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13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

16 **UNITED STATES OF AMERICA,**)
17)
18 **Plaintiff,**) **No. 15-CR-0126-WHA**
19)
20 **vs.**) **DEFENDANT MICHAEL ROSE'S**
21) **MOTION TO DISMISS BASED ON**
22) **OUTRAGEOUS GOVERNMENT**
23) **CONDUCT**
24) **Date: October 13, 2015**
25) **Time: 2:00 p.m.**
26) **Court: Hon. William Alsup**
)
)

26 **MOTION TO DISMISS BASED ON OUTRAGEOUS**
GOVERNMENT CONDUCT
No. 15-CR-0126-WHA

1 TO: UNITED STATES OF AMERICA, PLAINTIFF; AND MELINDA HAAG,
2 UNITED STATES ATTORNEY; AND WILSON LEUNG AND
3 DAMALI TAYLOR, ASSISTANT UNITED STATES ATTORNEYS, AND
4 TO THE CLERK OF THE ABOVE-ENTITLED COURT

5 PLEASE TAKE NOTICE that on the date and time set out above, or as soon as thereafter
6 as the matter may be heard, Defendant Michael Rose, by and through undersigned counsel, will
7 bring the following Motion to Dismiss Based on Outrageous Government Conduct in the
8 courtroom of the Honorable William H. Alsup, United States District Judge.

9 Defendant Rose's motion to dismiss seeks dismissal of the Superseding Indictment, with
10 prejudice, due to the outrageous conduct of the Plaintiff United States of America.

11
12 DATED: September 8, 2015.

13 Respectfully submitted,

14 _____
/s/

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1 **POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Michael Rose was a 41 year old United States citizen with a business, a family, and an
4 unblemished record. In early 2012, Government agents deliberately created an alleged money
5 laundering scheme and improperly enticed Mr. Rose to join it, in order to steal his valuable
6 properties. They did this despite Mr. Rose's exemplary record. They did this despite his
7 reluctance to join their venture or use his properties in connection with it. And they did this with
8 a sophisticated callousness that shocks the conscience. But the Government did not stop there.
9 After obtaining a sealed Indictment in February 2015, Government agents manufactured a fake
10 drug transaction in March 2015, days before securing a Superseding Indictment, and urged Mr.
11 Rose to assist the transaction, for the sole purpose of obtaining a 10 year mandatory minimum
12 conviction. Incredibly, Government agents took this step in the face of Mr. Rose's repeated
13 indications, over a three year period, that he wanted no part of any drug deals. The Government's
14 conduct is more than shocking and more than outrageous. The Superseding Indictment against
15 Mr. Rose must be dismissed, lest the Court allow the judicial system to be sullied through the
16 Government's misdeeds.
17

18 The United States Court of Appeals for the Ninth Circuit has repeatedly stressed that it is
19 outrageous for Government agents to "engineer[] and direct[] a criminal enterprise from start to
20 finish." *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008). Yet that is exactly what
21 happened here. The Ninth Circuit also teaches that it is outrageous for the Government to
22 "generat[e]...new crimes merely for the sake of pressing criminal charges." *United States v.*
23 *Emmert*, 829 F.2d 805, 812 (9th Cir. 1987). Again, indisputably, that happened here.
24
25
26

1 Since it is not clear from the Superseding Indictment, we note for the Court that in the
 2 matter before it there were never any actual laundered funds handled by Mike Rose or anyone
 3 else. There were likewise never any real drugs or real drug deals. Quite literally, from start to
 4 finish, all of the alleged criminal activities were Government creations.¹

FACTUAL BACKGROUND

I. The “racketeering enterprise.”

A. Introduction of Michael Rose to UCE-4252’s enterprise.

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9 The government's primary undercover agent in this case was UCE-4252. UCE-4252 first
10 heard of Michael Rose, a businessman in the Myrtle Beach, South Carolina area, in a phone
11 conversation with Vladimir Handl on January 21, 2012. During that conversation, Mr. Handl
12 mentioned, “another thing, one of my friends who owns probably around 10 clubs from like strip
13 clubs to dance clubs in the North Carolina, South Carolina, Virginia, and Georgia area. He's
14 putting together a club . . . at one of the hottest spots, Myrtle Beach, and [was] looking for a 50%
15 investor.” (January 21, 2012 5:18:07 p.m. Recording at 00:01:04-00:01:23.) UCE-4252
16 explained to Mr. Handl that his clients were not interested in investments. (*Id.*) However, after
17 Mr. Handl identified his friend Mike Rose as the owner of “eight Gold Clubs in the Southeast
18 region,” UCE-4252 became instantly interested, stating, “Gold Clubs are his clubs? ‘Cause those
19 clubs are all over the country . . . Wow!” (*Id.* at 00:05:13-00:05:55.) At no point in the
20 conversation did Mr. Handl indicate in any manner that Mr. Rose wanted to launder funds, knew
21 anything about illegal activities, knew anything UCE-4252’s clients, or wanted to participate in
22 any illegal activities. (*See generally* January 21, 2012 05:18:07 p.m. Recording.) On January 25,
23 2012, UCE-4252 placed a call to Mr. Scalise, who also mentioned Mr. Rose as another potential
24

25
26 ¹ By making this motion to dismiss based on outrageous government conduct, Mr. Rose does not
intend to admit any of the charges or allegations against him.

1 object of their enterprise. (January 25, 2012 7:58:58 p.m. Recording.) Mr. Scalise told UCE-
2 4252 that they could arrange a meeting with Mr. Rose. (*Id.*) UCE-4252 discussed Mr. Rose again
3 with Mr. Handl and/or with Mr. Scalise in two more phone calls and one email in the next three
4 weeks. (*See* January 31, 2012 5:42:06 p.m. Recording at 00:02:12; February 4, 2012 2:25:55
5 p.m. Recording at 00:04:25.)

6 UCE-4252's first communication with Mr. Rose took place in Charlotte, North Carolina
7 on February 10, 2012, and was secretly recorded by the Government. (February 10, 2012
8 Recording at 00:00:59-00:01:25.) Mr. Handl and Mr. Scalise were also present at the meeting.
9 (*Id.*) Mr. Rose stated that he did not "know anything other than a little bit" about UCE-4252's
10 proposal, and wanted UCE 4254 to "lay it out for [him]." (*Id.* at 01:03:36-01:03:40; 01:05:37-
11 1:05:44.) UCE-4252 mentioned a client who wanted to launder funds through one or more of Mr.
12 Rose's clubs in order to hide proceeds from a bankruptcy proceeding. (*Id.* at 01:03:50-01:06:45.)
13 Mr. Rose expressly stated that he would not want to run any of the client's money through one of
14 his existing clubs, generally discussed various ways that the client's goals could be
15 accomplished, and noted that such conduct would be "highly illegal." (*Id.* at 01:12:05-01:17:05.)
16 There was no agreement by Mr. Rose at any point during this meeting to join in UCE-4252's
17 proposed venture to run funds through Mr. Rose's clubs.
18

19
20 **B. Government encouragement of Mr. Scalise and Mr. Handl to involve Mr. Rose in the enterprise.**

21 UCE-4252 did not talk to Mr. Rose again—over the phone, via email, or in person—for
22 the next two-and-a-half months. There is virtually no evidence that Mr. Rose definitively agreed
23 during this interval to join UCE-4252's proposed venture. The Government has not specifically
24 charged that Mr. Rose joined any conspiracy during the two and one-half month interval between
25 the first and second meetings. However, there were several exchanges via telephone and email
26

1 between UCE-4252 and Handl and/or Scalise in which Mr. Rose's possible participation, and the
2 details of such participation, were considered. These exchanges occurred on several dates in
3 February, March, and April of 2012, and, as outlined below, show a relentless effort on UCE-
4 4252's part to enlist Mr. Rose and his clubs in the government's manufactured scheme.

5 On February 16, 2012, a mere six days after UCE-4252's meeting with Mr. Rose, UCE-
6 4252 explained that he did not discuss "pineapples," or cocaine, at the February 10 meeting in
7 Charlotte because, "when you guys didn't bring it up I didn't know if you wanted to bring it up
8 in front of Mike or what so I didn't say anything." (February 16, 2012 09:46:41 p.m. Recording
9 at 00:04:30-00:04:38.) Mr. Scalise responded, "[e]xactly. That's why. You hit that on the head."
10 (*Id.* at 00:04:39-00:04:45.) Mr. Scalise made it very clear that Mr. Rose wanted nothing to do
11 with "pineapples." (*Id.*)
12

13 The next day, on February 17, 2012, UCE-4252 informed Mr. Handl and Mr. Scalise that
14 his client would need to move \$50,000.00 per week through a business. (February 17, 2012 1:04
15 p.m. Recording at 00:22:55-00:23:59.) Mr. Handl and Mr. Scalise stated several times during the
16 call that they were willing and able to handle that sum on their own, without Mr. Rose's
17 involvement. (*See id.* at 00:23:00; 00:33:20.) Every time they did so, however, UCE-4252
18 steered the conversation back to Mr. Rose and his clubs:
19

20 Scalise: . . . We can do that ourselves.

21 UCE-4252: Well, I mean the thing is . . . if it's 50 a week you're talking about
22 200 in a month and so you got to have a place that looks credible
23 for that amount of cash coming in. And Mike's got the advantage
24 that he's got all these clubs that he's saying is already putting
25 about 50 a week in door.

26 Scalise: But we have a club here in North Myrtle Beach that we have our
hands on right now that is doing about 21 thousand, between 15
and 20 a week at the door. It's a night club . . . So we're doing 21
to 20 a week at the door. Just, and that's doing it now, you know.
And that's published, that's a fact. . . .

1 UCE-4252: One of the things that is attractive or the reason why I can say guys
2 pay a little more because we're getting the better service is, you
3 know, um they kind of understand strip clubs. They understand the
4 cash can be really great and you know these kinds of clubs can
kind of turn around and having like you know eight at his disposal
to be able to use at least on paper.

5 (*Id.* at 00:24:40-00:26:35.) Later, Mr. Handl told UCE-4252,

6 Handl: If you guys want to move another 25 thousand a week, I can
7 set that up through another entity and set that up without a
8 problem. . . . [a]nd we'll be basically the owners of the club. We'll
9 operate it, we'll oversee it. You know what I mean? We'll have an
operation team, but I'm going to have my hands in the money so it
don't slip out somewhere.

10 Scalise: And we want at least 30. . . .

11 UCE-4252: . . . So here's one of the things that, that I'll tell you is a selling
12 point in the way Mike comes across. It is a positive selling point to
say that this is a guy, here's a website, clubs in Beaumont,
Bedford, New Hampshire, Myrtle Beach, etc. He really looks like a
successful strip club and night club owner, right?

13 Scalise: . . . But then again, we can package just as pretty, trust me.

14 UCE-4252: No, no, I understand. But you know when the clients start asking
15 questions and I start, you know, arguing with them or explaining to
16 them what the advantages are, this is one of the things. I'm just
telling you up front that any one club, you know, I mean, how
many nightclubs, how many restaurants, all these things they fail
all the time, shit like that.

17 (*Id.* at 00:33:22-00:35:20.) Mr. Handl also made it clear that Mr. Rose would not risk involving
18 his current successful businesses in UCE-4252's venture. (*Id.* at 00:36:21-00:36:36.)

19 A taped conversation between UCE-4252 and Mr. Handl on February 22, 2012 reveals
20 that no agreement with Mr. Rose was even close to being reached and that Mr. Rose, despite
21 UCE-4252's best efforts, had taken no steps and shown no eagerness to consummate such a deal.

22 After calling Mr. Handl and discussing other business, UCE-4252 steered the conversation to

23 Mr. Rose:

24 UCE-4252: So now a couple of questions. Let's see here as far as the Club XS
25 goes. Club XS is one where he wants, Mike's hope he's looking
26 for a 250 in investment but he might take 125 is that right?

1 Handl: I will get, I don't have a correct answer for you. I'll get with him. .

2 UCE-4252: . . . If it's a pay as you go, does Mike have a club that he would
3 prefer to use . . . does he want the Gold Club in Myrtle Beach to be
4 the one to handle it or does he still prefer the XS Club in
Columbia?

5 Handl: I'm not sure. . . . His concern was he did not want to risk running
6 money through his clubs and risk his clubs you know what I mean.

7 UCE-4252: No, no, I understood what he meant, but you still have to put one
8 club on the contract. Like he was talking about making a marketing
9 contract we have to pick one club.

10 Handl: I think what he wants to do is possibly do the XS Club, which will
11 be a brand new club

12 UCE-4252: Okay, so, now the question is does he, do you guys own XS or is
13 he managing it for someone else?

14 Handl: No, he doesn't own XS yet. He was looking at possibly buying it
15 with another investor. You know, he kind of he came to me, um,
16 you know, a few weeks back and says hey you know I got this,
17 awesome club, you know, so I got a bunch of other guys that like
18 to kind of throw money around and buy clubs and just kind of have
19 on the side. So I figured you know why not kind of introduce this
20 to you guys?

21 UCE-4252: No, no, I understand that. He would, so does he have a date that he
22 thinks he's going to close on XS or is he still wanting to line up
23 investors?

24 Handl: He is still needing to line up investors just because he's been busy .
25 . . as soon as that's done he's ready to run to something else.

26 (February 22, 2012 8:39:50 p.m. Recording at 00:10:25-00:13:20.) A few minutes later, UCE-
4252 stated that, to his "pineapple" clients, "the established good high-end strip club sounded
real good . . . because they know that business well and they know that's a good way for
moneymakers for a deal. I'm not saying that that club, the XS Club, is not going to work but it's
not even something that he owns yet so I guess ask him about how he wants it to work." UCE-
4252 suggested that Mr. Handl "speak to Mike let him, let me know what he has to say and
whether we can work this out and if sounds good then I think I'll go back. I'll firm it up probably
with the pineapple client first and then we'll worry about the rest later." (*Id.* at 00:15:55-
00:19:44.)

1 In a taped conversation between UCE-4252, Mr. Scalise and Mr. Handl, on February 27,
2 2012, Mr. Rose continued to have concerns about accepting UCE-4252's proposal. The
3 conversation occurred two days after Mr. Scalise and Mr. Handl met with Mr. Rose. (February
4 27, 2012 Recording 00:00:24-00:00:30.) Mr. Scalise stated that Mr. Rose "just doesn't, you
5 know, the deal is he's like when he looks at it he's like you know it's not like that much money
6 that he made, you know, but I'm risking a lot." (*Id.* at 00:10:10-00:10:20.) Later that day, UCE-
7 4254 acknowledged that "Mike was very concerned about putting all of his clubs, you know, at
8 risk." (February 27, 2012 Recording at 00:02:55-00:03:05.)

9
10 In a taped conversation on April 5, 2012, Mr. Handl asked UCE-4252 whether Handl
11 should look for another club owner if Mr. Rose did not work out. (April 5, 2012 01:01:04 p.m.
12 Recording at 00:13:41-00:14:08.) UCE-4252 asked Mr. Handl if Mr. Rose was interested in
13 UCE-4252's scheme, to which Handl responded, "[T]hat's what I'm trying to figure out. You
14 know if he doesn't want to do that, I mean, we got another club that's going to be opening up in
15 April" (*Id.* at 00:14:08-00:14:43.) UCE-4252 reaffirmed the importance of including Mr.
16 Rose for the enterprise to be successful, stating that ". . . Mike's got enough places that make
17 enough money that it will all look good and provide the client with everything he needs." (April
18 5, 2012 01:19:27 PM Recording at 00:00:53-00:01:12.) UCE-4252 tried to confirm Mr. Rose's
19 participation, asking, "[i]f Mike is on board with that, that's all I'm asking, if Mike's on board,
20 we can probably still do this." In response, Mr. Scalise admitted, "[t]his is the deal—he hasn't
21 said yes or no." (*Id.* at 00:01:34-00:01:46.)

22
23 In a taped conversation on April 9, 2012, Mr. Scalise suggested to UCE-4252 that the
24 latter should hold a face to face meeting with Mr. Rose, stating that "[i]t's always better face to
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26

1 face, and he's got questions too, you know." (April 9, 2012 03:17:29 p.m. Recording at
2 00:10:13-00:10:18.)

3 In a taped conversation on April 10, 2012, Mr. Handl called UCE-4252 to inform him
4 that Mr. Rose had agreed to a second face-to-face meeting. Mr. Handl told UCE-4252 that
5 "whatever questions you have with Mike can be taken care of, maybe at lunchtime or so." (April
6 10, 2012 09:29:02 PM Recording at 00:01:32-00:01:38.)

7
8 **C. Government encouragement of Mr. Rose.**

9 At the second in-person meeting on April 26, 2012 in Myrtle Beach, details about a
10 business arrangement were discussed among UCE-4252, Mr. Handl, Mr. Scalise and Mr. Rose.
11 (April 26, 2012 11:55:00 a.m. Recording.) As UCE-4252 offered details about the venture, Mr.
12 Rose expressed concerns about UCE-4252's proposals. In response to Mr. Handl's statement that
13 they would be moving "100,000 a week," Mr. Rose was taken aback, stating, "you didn't tell me
14 that." (*Id.* at 01:06:38-01:07:10.) Later, Mr. Rose stated "the truth is, I mean, even with all that, I
15 mean if the bank catches on to something, anything could happen." (*Id.* at 01:31:58-01:32:05.)
16 Mr. Rose also expressed concern about being in business with UCE-4252's clients, who were
17 identified as Colombians, questioning "are these guys good guys, or are these guys probably
18 going to shoot somebody?" (*Id.* at 01:13:36-01:13:43.) Additionally, Mr. Rose suggested that the
19 meetings could be done at hotels rather than at his clubs, but UCE-4252 said his clients would
20 not do that. (*Id.* at 01:09:34-01:09:36.) At one point, UCE-4252 had to ask Mr. Handl and Mr.
21 Scalise outside of Mr. Rose's presence whether Mr. Rose was actually on board or "if were there
22 any concerns?" (April 26, 2012 9:25:00 p.m. Recording 01:38:07-01:38:12.) Mr. Handl replied,
23 "[n]o, you are good. . . . Just let me know when you are ready," while Mr. Scalise responded that
24 he "did not get to spend too much time with him." (*Id.* at 01:38:13-01:38:17.) UCE-4252 later
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26

1 spoke with Mr. Rose privately and said “I don’t want you to feel like you jumped on a train and
2 you can’t get off. I’m the guy who can stop that train.” (*Id.* at 02:51:55-02:52:02.) Rose
3 responded, “[y]eah, if I want to be done with it, I want to be done with it. That’s fine.” (*Id.* at
4 02:52:03-02:52:05.)

5 In a May 8, 2012 text exchange with Mr. Handl, UCE-4252 tried to renegotiate Mr.
6 Rose’s commission from 12 to 10 percent. (*See* HANDL-ALL-302S_000298-302, attached as
7 Exhibit C.) Handl replied that Rose would not do this and forwarded a statement from Rose:
8 “They are worried about trust and I’m worried about other stuff.” (*Id.* at HANDL-ALL-
9 302S_000302.) According to the Superseding Indictment, Mr. Rose conducted financial
10 transactions involving property said to be the proceeds of unlawful activity between June 7, 2012
11 and December 31, 2014. (*See* Superseding Indictment, Paragraph 12.) During the time period of
12 the alleged RICO and money laundering conspiracies, UCE-4252 aggressively pressured Mr.
13 Rose and his associate to expand the charged money laundering activity. When Mr. Rose
14 attempted to have the deals take place in hotel rooms rather than in his clubs, UCE-4252 told him
15 that meeting in hotels is “what the cops do, and [his clients are] just never, ever gonna do a deal
16 there.” (June 18, 2012 11:04:19 Recording at 00:15:10.) Mr. Rose stated that the company was
17 already “bigger than what [they] thought they were gonna do” and declined to expand the
18 enterprise geographically. (*Id.* at 00:17:12.)

19
20
21 During the time period of the alleged RICO and money laundering conspiracies, UCE-
22 4252 invested \$200,000.00 of his purported clients’ funds in a nightclub that Mr. Rose and an
23 associate were operating in Las Vegas, Nevada. The nightclub quickly failed and Mr. Rose and
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26

1 the associate were worried about losing that much money of the purported client's funds in an
 2 investment venture. These worries were expressed by Mr. Rose and his associate to UCE-4252.²

3 On February 24, 2015, a sealed Indictment was returned against Mr. Rose and several
 4 Co-Defendants. Mr. Rose was charged with various RICO and money laundering counts, but was
 5 not included in the Count 132 narcotics conspiracy, which carries a minimum mandatory ten-
 6 year sentence. (*See* Dkt. Entry 201.)

7 **II. The "cocaine enterprise."**

8 On March 8, 2015, UCE-4252 invited Mr. Rose to a lunch in San Francisco. Well into the
 9 lunch, to Mr. Rose's obvious surprise, UCE-4252 informed Mr. Rose of a pending three kilo
 10 "pineapple" deal he was arranging for Mr. Handl. UCE-4252 advised Mr. Rose that he would be
 11 coming to Myrtle Beach, saying, "I'll tell you the reason why but the--another quarter pounder
 12 will be delivered tomorrow." (March 8, 2015 1:26 p.m. Recording at 00:30:17-00:32:25.) Mr.
 13 Rose asked, "To Myrtle? Why is it going there?" UCE-4252 told Mr. Rose that Handl was
 14 "branching out," to which Mr. Rose responded in surprise, "He didn't tell me about this . . .
 15 That's the other side" (*Id.*) Mr. Rose said, of Handl's planned involvement, "[t]hat's crazy .
 16 . . I didn't know they would go on their own and do that." (*Id.* at 0037:22-00:37:32.) Mr. Rose
 17 reiterated his oft-repeated desire to avoid such work, telling UCE-4252 that "I'd be scared to
 18 death" to be involved in a drug transaction like the one UCE-4252 was describing. (*Id.* at
 19 01:01:30-01:01:32.) Mr. Rose sought confirmation from UCE-4252 that the Handl drug
 20 transaction would be separate from the purported delivery of funds to Mr. Rose that UCE-4252
 21 had scheduled for the same weekend, asking, "But that's gonna be separate from anything else?"
 22 UCE-4252 assured Mr. Rose, "No, of course, separate." (*Id.* at 01:05:48-01:05:58.)

25 ² Numerous discovery materials related to this paragraph were not made available by the
 26 Government until August 25 and were not received by undersigned counsel until September 1.

1 On March 17, 2015, Mr. Rose, Co-Defendant David Gaither, and UCE-4252 met at UCE-
2 4252's urging. UCE-4252's request of Mr. Rose, two days previously, to bring Mr. Gaither to the
3 meeting had come as a surprise. (March 15, 2015 05:35:40 p.m. Recording at 00:00:29-
4 00:01:47.) At the meeting, UCE-4252 asked Mr. Rose if he could recommend a law enforcement
5 lookout for the cocaine transaction, and Mr. Rose mentioned Co-Defendant McGaha. (March 17,
6 2015 12:19 p.m. Recording at 00:49:40.) However, Mr. Rose confirmed that he was not going to
7 be involved in the drug transaction, asking, "the other thing is . . . I'm trying to figure out how to
8 send it, because Vlad's going to be there . . . that side, and the money side." (*Id.* at 00:53:23.)
9 UCE-4252 assuaged his concern by stating, "here's the thing. The fact that you guys are in the
10 same room when the 250 shows up, at that time, it's all separate." (*Id.*) Mr. Gaither subsequently
11 contacted Mr. McGaha.
12

13 On March 18, 2015, a Superseding Indictment was filed against Mr. Rose and several co-
14 defendants. (*See* Dkt. Entry 125.) The Superseding Indictment charged Mr. Rose with the Count
15 132 drug conspiracy, which carries a 10 year statutory minimum punishment.
16

17 LEGAL STANDARD

18 Outrageous government conduct occurs when the actions of a government actor are "so
19 outrageous that due process principles would absolutely bar the government from invoking
20 judicial processes to obtain a conviction." *United States v. Black*, 733 F.3d 294, 302 (9th Cir.
21 2013) (quoting *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). In order for dismissal of
22 an indictment or reversal of a conviction to be appropriate, the conduct must be "so grossly
23 shocking and so outrageous as to violate the universal sense of justice" mandated by the Due
24 Process Clause of the Fifth Amendment. *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir.
25 2011) (quotation omitted); *see also United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).
26

1 Outrageous government conduct is an objective test³ that looks only to the Government's
2 actions. *Black* at 306 n.9; *United States v. McClelland*, 72 F.3d 717, 721 n.1 (9th Cir. 1995);
3 *United States v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985). On the other hand, entrapment is a
4 subjective defense that considers the defendant's predisposition to commit the crime. *Black* at
5 306 n.9. As a result, the two arguments are similar but not coextensive; it is possible for an
6 indictment to be dismissed due to the government's conduct in prosecuting the crime even if the
7 defendant was predisposed to commit the crime. *McClelland* at 721 n.1. Outrageous government
8 conduct is a matter of law for the court, whereas entrapment is a factual defense for the jury.
9 *United States v. McQuin*, 612 F.2d 1193, 1196 (9th Cir. 1980).

10
11 In entrapment cases, the Ninth Circuit has held that a defendant cannot claim entrapment
12 when he "never had contact with a federal agent." *United States v. Stewart*, 770 F.2d 825, 831
13 (9th Cir. 1985). However, to our knowledge, the Ninth Circuit has never explicitly applied this
14 derivative entrapment rule in its outrageous government conduct analysis. To the contrary, the
15 court has reviewed the government's activities for due process violations even if the challenging
16 defendant was brought in derivatively. *See United States v. Lomas*, 706 F.2d 886, 891 (9th Cir.
17 1983). The Ninth Circuit recently identified six factors, culled from the circuit's outrageous
18 government conduct jurisprudence, relevant to whether the government's conduct will be
19 considered outrageous in a particular reverse sting case. The factors are:

- 20 (1) known criminal characteristics of the defendant;
- 21 (2) individualized suspicion of the defendant;
- 22 (3) the government's role in creating the crime of conviction;
- 23 (4) the government's encouragement of the defendant to commit
24 the offens[iv]e conduct;

25 ³ Because the remedy for outrageous government conduct is dismissal of the indictment, it is not
26 properly characterized as a defense. *See United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir.
2008).

- 1 (5) the nature of the government’s participation in the offens[iv]e
conduct; and
2 (6) the nature of the crime being pursued and necessity for the
3 actions taken in light of the nature of the criminal enterprise at
issue.

4 *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013). These factors “do not constitute a
5 formal checklist, but help focus our analysis of the totality of the circumstances.” *Id.* at 304.

6 The first three factors are relevant to how the government established the criminal
7 operation. The government’s conduct is less likely to be found outrageous if the government
8 knew of the defendant’s criminal history or propensity to commit the crime when it initiated its
9 sting operation. *Id.*; see also *United States v. Williams*, 547 F.3d 1187, 1200 (9th Cir. 2008).
10 “Whether the government had reason to suspect an individual or identifiable group before
11 initiating a sting operation is an important consideration.” *Black* at 304; *United States v.*
12 *Bonanno*, 852 F.2d 434, 438 (9th Cir. 1988). The third factor considers whether the government
13 approached the defendant, or vice versa, and which party created or proposed the criminal
14 enterprise. If the government merely attached itself to an ongoing enterprise, then the conduct
15 will not typically be outrageous. See, e.g., *Williams*, 547 F.3d 1187, 1200 (9th Cir. 2008)
16 (finding that the government agent merely attached himself to an ongoing enterprise, despite
17 suggesting that the defendant rob a stash house, because the defendant was already planning a
18 bank robbery).

19
20
21 The fourth and fifth *Black* factors are relevant to the government’s conduct in the
22 ongoing criminal enterprise after its initiation. The government’s encouragement of the
23 defendant to commit the crime will weigh more heavily toward outrageous conduct if it took the
24 form of pressure, harassment, threats, or coercion. *United States v. Poehlman*, 217 F.3d 692, 698
25 (9th Cir. 2000). The weight of the government’s involvement in the crime depends upon the: 1)

1 duration; 2) nature; and 3) necessity of its participation. *Black* at 308. Long-term involvement is
2 more outrageous than short-term; active participation is more outrageous than mere observation;
3 and necessary government participation, in the form of technical expertise or resources needed to
4 accomplish the crime, is more outrageous than auxiliary contributions from the government
5 actor. *See Greene v. United States*, 454 F.2d 783, 786 (9th Cir. 1971) (finding three and a half
6 years of direct, substantial government involvement to be outrageous).

7
8 Finally, the sixth *Black* factor is relevant to the government's justification for its chosen
9 strategy. The purpose of this factor is to consider the need for the technique being used, and the
10 alternative tools and methods available, to investigate and prosecute the type of offense under
11 investigation. *See Black* at 309-310; *United States v. Wiley*, 794 F.2d 514, 516 (9th Cir. 1986).

12 Prior to the establishment of the six *Black* factors, the Ninth Circuit often reviewed
13 outrageous government conduct claims in light of five permissible contexts of government
14 activity:

- 15 1) the defendant was already involved in a continuing series of
- 16 similar crimes, or the charged criminal enterprise was already in
- 17 progress at the time the government agent became involved;
- 18 2) the agent's participation was not necessary to enable the
- 19 defendants to continue the criminal activity;
- 20 3) the agent used artifice and stratagem to ferret out criminal activity;
- 21 4) the agent infiltrated a criminal organization; [or]
- 22 5) the agent approached persons already contemplating or engaged in
- 23 criminal activity.

24 *United States v. Bonanno*, 852 F.2d 434, 437-38 (9th Cir. 1988). *Bonanno* is still good law.
25 According to the *Black* majority, the five *Bonanno* factors "have not been used consistently or as
26 a dispositive test." *Black* at 304 n.7. Thus, "[b]ecause we are to resolve every case on its own
particular facts, we take account of the *Bonanno* factors in our analysis but only as part of our
consideration of all the circumstances as a whole." *Id.*

1 The Ninth Circuit has also identified two relevant scenarios which may constitute
2 outrageous government conduct *per se*. First, the Ninth Circuit has repeatedly stressed that it is
3 outrageous for Government agents to “engineer[] and direct[] a criminal enterprise from start to
4 finish.” *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008). Law enforcement agents
5 can use and pay informants, supply contraband, and provide necessary and/or valuable items to
6 further an existing conspiracy without violating this prohibition. *United States v. Bogart*, 783
7 F.2d 1428, 1438 (9th Cir. 1986), *vacated in part on other grounds on reh’g sub nom. United*
8 *States v. Wingender*, 790 F.2d 802 (9th Cir. 1986). However, the Government cannot create and
9 push forward the enterprise on its own. *See Greene v. United States*, 454 F.2d 783 (9th Cir.
10 1971).

12 In *Greene*, an undercover agent infiltrated a bootleg alcohol operation. After the
13 defendants were arrested and imprisoned, the agent re-initiated contact. For the next three and a
14 half years, the agent frequently prodded the defendant to produce liquor, giving them a still, a
15 location for the still, a still operator, and two thousand pounds of sugar at wholesale price. The
16 defendants frequently stalled but ultimately made four deliveries over the period. They testified
17 that they did not produce any alcohol except to provide to the government agent.

18 The *Greene* court reversed the convictions on the basis of outrageous conduct by the
19 undercover agent. He initiated contact with the defendants after they were released from prison,
20 originating the second bootleg operation. For three years, he provided nearly all of the supplies
21 and infrastructure necessary to run the criminal enterprise and was the only customer. The Ninth
22 Circuit found that it was the combination of all of these circumstances that was outrageous,
23 finding that the government may not “involve itself so directly and continuously over such a long
24 period of time in the creation and maintenance of criminal operations, and yet prosecute its
25

1 collaborators.” *Id.* at 787. *Greene* remains a “useful precedent” in the Ninth Circuit. *Bogart* at
2 1436 n.8.

3 The second *per se* outrageous scenario occurs when government agents “generat[e] . . .
4 new crimes merely for the sake of pressing criminal charges.” *United States v. Emmert*, 829 F.2d
5 805, 812 (9th Cir. 1987), or “completely fabricate the crime solely to secure the defendant’s
6 conviction.” *United States v. Winslow*, 962 F.2d 845, 849 (9th Cir. 1992). There is a great danger
7 of this happening in a reverse sting scenario, “when the government initiates the criminal
8 conduct, setting up a fictitious crime and arresting the criminals as they begin to carry out what
9 they believe is a real crime.” *United States v. Black*, 733 F.3d 294, 298 n.1 (9th Cir. 2013). The
10 government can create a scenario suggesting a big payday with no risk that would otherwise be
11 beyond the defendant’s means or predisposition; a vulnerable person who never would have
12 considered committing a robbery may be inclined to do so in response to the government agent’s
13 promise of a perfect crime. *See United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010). Such
14 conduct can become outrageous if the government created a crime that otherwise would not have
15 occurred. “Criminal sanction is not justified when the state manufactures crimes that would
16 otherwise not occur. Punishing a defendant who commits a crime under such circumstances is
17 not needed to deter misconduct; absent the government’s involvement, no crime would have
18 been committed.” *United States v. Bogart*, 783 F.2d 1428, 1436 (9th Cir. 1986).

19
20
21 Although the Ninth Circuit speaks of these two scenarios in absolute or *per se* terms, in
22 actually determining whether the government “created and directed a criminal enterprise from
23 start to finish” or “generated a new crime solely to press criminal charges” the court has
24 sometimes referenced the factors enunciated in *Bonanno* and *Black*.

1 For example, the *Gurolla* court noted that the “shocking to due process” standard “is met
2 when the government engineers and directs a criminal enterprise from start to finish,” but “is not
3 met when the government merely infiltrates an existing organization, approaches persons it
4 believes to be already engaged in or planning to participate in the conspiracy, or provides
5 valuable and necessary items to the venture.” *Gurolla* at 950 (internal quotation marks and
6 citations omitted); *accord Williams* at 1199.

7 Similarly, the *Black* court acknowledged that “the stash house robbery was entirely the
8 ATF’s creation” and that “the government’s role in creating the crime” raised concerns “that it
9 sought to manufacture a crime that would not have otherwise occurred.” *Black* at 306-307. But,
10 although clearly troubled and concerned by the government’s methods, the majority declined to
11 find a due process violation, primarily because the defendants: 1) enthusiastically and eagerly
12 joined in the crime without further inducement; 2) repeatedly bragged that they had already
13 participated in many such stash house robberies; and 3) had a significant independent role in
14 planning the crime. *Id.*

15 ARGUMENT

16 Any nuanced differences between the *Black* and *Bonanno* factors or between those
17 factors collectively considered and the *per se* scenarios outlined above need not concern the
18 Court in this case. Under any of the extant Ninth Circuit tests, the government’s conduct toward
19 Mr. Rose was a shocking due process violation.
20

21 **I. The *Per Se* Test.**

22 Both the first and second *per se* outrageous conduct scenarios are present here. It is
23 undisputed as a factual matter that the government, slowly and methodically over a multi-year
24 period, engineered and directed the crimes charged in the Superseding Indictment, and did so
25

1 from start to finish. We do not believe that the government will dispute this factual point. There
2 were never any actual laundered funds resulting from criminal activity. There were never any
3 actual drugs. And the government called the shots as to how the charged schemes were
4 accomplished. All of this was engineered against a man with a spotless record. This was thus a
5 *per se* Fifth Amendment Due Process violation that can only be cured by dismissal with
6 prejudice. *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *United States v. Williams*, 547
7 F.3d 1187, 1199 (9th Cir. 2008).

8
9 In Mr. Rose's case, the government also generated a crime "merely for the sake of
10 pressing criminal charges." *United States v. Emmert*, 829 F.2d 805, 812 (9th Cir. 1987). This was
11 nowhere more evident than in the government's orchestration of a last minute fake drug deal in
12 order to saddle Mr. Rose with a minimum mandatory drug count. Remarkably, this was done in
13 the face of Mr. Rose's longstanding refusal, well-known to UCE-4252, to participate in drug
14 transactions. But UCE-4252 was fixated as well on Mr. Rose's nightclub empire and relentlessly
15 generated a crime against him in order to press charges and seize that empire.

16 As noted in the previous section, the Ninth Circuit in *Black* failed to find outrageous
17 government conduct even though "the stash house robbery was entirely the ATF's creation and it
18 was Zayas [the undercover agent] who set the parameters for how it had to be carried out." *Black*
19 at 305. The court refused to find a due process violation because: 1) the defendants
20 enthusiastically, eagerly, and readily joined in the crime without further inducement; 2) the
21 defendants repeatedly bragged, from their very first meeting with the undercover agent, that they
22 had already participated in many such stash house robberies; and 3) the defendants had a
23 significant independent role in planning the crime.
24
25
26

1 Not one of those circumstances is present in Mr. Rose's case. First, Mr. Rose was non-
2 committal in his initial meeting with UCE-4252 and did not agree to participate in his venture for
3 approximately three months. The recordings show a businessman who was obviously lukewarm,
4 hesitant, and even nonchalant, about the government's proposal. Second, Mr. Rose never once
5 bragged that he had committed any crime, much less money laundering or narcotics sales, in the
6 past. Finally, Mr. Rose did not have a significant independent role in planning the crime. UCE-
7 4252 directed the enterprise, sent the funds, and picked the locations. When Mr. Rose tried to
8 alter the script, by suggesting that funds be delivered to a hotel, UCE-4252 would not hear of it.
9 This was a far cry from Zayas, the undercover agent in *Black*, who regularly told the defendants
10 that they were the experts and had to be in charge of planning the robbery details and bringing
11 the guns. Thus, whether the government is barred outright from engineering and directing an
12 alleged crime from start to finish or prohibited in most circumstances, Mr. Rose has satisfied
13 either standard.
14

15 The government's conduct in obtaining the Superseding Indictment against Mr. Rose is
16 barred under the first and second *per se* scenarios, and the Superseding Indictment should be
17 dismissed.
18

19 **II. The Five *Bonanno* Factors.**

20 If this Court fairly considers the five *Bonanno* factors that, when satisfied, indicate
21 acceptable government conduct, the only remedy is likewise dismissal with prejudice.

22 Factor One: Was Mr. Rose *already involved in the charged criminal enterprise or in a*
23 *continuing series of similar crimes* at the time UCE-4252 became involved in this matter? The
24 answer is no. The government was well into orchestrating the racketeering enterprise against Mr.
25 Scalise and Mr. Handl long before it even heard of Mr. Rose. When UCE-4252 first found out
26

1 about Mr. Rose on January 21, 2012, Mr. Rose was not involved in criminal conduct, and Mr.
2 Handl did not present Mr. Rose to UCE-4252 as anyone other than a friend who owned strip
3 clubs and was looking for investors. Mr. Handl's comments in the initial conversation indicate
4 that Mr. Rose knew nothing about what UCE-4252 was contemplating. After this initial
5 conversation, UCE-4252 could have easily run a background check and discovered Mr. Rose's
6 spotless record.⁴ And nothing changed in this regard between the initial conversation and the
7 February 10, 2012 face to face meeting. Mr. Rose was not "already involved" in any similar
8 enterprise, or the charged enterprise, until he found himself in UCE-4252's clutches.
9

10 Factor Two: Was UCE's participation *necessary to enable Mr. Rose to begin or continue*
11 *the charged criminal activity*? The answer is yes. It was UCE-4252 and his fellow agents who
12 supplied the money to Mr. Rose at every stage of the purported enterprise. The answer is the
13 same with respect to the drug charge. No crime involving Mr. Rose would have existed had
14 UCE-4252 not asked him at the last minute to suggest a lookout for an imagined drug deal that
15 never occurred.

16 Factor Three: Did UCE-4252 use *artifice and stratagem to ferret out criminal activity*?
17 The answer is no. *Williams* makes clear that the stratagem must be directed at pre-existing
18 criminal activity. 547 F.3d 1187, 1199 (9th Cir. 2008). The defendant in *Williams* was already
19 deep in the planning stages of a bank robbery, and the agent wisely suggested that he switch his
20 focus to a stash house. *Id.* at 1199.
21

22 Factor Four: Did the agent *infiltrate a criminal organization*? The answer is no. The
23 evidence before the Court unequivocally demonstrates that Mr. Rose was not part of any pre-
24

25
26 ⁴ Undoubtedly, UCE-4252 did run a background check on Mr. Rose at this point.

1 existing criminal organization when UCE-4252 targeted him. Unlike the defendant in *Williams*,
2 Mr. Rose had not planned a crime or hired an experienced crew to help him commit a crime. *Id.*

3 Factor Five: Was Mr. Rose *already contemplating or engaged in criminal activity* when
4 UCE-4252 approached him? The answer is no. It is established, and we believe the government
5 will concede, that it was not aware of any criminal activity Mr. Rose was engaged in when UCE-
6 4252 approached him. Was Mr. Rose contemplating any such criminal activity at this time?
7 Again, the answer is no. The government may counter that Mr. Handl and/or Mr. Scalise, before
8 the first face to face meeting, reported some interest on Mr. Rose's part in UCE-4252's ersatz
9 venture. But we are aware of no case where the "contemplated" criminal activity is the very
10 crime being manufactured and pushed by the government. *See Williams* at 1199 (finding that a
11 bank robbery being independently planned by the defendant constituted the contemplated
12 criminal activity). The facts of this case establish that the government has failed to satisfy *any* of
13 the five *Bonanno* factors, and the government's conduct can only be remedied by dismissal of
14 the Superseding Indictment.
15

16 **III. The Six *Black* Factors.**

17 Mr. Rose should also prevail if the Court only considers the six factors enunciated in
18 *Black*.

19 Factor One: What were Mr. Rose's *known criminal characteristics* when UCE-4252 first
20 approached him? *Black* at 304. The answer is that there could not have been any because Mr.
21 Rose had none.
22

23 Factor Two: Did the government have an *individualized reason to suspect* Mr. Rose
24 before initiating a sting against him? *Id.* The answer is no. He was not "already involved in an
25 illegal scheme" as were the defendants in *Bonanno*. *Bonanno* at 438. He was not "suspected to
26

1 be a long-time drug dealer involved in the laundering operation.” *See United States v.*
2 *Pemberton*, 853 F.2d 730, 732 (9th Cir. 1988); *see also United States v. Stenberg*, 803 F.2d 422,
3 430 (9th Cir. 1986) (finding that the defendant was “already involved in continuing illegal
4 transactions involving wildlife”). On the contrary, Mr. Scalise and Mr. Handl explained to UCE-
5 4252 that Mr. Rose’s categorically refused to involve his clubs in illegal activity, yet the
6 Government targeted them regardless. (*See* February 17, 2012 1:04 p.m. Recording.)

7
8 Factor Three: What was the *government’s role in creating the crime of conviction*? The
9 recordings reveal that the government proposed and orchestrated the criminal enterprise from
10 start to finish. Although the government first heard of Mr. Rose from Mr. Handl, this occurred
11 well after UCE-4252 had begun his reverse sting racketeering operation. Mr. Handl’s initial
12 discussion of Mr. Rose did not describe any criminal designs on Mr. Rose’s part. It was only
13 after UCE-4252 heard about Mr. Rose’s ownership of the Gold Clubs that UCE-4252
14 encouraged Mr. Handl to set up a meeting. (January 21, 2012 05:18:07 p.m. Recording at
15 00:05:13-00:05:55.) At that meeting, Mr. Rose was non-committal and hesitated almost three
16 months before agreeing to commit to UCE-4252’s fake plan.

17
18 Factor Four: What was *the government’s encouragement of Mr. Rose to commit the*
19 *offensive conduct*? Although the government did not physically threaten Mr. Rose, UCE-4252
20 was dogged in his efforts to enroll Mr. Rose and his clubs in the government’s scheme, as can be
21 seen in UCE-4252’s relentless efforts over a two to three month period to reel in Mr. Rose.

22
23 Factor Five: How deep was *the government’s participation in the offensive conduct*? The
24 *duration* of the government’s participation was extremely long—from three to five years. The
25 *nature* of the participation was that of a boss and participant—not an observer. And the *necessity*
26 of the government’s participation was clear. As stated in the discussion of the second *Bonnano*

1 factor, not one of the alleged crimes here would have been consummated without the aid of
2 government agents. Each of the transactions was fabricated using government money and
3 government men and government orders.

4 Factor Six: What was *the government's need for this investigative technique*? Financial
5 institutions are required to know their customers, report suspicious activities, and file currency
6 transaction reports. Money laundering is one of the least likely crimes to warrant the kind of
7 reverse sting the government operated in this case.

8
9 In short, of the six factors enunciated in *Black*, only one, *encouragement*, could break the
10 government's way, because, although UCE-4252 encouraged Mr. Rose, he did not explicitly
11 threaten to physically harm him.

12 Looking at each of the primary methods used by the Ninth Circuit to determine whether
13 outrageous government conduct occurred in the case before this Court, the record is clear that
14 Mr. Rose's Fifth Amendment Due Process right have been violated. Mr. Rose simply never
15 would have committed a crime without the government creating the enterprise and directing his
16 involvement from start to finish. Moreover, no crime ever actually occurred—everything was
17 invented by the government using imaginary scenarios and fabricated funds. The government's
18 use of its resources to target an average citizen with no criminal record and pressure him into an
19 imaginary enterprise is far beyond any appropriate undercover investigation of which our judicial
20 system could approve. The Court may only remedy the government's outrageous conduct
21 through dismissal of the Superseding Indictment with prejudice.

22
23 **IV. As an alternative, dismissal under the Court's supervisory powers is also
24 appropriate.**

25 If the government's conduct does not rise to the level of a due process violation, the court
26 can still dismiss the indictment under its supervisory powers. The court's supervisory power

1 may be exercised “to remedy a constitutional or statutory violation; to protect judicial integrity
2 by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter
3 future illegal conduct.” *United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011) (internal
4 quotation omitted). UCE-4252’s conduct in fabricating imaginary crimes and encouraging Mr.
5 Rose to take part in them for years was directly encouraged by the Government and a flagrant
6 violation of Mr. Rose’s due process rights for all of the same reasons argued above. Accordingly,
7 the Court should also dismiss the Superseding Indictment pursuant to its general supervisory
8 powers.
9

10 **CONCLUSION**

11 WHEREFORE, Mr. Rose respectfully requests this Court grant his Motion to Dismiss
12 Based on Outrageous Government Conduct and dismiss the Superseding Indictment with
13 prejudice.

14 DATED: September 8, 2015.

15
16 Respectfully submitted,

17 _____
18 /s/

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