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13 IN THE UNITED STATES DISTRICT COURT  
14 DISTRICT OF ARIZONA

15 United States of America,  
16  
17 Plaintiff,  
18  
19 vs.  
20  
21 Thomas Mario Costanzo,  
22  
23 Defendant.

No. CR-17-585-PHX-GMS

**MEMORANDUM**  
**RE: SUFFICIENCY OF EVIDENCE**  
**& THEORIES OF LIABILITY AS**  
**TO GOVERNMENT'S CHARGE**  
**THAT DEFENDANT VIOLATED**  
**18 U.S.C. § 1956(a)(3)(C)**

24 Thomas Mario Costanzo, through undersigned counsel, submits the  
25 attached Memorandum regarding the Court's request for the parties to prepare  
26 responses as to following issues:

- 27 1. Sufficiency of the evidence presented in the government's case-in-chief as  
28 to § 1956(a)(3)(C) charges filed against Mr. Costanzo; and
2. Whether Mr. Costanzo can be convicted under § 1956(a)(3)(C), as charged  
in the present indictment, on an aiding and abetting theory.

MEMORANDUM

**I. SUFFICIENCY OF THE EVIDENCE PRESENTED BY THE GOVERNMENT IN ITS CASE-IN-CHIEF AS TO THE CHARGES UNDER 18 U.S.C. § 1956(a)(3)(C).**

The government announced, in its Response to Mr. Costanzo's Motion for a Bill of Particulars, the regulatory bases under which it intended to proceed at trial with respect to the § 1956(a)(3)(C) charges.

Some of the regulations selected by the government are applicable to financial institutions, generally, *see* 31 C.F.R. §§ 1010.310, Reports of transactions in currency; 1010.311, Filing obligations for reports of transactions in currency; 1010.312, Identification required; 1010.320, Reports of suspicious transactions; 1010.410, Records to be made and retained by financial institutions. The government also selected entire chapters of regulations specific to two particular kinds of financial institutions: banks, *see* 31 C.F.R. § 1020, Rules for Banks, and casinos, *see* 31 C.F.R. § 1021, Rules for Casinos and Card Clubs.

The government offered no evidence that would allow a rational jury to conclude that Mr. Costanzo is a financial institution as a matter of law. Certainly nothing was offered to support the conclusion that he is either a bank or casino (or card club).

The defense understands that individuals who do not qualify as financial institutions, and are engaged in a trade or business, are subject to reporting requirements should they receive in excess of \$10,000, *see* 31 C.F.R. § 1010.330. The government did not choose to rely on this regulation. *See* Dkt. # 117, 139.

The government suggests an interesting theory of derivative liability: that by opting not to conduct what would otherwise be reportable financial transactions with a bank, one thereby prevents the hypothetical bank that would

1 otherwise be subject to reporting requirements from filing the appropriate report  
2 for a transaction that was never presented to it.

3 While no case was identified by undersigned counsel where the  
4 government had proceeded on such an attenuated theory of derivative liability, in  
5 the Ninth Circuit, *United States v. Hayes*, is instructive in that it compiles a series  
6 of currency transaction reporting cases, notable that each involved defendants—  
7 through subterfuge or structuring—having interfered with an actual bank’s duty  
8 to report in transactions presented to said bank. 827 F.2d 469, 471-472 (9th Cir.  
9 1987).

10 In this case, no bank or other financial institution was involved. Therefore,  
11 the transaction reporting requirements applicable to financial institutions on  
12 which the government has bound itself to rely are simply inapplicable. The  
13 defense Rule 29 motion as to each charge filed under § 1956(a)(3)(C) should be  
14 sustained.

15 **II. AIDING AND ABETTING LIABILITY UNDER 18 U.S.C. §**  
16 **1956(a)(3)(C) IS NOT AVAILABLE AS A MATTER OF LAW.**

17  
18 In argument regarding the Fed. R. Crim. P. 29 motion made by the defense  
19 at the close of the government’s case in chief, the government suggested that  
20 liability could attach to Mr. Costanzo for violation of § 1956(a)(3)(C) on a theory  
21 of aiding and abetting. Specifically, the government argued that undercover  
22 agents expressed their desire to avoid government reporting and Mr. Costanzo’s  
23 assertion that reporting is not required in bitcoin transactions amount to aiding  
24 and abetting the undercover agents in one prong of their ruse: the avoidance of  
25 reporting requirements.  
26  
27  
28

1           **A. Aiding and abetting liability under § 1956(a)(2)(C) is not available**  
2           **to the prosecution based on the language of the statute**

3           Title 18 U.S.C. § 1956(a)(3), criminalizes, in pertinent part, “conduct[ing]  
4           or attempt[ing] to conduct a financial transaction...” The substantive money  
5           laundering statute covers attempts to violate the statute, but does not cover  
6           aiding and abetting. *See United States v. Jayavarman*, 871 F.3d 1050, 1056, note  
7           1 (9th Cir. 2017)(vacating conviction for attempting to aid and abet criminal  
8           conduct, where the substantive statute—18 U.S.C. § 2423(b)—does not cover  
9           attempted aiding and abetting); *see also United States v. Kuok*, 671 F.3d 931,  
10          941–42 (9th Cir. 2012)(vacating conviction for attempting to cause the  
11          commission of a federal crime where the substantive statute did not contain a  
12          causation provision and the general causation statute did not contain an attempt  
13          provision; holding: “[a] defendant...can only be found guilty of an attempt to  
14          commit a federal offense if the statute defining the offense also expressly  
15          proscribes an attempt.”).

16           **B. Inclusion of aiding and abetting liability is a constructive**  
17           **amendment and/or fatal variance to and from the present**  
18           **indictment.**

19          The first murmur from the government as to aiding and abetting liability  
20          under § 1956(a)(3)(C) in this case was after the close of its case-in-chief, in  
21          argument attempting to address this Court’s concerns regarding the Rule 29  
22          motion made by the defense. Such a theory is outside the bounds of the statute—  
23          as discussed above—and it is also alien to the allegations in the indictment.

24          Inclusion of this questionable theory of liability in either this Court’s  
25          consideration of the Rule 29 motion or instructions to the jury, would constitute a  
26          fatal variance or constructive amendment of the indictment, given its silence on  
27          such a theory, which would have been challenged and litigated in pretrial motions  
28

1 had it been asserted. *See, e.g., United States v. Ward*, 747 F.3d 1184, 1189-93 (9th  
2 Cir. 2014)

3 1. A variance involves a divergence between the allegations set forth in  
4 the indictment and the proof offered at trial. Where this divergence acts to prejudice  
5 the defendant's rights, the conviction must be reversed. *Id., see also United States*  
6 *v. Tsinhnahjinnie*, 112 F.3d 988, 989 (9th Cir.1997).

7 2. A constructive amendment occurs when the charging terms of the  
8 indictment are altered, either literally or in effect, by the prosecutor or a court after  
9 the grand jury has last passed upon them. *Id.; see also Stirone v. United States*, 361  
10 U.S. 212 at 586 (1960) (quoting *Ex parte Bain*, 121 U.S. 1, 10 (1887) (overruled  
11 on other grounds) “If it lies within the province of a court to change the charging  
12 part of an indictment to suit its own notions of what it ought to have been, or what  
13 the grand jury would probably have made it if their attention had been called to  
14 suggested changes, the great importance which the common law attaches to an  
15 indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and  
16 without which the constitution says ‘no person shall be held to answer,’ may be  
17 frittered away until its value is almost destroyed.”).

18  
19 For the above stated reasons, the government must not be permitted to  
20 advance or rely upon an aiding and abetting theory of liability with respect to any  
21 of the substantive money laundering charges in this case.

22 Respectfully submitted: March 12, 2018.

23 JON M. SANDS  
24 Federal Public Defender

25 *s/Maria Teresa Weidner*  
26 MARIA TERESA WEIDNER  
27 Asst. Federal Public Defender  
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1 Copy of the foregoing transmitted by ECF for filing March 27, 2018, to:

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