IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:09CR27-V

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD VON NOTHAUS,

Defendant.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL PURSUANT TO RULES 29 AND 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

NOW COMES defendant Bernard von NotHaus, through counsel, and submits this supplemental memorandum of law in support of his pending motion for judgment of acquittal on the grounds that the evidence presented by the government was insufficient to sustain conviction on any of the three counts alleged in the indictment. In the alternative, Mr. von NotHaus seeks a new trial in the interest of justice. In support of this motion, Mr. von NotHaus shows the Court the following:

INTRODUCTORY STATEMENT

Mr. von NotHaus stands convicted of various statutorily-defined forms of counterfeiting. The irony of this is that if anything is clear from the evidence presented at trial, it is that the last thing Mr. von NotHaus wanted was for Liberty Dollars to be confused with coins issued by the United States government. That would, as witness Vernon Robinson testified, have defeated the whole purpose- - to demonstrate to citizens and communities that there is a way to engage in commerce and not use the Federal Reserve system.[1] Whether writing scholarly papers on value-based currency, attracting media attention, or selling t-shirts saying "The Fed can bite me," Mr. von NotHaus has always operated out in the open. His intention- - to protest the Federal Reserve system- - has always been plain. The jury's verdict conflates a program created to function as an alternative to the Federal Reserve system with one designed to deceive people into believing it was the very thing Mr. von NotHaus was protesting in the first place. Whatever one's opinion about the merit of value-based currency, the fact remains that the Liberty Dollar was not a counterfeit and was not intended to function as such. The verdict is a perversion of the counterfeiting statutes and should be set aside.

1 Trial Tr. Vol. VI, p. 888, Mar. 16 2011.

DISCUSSION

I. The Court should enter judgment of acquittal or award a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.

` In evaluating a motion for a judgment of acquittal based on insufficiency of the evidence, this Court is required to "view the evidence in the light most favorable to the prosecution, and inquire whether a rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt." *United States v. Singh*, 518 F.3d 236, 246 (4th Cir. 2008); *see also United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Perkins*, 470 F.3d 150, 160 (4th Cir. 2006); *United States v. Uzenski*, 434 F.3d 690, 700 (4th Cir. 2006); *United States v. Lentz*, 383 F.3d 191, 199 (4th Cir. 2004); *United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997). The court must be satisfied that there is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (*en banc*). Admittedly, "[a] defendant challenging the sufficiency of the evidence faces a heavy burden." *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007) (citation omitted), cert. denied, 552 U.S. 1274 (2008). In assessing the evidence, the jury's resolution of all evidentiary conflicts and credibility determinations must be given deference. *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). However, "where the prosecution's failure is clear," the judgment must be set aside. *Burks v. United States*, 437 U.S. 1, 17 (1978).

The two counterfeiting statutes at issue read as follows:

18 U.S.C. § 485. Coins or bars.

> Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coins of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States; or
>
> Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or counterfeit coin or bar, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or attempts the commission of any offense described in this paragraph, shall be fined under this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 486. Uttering coins of gold, silver or other metal.

> Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined under this title or imprisoned not more than five years, or both.

Contrary to what the government alleges in its Response, it did not "present[] substantial evidence at trial on each element of the charges for which Defendant was convicted."[2] The government alleges that the evidence proved:

> that Defendant (1) designed and created counterfeit coins (Liberty Dollars) that resembled genuine coins of the United States; (2) instructed individuals on methods to inject the Liberty Dollar coins into the flow of current money by misleading people to believe that the coins were genuine U.S. coins; and (3) defrauded people by minting the Liberty Dollar coins with a dollar value that was in excess of the true inherent value of the silver contained in the

2 Document 201.

coins.[3]

A review of the entire record, however, reveals that the evidence weighs heavily against a finding of any of these things.

A. Mr. von NotHaus lacked criminal intent.

Substantial undisputed evidence demonstrates Mr. von NotHaus' lack of criminal intent. This evidence spans the decades before he created the Liberty Dollar, the Liberty Dollar's inception, and the existence of NORFED.

1. Mr. von NotHaus was advised- - by counsel and other credible sources- - that he was doing nothing illegal.

Throughout the existence of NORFED, Mr. von NotHaus was advised by counsel. He was also aware that representatives of the Federal Reserve, the United States Mint, the United States Secret Service, and other organizations had examined the Liberty Dollar and found that it was not a counterfeit for United States currency.[4] The evidence of Mr. von NotHaus' reliance on the advice of counsel is in large part undisputed.

This fact forms a basis for entering judgment of acquittal by itself. Good faith reliance on the advice of counsel is relevant because such reliance demonstrates a defendant's lack of requisite intent to violate the law. *United States v. Stevens*, 771 F.Supp.2d 556, 560 (D. Md. 2011). A critical element in the advice of counsel defense is that the defendant secured the advice on the lawfulness of his possible future conduct. *United States v. Polytarides*, 584 F.2d 1350, 1352 (4th Cir. 1978). The essential elements of the reliance-on-counsel defense are "(a) full disclosure of all pertinent facts to an expert, and (b) good faith reliance on the expert's advice. *United States*

3 Document 201.
4 *See e.g.*, Defendant's Exhibit No.'s 144, 151, 214, 234, 235; Trial Tr. vol. V, 738-47, March 15, 2011.

v. Butler, 211 F.3d 826, 833 (4th Cir. 2000). Good faith is a complete defense to the charges because good faith on the part of the defendant is inconsistent with intent "calculated to deceive," which is an essential part of the charges. *See e.g.*, Modern Federal Jury Instructions – Criminal, ¶ 6.01 – "Good Faith" (Matthew Bender, 2001).

A complete defense exists here. The jury was presented with undisputed evidence that Mr. von NotHaus consulted with counsel beginning with NORFED's inception, regarding the legality of the corporation, as well as the design and distribution of Liberty Dollars.[5] Mr. von NotHaus' chief counsel was Marion Edwyn Harrison,[6] who described Mr. von NotHaus as the "sort of client who was heavily involved in seeking solid legal advice."[7] He testified that Mr. von NotHaus "was always, in my opinion, extremely conscientious to be sure that anything that he was about to do or was even thinking of doing would in no way be unlawful."[8] Mr. Harrison stated that Mr. von NotHaus "always was most interested in being precise and thorough in following my advice. Insofar as I knew, he always did follow it. And to this day, I have no knowledge of anything that he did which was contrary to advice I had given on that subject."[9] Throughout NORFED's existence, Mr. von NotHaus frequently contacted Mr. Harrison regarding the company's proposed or current actions. In particular, Mr. Harrison looked into counterfeiting issues related to 18 U.S.C. §§ 485 and 486, and testified that in his opinion the creation and distribution of the Liberty Dollars did not violate either statute.[10] Even when the

5 *See e.g.*, *Id.* at 569; Trial Tr. vol. V, 684-700, 737, March 15, 2011.
6 On frequent occasions, Mr. Harrison was referred to as NORFED's general counsel.
7 Trial Tr. vol. IV, 438:4-5, March 14, 2011.
8 *Id.* at 438:11-14
9 *Id.* at 439:6-10. Mr. Harrison later submitted a letter to the Court that only reinforces his trial testimony. Regarding Mr. von NotHaus' conduct, Marion Harrison explained, "[t]he Liberty Dollar never was intended to violate a law. It was intended solely for private barter and/or numismatics. As Bernard promoted the Liberty Dollar, he made every effort to clarify its limited purpose." Mr. Harrison's letter is included as Exhibit A.
10 *Id.* at 445.

Mint issued its 2006 warning regarding the Liberty Dollar, Mr. Harrison advised Mr. von NotHaus that although the warning should be taken seriously, he disagreed with both the Mint's rationale and its conclusions. [11]

Marion Edwyn Harrison was not the only attorney with whom Mr. von NotHaus consulted. He sought advice from three additional attorneys as well. Before any currency was printed or issued, Mr. von NotHaus hired Paul Sulla to write an opinion letter and draft Liberty Dollar warehouse receipts.[12] After the Mint issued its 2006 warning, Mr. von NotHaus retained James E. Burk, who filed a federal lawsuit for a declaratory judgment against the U.S. Mint. In addition, Mr. von NotHaus retained Charles McCarthy, an expert in securities law, to examine the securities laws as they pertained to NORFED and the Liberty Dollar. Like Mr. Harrison, none of these attorneys ever warned Mr. von NotHaus that his actions were potentially illegal.

It is true that, "[o]n September 19, 2006, the United States Mint issued a press release warning American citizens that the NORFED 'Liberty Dollar' medallions [were] not genuine United States Mint coins, and [were] not legal tender."[13] It is also true that the press release also stated that the Department of Justice had determined that the use of gold or silver Liberty Dollars as "circulating money" was a Federal offense.[14] The Mint's 2006 warning, however, should be viewed in context. First, the U.S. Mint used the term "circulating money," and not "current money," the operative phrase in 18 U.S.C. §486.15 Further, by the time it was issued Mr. von NotHaus had already heard, from multiple sources, opinions from governmental employees that the Liberty Dollar was legal. Trial testimony revealed that when Liberty Dollars were first

11 *Id.* at 447.
12 *See* Exhibit B (affidavit of Paul J. Sulla, Jr.).
13 Government's Exhibit No. 47. *See also* Trial Tr. vol. IV, 459, March 14, 2011; Trial Tr. vol. V, 710-17, March 15, 2011.
14 Government's Exhibit No. 47.
15 The phrase "circulating money" is not defined anywhere known to the defense.

minted (as American Liberty Currency), several articles were published regarding the legality of the medallions and silver certificates. For example, a May 3, 1999 Naples Daily Newspaper article entitled "As Y2K Looms, Estero Man Offers Silver-Backed Currency" was entered as Defense Exhibit 39.[16] This article includes several quotes from Claudia Dickens, spokeswoman for the U.S. Treasury Department of Engraving and Printing. The article states, "There's nothing illegal about this, Dickens said after the Treasury Department's legal team reviewed the currency. As long as it does not say legal tender, there's nothing wrong with it."[17] An additional article quotes Ron Legan, a Special Agent of the Secret Service.[18] Regarding the Liberty Dollar, Mr. Legan explained that "[q]uite simply, it's not counterfeit money."[19] The Mint's warning notwithstanding, the trial record is thus replete with evidence that Mr. von NotHaus relied on counsel, corroborated by government-sourced opinions, in forming the reasonable belief that he was not breaking the law.

Likewise, it is beyond cavil that Mr. von NotHaus believed the advice of his attorneys and others- - that using Liberty Dollars was legal. As with everything else with NORFED, Mr. von NotHaus broadcast his belief to RCOs, Liberty Dollar Associates, and the public.[20]

16 *Id.* at 730-32.
17 *Id.* at 732:22-25.
18 *Id.* at 737.
19 *Id.* at 737:19.
20 Trial Tr. vol. V, 717, March 15, 2011.

2. Mr. von NotHaus' lack of criminal intent is corroborated by the fact that he sought to create an alternative to the Federal Reserve System beginning in the 1970s.

Few, if any, federal criminal defendants are prosecuted for conduct, which is the subject of a dissertation written decades before the offense of conviction which explains the defendant's state of mind. It is indisputable that Mr. von NotHaus conceived of, designed, marketed and distributed the Liberty Dollar as the result of his deeply held conviction that this country's monetary system is terribly flawed. His conviction dated back to at least the summer of 1974, when he experienced a self-described "epiphany"[21] as he "came to understand the monetary system and the inner relationship between . . . political and economic systems in monetary terms."[22] He wrote a research paper, "To Know Value," in which he analyzed monetary theory and the effect of money on United States citizens, including the relationship between inflation and political and economic instability.[23] "To Know Value" explained that money must have five properties –"[d]urability, devisibility, convenience, consistency, and. . . value."[24] In Mr. von NotHaus' view, value-based currencies, such as those backed by precious metals, had all five properties, while the paper dollars issued by the United States government had none of them.[25] He opined that throughout history, the federal government has increased "'money substitutes above the stored stock of real money'" while the United States Department of Engraving and Printing printed paper money that "had no basis to be dollars" because it was not "backed up by anything."[26] Mr. von NotHaus further theorized that overprinting caused monies and credit to

21 Trial Tr. vol. IV, 505:2, March 14, 2011.
22 *Id.* at 505:4-7.
23 Defense Exhibit No. 1. *See also* Trial Tr. vol. IV, 504, March 14, 2011.
24 Trial Tr. vol. IV, 523:8-9, March 14, 2011.
25 *Id.* at 523:10.
26 *Id.* at 512:4-15 (*quoting* Defense Exhibit No. 1).

become out of balance with the nation's supply of goods and services, thus resulting in a variety of social ills, including inflation, the collapse of the housing industry, unemployment, and bankruptcies.[27]

After writing "To Know Value," in 1974 Mr. von NotHaus served as Mint Master for the Royal Hawaiian Mint for 25 years.[28] The company produced medallions made of precious metals that commemorated Hawaiian history.[29] During his time as Mint Master, Mr. von NotHaus remained engaged in his studies of money and economics, basing his theories on the works of a variety of academics and economists. He considered it his "personal mission" to bring about "a free money movement led by the people returning to a value based currency."[30]

Evidence of Mr. von NotHaus' self-described personal mission, lifetime of involvement with coinage and provides strong evidence of his intentions. This evidence too was undisputed. Deceiving persons into believing the Liberty Dollar was United States currency would have been in diametric opposition to the mission of establishing the legitimacy and preferability of value-based currency. This evidence established an absence of intent to deceive and should be considered as well.

B. Liberty Dollars were not counterfeits of United States coins.

1. The statutory requirements for United States coins.

Although not dispositive, it is relevant that there are various design requirements for United States coins to which Liberty Dollars do not conform. Government witness Brian

27 *Id.* at 516:5-6.
28 *Id.* at 500.
29 *Id.* at 499.
30 *Id.* at 531:15-17.

Silliman testified that United States coinage must meet specific standards as to size, weight, fineness, and other characteristics.[31] In addition, United States coins are required to include "Liberty," "e pluribus unum," and "In God We Trust" in addition to a legend representing the date.[32] Although the government's own expert witness, Mr. Silliman, was unaware that the United States never issued a 5 dollar coin and was unable to recall the statutorily-mandated specifications the Mint must adhere to in the production of United States coins,[33] the requirements set out in the applicable statute, 31 U.S.C. § 5112, are as follows:

Denomination	$1	$.50	$.25	$.10	$.05	$.01
Diameter (inches)	1.043	1.205	.955	.705	.835	.75
Weight (grams)	*	11.34	5.67	2.268	5	3.11
Composition	*	Copper inner layer; 2 nickel/ copper alloy coating outer layers	Copper inner layer; 2 nickel/ copper alloy coating outer layers	Copper inner layer; 2 nickel/ copper alloy coating outer layers	Copper/ nickel alloy	Copper/ zinc alloy
Features	Obverse- President image and name; date of term of office; order of office Reverse- Statue of Liberty image; "$1" and "United States of America" inscriptions	Eagle image on reverse	Eagle image on reverse	*	Thomas Jefferson on obverse; Monti-cello on reverse	*

31 Trial Tr. vol. III, 391, March 10, 2011. *See also* 31 U.S.C. § 5112 (2012).
32 *Id.* at 397.
33 *Id.* at 391.

* No statutory requirement[34]

There are other requirements as well. Under section (d) of the statute, all U.S. Mint-issued coins are required to feature specified inscriptions. In addition, both a designation of value as well as the year of minting or issuance must be included in at least one location on the coin. Finally, the statute dictates that inscriptions of the phrases, "In God We Trust" and "E Pluribus Unum" must appear on the reverse side of the coin, while the word "Liberty" must be inscribed on the obverse side of the coin.[35]

2. The standard for similitude.

An item is considered counterfeit under 18 U.S.C. § 485 if it is "in resemblance or in similitude" to any United States or foreign coin.[36] To be counterfeit, a coin must not only resemble or be in similitude to a United States or foreign coin, but it must "deceive a person using ordinary caution." *United States v. Bogart* 24 Fed. Cas. 1185, 1185 (N.D.N.Y. 1878). Under this Court's instruction, "[t]he term 'counterfeit' means that the item was made in order to bear such a likeness or resemblance to something genuine that it is calculated to deceive an

34 31 U.S.C. § 5112 (2012).
35 *Id.* While it is required that U.S. coins contain all the above-mentioned features, the United States does not own a copyright on any of them, including the word "dollar" or the "$" symbol. Evidence presented at trial revealed that "$" is not the universal symbol for the U.S. dollar, but is used on official currency in numerous other countries and on other medallions used in systems of private barter currency. If they existed, these trademarks would be held by the U.S. Mint. However, according to Daniel P. Shaver, the U.S. Mint's Chief Counsel, the Mint's practice is that it does not provide legal advice to the public. Trial Tr. vol. II, 273, March 9, 2011. A separate counterfeiting statute from those at issue in this case, 31 U.S.C. § 333 "prohibits individual parties from advertising or producing products that convey the false impression that they are either associated, sponsored by or sanctioned by the Department of the Treasury and the United States Mint." *Id*. at 270. Because the public cannot seek advice from the Mint regarding the legality of their product, they have no guidance unless the Mint, on its own, determines that the item is being produced in violation of a Mint trademark and issues a cease and desist letter. The evidence revealed that the U.S. Mint never presented NORFED with a cease and desist letter because Liberty Dollars did not infringe upon any U.S. Mint trademark.
36 18 U.S.C. § 485.

honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with an individual who is presumed to be honest and upright."[37] Likewise, "[t]he term 'resemblance' means the quality or state of resembling, especially correspondence in appearance or superficial qualities; a point of likeness; or it means similarity. The word or term 'similitude' means a counterpart, a double; a visible likeness; or correspondence in kind or quality; a coin of comparison."[38] In sum, any coin that does not resemble a United States coin cannot be considered counterfeit.

3. Under this standard, Liberty Dollars were not counterfeit.

The Liberty Dollar medallions that were presented to the jury do not have what coins are statutorily required to have and do not look like United States coins. In the first place the name Mr. von NotHaus chose, NORFED, was chosen in order to make it clear that the Liberty Dollar did not come from the United States government. While the Liberty Dollar did feature an image of Lady Liberty, it was an image that Mr. von NotHaus personally designed in 1992 for the 50th anniversary of the Battle of Midway. That Liberty image was never used on any coin issued by the U.S. Mint.[39] Rather than "In God We Trust," Liberty Dollars were inscribed with the phrase "Trust in God." Further, the design of the Liberty Dollar changed throughout the years and over time, and came to include inscriptions of both a toll free telephone number and the company URL address.[40] Later versions of Liberty Dollars included inscriptions of both "MSRP"

37 Trial Tr. vol. VII, 1071-72, March 17, 2011.
38 *Id.* at 1072.
United States v. Ross, 844 F.2d 187, 190 (4th Cir. 1988).
39 Trial Tr. vol. V, 614-15, March 15, 2011.
40 *Id.* at 628.

(manufacturer's suggested retail price) and "PVBC" (private voluntary barter currency).[41] Still later versions of Liberty Dollars included the inscriptions "BVNH" (Mr. von NotHaus' initials) and "TM" (trademark).[42] The exhibits and trial testimony further revealed that as a one ounce, .999 fine troy silver medallion, Liberty Dollars were heavier, shinier, and of a different color than every coin issued by the United States Mint.[43] In short, Liberty Dollars were "not even close" to matching the characteristics of any U.S. coin.[44]

Liberty Dollars thus cannot be considered counterfeits. They simply are not "in resemblance or in similitude" to any coin issued by a Mint of the United States. There are sufficient dissimilarities between the look and feel of Liberty Dollars and United States Mint-issued coins, such that Liberty Dollars cannot be considered to be "calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright."

The government points to the design characteristics Liberty Dollars shared in common with United States coins. Among other things, Liberty Dollars contained a dollar sign, and the phrase "Trust in God." Certain denominations also had the word "Liberty," the letters USA, and a burning torch.45 The fact that Liberty Dollars shared certain characteristics with United States coins, however, is not dispositive.

In *United States v. Ross*, 844 F.2d 187 (4th Cir. 1988), the Fourth Circuit reversed where the district court declined to enter judgment of acquittal in a counterfeiting case. The instrument there was a Xerox copy of a dollar bill which the defendant inserted into a coin change machine

41 *Id.* at 656.
42 *Id.* at 660.
43 *Id.* at 701.
44 *Id.* at 705.
45 Doc. 201 at 7.

to obtain coins. Although the fake dollar there had the exact face of a U.S. dollar bill, the Fourth Circuit found it could not be counterfeit because it also had dissimilarities, such as being blank on the back, which made it obvious it was not United States currency. *Accord*, *United States v. Smith*, 318 F.2d 94 (4th Cir. 1963) (reversing counterfeiting conviction where defendant used crude reproduction of Federal Reserve note used in confidence game).

Here, recognition of any one of the dissimilarities outlined above would have alerted any reasonable person that the Liberty Dollar was not United States currency. And, where every witness in *Ross* testified that it was obvious the fake instrument there was not a real government-issued dollar bill, it is telling that here the government produced a single witness to testify she was deceived by the look and feel of a $10 Liberty Dollar.46 It is also relevant that when weighed by FBI forensic metallurgist Michael Smith, Liberty Dollars were found to be what they purported to be- - one troy ounce and .999 fine silver.47 The fact that Liberty Dollars share certain characteristics with United States coins is thus not dispositive, and in fact is less important that the fact that they have numerous differences with United States currency.

C. Liberty Dollars were intended to be used for barter, not as coins.

The government dismisses Mr. von NotHaus' previously-filed arguments regarding private voluntary barter currency as irrelevant. In the first place, this evidence corroborates his lack of intent to deceive anyone into believing Liberty Dollars were United States coins. Witnesses testified that Mr. von NotHaus insisted that Liberty Dollars never be referred to as coins because he did not want Liberty Dollars to be confused with anything associated with the

46 This witness received the Liberty Dollar from Kevin Innes, not Mr. von NotHaus.
47 Trial Tr. Vol. II, 298, March 9, 2011.

United States government.[48] As expressed to Regional Currency Officers ("RCOs"), Liberty Dollar Associates, Liberty Dollar Merchants, and the general public, Liberty Dollars were to be used as medallions symbolic of a voluntary barter currency system, not coins.

The government also assigns great significance to the fact that Mr. von NotHaus marketed Liberty Dollars. It is, in the first place, significant that he saw the need for any marketing program at all. Had his intent been to deceive there would have been no need for marketing- - simply passing Liberty Dollars off as United States coins would have been the preferable means of distribution.

Those issues aside, the trial testimony on the marketing program he did use for Liberty Dollars- - "Do the Drop"- - emphasized the differences between the Liberty Dollar and United States coins by its very nature. Witnesses testified that "Do the Drop" was meant to initiate dialogue about Liberty Dollars and convince merchants to accept Liberty Dollars and circulate them through their business.[49] "Do the Drop" literally involved dropping a Liberty Dollar into a person's hand rather than handing it or passing it to the person or placing it on a counter.[50] Promulgated with the intention of emphasizing the differences between Liberty Dollars and U.S. coins, "Do the Drop" drew attention to the heavy weight of the Liberty Dollar as well as its shiny appearance and attractive aesthetics.[51] A merchant was free to either accept or reject the Liberty Dollar at that point, and NORFED company policy was to never force any person or business to accept a Liberty Dollar.[52] In fact, NORFED freely allowed people to exchange any unwanted

48 Trial Tr. vol. VI, 845, March 16, 2011; *see also* Trial Tr. vol. VII, 964, March 17, 2011.
49 Trial Tr. vol. I, 103, March 8, 2011
50 *Id*. *See also* Trial Tr. vol. VI, 899-900, March 16, 2011; Trial Tr. vol. V, 753, March 15, 2011.
51 Trial Tr. vol. V, 701, March 15, 2011.
52 *Id*. at 753-54.

Liberty Dollars for an equivalent amount of Federal Reserve Notes.[53]

Further, in the materials he distributed to RCOs, Liberty Dollar Associates, and merchants, Mr. von NotHaus gave notice that Liberty Dollars were not from the government, could not be put in a bank, and were not to be used or referred to as legal tender, current money, or coins.[54] In addition to distributing marketing materials giving notice that Liberty Dollars were not a form of governmental currency, the marketing techniques used by RCOs and Liberty Dollar Associates drew attention to the dissimilarities between Liberty Dollars and U.S. Mint-issued coins. Jason Pratt, an architect and graduate of Duke Business School, served as an RCO in the northern area of Austin, Texas.[55] He testified that as an RCO, he gave merchants a counter mat printed with information about Liberty Dollars.[56] The purpose of this mat was twofold: first, it facilitated conversation between merchants and customers regarding the possible advantages of receiving change in Liberty Dollars; second, "it helped the merchant circulate the currency because they knew and we told them that you couldn't put it in the bank."[57]

Trial testimony further revealed that Mr. von NotHaus included NORFED's URL and telephone contact information on the reverse of later-issued Liberty Dollars so that it was easy for people to contact the organization.[58] In addition, in the rare event that there was an unhappy Liberty-holder, NORFED freely allowed people to exchange any unwanted Liberty Dollars for an equivalent amount of Federal Reserve Notes.[59] According to Mr. Pratt, part of the RCO's role

53 *Id*. at 751.
54 Trial Tr. vol. VII, 964, March 17, 2011.
55 Trial Tr. vol. VII, 951-59, March 17, 2011.
56 *Id.* at 956. *See also* Defense Exhibit 654.
57 *Id.* at 957:9-11.
58 Trial Tr. vol. V, 628, March 15, 2011. *See also* Trial Tr. vol. VII, 957, March 17, 2011 (describing the placement of NORFED's website and telephone number on Liberty Dollars).
59 *Id.*

was to exchange U.S. Dollars for Liberty Dollars, and vice versa.[60] Mr. Pratt explained that as an RCO,

> I was the one who would exchange them [Liberty Dollars] back in case and merchant's needed to. So if anyone got inundated with them or had too many, or wasn't able to spend them, they could call or e-mail me and I would arrange to exchange them back for Federal Reserve Notes or U.S. Dollars.[61]

Despite the foregoing facts, the government contends that scenes in a Learning Channel video depicting Mr. von NotHaus engaging in business transactions with two vendors are important evidence.[62]

> While offering a Liberty Dollar coin to the first vendor to make a purchase, he states simply, "I have a ten dollar silver." When the vendor asks what it is, he says only, "it's the new ten dollar silver piece." When purchasing merchandise from a second vendor, Defendant again offers a Liberty Dollar coin and says, "I have the paper money, but have a new silver ten dollar piece."[63]

If anything, this evidence supports the defense position. In the first place, it is telling that this evidence comes from the Learning Channel, as it is difficult to imagine a less clandestine operation. Further, it is clear that in the video Mr. von NotHaus is distinguishing the Liberty Dollar from paper money. The phrase "I have the paper money, but have a new ten dollar silver piece" by its plain language connotes a distinction between the two. Indeed, the government presented no witnesses who claimed to have been deceived by Mr. von NotHaus. When taken into consideration with all of the evidence, it is clear that the Liberty Dollar was repeatedly distinguished from

60 *Id.* at 959-60.
61 *Id.* at 960:1-5.
62 Government Exhibit 25.
63 *Id.*

United States currency, and its intended use as private voluntary barter currency was an integral part of that distinction.

Federal Rule of Criminal Procedure 33

A. Applicable legal provisions and case law

Under Rule 33 of the Federal Rules of Criminal Procedure, the district court can grant a new trial on the defendant's motion "if the interests of justice so require." Fed. R. Crim. P. 33. In the Fourth Circuit, "a district court should exercise its discretion to grant a new trial 'sparingly' and . . . a district court should grant a new trial based on the weight of the evidence 'only when the evidence weighs heavily against the verdict.'" *United States v. Wilson*, 118 F.3d 228, 237 (4th Cir. 1997) (quoting *United States v. Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985)). The court should grant a motion for a new trial "[w]hen the evidence weighs so heavily against the verdict that it would be unjust to enter judgment." *Arrington*, 757 F.2d at 1485.

The defense is aware that since trial the Court has likely received a large number of letters from individuals writing on Mr. von NotHaus' behalf. Under Rule 33, courts considering motions for new trial have greater latitude to consider newly discovered evidence where it bolsters a claim of actual innocence. *United States v. Smith*, 62 F.3d 641, 649 (4th Cir. 1995). A number of witnesses who had been issued trial subpoenas but were not called to testify have taken it upon themselves to submit affidavits which corroborate the arguments made above, all of which relate to Mr. von NotHaus' claim of innocence. A summary of these affidavits follows and is submitted to corroborate the argument that the interests of justice support directing judgment of acquittal or a new trial.

1. Advice of counsel and good faith.

Paul Sulla is an attorney in good standing with the state of Hawaii since 1990 and the state of Massachusetts since 1973. Mr. von NotHaus first consulted with him on April 1, 1998, prior to the inception of NORFED. He states:

> Mr. von NotHaus was always quite concerned with the legality of all that he was engaging in. I was aware of the extensive research he had engaged in concerning the issuance of these paper certificates backed by fine silver relative to its legality and its import as an alternative to the paper fiat money issued by the Federal Reserve. Further, as a director of NORFED, he was primarily concerned with the use and acceptance of the Liberty Certificates as a petition to the U.S. government to repeal the Federal Reserve Act. He was expressly concerned with the United States' laws concerning counterfeiting and similitude and wanted to be sure that he would not be in violation of any U.S. law or regulation issued by the Treasury Department. . .
>
> I was shocked to learn that Mr. von NotHaus had been convicted of three felonies related to his issuance of the paper certificates and minted silver and gold Liberty Dollars. I could not understand how he could be convicted for following and relying upon attorney Harrison's and my legal opinion and advice. I was sorry that I had not been called to testify, as I believed my testimony would have aided his defense and I was confused why his attorneys had not contacted me to learn what could have been offered by my testimony at his trial or made any arrangements for me to attend the trial after issuing a subpoena for my attendance.

Exhibit B at 3, 6.

David Rostcheck was employed by Brinks, Inc. as a regional applications architect at the time of trial. He is not an attorney, but has conducted extensive research on the counterfeiting statutes. In 2002, he was contacted by Mr. von NotHaus regarding whether the Liberty Dollar could be prohibited by 18 U.S.C. §486. He compiled a 42 page research paper and delivered it to Mr. vonNotHaus. He states:

> Mr. vonNotHaus was charged with conspiracy against the United States. Because his counsel did not call me as a witness, I was unable to testify that von NotHaus had actually commissioned extensive research on whether he was, in fact, violating 18 U.S.C. 486, that this research had conclusively demonstrated that he

> was not, that he had discussed the results with me and informed his actions based on the historical research- - information directly relevant to the jury's deliberation of whether he had intent to violate the law.

Exhibit C at 5.64

2. Similitude.

George Selgin was, in 2011, a professor of economics at the University of Georgia Terry College of Business. He has a Ph.D in economics from New York University and is a specialist in monetary economics with expertise in the history and theory of coinage. Had he been called to testify, he would have offered his opinion, that Liberty Dollars do not meet the ordinary economic definition of coins, that none of their markings identify them as official U.S. government products, and that both their designs and actual usage qualify them as non-monetary numismatic products. He further states:

> The verdict in Mr. von NotHaus' trial, if allowed to stand, could serve as a precedent for prosecuting many other private producers of numismatic products merely because those products bear a superficial resemblance to coins, notwithstanding the facts that these products are not currency, do not replicate any current U.S. Mint products and are clearly distinct from all past official U.S. coins both in their markings and in their size and metal content.

Exhibit D at 2.

Beth Deisher was, at the time of trial, the editor of Coin World, the largest and most widely circulated weekly publication serving the numismatic field worldwide. She states:

> The verdict in Mr. von NotHaus' trial, if left to stand, has repercussions beyond the current case. The government's approach and successful prosecution has far-reaching implications for every private mint in the United States and for anyone possessing privately issued rounds that remotely resemble or contain any devices used on U.S. coins. Such pieces exist in the marketplace by the hundreds of

64 Other affidavits corroborating this claim is attached from attorney James Burk (Exhibit H- stating that Mr. von NotHaus relied on his legal advice) and Lawrence White (Exhibit I- - professor of economics at George Mason University who published article on the Liberty Dollar calling it "an innovative approach to monetary reform.")

> thousands, if not by the millions, and are bought and sold in the marketplace every day. These privately produced pieces do not replicate the metal content, diameter, weight, design devices and legends used on U.S. coins- - the standard definition of a counterfeit. However, under the standards set by this case, they would.

Exhibit E at 3.[65]

3. Private voluntary barter currency.

Richard Pitagora is one of the individuals who regarded the Liberty Dollar as an instrument of private voluntary barter, although he was not asked that question when he testified at trial. A retired attorney, Mr. Pitagora was also a former director and officer of a community bank. Mr. Pitagora states:

> At trial I could have testified that I never considered the Liberty Dollar to be anything other than an alternative currency to be used as merchants as a bartering tool; that we were always to advise merchants and holders that the Liberty Dollar was not current money and not accepted by banks as U.S. currency; that the Liberty Dollar was not a coin but a medallion but that it was 99% silver; that the medallions were also available in gold; and that the medallions could not, if looked at by any reasonable person, be considered as counterfeit.

Exhibit F at 2.

Ada Loper is a CPA who would have provided the strongest evidence that the Liberty Dollar was always intended for private barter- - Mr. von NotHaus retained her to conduct monthly independent audits at the Sunshine Mint to ensure the volume of minted gold and silver Liberty Dollars was equal to the total number of ounces issued as paper or digital warehouse receipts. She states:

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65 Other corroborating affidavits are from Clifford Mishler, past president of the American Numismatic Association (Exhibit J- - Liberty Dollars could have in no way been confused with Legal Tender of the United States); Peter Hallock (Exhibit K- - who maintains a website demonstrating differences between the Liberty Dollar and U.S. currency); Jason Pratt (Exhibit L- - explaining how, as an RCO, he was forthright about the Liberty Dollar); Clifford Thies, a professor of economics at Shenandoah University (Exhibit M- - lack of fraud with charging more than the melt value of silver used in Liberty Dollars).

> From October 1998 when the Liberty Dollar was first issued to April 2005, we would count the gold and silver and compare the amounts i.e. weights against the amount of all the gold and silver backing the Liberty Dollars paper certificates that had been issued as warehouse receipts. We then issued an Auditor's Report utilizing the strictest Generally Accepted Accounting Principles (GAAP) that von NotHaus posted on his website every month. During the 79 months of audits, we never found a single discrepancy.

Exhibit G at 1.[66]

66 And, when Ms. Loper changed jobs the audits continued with another firm until the warehouse at Sunshine Minting was raided by the FBI in 2007.

CONCLUSION

This case presents an example of the sort of rare but irrational verdict that Rule 29 was designed to remedy. For the reasons set forth above, Mr. von NotHaus requests that this motion be granted and that the Court enter a judgment of acquittal as to each of the three counts of conviction. Alternatively, based on the interests of justice, Mr. von NotHaus requests a new trial.

This the 25th day of March, 2013.

Respectfully submitted,

/s/ Noell P. Tin
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CERTIFICATE OF SERVICE

I certify that I have served the foregoing **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL** on opposing counsel by submitting a copy thereof through ECF, to be sent to:

Jill Rose
Assistant United States Attorney
227 West Trade Street
Suite 1650
Charlotte, NC 28202
jill.rose@usdoj.gov

This the 25th day of March, 2013.

/s/ Noell P. Tin
Noell P. Tin