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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KRISTOPHER LEE DALLMANN,

Defendant.

Case No. 2:22-cr-00030-RFB-DJA-1

KRISTOPHER LEE DALLMANN'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER FED. R. CRIM. P. 29(C)

This motion is timely filed per Fed. R. Crim. P. 29(c)(1).

I. INTRODUCTION

Mr. Dallmann seeks acquittal because the government failed to meet its burden on all counts: Counts One, Two, Three, Four, Thirteen, and Fourteen. U.S. Const. amend. V; Fed. R. Crim. P. 29(c). Mr. Dallmann incorporates and renews his earlier motion for judgment of acquittal under Rule 29(a) filed at ECF No. 458 and supplemental motion for judgment of acquittal under Rule 29(a) filed at ECF No. 468. The jury acquitted Mr. Dallmann of Count Five, and this Court dismissed Counts Twelve and Fifteen at the close of evidence.

The government failed to meet its burden on all remaining counts: Counts One (Conspiracy to Commit Copyright Infringement); Count Two (on January 14, 2017, Copyright Infringement by Distributing an Episode of "Blood Washed Away" of the Television Series "12 Monkeys" over the Internet); Count Three (on January 4, 2017 Copyright Infringement by Distributing a copy of "Memory Tomorrow" of the Television Series "12 Monkeys" over the Internet); Count Four (on December 29, 2016, Copyright Infringement by Publicly Performing/Streaming a copy of the episode "Paradise" of the Television Series "OA" over the Internet); Count Thirteen (Promotion Money Laundering in that Mr. Dallmann made a payment from Wells Fargo Bank Acct. #6241 in the name of Jetflicks LLC to co-defendant Louis Villarino for programming and coding services for Jetflicks); Count Fourteen (Promotion Money Laundering in that on February 9, 2017, Mr. Dallmann made a payment from Wells Fargo Bank Acct. #6241 in the name of Jetflicks LLC to a hosting service in Canada designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds).

II. LEGAL STANDARD

In deciding a defendant's Rule 29 motion, the district court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). To decide whether the evidence was insufficient, the court must consider the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc). While "circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction, . . . mere suspicion or speculation cannot be the basis for creation of logical inferences." *United States v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010) (cleaned up). Due process protects everyone from criminal conviction unless the government proves guilt on each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363–64 (1970). "A conviction based on a record lacking any relevant evidence as to crucial element of offense charged violates due process." *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974).

Mr. Dallmann seeks acquittal because the government failed to meet its burden on all counts: Counts One through Four and Counts Thirteen and Fourteen. To support his argument, he incorporates by reference all arguments made in his prior written briefing and oral advocacy, including, but not limited to, his motions to dismiss (ECF Nos. 129, 148); his proposed jury instructions (ECF Nos. 352, 357, 366, 374, 449, 451, 454); his motions for mistrial, (ECF Nos. 403, 428, 440), the oral and written Rule 29 motions at trial (ECF Nos. 458, 468), and the Rule 29 motions made by his co-defendants (ECF Nos. 457, 459, 460, 461, 467). Mr. Dallmann augments his general motion for acquittal with additional arguments in this written motion but does not waive or forfeit his general motion for acquittal on the charged counts. *See United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010).

III. THERE IS INSUFFICIENT EVIDENCE TO CONVICT MR. DALLMANN OF COUNTS ONE THROUGH FOUR.

A. Count Four: Copyright Infringement of *The OA* Episode *Paradise*

In Count Four, the government alleges that Mr. Dallmann "did willfully, and for purposes of commercial advantage and private financial gain, infringe a copyright in the episode 'Paradise' of the television program 'The OA' by streaming, that is, publicly performing the work over the internet" on or about December 29, 2016. *United States v. Dallmann*, Case No. 1:19-cr-00253-MSN, ECF No. 1 at 28 (E.D. Va. Aug. 27, 2019).

The elements of the offense are:

- First, that the episode "Paradise" of the television program "The OA" was a copyrighted work;
- Second, that the defendant infringed on the copyright of that work;
- Third, that the defendant acted willfully; and
- Fourth, that the defendant acted for the purpose of commercial advantage or private financial gain.

As to the second element, the government failed to prove that Mr. Dallmann even downloaded a copy of the episode "Paradise" of the television program "The OA." The episode

titled "Paradise" was not published until December 16, 2016 (GX 803), and the latest date associated with The OA on a show list seized from Mr. Dallmann's residence is December 15, 2016 (GX 171 at 40). The show list does not identify the episode "Paradise" at all. (*See id.)* Rather, it simply lists "The OA." (*See id.)* Even viewing the evidence in the light most favorable to the prosecution, there is insufficient evidence to show that Mr. Dallmann even downloaded the episode "Paradise," much less provided it by streaming.

B. There is insufficient evidence of willfulness to convict Mr. Dallmann of Counts Two, Three, and Four.

The government has not produced sufficient evidence of willfulness to convict Mr. Dallmann of Counts Two, Three, and Four under 17 U.S.C. § 506(a). For a person's conduct to constitute *criminal* copyright infringement, the government must prove that the person has *willfully* infringed on a copyright. In other words, if an infringer has *not* engaged in a willful violation of copyright law, they are subject only to civil penalties for infringing conduct.

Although "willfulness" is a common requirement for criminal liability, the term does not have a singular legal meaning. Rather, as the Supreme Court has said, "its construction [is] often . . . influenced by its context." *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). Across different contexts, "willfulness" has been interpreted as requiring 1) that the individual intended to perform the action constitutive of the crime; or 2) that the individual intended to perform said action and acted with a "bad purpose" of some specified sort; or 3) that the individual intended to perform said action while knowing that the action violated a legal duty. *United States v. Moran*, 757 F. Supp. 1046, 1048 (D. Neb. 1991) (quoting *Cheek v. United States*, 498 U.S. 192, 200 (1991)).

Within the Ninth Circuit, courts have endorsed different definitions of willfulness depending on the particular nature of the crime. In *United States v. Liu*, 731 F.3d 982, 990 (9th Cir. 2013), the Ninth Circuit defined the "willfulness" requirement regarding criminal copyright infringement specifically (as articulated in 17 U.S.C. § 506(a)). The court endorsed a definition of "willfulness" akin to the third one listed above—infringing actions can only constitute

criminal copyright infringement if the actor actually knows that her conduct is unlawful. Anyone who infringes a copyright without knowing they have violated copyright law does not satisfy the "willfulness" standard and is not subject to criminal penalties.

As the Ninth Circuit explained in *Liu*, this is the correct interpretation of the "willfulness" requirement within the context of criminal copyright infringement, because it preserves the distinction between criminal and civil copyright infringement:

> Copying is of necessity an intentional act. If we were to read 17 U.S.C. § 506(a)'s willfulness requirement to mean only an intent to copy, there would be no meaningful distinction between civil and criminal liability in the vast majority of cases. That cannot be the result that Congress sought.

Liu, 731 F.3d at 993.

Since the "willfulness" requirement *differentiates* criminal copyright infringements (the rare exceptions) from civil ones (the overwhelming majority), "willful" cannot mean something in the copyright context that essentially applies to *all* acts of copyright infringement, such as that the infringer intended the action constitutive of infringement, or even that they had reason to know the action was unlawful. Instead, the panel in *Liu* held that "'willfully' as used in 17 U.S.C. § 506(a) connotes a 'voluntary, intentional violation of a known legal duty.'" *Liu*, 731 F.3d at 990 (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted)). The Ninth Circuit clarifies that "having 'good reason to know' one is violating the law is not tantamount to knowing it," further emphasizing the requirement of "actual knowledge" that one has violated a legal duty. *Liu*, 731 F.3d at 993. The Ninth Circuit's definition of "willfulness" reflects and encodes the key distinction between civil and criminal copyright liability: whereas civil liability requires the general intent to copy, criminal liability requires the specific intent to knowingly violate the law.

Even viewing the evidence in the light most favorable to the prosecution, there is insufficient evidence to show Mr. Dallmann actually knew that his conduct was unlawful. For example, Co-Case Agent Jeffrey Schurott testified on cross-examination it appeared that Mr.

Dallmann was trying to verify that what he was doing was legal. (ECF No. 410 at 55.) And the general theme of the evidence adduced at trial was that Mr. Dallmann was endeavoring to operate a legal business enterprise that he considered to be in the "grey" area.

C. There is insufficient evidence that the retail value of infringement attributable to Mr. Dallmann surpassed $2,500.

The government also must prove beyond a reasonable doubt that the retail value of the attempted, planned, or actual infringement attributable to Mr. Dallmann during any 180-day period, of 10 or more copies of one or more copyrighted works, was more than $2,500. The government has not adduced sufficient evidence to establish that the retail value of any infringement attributable to Mr. Dallmann exceeded $2,500.

D. There is insufficient evidence of infringement given the government's failure to comply with the best evidence rule at Fed. R. Evid. 1002.

The best evidence rule provides that the original of a "writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. The rule's application turns on "whether contents are sought to be proved." Fed. R. Evid. 1002, Advisory Committee's note. "Copyright, defamation, and invasion of privacy by photograph or motion picture falls [sic] in this category." *Id.*; *see also Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062, 1066 (9th Cir. 2016); *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1320 (9th Cir. 1986) ("A creative literary work, which is artwork, and a photograph whose contents are sought to be proved, as in copyright, defamation, or invasion of privacy, are both covered by the best evidence rule.").

Several authorities state that the copy of the work deposited with the Copyright Office is the best evidence of the scope of the copyright:

Skidmore v. Led Zeppelin, 952 F.3d 1051, 1062–64 (9th Cir. 2020):

> The purpose of the deposit is to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright . . .. [T]he scope of the copyright is limited by the deposit copy . . .. [The] deposit copy circumscribes the scope of the copyright.

Seiler v. Lucasfilm, 808 F.2d 1316, 1319–22 (9th Cir. 1986) (where plaintiff had no proof that his original work existed before the allegedly infringing work was created; and instead registered a "reconstruction" of the original):

> The contents of Seiler's work are at issue. There can be no proof of "substantial similarity" and thus of copyright infringement unless Seiler's works are juxtaposed with Lucas' and their contents compared. Since the contents are material and must be proved, Seiler must either produce the original or show that it is unavailable through no fault of his own. Rule 1004(1). This he could not do.

Evox Prods. L.L.C. v. Chrome Data Sols. LP, No. 3:16-cv-00057-JR, 2021 WL 7081390, *2 (D. Or. Nov. 27, 2021) (applying "best evidence" rule to prove the content of the *infringing* work):

> Under Fed. R. Evid. 1002-1004, a party must produce an original or duplicate of a photograph if the party is trying to "prove its content," unless the original/duplicate has been lost or destroyed through no fault of the proponent. *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986). After reviewing the parties' briefs, the Court concludes that the best-evidence rules applies. In order to show direct infringement, Del Monte and Thompson will necessarily have to try to prove the content of images they saw on Potratz's server because they will have to testify about how they were able to identify them as Plaintiff's protected works. "When the contents of a [picture] are at issue, oral testimony as to the [content of the picture] is subject to a greater risk of error than oral testimony as to events or other situations. The human memory is not often capable of reciting the precise [content of a picture], and when the [contents] are in dispute only the [picture] itself, or a true copy, provides reliable evidence." *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986); *see also* Fed. R. Evid. 1002 advisory committee's note ("[S]ituations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category."). Because direct copyright infringement requires evidence of both the copyrighted work and of the allegedly infringing work, Plaintiff cannot use the testimony of Del Monte and Thompson to prove the content of the images they purportedly saw on Potratz's server.

Score Right Pub'g v. Nat'l Junior Basketball League, No. 8:19-cv-01604-JLS-KES, 2020 WL 2510515, *3 (C.D. Cal. Jan. 7, 2020): Failure to attach accurate copy of work to infringement complaint "deprive[d] Defendants of the fair notice to which they are entitled."

Here, the government violated the best evidence rule. None of the government's witnesses viewed the *original* copyrighted works at issue. Rather, the witnesses viewed "authorized copies." (*See, e.g.*, ECF No. 421 at 18 (Lucia Rangel's testimony she did not fly to Washington, D.C., to watch the original episode of Season 3, Episode 4 of Game of Thrones on file with the copyright office).) But authorized copies can differ from the original work. For example, particularly raunchy scenes may be excised from cable TV broadcasts of a film. The government's failure to adduce the original copyrighted works at issue (or even have witnesses view the original copyrighted works at issue) flouts the best evidence rule. When the record is sanitized of testimony based on anything other than the best evidence (here, the original copyrighted works), there is insufficient evidence to convict Mr. Dallmann of copyright infringement.

E. There is insufficient evidence that Mr. Dallmann ever actually possessed unauthorized copies of copyrighted works.

Case Agent Clay Chase testified on cross-examination by Attorney Tate to the following. He viewed the Jetflicks.mobi website from a coffee shop in Virginia. Jetflicks.mobi was hosted on servers based in Canada. He never obtained copies of the servers based in Canada. Given that the government never obtained copies of those servers, no evidence shows that Mr. Dallmann ever actually possessed unauthorized copies of copyrighted works.

F. There is insufficient evidence of Count One: Conspiracy.

A conspiracy conviction requires 1) an agreement to accomplish an illegal objective, 2) coupled with one or more acts in furtherance of the illegal purpose, and 3) the requisite intent necessary to commit the underlying substantive offense. 18 U.S.C. § 371. Here, the government failed to prove all three elements. There was no agreement or illegal objective (and thus no acts in furtherance of any illegal purpose); rather, the evidence shows Mr. Dallmann endeavored to conduct a legal business enterprise. *See infra,* pp. 5-7. And Mr. Dallmann lacked the specific intent necessary to commit the underlying substantive offenses, *see infra*, pp. 5-7, and thus the government failed to prove the intent necessary for conspiracy in Count One. In addition, when

there is insufficient evidence of each substantive count on which the charged conspiracy is based, as here, the conspiracy count also fails. *See United States v. Jaimez*, 45 F.4th 1118, 1130-31 (9th Cir. 2022).

G. The Court should enter judgment of acquittal on Counts One through Four based on constructive amendment.

"The Fifth Amendment's grand jury requirement establishes the 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001) (quoting *United States v. Miller*, 471 U.S. 130, 140 (1985)); *see also United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017) (quoting *Antonakeas*, 255 F.3d at 721); U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .."). Constructive amendment occurs "when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or court after the grand jury has last passed upon them." *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (citing *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir.1984)). A constructive amendment requires reversal "because it destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment.'" *Id.* (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)).

"A constructive amendment is an alteration to the indictment's terms 'either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.'" *United States v. Singh*, 995 F.3d 1069, 1078 (9th Cir. 2021) (quoting *United States v. Mickey*, 897 F.3d 1173, 1181 (9th Cir. 2018)). "We have identified two kinds of constructive amendments: (1) those involving a 'complex of facts presented at trial distinctly different from those set forth in the charging instrument' and (2) those where 'the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" *Id.* at 1078-79 (citing *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017)).

Stirone v. United States, 361 U.S. 212, 217 (1960), and *United States v. Ward*, 747 F.3d 1184, 1192 (9th Cir. 2014), are both cases where the courts found a constructive amendment. In *Stirone*, the Supreme Court found a constructive amendment when the indictment charged the defendant with unlawful interference with the interstate movement of sand, while the trial court's instruction allowed the jury to convict for either unlawful sand or steel shipments. The Court held that the indictment could not 'fairly be read' as containing the same charge as the conviction. *Stirone*, 361 U.S. at 217. In *Ward*, the Ninth Circuit found a constructive amendment where there was ambiguity around whether identity theft convictions were based on the indictment's charge or "uncharged conduct." 747 F.3d at 1191. There, the jury may have convicted the defendant for aggravated identity theft against victims who were not specified in the indictment. A constructive amendment occurred because, since "the identity of the victims was necessary to satisfy an element of the offense," the conviction was not unequivocally based on the indictment's charged conduct." *Id*. at 1192.

1. The government constructively amended Count One by omitting evidence related to Darryl Polo and iStreamItAll at trial.

Judgment of acquittal as to Count One is appropriate based on either constructive amendment of or variance from the indictment. Count One charged that Darryl Polo was part of the conspiracy to commit copyright infringement, but the government presented no evidence that Darryl Polo was involved. Omitting any evidence of Darryl Polo's significant participation in the alleged conspiracy fundamentally alters Count One. A conspiracy that includes Darryl Polo and iStreamItAll is qualitatively different from one that does not. This difference constitutes either a constructive amendment or a variance.

Here, the indictment contained extensive allegations about Darryl Polo and iStreamItAll. In addition, Darryl Polo was charged as a co-conspirator in Count One. *See*, *e.g.*, *United States v. Dallmann*, Case No. 1:19-cr-00253-MSN, ECF No. 1 at 9 (E.D. Va. Aug. 27, 2019). But the government introduced no evidence regarding Darryl Polo or iStreamItAll.

When the government avoided presenting any evidence related to Darryl Polo or iStreamItAll, it constructively amended Count One—it presented a conspiracy that did not involve Darryl Polo at all. Such a conspiracy is qualitatively different from a conspiracy that included Darryl Polo. Thus, both types of constructive amendment are implicated. *Singh*, 995 F.3d at 1078-79 ("We have identified two kinds of constructive amendments: (1) those involving a 'complex of facts presented at trial distinctly different from those set forth in the charging instrument' and (2) those where 'the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'"). The constructive amendment matters because the grand jury indicted a conspiracy that included Darryl Polo. At trial, the government has endeavored to prove a qualitatively different conspiracy.

Accordingly, judgment of acquittal as to Count One based on constructive amendment is warranted.

2. The government constructively amended Counts One through Four by introducing evidence of infringement as to shows never identified in the indictment.

Judgment of acquittal as to Counts Two through Four is appropriate because the government introduced evidence related to copyright infringement of several television shows never identified in the indictment. The mismatch between Counts Two through Four and the evidence adduced at trial constitutes constructive amendment or variance. Accordingly, judgment of acquittal as to Counts Two through Four is warranted.

Here, there is significant risk that the jury will convict Mr. Dallmann for infringement of copyrighted works not specified in the indictment. The government introduced evidence of purported and *unproved* infringement of several television shows titles *not* listed in the indictment:

Show title	**Citation**	**Witness**
Stranger Things	ECF No. 414 at 104; 108–09	Andrews
Sense8	ECF No. 414 at 104–05, 108, 110	Andrews

A Series of Unfortunate Events	ECF No. 414 at 104, 108, 110	Andrews
NCIS	ECF No. 414 at 48, 50–51, 64, 67, 87, 90, 92	Housley
NCIS: Los Angeles	ECF No. 414 at 48–49, 56–57, 67	Housley
NCIS: New Orleans	ECF No. 414 at 48–49, 65, 67	Housley
Lois & Clark	ECF No. 421 at 10	Rangel
American Dad	ECF No. 426 at 53	Cooper
Keeping Up with the Kardashians	ECF No. 426 at 55	Cooper
Brooklyn 99	ECF No. 426 at 55	Cooper
Hollywood Game Night	ECF No. 426 at 59–60	Cooper
Jimmy Kimmel Live	ECF No. 442 at 46	Chase
2 Broke Girls	ECF No. 442 at 48, 50	Chase
Family Guy	ECF No. 442 at 50, 52	Chase

(This list is not exhaustive.)

The mismatch between the charges in Counts One through Four and the evidence adduced at trial constitutes constructive amendment. For example, in *Ward*, the Ninth Circuit found a constructive amendment where there was ambiguity around whether identity theft convictions were based on the indictment's charge or "uncharged conduct." 747 F.3d at 1191. There, the jury may have convicted the defendant for aggravated identity theft against victims who were not specified in the indictment. A constructive amendment occurred because, since "the identity of the victims was necessary to satisfy an element of the offense," the conviction was not unequivocally based on the indictment's charged conduct." *Id*. at 1192. As the identity of the victims was necessary to satisfy an element of the offense in *Ward*, the identities of the television shows in Counts One through Four are necessary to satisfy elements of those offenses.

Judgment of acquittal as to Counts One through Four based on constructive amendment is warranted.

3. The Court should enter judgment of acquittal on Counts One through Four based on variance.

A variance "occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Ward*, 747 F.3d at 1189. "The line that separates a constructive amendment from a variance is

not always easy to define . . ..." *Id.* (citing *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) and *Antonakeas*, 255 F.3d at 722). But "[a] variance involves a divergence between the allegations set forth in the indictment and the proof offered at trial." *Id.* "Where this divergence acts to prejudice the defendant's rights, the conviction must be reversed." *Id.*

Here, the differences between the indictment and the evidence adduced at trial discussed *supra* Section II(A) may be considered variances instead of constructive amendments. These variances prejudiced Mr. Dallmann rights. As to Count One, the absence of Darryl Polo from the evidence inappropriately suggests that Mr. Dallmann—not Darryl Polo—was the mastermind of the alleged conspiracy. As to Counts Two through Four, the evidence of infringement of several television shows not identified in the indictment creates significant risk that the jury will convict Mr. Dallmann on Counts Two through Four as a way to punish him for other conduct they perceive to be unlawful or immoral. While the jury should have convicted on Counts Two through Four only if they found those particular television shows were infringed (12 Monkeys episodes Blood Washed Away and Memory of Tomorrow, and The OA episode Paradise), the jury may nonetheless have convicted Mr. Dallmann because infringement of *other* television shows came into evidence. Judgment of acquittal as to Counts One through Four based on constructive amendment or variance is warranted.

* * *

Accordingly, Mr. Dallmann asks the Court to enter judgment of acquittal as to Counts One through Four.

IV. THERE IS INSUFFICIENT EVIDENCE TO CONVICT MR. DALLMANN OF MONEY LAUNDERING IN COUNTS THIRTEEN AND FOURTEEN.

In Counts Thirteen and Fourteen, Mr. Dallmann is charged with money laundering. *United States v. Dallmann*, Case No. 1:19-cr-00253-MSN, ECF No. 1 (E.D. Va. Aug. 27, 2019).

The elements of the offense are:

- First, the defendant conducted or intended to conduct a financial transaction involving property that represented the proceeds of criminal copyright infringement or conspiracy to commit criminal copyright infringement;
- Second, the defendant knew that the property represented the proceeds of some form of unlawful activity;
- Third, the defendant acted with the intent to promote the carrying on of the criminal copyright infringement or conspiracy to commit criminal copyright infringement; or *the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity*; and
- Fourth, the defendant did something that was a substantial step toward committing the crime.

(ECF No. 192 at 63).

Even viewing the facts in the light most favorable to the prosecution, there is insufficient evidence to convict Mr. Dallmann of the money laundering counts. Nearly every witness has agreed that Mr. Dallmann operated Jetflicks openly and publicly. He did not attempt to disguise or conceal the nature, the location, the source, the ownership, or the control of proceeds from operating Jetflicks. Case Agent Clay Chase agreed that throughout his whole investigation, Mr. Dallmann was using his real name and real identity. (ECF No. 450 at 50, lines 16-18.) Co-Case Agent Jeffrey Schurott also testified extensively in this regard:

- Mr. Dallmann did not use a fake email address or fake physical address when registering for PayPal. (ECF No. 410 at 40, lines 23-24.)
- Mr. Dallmann was transacting between the PayPal account and his Bank of America account in his own name—there was no clandestine activity. (*Id.* at 48–49, lines 18-23.)
- The Bank of America account was used when Mr. Dallmann was doing business as Rent-A-Geek. (*Id.* at 49, lines 9-10.)

- Mr. Dallmann was openly operating his business in public. They had ad campaigns and were engaged in marketing. (*Id.* at 54, lines 1-3.)
- Mr. Dallmann's Wells Fargo account was also legitimate and open—there was no clandestine activity. (*Id.* at 63, lines 1-13.) He didn't hide his bank account numbers, name, etc. (*Id.* at 67, lines 1-4.)
- He was paying ordinary household bills out of his bank accounts. (*Id.* at 71, lines 15-18.)

There simply is no evidence that Mr. Dallmann intended to conceal his activities—he believed he was operating a legitimate business, and he acted accordingly. He did not use an alias for Stripe, PayPal, Bank of America, or any other business service he used. He consistently used his own true name and identity because he didn't believe he was doing anything unlawful.

Nor is there evidence that Mr. Dallmann had the specific intent to promote an ongoing specified unlawful activity through financial transactions. As Mr. Dallmann raised in his pretrial motion to dismiss, incorporated herein, the investment of ill-gotten profits into legitimate business expenses cannot constitute "promotion of specified unlawful activity." (*See* ECF Nos. 129, 148.) The result is insufficient evidence of the mens rea element: intent to engage in promotional financial transactions. (*See* ECF No. 129, pp. 2-6 (discussing cases); ECF No. 148, pp. 3-4 (discussing cases).) Strict adherence to the specific intent requirement of the promotion element is necessary to ensure the money laundering statute is not applied to conduct that is indistinct from the underlying specified unlawful activity.

The trial record is devoid of evidence that Mr. Dallmann *knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity* Accordingly, the Court must enter judgment of acquittal as to Counts Thirteen and Fourteen.

CONCLUSION

Mr. Dallmann respectfully requests that the Court enter judgment of acquittal as to all counts: Counts One, Two, Three, Four, Thirteen, and Fourteen for the aforementioned reasons.

DATED this 25th day of June 2024.

RENE L. VALLADARES
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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that he is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on June 25, 2024, he served an electronic copy of the above and foregoing Motion for Mistrial by electronic service (ECF) to the person named below:

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