶¶ 27-28.) IRS agent learned that Morpheus Titania was an alias and the telephone number listed on his profile was subscribed to Thomas Costanzo, the Defendant. (*Id.* at ¶ 29.)

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On March 20, 2015 an IRS undercover agent (hereinafter “UCA1”) met Defendant at a Starbucks after contacting him at the listed phone number on his profile. (*See* Ex. B, IRS Rpt. at 001.) This was the first undercover meeting with Defendant and it was audio recorded in its entirety. Some of the topics Defendant spoke about during the meeting included Bitcoin, his involvement with Bitcoin, and the anonymity associated with Bitcoin and Defendant’s transaction. UCA1 portrayed himself as an importer/exporter who needed to transport large amounts of currency without detection from the government. Near the end of the meeting, Defendant helped UCA1 download mycelium, a digital application to exchange Bitcoin that increases the anonymity. UCA1 then provided Defendant with \$2,000 of United States Currency (USC), including the transaction fee, in exchange for Bitcoin. Defendant also informed UCA1 about a Bitcoin meetup that was occurring the following day.

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On March 21, 2015, UCA1 attended the Bitcoin meetup and met Dr. Peter N. Steinmetz, a Bitcoin wholesaler who could do large transactions for a five percent fee. (*Id.*

1 at ¶ 31.) UCA1 sat at a table with Dr. Steinmetz and a few other individuals who were also
2 present for the Bitcoin meetup. (*Id.*) Defendant also arrived to the Bitcoin meetup with a
3 board to list the sale of Bitcoin by the organizations members to other members or attendees
4 of the meetup. (*Id.*) Defendant and Dr. Steinmetz spoke about at length about Bitcoin and
5 discussed their relationship, informing they met on localbitcoins.com a couple of years
6 prior. (*Id.*) UCA1 did not purchase any Bitcoin that day. The meetup was also audio
7 recorded in its entirety.

8 On May 20, 2015, UCA1 met with Defendant at a Starbucks and gave him \$3,000
9 worth of USC for Bitcoin. At this meeting, UCA1 informed Defendant that he needed the
10 Bitcoin to pay his supplier for heroin. (*Id.* at ¶ 32.)

11 On October 7, 2015, a second IRS undercover agent (hereinafter “UCA2”) who
12 portrayed himself as UCA1’s business partner met with Defendant at a Starbucks to
13 purchase Bitcoin related to the UC’s business. (*Id.* at ¶ 34.) UCA2 had prearranged to
14 exchange \$10,000 worth of USC with Defendant, but increased the amount to \$15,000
15 USC during the meeting. (*Id.*) Defendant only had enough Bitcoin to exchange \$13,000
16 USC but agreed to meet UCA2 later that day to exchange the rest. After the \$13,000
17 transaction was complete, surveillance units followed Defendant to Dr. Steinmetz’s
18 residence, where Defendant remained for ten to fifteen minutes, and subsequently traveled
19 to two public locations and conducted two Bitcoin transactions. (*Id.*)

20 On November 21, 2015, UCA1 contacted Defendant to arrange another exchange.
21 (*Id.* at ¶ 37.) Defendant invited UCA1 to another Bitcoin meetup. (*Id.*) Dr. Steinmetz was
22 present at the meetup. (*Id.*) UCA1 observed Dr. Steinmetz conduct a Bitcoin transaction
23 with an unknown individual. (*Id.*) UCA1 also provided Dr. Steinmetz \$2,000 USC in
24 exchange for Bitcoin. (*Id.*) Dr. Steinmetz transferred the Bitcoin and provided his business
25 card to UCA1, informing him to call to discuss a larger transaction. (*Id.*) During that
26 meeting, UCA1 also exchanged \$13,000 worth of USC for Bitcoin with Defendant. (*Id.*)

27 On February 29, 2016, UCA1 contacted Dr. Steinmetz on the phone number
28 provided on his business card and arranged a meeting at Dr. Steinmetz’s residence on

1 March 8, 2016, to conduct a \$22,000 to \$23,000 USC transaction. (*Id.* at ¶ 40.) On the
2 day of the transaction, UCA1 told Dr. Steinmetz that currency was proceeds from the sale
3 of drugs. Dr. Steinmetz terminated the transaction and referred UCA1 to a Bitcoin meetup
4 event occurring that evening where someone might be available to conduct the transaction.
5 (*Id.* at ¶ 41.)

6 In March 2016, Phoenix investigators from the Drug Enforcement Administration
7 (DEA), United States Postal Inspectors Service (USPIS), the Department of Homeland
8 Security (DHS), and the IRS, created a taskforce to investigate the money laundering and
9 drug trafficking activities of individuals using the Darknet. (*Id.* at ¶ 42.) Because of what
10 the task force was learning from their investigations, they expanded the scope of their
11 investigations to include the money laundering and unlicensed money transmission
12 business by Bitcoin exchangers, including Defendant and Dr. Steinmetz. (*Id.* at 43.) DEA
13 TFO Chad Martin, the Affiant of the Search Warrant Affidavit, and IRS agents involved
14 in the initial investigation of Defendant and Dr. Steinmetz were members of the task force.
15 (*Id.*)

16 From September 2016 to April 2017, TFO Martin, acting in an undercover capacity,
17 interacted with Defendant over the phone and in person on multiple occasions. Defendant
18 conducted four Bitcoin transactions with TFO Martin, exchanging approximately \$151,000
19 worth of USC, which included Defendant's exchange fee. All of the in person meetings
20 were audio recorded. Text messages were also preserved. Investigators
21 contemporaneously conducted surveillance on Defendant.

22 On September 14, 2016, TFO Martin met with Defendant who spoke about Bitcoin
23 and anonymity. (*Id.* at ¶ 51.) TFO Martin informed Defendant that he needed to transport
24 money between Arizona and California without getting it seized if stopped by law
25 enforcement. (*Id.*) They then conducted a \$2,000 transaction.

26 On November 16, 2016, TFO Martin met with Defendant who exchanged \$12,000
27 worth of USC for Bitcoin. (*Id.* at ¶ 53.)
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1 On February 2, 2017, TFO Martin met with Defendant who exchanged \$30,000
2 worth of USC for Bitcoin. (*Id.* at ¶ 61.) TFO Martin stated was planning to do a \$100,000
3 transaction in the future. Defendant informed he had a “banker” who loans him large
4 amounts of currency for larger transactions. TFO Martin told Defendant the cash was
5 proceeds from cocaine sales. Defendant put his finger over his lips and said “shhh I don’t
6 want to know that,” and then completed the transaction and still planned for the \$100,000
7 deal. (*Id.*) Defendant told TFO Martin to download a secure messaging application on his
8 telephone called “Telegram” to communicate in the future. (*Id.*)

9 On April 10, 2017, TFO Martin met with Defendant and Dr. Steinmetz to discuss
10 the details of the \$100,000 Bitcoin purchase, arranged for April 20, 2017. (*Id.* at 70.) Dr.
11 Steinmetz introduced himself as “Amideo.” (*Id.*) During the meeting, they told TFO
12 Martin they had been doing business together since 2013. TFO Martin informed he needed
13 to purchase large amounts of Bitcoin to transport across state line in order to avoid having
14 to explain the origin of the money if stopped by the police. (*Id.* at ¶ 72.) Dr. Steinmetz
15 advised he could conduct such a deal but wanted it to be legal. (*Id.* at ¶ 73.) Dr. Steinmetz
16 stated that he does not file any paperwork, complete government documentation or disclose
17 personal information about the transaction unless required by a court subpoena. (*Id.*)

18 On April 19, 2017, United States Magistrate Judge David K. Duncan signed Search
19 Warrant No. 17-6318 MB, authorizing the search of Defendant’s residence and electronic
20 devices located during the execution of the search warrant.

21 On April 20, 2017, TFO Martin met with Defendant and provided him \$107,000
22 USC in exchange for Bitcoin. Dr. Steinmetz did not appear to the meeting. Dr. Steinmetz
23 did not show up the transaction ten days later. Defendant informed Dr. Steinmetz was out
24 of town. TFO Martin informed Defendant that the \$107,000 he was exchanging was from
25 drug dealers. Defendant conducted the transaction and was arrested shortly thereafter.
26 Law enforcement officers then executed the Search Warrant at Defendant’s residence.

27 **B. Search Warrant**

28 Search Warrant No. 17-6318 MB, signed by United States Magistrate Judge David

1 K. Duncan, authorizing the search of Defendant's residence and electronic devices located
2 therein, included the 37-page Affidavit of DEA TFO Chad Martin. The Affidavit was
3 common to the Applications for Search Warrants for Dr. Steinmetz's residence and vehicle.

4 In pages 1 through 5 of the Affidavit for the Search Warrant, TFO Martin lists his
5 background. In paragraphs 7, 8, 11, and 16, TFO Martin documents his experience
6 investigating financial crimes. In paragraphs 20 through 26, TFO Martin provides a
7 detailed background on Bitcoin. In pages 8 through 29, TFO Martin provided a detailed
8 summary of the entire investigation from March 2015 to April 2017. In pages 29 through
9 35, TFO Martin explained the necessity for analysis of electronic devices.

10 **II. Law and Argument**

11 Defendant now makes an application to the Court for suppression of all evidence
12 seized during the execution of the search warrant claiming TFO Martin's Affidavit
13 included recklessly misleading statements material to the finding of probable cause. (*See*
14 *Doc. 65.*) Defendant also argues that the Search Warrant Application is impermissibly
15 overbroad and this invalid. (*Id.*) Both claims are without merit.

16 The decision of the Magistrate Judge in authorizing the search warrant should be
17 considered with great deference, and the relevant inquiry is whether the magistrate judge
18 had sufficient basis for finding probable cause. *See United States v. Meek*, 366 F.3d 705,
19 712 (9th Cir. 2004). A magistrate judge's decision to authorize a search warrant is to be
20 subjected to a narrow standard of review. *United States v. Stanert*, 762 F.2d775 (1985).

21 **A. Defendant has failed to demonstrate that TFO Martin's statements are** 22 **intentionally or recklessly misleading.**

23 To challenge the veracity of an affidavit in support of a search warrant, a defendant
24 must make a substantial preliminary showing that (1) the affidavit contains intentionally or
25 recklessly false statements or misleading omissions, and (2) the allegedly false statement
26 or omission is necessary to the finding of probable cause. *United States v. Reeves*, 210
27 F.3d 1041, 1044 (9th Cir. 2000), *citing Franks v. Delaware*, 438 U.S. 154 (1978). If a
28 defendant satisfies both prongs, he or she is entitled to an evidentiary hearing. *Franks*, 438

1 U.S. at 172. On the other hand, a defendant's substantial preliminary showing of
2 recklessness or deliberate falsity is of no consequence and requires no hearing "when
3 material that is the subject of the alleged falsity or reckless disregard is set to one side [and]
4 there remains sufficient content in the warrant affidavit to support a finding of probable
5 cause." *Id.*

6 In making a determination, "there is a presumption of validity with respect to the
7 affidavit supporting the search warrant." *Franks*, 438 U.S. at 164. "The Warrant Clause
8 of the Fourth Amendment takes [an] affiant's good faith as its premise." . *Stanert*, 762
9 F.2d at 781. It is assumed the facts listed in the affidavit are truthful. *Franks* 438 U.S. at
10 165 ("[A truthful showing] does not mean that every fact recited in the warrant affidavit is
11 necessarily correct, for probable cause may be founded upon hearsay and upon information
12 received from informants, as well as upon information within the affiant's own knowledge
13 that sometimes must be garnered hastily. But surely it is to be truthful in the sense that the
14 information put forth is believed or appropriately accepted by the affiant as true.") (internal
15 quotations omitted). A defendant's "attack must be more than conclusory and must be
16 supported by more than a mere desire to cross-examine." *Franks*, 438 U.S. at 172, 98 S.Ct.
17 at 2685. "Allegations of negligence or innocent mistake are insufficient." *Id.*

18 Here, Defendant lists twelve statements he claims are intentionally false or
19 recklessly misleading statements that are necessary for a finding of probable cause, and
20 material to a finding of probable cause. Defendant's attacks are all conclusory. Defendant
21 simply states they are false or misleading without demonstrating what is false or misleading
22 about them. Contrary to Defendant's claims, the twelve statements by TFO Martin are
23 founded upon reliable hearsay, information learned from TFO Martin's training,
24 experience and personal involvement in this investigation, and are statements appropriately
25 accepted by TFO Martin as true.

26 The Affidavit contained one inadvertent error, whereby the localbitcoins.com
27 profile listed for the initial IRS investigation was the listed profile when TFO Martin
28 contacted Defendant in 2016 instead of the one accessed by the IRS agents earlier in 2015

1 towards the beginning of the investigation. The incorrect use of Defendant's updated
2 profile was a *de minimis* error of no significance to the question of the sufficiency of the
3 application for the warrant, as they both contained very similar information: same name,
4 same phone number, same feedback score and website. (*See* Ex. C, 2014 Profile, pgs. 1-
5 3.) It is impossible to articulate any way in which the use of a more current profile affected
6 the application. The Affidavit did not contain intentionally false or misleading statements,
7 nor did it contain statements made with a reckless disregard for the truth.

8 **Challenged Statement #1:** In paragraph 31, TFO Martin states, "STEINMETZ
9 also spoke about structuring cash deposits at banks by breaking the large deposits up into
10 smaller amounts." Defendant erroneously argues this statement is misleading because it
11 falsely suggests Dr. Steinmetz was discussing how to structure deposits to avoid a
12 regulation. (*See* Doc. 65 at pg. 7.) Defendant takes TFO Martin's statement out of context
13 and fails to provide background for Dr. Steinmetz's statement about structuring.

14 On March 21, 2015, Dr. Steinmetz was present at a Bitcoin meetup where he
15 discussed Bitcoin with many individuals, including UCA1. Paragraph 31 is TFO Martin's
16 chronological summary of Dr. Steinmetz's conversation during the meetup. Paragraph 31
17 contains fifteen sentences; the challenged statement is number nine. The statements
18 preceding the challenged statement, inform that Dr. Steinmetz spoke about getting involved
19 with Bitcoin for political reasons, his attractions to lack of government manipulation,
20 Suspicious Activity Reports (SARs), and Dr. Steinmetz's belief that large transactions have
21 generated SARs on him. Next followed the challenged statements, followed by other
22 Bitcoin related topics and mention of his business with Defendant. TFO Martin provided
23 no direct quotes by Dr. Steinmetz. There are also no statements stating TFO Martin
24 believed Dr. Steinmetz was instructing individuals on how to structure. Structuring is not
25 one of the violations listed in the Affidavit. Thus, this is not a recklessly misleading
26 statement.

27 **Challenged Statement #2:** In paragraph 49, TFO Martin states, "COSTANZO
28 advised that Bitcoin is pseudonymous and that there are ways to make it difficult to track."

1 Defendant argues that this statement is misleading because it characterizes Defendant “as
2 a primer on concealing money transactions through Bitcoin.” (Doc. 65 at pg. 8.)
3 Defendant fails to point out how the next statement in paragraph 49 by TFO Martin, which
4 states, “COSTANZO also advised that localbitcoins.com is a good way to conceal money
5 transactions.” (Ex. A at pg. 17, ¶ 49.) Additionally, in Defendant’s Exhibit E, an excerpt
6 of the transcript from the September 14, 2016 meeting between TFO Martin and Defendant,
7 Defendant is captured discussing multiple applications aimed at providing higher
8 anonymity and explains them to TFO Martin in simple terms. It is not disputed that
9 Defendant was well versed in Bitcoin, and willing to teach and talk about it. (See Ex. A at
10 ¶ 27.) Defendant’s own statements and advertisements negate his claim that TFO Martin’s
11 statement is misleading.

12 **Challenged Statement #3:** In paragraph 50, TFO Martin states, “Your Affiant
13 spoke to COSTANZO about his use of the Darknet and told COSTANZO that he was
14 looking to purchase items on the Darknet and use Bitcoin as payment method because it is
15 secure. COSTANZO advised that the issue with trusting sites on the Darknet is that
16 websites can be taken down.” Defendant argues this statement is misleading because it
17 suggests Defendant was involved in the Darknet. As noted in Defendant’s Exhibit E at
18 Bates 634, when TFO Martin asked Defendant if he knew much about the Darknet,
19 Defendant responded, “Um, I haven’t really experimented too much.” The government
20 submits that actually indicated Defendant has at least some experience. Defendant then
21 goes on to offer that the problem with Darknet websites is that they can be taken down.
22 Regardless of how he may have learned of the information, Defendant made the statement,
23 and TFO Martin included it in the Affidavit in efforts to provide a comprehensive account.
24 Additionally, Defendant fails to demonstrate how the statement is reckless. As Defendant
25 suggests he obtained knowledge of the Darknet from open source media articles, on that
26 same token, Defendant could similarly learn that the Darknet, although not common, could
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1 be used lawfully. As such, this statement is not recklessly misleading.¹

2 **Challenged Statement #4:** In paragraph 53, TFO Martin stated, “COSTANZO
3 explained to your Affiant that anytime someone withdrawals [sic] more than \$3,000 at a
4 time, the bank will complete a SAR for the government to document the transaction. These
5 statements lead your Affiant to believe that Costanzo is aware of United States money
6 laundering laws and currency reporting regulations and is knowingly using Bitcoin to
7 circumvent the law and launder the proceeds from illegal activity.” Defendant argues these
8 statements are misleading because they fail to note Defendant’s ignorance. Defendant only
9 provided one of the statements in paragraph 53 upon which TFO Martin derived his beliefs.
10 Defendant failed to include the preceding statement “COSTANZO stated that the guy had
11 to go around to several different banks and withdraw a few thousand dollars at a time to
12 avoid getting a suspicious activity report (SAR) generated on him.” (Ex. A at pg. 19, ¶
13 49.) TFO Martin’s belief statement is based on the totality of all Defendant’s statements.,
14 *See Franks*, 438 U.S. at 171 (it is the Affiant’s statements that are subject to review, not a
15 defendants). As such, Defendant fails at demonstrating how the challenged statement is
16 recklessly misleading.

17 **Challenged Statement #5:** In paragraph 54, TFO Martin states, “COSTANZO
18 stated this is because the customer gets cash from “his girls” because he is a “pimp.”
19 Defendant argues this statement is misleading because it states that Defendant’s client was
20 a pimp and it suggests that TFO Martin assumed the girls were prostitutes. Although
21 neither the transcript nor the audible segments of the audio clearly reflect Costanzo’s
22 statement that he was exchanging money for “a pimp,” TFO Martin would testify that he
23 heard Costanzo state “. . . he gets em from his girls pimpin’ or whatever” during an
24 inaudible portion of the audio. Moreover, the description is not misleading. TFO Martin

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26 ¹ As further proof that the government did not intend to create any false impressions
27 about the Dark Net in this case, the Court may consider the superseding testimony in the
28 grand jury, in which the testifying agent confirmed that there were no allegations in the
instant case that Costanzo or Steinmetz sold anything on the dark net. (6/20/17 Test. of
IRS agent, at 22, attached as Exhibit 2 to the Motion to Seal.)

1 never provided any indication or conclusion in the Affidavit insinuating the “girls” were
2 prostitutes despite Defendant informing TFO Martin, “you can do whatever you want, you
3 can do something illegal, I don’t want to know about it.” Even if TFO Martin misheard
4 the pimp reference, substantial probable cause exists in the absence of paragraph 54.

5 **Challenged Statement #6:** Defendant claims that TFO Martin’s recitation of his
6 extensive training and narcotics investigations is misleading because it misdirects the
7 magistrate judge from the focus of this investigation, leading the magistrate to believe it
8 was a narcotics investigations, creating a false sense of urgency for the approval of the
9 warrant.² An affiant’s training, experience, and background is commonplace in an affidavit
10 in support for a search warrant. *See United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir.1995).
11 TFO Martin was not reckless. He included his experience with finical investigations,
12 Bitcoins, and also informed that the initial investigation was conducted by the IRS.

13 **Challenged Statement #7:** In paragraph 23, TFO Martin discusses “specific
14 guidelines and regulations pertaining to persons who administer or exchange virtual
15 currencies such as Bitcoin.” Defendant fails to demonstrate how this is recklessly
16 misleading, and he fails to support his conclusion that interpretive guidance from the
17 Financial Crimes Enforcement Network of the Treasury Department (“FinCEN”) lacks
18 persuasive authority in a criminal prosecution. TFO Martin was just providing additional
19 background and context for the investigation.

20 **Challenged Statement #8:** In paragraph 25, TFO Martin states that “peer-to-peer
21 Bitcoin transactions conducted with non-registered exchangers [are] typically undertaken
22 to avoid reporting requirements under State or Federal law.” Again, Defendant fails to
23 demonstrate how this is recklessly misleading. TFO Martin arrived at this conclusion from
24 his own involvement in the investigation in an undercover capacity. He carefully qualifies

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28 ² Substantial contextual evidence also strongly suggests that the Magistrate Judge was not in fact confused or misdirected, in the form of the interdelineations the Magistrate Judge made to Attachment B while carefully reviewing the warrant package. (*See* dkt. # 65-1 at 43-46.)

1 his conclusion to avoid misleading that all such transactions are to avoid reporting
2 requirements.

3 **Challenged Statement #9:** In paragraph 42, TFO Martin states that a Joint Task
4 Force was investigating money laundering and drug trafficking activities on the Darknet.
5 Defendant claims the statement is misleading because it implies that COSTANZO and
6 STEINMETZ were so involved. Defendant fails to include how TFO Martin then stated
7 that the Task Force expanded their investigations to include money laundering and
8 unlicensed money transmission businesses by Bitcoin exchangers, like Costanzo and
9 Steinmetz. As such, Defendant fails to demonstrate how TFO's statement is misleading
10 considering the subsequent statements alleviated of any confusion.

11 **Challenged Statement #10:** Defendant argues that TFO Martin's conclusion that
12 "COSTANZO and STEINMETZ...are knowingly operating an unlicensed money
13 transmission business and laundering proceeds from the illegal activities including drug
14 trafficking by exchanging U.S. Currency/cash for Bitcoin" is recklessly misleading. TFO
15 Martin reached this conclusion after two years of an investigation, which he was directly
16 involved in over a year, had personal interaction with Defendant and Dr. Steinmetz, and
17 became educated on everything that occurred prior to his involvement.

18 **Challenged Statement #11:** Defendant argues that TFO Martin's discussion in
19 paragraph 83 of The Onion Router (TOR) and the Darknet in addressing the need to analyze
20 any electronic devices in the course of the search is misleading. Defendant fails to inform
21 the Court how during the March 21, 2015 Bitcoin meeting recorded by UCA1, Dr.
22 Steinmetz informed in response to an inquiry about enhancing anonymity with Bitcoin that
23 the Darknet was an option. Additionally, Defendant seemed to have some minimal
24 experience with the Darknet, whose attractive feature is anonymity. (See dkt. # 65-1, Ex.
25 F at 643.) Anonymity is a feature strongly emphasized by Defendant in regards to Bitcoin
26 exchanges; as demonstrated above, Defendant informs about multiple ways to enhance
27 anonymity. And lastly, TFO Martin is aware from his training and experience that TOR
28 and Darknet are anonymous and deal with Bitcoin. Thus, TFO Martin's statements are not

1 recklessly misleading.

2 **Challenged Statement #12:** Defendant claims TFO Martin’s assertion that there
3 is “probable cause to believe there have been violations of federal law” as related to
4 operation of an unlicensed money transmitting business, conspiracy to do the same, and
5 money laundering under the “sting” provision is misleading because the Search Warrant
6 Application included a violation of 21 U.S.C. 846, conspiracy to distribute controlled
7 substances. The underlying specified unlawful activity for the money laundering charges
8 are narcotics offenses.³ As noted in the Affidavit, undercover agents informed Defendant
9 on multiple separate occasions that the cash they were exchanging for Bitcoin derived from
10 the sale of drug proceeds. Defendant understood and after learning of those facts, not only
11 completed the transaction at hand with the particular UC, but also continued to do business
12 with each UC in the future. TFO Martin was one those UC, and his assertion is based on
13 his personal involvement in the investigation in addition to his training and experience.
14 Defendant fails to sufficiently demonstration hos TFO Martin’s statement is recklessly
15 misleading.

16 Thus, the government submits that Defendant has not made the threshold showing
17 to warrant a *Franks* evidentiary hearing because even if the above statements are omitted
18 from the affidavit, would not have negated a substantial basis for concluding that there was
19 probable cause to believe that evidence money laundering, unlicensed money transmitting
20 and conspiracy to distribute narcotics would be found on the premises to be searched.
21 Given this conclusion, there are also no grounds to support an inference that the statements

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23 ³ Defendant’s argument seems a bit intentionally vague. There is no reference to a
24 substantive controlled substance violation in either the warrant face sheet or the application
25 cover page. Rather, the only reference to Title 21 is in the Attachment B identifying items
26 to be seized. Given that the sting’s SUA was drugs, the Magistrate Judge’s conclusion that
27 the warrant scope includes drugs seems inherently reasonable. Moreover, the conjecture
28 that but for the search for drugs the agents would never have looked in other places that
they looked is specious. Documents and thumb drives and other slips of paper on which
wallet information may be identified can be found in the same places one hides drugs or
other contraband.

1 were intentional or made with reckless disregard for the truth.

2 **A. There was a “fair probability” evidence of conspiracy to distribute a controlled**
3 **substance would be found in Defendant’s residence.**

4 Probable cause means a “fair probability” that contraband or evidence is located in
5 a particular place. *Illinois v. Gates* 462 U.S. 213, 246 (1983). The determination of fair
6 probability depends upon the totality of the circumstances, including reasonable inferences,
7 and is a “commonsense, practical question.” *United States v. Gourde*, 440 F.3d 1065, 1069
8 (9th Cir. 2006) (citing and quoting *Gates*, 462 U.S. at 230). “Neither certainty nor a
9 preponderance of the evidence is required.” *Id.* (citing *Gates*, 462 U.S. at 246). Under the
10 totality of the circumstances test, otherwise innocent behavior may be indicative of
11 criminality when viewed in context. *See United States v. Ocampo*, 937 F.2d 485, 490 (9th
12 Cir.1991). Additionally, magistrate judges may rely on the training and experience of
13 affiant police officers. *Gil*, 58 F.3d at 1418 (9th Cir.1995).

14 Defendant erroneously argues the Search Warrant is overbroad because there was
15 not probable cause to support either a violation of 21 U.S.C. § 846, conspiracy to distribute
16 a controlled substance, or the existence of drug evidence at the warrant site, as identified
17 in Attachment B. The Affidavit demonstrates that throughout the entire investigation, from
18 March 2015 to April 2017, multiple undercover agents informed Defendant that their need
19 for Bitcoin was to facilitate the transfer of drug proceeds. (*See* Ex. A ¶¶ 32, 33, 34, 51,
20 63.) The drugs mentioned by investigators included heroin and cocaine. (*Id.*) This
21 information never deterred Defendant from engaging in transactions with the undercover
22 agents. To the contrary, Defendant continued to engage in exchanges. In February 2, 2017,
23 during a \$30,000 exchange represented to be from the sale of cocaine, TFO Martin
24 informed Defendant the he would need to do a \$100,000 exchange in the near future, if he
25 sold additional kilograms of cocaine. (*Id.* at ¶64.) Rather than refuse, Defendant agreed
26 and additionally instructed TFO Martin to download, “Telegram,” a cellular device
27 application that provided secure messaging because it “keeps the numbers off a server.”
28 (*Id.*) TFO Martin followed Defendant’s instructions, and via Telegram, arranged from the

1 \$107,000 transaction, which occurred on April 20, 2017. It is important to note that TFO
2 Martin's statements to Defendant were conditioned on the future sale of cocaine.
3 Defendant arguably aided to the success of that sale but providing the encrypted messaging
4 system and obtaining the digital currency to further such activity. Based on this, coupled
5 with TFO Martin's training and experience of drug trafficking, which includes drug
6 trafficking on the internet, it is "fairly probable" Defendant was conspiring to distribute
7 drugs. However, even if the Court agrees with Defendant, the result is the same based on
8 the probable cause Defendant was involved in money laundering and operating an
9 unlicensed money transmission business.

10 **III. Conclusion**

11 Consistent with the standards expressed in *Franks v. Delaware*, 98 S.Ct. 2674
12 (1978), the information contained in the Affidavit was acquired and believed and accepted
13 as true and accurate by TFO Martin. All the challenged assertions made in the Affidavit
14 were based upon sufficient particular facts and circumstances which were set forth in the
15 Affidavit. The facts as outlined above completely rebut defendant's assertion that the
16 Affidavit contains false statements or reflects a reckless disregard for the truth of those
17 statements. Even if the Court disagrees, Defendant's request for an evidentiary should
18 nonetheless be denied because there is still sufficient content to make a probable cause
19 determination that the Defendant was involved in criminal activity, which included
20 conspiracy to distribute drugs.

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