

1 ELIZABETH A. STRANGE  
2 First Assistant United States Attorney  
3 District of Arizona

4 MATTHEW BINFORD  
5 Arizona State Bar No. 029019  
6 Matthew.Binford@usdoj.gov  
7 CAROLINA ESCALANTE  
8 Arizona State Bar No. 026233  
9 Fernanda.Escalante.Konti@usdoj.gov

10 GARY M. RESTAINO  
11 Arizona State Bar No. 017450  
12 Gary.Restaino@usdoj.gov  
13 Assistant U.S. Attorneys  
14 40 N. Central Ave., Suite 1800  
15 Phoenix, Arizona 85004  
16 Telephone: 602-514-7500

17 *Attorneys for Plaintiff*

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

20 United States of America,  
21  
22 Plaintiff,  
23  
24 v.  
25 Thomas Mario Costanzo,  
26  
27 Defendant.

28 CR-17-00585-PHX-GMS

**UNITED STATES' MEMORANDUM RE:  
SUFFICIENCY AS TO THE  
AVOIDANCE PRONG**

29 The Court denied the Rule 29 motion this afternoon as to the concealment prong of  
30 the money laundering sting provision. The government submits this memorandum in  
31 regard to the sufficiency of the evidence as to defendant's intent to avoid a transaction  
32 reporting requirement, as a second, disjunctive way to establish a violation of the money  
33 laundering sting.

34 A. The Nature of the Charge

35 As supplemented by the Response to the Motion for a Bill of Particulars (dkt. #  
36 117), the government's theory of this case is and has been that defendant intended to avoid  
37 a transaction reporting requirement "that any financial institution abiding by "know your  
38 customer" guidelines would have been obligated to undertake." *Id.* at 1. The proof  
articulated in the Response included "defendant's efforts to use his bitcoin transmittal

1 platform to avoid reporting requirements” and further identified specific instances in which  
2 bitcoin exchanges kept transactions under wraps to avoid banks and bank reporting  
3 requirements. *Id.* at 2-11. This is consistent with the statutory language, to wit: the intent  
4 to avoid “a” transaction reporting requirement, not “the defendant’s own” requirement.<sup>1</sup>

5 Whether this ongoing theory is viable is of course for the Court to decide. As a  
6 threshold matter, this is not an aiding and abetting theory; defendant is charged directly  
7 with engaging in a financial transaction with what he thought was dirty drug money, while  
8 intending to avoid reporting requirements. His intent is at issue, not his obligations. That  
9 defendant tried to guide the agents, or educate them, about the secrecy benefits of bitcoin  
10 does not convert this theory into aiding and abetting liability.

11 There simply are no cases yet involving peer-to-peer virtual currency exchanges on  
12 the reporting requirement prong of the sting provision. *United States v. Nelson*, 66 F.3d  
13 1036, 1041 (9th Cir. 1995) gets us part of the way there. The court in *Nelson*, before  
14 reversing on other grounds, construed the avoidance prong broadly, by holding that the  
15 intent to avoid a reporting requirement may be established not just by taking in more than  
16 \$10,000 and not reporting it, but also by breaking it up into smaller transactions.

17 Two out-of-circuit cases under 18 U.S.C. § 1956(a) support criminal liability for  
18 avoiding reporting requirements even when the defendant himself does not have such a  
19 requirement. *E.g.*, *United States v. Bowman*, 235 F.3d 1113, 1117-18 (8th Cir. 2000)  
20 (holding, in a case under 18 U.S.C. § 1956(a)(1)(B)(ii), that a defendant intended to avoid  
21 bank reporting requirements when exchanging cashier’s checks for vehicles). Ultimately  
22 the Court in *Bowman* held that the defendant lacked the knowledge of the requirements  
23 (which is not an issue here) but its analysis is informative:

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<sup>1</sup> The *in limine* response on the Dark Net contains similar representations. (Dkt. # 139). “That means, in order to find Costanzo guilty at trial, the jury does not have to find a violation of a specific regulation – it simply has to find that Costanzo attempted to work around those regulatory concepts.” *Id.* at 2.

1 Mr. Bowman's argument in regard to these two counts is not altogether clear  
2 to us, but apparently consists of the assertion that it was either the seller of  
3 the vehicle, the bank that drew the cashier's checks, or possibly the friend,  
4 who had the obligation under federal law to report any relevant financial  
5 transactions—presumably, in this case, the exchange of \$23,500 for the  
6 vehicle and the execution of the cashier's checks in amounts of \$6,000 or  
7 less. This argument misses the point by a long shot. What the money  
8 laundering statute prohibits is not the failure to report a certain type of  
9 transaction, see, e.g., 26 U.S.C. § 6050I(a), 31 U.S.C. § 5311, § 5313(a), but  
10 the purposeful structuring of such a transaction so as to make it appear that  
11 no reporting requirement is applicable.

12 *Id.* at 1118.

13 *United States v. Florez*, 516 Fed. Appx. 777, 785 (11th Cir. 2013) also supports the  
14 government's position. In that sting case, undercover agents provided cash represented to  
15 be from drug proceeds to the defendant for a vehicle purchase. "Thus, whether or not EZ  
16 Pay Auto had to file a CTR was largely irrelevant. The evidence demonstrating Gabriel  
17 intended to structure the deposits of the drug proceeds in both transactions is sufficient to  
18 show he intended to avoid a transaction reporting requirement." *Id.* at 785. The focus here  
19 is on defendant's intent (while conducting a financial transaction with putative drug  
20 money) rather than on his own obligations.

21 Finally, even were the Court to preclude the government from arguing the second  
22 prong, all of the evidence of avoidance is directly relevant to the remaining concealing  
23 prong. *E.g.*, *Florez*, 516 Fed. Appx. at 785 (evidence of concealment includes unusual  
24 secrecy surrounding the transaction; structuring the transaction to avoid attention; highly  
25 irregular features of the transaction); *United States v. Delgado*, 653 F.3d 729, 737-38 (8th  
26 Cir. 2011) (considering structured transactions as evidence of concealment); *United States*  
27 *v. Hosseini*, 679 F.3d 544, 559 (7th Cir. 2012) (including evidence of transaction reporting  
28 failures to establish concealment).

#### 29 B. The Specific Evidence Per Count

30 As the Court intuited but the government did not, not all of the charged counts  
31 contain directly predicating evidence of specific intent to avoid the reporting requirements.  
32 To the extent the Court deems that necessary, instead of taking into account the prior

1 communications as evidence of the specific intent on each count,<sup>2</sup> the government concedes  
2 on Counts 1 and 5.

3 As to Count 2, the government references Ex. 103F and 103J:

4 Ex. 103F

5 THOMAS COSTANZO: Well there's a way.

6 UCA TOM: And there's - and keep this in  
7 mind. Like right now I can - I still do  
8 traditional banking and that kind of thing.

9 THOMAS COSTANZO: Right.

10 UCA TOM: And I - I haven't moved away  
11 from that so what - what needs to be on my  
12 radar screen about...

13 THOMAS COSTANZO: As far as losing value?

14 UCA TOM: No.

15 THOMAS COSTANZO: Or...

16 UCA TOM: Either it getting stolen or -  
17 and, or being discovered what - what we're  
18 really - what I'm doing with it,  
19 essentially.

20 THOMAS COSTANZO: Well, you know, I mean,  
21 dealin' with me is one way.

22 UCA TOM: Yeah?

23  
24 \_\_\_\_\_  
25  
26 <sup>2</sup>Or at least the prior communications involving drug talk. In other words, it would  
27 certainly seem reasonable that Count 2 bolsters Count 3 in the combined Klepper-Kushner  
28 transactions. And that Count 4 bolsters Count 5 in the Martin transactions. But this still  
would not save Count 1 if the initial, uncharged communications cannot be used to show  
specific intent.

1 THOMAS COSTANZO: 'Cause I don't say  
2 anything to anybody.

3 Ex. 103J

4 THOMAS COSTANZO: And see, you know, like,  
5 for - for people with medical marijuana  
6 it's - it's a f\*\*\*\*\* great thing because  
7 if you have a medical marijuana you can't  
8 use the bank.

9 UCA TOM: Yeah, that's true - that's  
10 true.

11 THOMAS COSTANZO: they don't want your  
12 money.

13

14 As to Count 3, the government references 104F, which is placed in context by the  
15 state reporting requirement identified in 104D:

16 Ex. 104F

17 UCA SERGEI: The virtual currency they give  
18 you to test with.

19 THOMAS COSTANZO: Yeah.

20 UCA SERGEI: The bitcoin - so, they take  
21 bitcoin... any currency? Or Bitcoins or...

22 THOMAS COSTANZO: Well, they take other  
23 currency but the thing is, I recommend is  
24 people, uh, do it with bitcoin. Then  
25 there's no tracking or anything.

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27

28

1 Ex. 104D

2 THOMAS COSTANZO: I'll let you know what I  
3 can do and then I'll.

4 UCA SERGEI: You know, it's... did you see  
5 that thing in New York you can't even uh.

6 THOMAS COSTANZO: I know, it's crazy.

7 UCA SERGEI: It's crazy, man. You need some  
8 kind of a license now in New York to do...,  
9 you know to sell bitcoins.

10 THOMAS COSTANZO: Yeah, f\*\*\* those f\*\*\*ing  
11 people. C\*\*\*\*\* mother\*\*\*ers.

12

13 As to Count 4, the government references the casino conversation in Ex. 107C:

14 TFO MARTIN: They just don't like you  
15 leaving with money.

16 THOMAS COSTANZO: They don't want you --  
17 giving you the money.

18 TFO MARTIN: Yeah.

19 THOMAS COSTANZO: So then it becomes this --  
20 it becomes this federal case, you know.

21 Well, we got to know -- you know, we got to  
22 get your ID. Oh, your ID is expired. We  
23 need your social. Sorry, I don't know it.

24 And then he goes, well -- you know, they  
25 call the manager. . . .

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1 Respectfully submitted this 27th day of March, 2018.

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3 ELIZABETH A. STRANGE  
4 First Assistant United States Attorney  
5 District of Arizona

6 *s/ Gary Restaino*  
7 \_\_\_\_\_  
8 MATTHEW BINFORD  
9 CAROLINA ESCALANTE  
10 GARY M. RESTAINO  
11 Assistant U.S. Attorneys

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and generation of a Notice of Electronic Filing to all counsel of record.