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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 HARRISON ULRICH JACK; LO CHA THAO
15 aka Locha Thao; LO THAO, aka President Lo
16 Thao, aka Xia Lo Thao; YOUA TRUE VANG,
17 aka Joseph Youa Vang, aka Colonel Youa True
18 Vang; HUE VANG, aka Chue Hue Vang;
19 CHONG YANG THAO; SENG VUE; CHUE LO;
20 NHIA KAO VANG; DAVID VANG, aka Dang
21 Vang; JERRY YANG, aka Thao Nou Yang; and
22 THOMAS YANG, aka Pao Yang

23 Defendants.
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27
28

Case No. 2:07-CR-0266 FCD

**DEFENDANTS' MOTION TO
DISMISS COUNT ONE OR, IN THE
ALTERNATIVE, TO STRIKE
PORTIONS OF COUNT ONE**

Judge: Hon. Frank C. Damrell, Jr.
Date: September 20, 2010
Time: 11:00 a.m.

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NOTICE OF MOTION AND MOTION

TO: BENJAMIN B. WAGNER, U.S. ATTORNEY, S. ROBERT TICE-RASKIN,
ELLEN V. ENDRIZZI, AND JILL THOMAS, ASSISTANT U.S. ATTORNEYS:

PLEASE TAKE NOTICE that on September 20, 2010, at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendants jointly, through counsel, will and hereby do move this Court, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, to dismiss Count One of the First Superseding Indictment (the “Superseding Indictment”), or, in the alternative, to strike portions of Count One, for failure to state a conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. §§ 922(o), 960, 22 U.S.C. § 2778, and 26 U.S.C. § 5861, and for failure to allege an essential element under 22 U.S.C. § 2778. All Defendants have joined this Motion.

This Motion is based on this Notice of Motion and the attached Memorandum of Points and Authorities, the files and records in this case, and any other evidence or argument that may properly be presented to the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Count One of the Superseding Indictment charges that Defendants conspired to violate various statutes. The Court should dismiss Count One because it fails to state a conspiracy to commit any of the statutes charged under that Count, and because it omits an essential element of one of charged statutes.

Count One charges Defendants with conspiracy to violate the Neutrality Act, 18 U.S.C. § 960. The Neutrality Act applies only to a military expedition or enterprise to be carried on from the United States. However, the Superseding Indictment alleges that the alleged military expedition or enterprise was to be carried on from Laos, not from the United States. The Neutrality Act also requires that the prohibited conduct take place “within the United States,” but the only alleged conduct that could constitute a violation of the Neutrality Act was to take place outside of the United States. Accordingly because the allegations in the Superseding Indictment reveal that there could be no violation of the Neutrality Act, Count One fails to state a conspiracy to violate that statute.

Count One also charges Defendants with conspiracy to transfer and possess machine guns, in violation of 18 U.S.C. § 922(o), and to receive, possess, and transfer firearms and destructive devices without registration, in violation of 26 U.S.C. § 5861. Sections 922(o) and 5861 apply only to the receipt, possession, and transfer of firearms in the United States, and the Superseding Indictment does not allege that any firearms were to be received, possessed, or transferred in the United States. Instead, the Superseding Indictment alleges that Defendants conspired to receive, possess, and transfer firearms in Thailand. Because sections 922(o) and 5861 do not apply to conduct on foreign soil, Count One fails to state a conspiracy to violate either statute.

Count One also charges Defendants with conspiracy to export defense articles without a license, in violation of 22 U.S.C. § 2778. The term “export” in section 2778 means sending or taking defense articles out of the United States. Because the Superseding Indictment alleges that Defendants planned to pay for and acquire weapons in Thailand for delivery to Laos, Defendants obviously could not have conspired to export those items from the United States. Count One,

1 therefore, fails to state a conspiracy to violate section 2778. The conspiracy alleged under section
2 2778 also fails because Count One omits the essential element of “willfulness” required under
3 that statute. Under controlling Ninth Circuit authority, this omission renders the conspiracy
4 charged under section 2778 constitutionally defective and requires dismissal.

5 For these reasons and those discussed below, the Court should dismiss Count One or, in
6 the alternative, strike the portions of Count One which fail to state an offense under the statutes
7 charged.

8 **II. THE SUPERSEDING INDICTMENT**

9 The Superseding Indictment alleges that Defendants participated in a plot to purchase and
10 acquire weapons and supply them to insurgents in Laos to overthrow the government of Laos.
11 (*See* Superseding Indictment at 8, filed on Sept. 17, 2009 [Docket # 460].) According to the
12 Superseding Indictment, various Defendants met and discussed the acquisition and transfer of
13 weapons, engaged in fund-raising activities, and created an operations plan for insurgent military
14 operations in Laos. (*See id.* at 7-11.) The Superseding Indictment alleges that Defendants
15 engaged in discussions and negotiations with a Bureau of Alcohol, Tobacco, Firearms, and
16 Explosives undercover agent posing as an arms trafficker regarding the purchase of weapons, and
17 inspected samples of various weapons. (*See id.* at 9-11.) It alleges that on May 7, 2007,
18 Defendant Lo Cha Thao placed an order with the agent for 125 AK-47 machine guns and related
19 supplies. (*See id.* at 17.) According to the Superseding Indictment, the undercover agent planned
20 to deliver this equipment to Thailand near the border of Laos (*id.* at 15:12-14), where certain
21 Defendants would pay for and acquire the equipment. (*See id.* at 10:23-25, 11:26-12:1, 15:12-14,
22 18:23-26, 21:16-20.) The Superseding Indictment does not allege that any arms, weapons, or
23 personnel were actually paid for or acquired by Defendants, or that any other orders were placed
24 with the agent.

25 Based on these allegations, Count One of the Superseding Indictment charges Defendants
26 with conspiracy under 18 U.S.C. § 371 to: violate the Neutrality Act, 18 U.S.C. § 960; transfer
27 and possess machine guns, in violation of 18 U.S.C. § 922(o); receive, possess, and transfer
28 firearms and destructive devices without registration, in violation of 26 U.S.C. § 5861; and export

1 listed defense articles without a license, in violation of 22 U.S.C. § 2778. (Superseding
2 Indictment at 5-7.) As shown below, none of these statutes applies to the conduct alleged in the
3 Superseding Indictment.

4 **III. ARGUMENT**

5 **A. Count One Fails To Allege A Conspiracy To Violate The Neutrality Act, 18**
6 **U.S.C. § 960.**

7 Count One of the Superseding Indictment charges Defendants with conspiracy to violate
8 the Neutrality Act, in violation of 18 U.S.C. §§ 371 and 960. (Superseding Indictment at 5-6.)
9 As set forth in Defendants' Motion to Dismiss Count Five, concurrently filed herewith, the
10 Neutrality Act by its very terms requires that a military expedition or enterprise be carried on
11 from the United States. (*See* Defendants' Motion to Dismiss Count Five at 3.) However, the
12 Superseding Indictment alleges that a military expedition or enterprise was to be carried on from
13 Laos, not from the United States. (*Id.* at 3-4.) The Neutrality Act also requires that the prohibited
14 conduct take place "within the United States," but the Superseding Indictment fails to allege that
15 any such conduct occurred in this country. (*Id.* at 4-7.) Because the Superseding Indictment does
16 not allege facts that could demonstrate a violation of the Neutrality Act, Count One fails to state a
17 conspiracy to violate that statute. *See United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir.
18 1973) ("It should require no citation of authority to say that a person cannot conspire to commit a
19 crime against the United States when the facts reveal there could be no violation of the statute
20 under which the conspiracy is charged.") (citation omitted). Count One, therefore, fails to state a
21 conspiracy to violate the Neutrality Act.

22 **B. Count One Fails To Allege A Conspiracy To Violate 18 U.S.C. § 922(o) Or**
23 **26 U.S.C. § 5861.**

24 Count One of the Superseding Indictment charges Defendants with conspiracy to transfer
25 and possess machine guns, in violation of 18 U.S.C. § 922(o), and to receive, possess, and
26 transfer firearms, in violation of 26 U.S.C. § 5861. (Superseding Indictment at 6-7.) As shown
27 below, both statutes only prohibit the receipt, possession, and transfer of firearms in the United
28

1 States. However, the Superseding Indictment does not allege that any Defendant conspired to
2 receive, possess, or transfer firearms in the United States. In fact, the Superseding Indictment
3 alleges that the first and only agreed upon purchase and acquisition of firearms was to take place
4 in Thailand.¹ Count One, therefore, fails to state a conspiracy to commit an offense under either
5 section 922(o) or section 5861.

6 “It is a longstanding principle of American law ‘that legislation of Congress, unless a
7 contrary intent appears, is meant to apply only within the territorial jurisdiction of the United
8 States.’” *Smith v. United States*, 507 U.S. 197, 204 (1993) (citations omitted). In applying this
9 principle, the Supreme Court has adopted “the legal presumption that Congress ordinarily intends
10 its statutes to have domestic, not extraterritorial, application.” *Small v. United States*, 544 U.S.
11 385, 388-89 (2005). Courts must therefore “resolve restrictively any doubts concerning the
12 extraterritorial application of a statute.” *Arc Ecology v. United States Dep’t of the Air Force*, 411
13 F.3d 1092, 1097 (9th Cir. 2005) (citing *Smith*, 507 U.S. at 204).²

14 Here, the statutory language, context, and history of sections 922(o) and 5861 bolster the
15 legal presumption against extraterritoriality and confirm that Congress intended to apply those
16 statutes only domestically, not abroad. The fact that Count One charges Defendants with
17 conspiracy rather than substantive violations of sections 922(o) and 5861 changes nothing,
18 because there can be no conspiracy if the underlying “crime” is not actually an offense. *See* 18
19 U.S.C. § 371 (making it unlawful to “conspire . . . to commit any offense against the United
20 States”); *see also Galardi*, 476 F.2d at 1079; *United States v. Lopez-Vanegas*, 493 F.3d 1305,

21 _____
22 ¹ (*See, e.g.,* Superseding Indictment at 10 (“Defendant Lo Cha THAO and other defendants made
23 arrangements to personally deliver \$50,000 to the undercover agent *in Bangkok, Thailand*, on
24 June 11, 2007.”) (emphasis added); *id.* at 11 (“Defendants Harrison JACK, Lo Cha THAO, Lo
25 THAO, Chong Yang THAO, Seng VUE, Nhia Kao VANG indicated that they would *travel*
26 *overseas to effectuate the first contemplated exchange of arms and money.*”) (emphasis added);
27 *id.* at 18 (“Defendant Lo Cha THAO indicated that . . . *they would be abroad on the appointed*
28 *date with the necessary funds for acquisition of the weapons.*”) (emphasis added).)

² In *Small*, the Supreme Court confirmed that the presumption against extraterritoriality would
apply to a statute that prohibits unlawful gun possession similar to the statutes charged here. *See*
Small, 544 U.S. at 389 (stating that the “presumption would apply, for example, were we to
consider whether [18 U.S.C. § 922(g)(1)] prohibits unlawful gun possession abroad as well as
domestically”).

1 1312 (11th Cir. 2007) (finding no violation of conspiracy statute where the substantive offense
2 charged prohibited only domestic conduct and the object of the conspiracy was to commit the
3 prohibited conduct abroad). Therefore, because the Superseding Indictment does not state a
4 violation of section 922(o) or section 5861, it necessarily follows that Defendants cannot be
5 charged with conspiracy to commit those violations.

6 **1. Section 922(o)'s Language, History, And Context Confirm That The**
7 **Statute Was Intended To Apply Only Domestically.**

8 The language of Section 922(o) — making it “unlawful for any person to transfer or
9 possess a machinegun” — does not suggest any intent to reach beyond domestic transfer or
10 possession of machineguns. 18 U.S.C. § 922(o). It does not mention foreign transfer or
11 possession, nor does it cover subject matter like immigration, where one might argue that foreign
12 conduct would seem relevant. A silent statute is presumed to apply only domestically. *See Small*,
13 544 U.S. at 388, 391 (finding “no convincing indication to the contrary” where a “statute’s
14 language does not suggest any intent to reach beyond domestic” conditions).

15 Section 922(o)'s legislative history confirms that Congress intended the statute to prohibit
16 only domestic transfer or possession of machineguns. On May 6, 1986, discussing the
17 introduction of section 922(o), Senator Durenberger stated:

18 I am pleased that my colleagues, the distinguished Senator from
19 Kansas [Mr. Dole] and the distinguished Senator from Utah
20 [Mr. Hatch] have clarified a very important issue surrounding the
21 amendment to ban the future sale and possession of machineguns. I do not believe that this amendment is intended to disrupt the
22 exportation of American manufactured machineguns. *Rather, it is intended to regulate the ownership and use of machineguns within the United States.*

23 Without a statement of clarification, however, those U.S.
24 companies which currently purchase machine guns from licensed
25 manufacturers for exportation would be severely harmed. The
26 Bureau of Alcohol, Tobacco and Firearms when drafting
27 implementing regulations must allow for the continuation of export
28 sales which are licensed by the office of Munitions Control in the
Department of State. These transactions fall under statutory
authority of the Arms Export Control Act, and *I do not believe that Congress should expand the jurisdiction of [§ 922(o)] into an area that is already sufficiently regulated by the Arms Export Control Act.*

1 132 Cong. Rec. S5358-04 (May 6, 1986) (statement of Sen. Durenberger) (emphasis added). Not
 2 only does Senator Durenberger’s statement indicate that section 922(o) was intended to apply
 3 domestically, it demonstrates Congress’ intent to avoid interfering with existing statutes that do
 4 regulate certain foreign firearms transactions.

5 Further reinforcing congressional intent to apply section 922(o) only domestically is the
 6 fact that other subsections of section 922 expressly apply to foreign conduct while subsection (o)
 7 does not. For example, subsection (a)(1)(A) explicitly regulates firearms activity in “foreign
 8 commerce”:

9 It shall be unlawful . . . for any person . . . except a licensed
 10 importer, licensed manufacturer, or licensed dealer, to engage in the
 11 business of importing, manufacturing, or dealing in firearms, or in
 the course of such business to ship, transport, or receive any firearm
 in interstate or *foreign commerce*.

12 18 U.S.C. § 922(a)(1)(A) (emphasis added). In fact, the phrase “foreign commerce” appears 23
 13 times in other subsections of Section 922, while it does not appear at all in subsection (o). *See* 18
 14 U.S.C. §§ 922(a)(1)(A), (a)(1)(B), (a)(2), (a)(4), (c)(1), (e), (f)(1), (f)(2), (g), (h)(1), (h)(2), (i), (j),
 15 (k), (n), (q)(1)(G), (q)(2)(A), (q)(3)(A), (u). The doctrine of *expressio unius est exclusio alterius*
 16 teaches that “omissions are the equivalent of exclusions when a statute affirmatively designates
 17 certain persons, things, or manners of operation.” *See Arc Ecology*, 411 F.3d at 1099-1100.
 18 Applying this doctrine strengthens the conclusion that Congress intended Section 922(o) to apply
 19 only to conduct in the United States.³

20 Moreover, Congress has shown it is capable of addressing acts involving firearms that
 21 occur outside the United States. For example, the Arms Export Control Act — which Senator
 22 Durenberger referred to in section 922(o)’s legislative history — makes it unlawful to willfully
 23 export defense articles listed on the United States Munitions List, which includes machineguns.
 24 22 U.S.C. §§ 2778(b)(2), (c); *see also* 22 C.F.R. § 120.17(a)(1) (defining “exporting” to mean

25 ³ Even those statutory provisions that contain the phrase “foreign commerce” do not necessarily
 26 apply to extraterritorial conduct. The Supreme Court has “repeatedly held that even statutes that
 27 contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign
 28 commerce’ do not apply abroad.” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991)
 (emphasis in original).

1 “[s]ending or taking a defense article out of the United States in any manner”); 22 C.F.R.
 2 § 121.1 (listing “Fully automatic firearms to .50 caliber inclusive” on the United States Munitions
 3 List). The Arms Export Control Act illustrates the principle that “when Congress seeks to
 4 legislate with extraterritorial effect, it does so with unmistakable intent.” *Arc Ecology*, 411 F.3d
 5 at 1100; *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258 (1991) (“when it desires
 6 to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute”)
 7 (internal citation omitted). In contrast, as Senator Durenberger correctly recognized, Congress
 8 did not intend for section 922(o) to apply to conduct outside the United States particularly
 9 because such conduct “is already sufficiently regulated by the Arms Export Control Act.” 132
 10 Cong. Rec. S5358 (May 6, 1986) (statement of Sen. Durenberger).

11 Here, the government has compounded the charges against Defendants by charging them
 12 under Count One with violations of both the Arms Export Control Act (22 U.S.C. § 2778) and
 13 section 922(o) based upon the same alleged conduct — the shipment of firearms to Laos.
 14 (Superseding Indictment at 6, 7.) As shown above, however, section 922(o) does not apply to
 15 conduct outside the United States.

16 2. Section 5861 Also Was Intended To Apply Only Domestically.

17 The violations charged under the National Firearms Act (26 U.S.C. §§ 5801 *et seq.*) also
 18 were intended to apply only within the United States. Section 5861(d) makes it unlawful for any
 19 person “to receive or possess a firearm which is not registered to him in the National Firearms
 20 Registration and Transfer Record.” 26 U.S.C. § 5861(d). Sections 5861(b) and (e) make it
 21 unlawful to receive, possess, or transfer a firearm “in violation of the provisions of this chapter.”
 22 26 U.S.C. §§ 5861(b), (e). The provision of “this chapter” allegedly violated by Defendants is 26
 23 U.S.C. § 5812, which sets forth registration requirements for the transfer of firearms:

24 (a) Application. A firearm shall not be transferred unless (1) the
 25 transferor of the firearm has filed with the Secretary a written
 26 application, in duplicate, for the transfer and registration of the
 27 firearm to the transferee on the application form prescribed by the
 28 Secretary; (2) any tax payable on the transfer is paid as evidenced
 by the proper stamp affixed to the original application form; (3) the
 transferee is identified in the application form in such manner as the
 Secretary may by regulations prescribe, except that, if such person
 is an individual, the identification must include his fingerprints and

1 his photograph; (4) the transferor of the firearm is identified in the
 2 application form in such manner as the Secretary may by
 3 regulations prescribe; (5) the firearm is identified in the application
 4 form in such manner as the Secretary may by regulations prescribe;
 5 and (6) the application form shows that the Secretary has approved
 6 the transfer and the registration of the firearm to the transferee.
 7 Applications shall be denied if the transfer, receipt, or possession of
 8 the firearm would place the transferee in violation of law.

(b) Transfer of possession. The transferee of a firearm shall not
 take possession of the firearm unless the Secretary has approved the
 transfer and registration of the firearm to the transferee as required
 by subsection (a) of this section.

26 U.S.C. § 5812.⁴

9 There is no language in the above statutes suggesting that Congress intended them to have
 10 extraterritorial effect, and there is no indication in the legislative history of such intent. *See* H.R.
 11 Rep. No. 90-1577 & Conference Rep. No. 90-1956, *reprinted in* 1968 U.S.C.C.A.A.N. 4410-26.
 12 On the contrary, the legislative history demonstrates that Congress was legislating with domestic
 13 concerns in mind. *See, e.g.,* H.R. Rep. No. 90-1577, *reprinted in* 1968 U.S.C.C.A.A.N. 4412
 14 (The “increasing rate of crime and lawlessness and the growing use of firearms in violent crime
 15 clearly attest to a need to strengthen Federal regulation of *interstate firearms traffic.*”) (emphasis
 16 added); *id.* 4413 (“The subject legislation responds to widespread national concern that existing
 17 Federal control over the sale and shipment of firearms [*across*] *State lines* is grossly
 18 inadequate.”) (emphasis added); *id.* (“H.R. 17735, as amended, is designed effectively to control
 19 the indiscriminate flow of such weapons *across State borders* and to assist and encourage States
 20 and local communities to adopt and enforce stricter gun control laws.”) (emphasis added).

21 In the absence of clear evidence of congressional intent to apply the statutes outside of the
 22 United States, this Court should decline to impute to Congress the intent that *nowhere in the*
 23 *world* may a person receive, possess, or transfer a firearm without registering it in the National
 24 Firearms Registration and Transfer Record, or without providing his photograph and fingerprints

25 _____
 26 ⁴ Title 26 U.S.C. § 7801(a)(2)(A)(i), which is also cited in the Superseding Indictment, provides:
 27 “The administration and enforcement of [26 USCS §§ 5801 *et seq.*] shall be performed by or
 28 under the supervision of the Attorney General; and the term “Secretary” or “Secretary of the
 Treasury” shall, when applied to those provisions, mean the Attorney General” 26 U.S.C.
 § 7801(a)(2)(A)(i).

1 to the United States Secretary of the Treasury, obtaining the Secretary's approval, and paying a
2 tax to the United States. *See* 26 U.S.C. §§ 5812, 5861(c)-(e); *see also United States v. Javino*,
3 960 F.2d 1137, 1142-43 (2d Cir. 1992) (holding that 26 U.S.C. §§ 5822 and 5861(c), prohibiting
4 receipt and possession of firearms made without complying with registration requirements, does
5 not apply to firearms made outside the United States).

6 Accordingly, because sections 922(o) and 5861 apply only to the receipt, possession, and
7 transfer of firearms within the United States, and because the Superseding Indictment does not
8 allege any conduct within the United States, Count One fails to state an offense under those
9 statutes and should be dismissed.

10 **3. The Rule Of Lenity Mandates That Any Ambiguity Be Resolved In**
11 **Defendants' Favor.**

12 If any doubt remains as to whether sections 922(o) and 5861 reach the conduct alleged in
13 the Superseding Indictment, the rule of lenity dictates that the ambiguity must be resolved in
14 Defendants' favor. As the Supreme Court has stated:

15 We have traditionally exercised restraint in assessing the reach of a
16 federal criminal statute, both out of deference to the prerogatives of
17 Congress, and out of concern that a fair warning should be given to
the world in language that the common world will understand, of
what the law intends to do if a certain line is passed.

18 *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703 (2005) (citations and quotation marks
19 omitted). Under this principle, "where text, structure, and history fail to establish that the
20 Government's position is unambiguously correct," courts must "apply the rule of lenity and
21 resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54
22 (1994).

23 In this case, given the text, structure, and legislative history of sections 922(o) and 5861, it
24 cannot be said that the government's interpretation of those statutes as applicable to the conduct
25 alleged in Count One is "unambiguously correct." To the contrary, sections 922(o) and 5861 by
26 their terms and as evidenced by their legislative history apply only to conduct inside the United
27 States. However, to the extent that any uncertainty remains as to the exact reach of the statutes,
28

1 the Court must resolve that ambiguity in Defendants' favor and dismiss Count One or strike the
2 conspiracy charged under sections 922(o) and 5861.

3 **C. Count One Fails To Allege A Conspiracy To Violate 22 U.S.C. § 2778.**

4 Count One fails to allege a conspiracy to violate 22 U.S.C. § 2778 because the
5 Superseding Indictment fails to allege that Defendants conspired to "export" any arms from the
6 United States, and because Count One fails to allege that Defendants acted "willfully," an
7 essential element under section 2778.

8 **1. The Superseding Indictment Does Not Allege A Conspiracy to**
9 **"Export" Any Arms From The United States.**

10 Section 2778 provides in relevant part that "no defense articles or defense services
11 designated by the President under subsection (a)(1) . . . may be exported or imported without a
12 license for such export or import, issued in accordance with this Chapter and regulations issued
13 under this Chapter" 22 U.S.C. § 2778(b)(2). Subsection 2778(c) criminalizes only "willful"
14 violations of this statute or any rule or regulation issued under the statute. The term "export" as
15 used in section 2778(b)(2) is defined in the federal regulations and means "[s]ending or taking a
16 defense article out of the United States in any manner" 22 C.F.R. § 120.17(a)(1).

17 As discussed above, the Superseding Indictment alleges that the first and only agreed
18 upon exchange of arms and money was to take place in Thailand.⁵ If, as alleged in the
19 Superseding Indictment, Defendants planned to purchase and acquire arms in Thailand for
20 delivery to Laos, Defendants obviously did not conspire to export — *i.e.*, send or take out of the
21 United States — any arms. 22 C.F.R. § 120.17(a)(1).

22 Defendants' intent with respect to the violation charged under section 2778 is critically
23 important because the statute criminalizes only "willful" violations of its provisions. 22 U.S.C.

24 ⁵ (*See, e.g.*, Superseding Indictment at 10 ("Defendant Lo Cha THAO and other defendants made
25 arrangements to personally deliver \$50,000 to the undercover agent *in Bangkok, Thailand*, on
26 June 11, 2007.") (emphasis added); *id.* at 11-12 ("Defendants Harrison JACK, Lo Cha THAO, Lo
27 THAO, Chong Yang THAO, Seng VUE, Nhia Kao VANG indicated that they would *travel*
28 *overseas to effectuate the first contemplated exchange of arms and money.*") (emphasis added);
id. at 18 ("Defendant Lo Cha THAO indicated that . . . *they would be abroad on the appointed*
date with the necessary funds for acquisition of the weapons.") (emphasis added).)

1 § 2778(c). In *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the Ninth
2 Circuit held that “in order for a defendant to be found guilty of exporting under [the predecessor
3 to section 2778], the government must prove that the defendant voluntarily and intentionally
4 violated a known legal duty not to export the proscribed articles.” *Id.* at 829. The Superseding
5 Indictment does not allege that Defendants willfully violated section 2778 or that they
6 “voluntarily and intentionally violated a known legal duty not to export the proscribed articles.”
7 *Lizarraga*, 541 F.2d at 829. Count One, therefore, fails to allege a conspiracy under 22 U.S.C.
8 § 2778.

9 **2. Count One Fails To Allege The Essential Element Of Willfulness**
10 **Under Section 2778.**

11 Despite the obvious importance of the element of willfulness under section 2778, Count
12 One omits this essential element completely. This omission renders the conspiracy charged under
13 section 2778 constitutionally defective and requires dismissal.

14 The Sixth Amendment requires that a defendant be informed of “the nature and cause of
15 the accusation.” U.S. Const. amend. VI. The Supreme Court has held that one of the protections
16 an indictment is intended to guarantee is measured by “whether the indictment contains the
17 elements of the offense intended to be charged, and sufficiently apprises the defendant of what he
18 must be prepared to meet.” *Russell v. United States*, 369 U.S. 749, 763 (1962). The Ninth Circuit
19 requires that an indictment “allege the elements of the offense charged and the facts which inform
20 the defendant of the specific offense with which he is charged.” *United States v. Lane*, 765 F.2d
21 1376, 1380 (9th Cir. 1985). An indictment’s failure to “recite an essential element of the charged
22 offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal of the indictment.”
23 *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999).

24 In *Du Bo*, the defendant was convicted of a violation of the Hobbs Act, which requires
25 that a defendant “knowingly or willfully” interfere with commerce. *Id.* at 1179. The indictment
26 charged the defendant only with “unlawfully” interfering with commerce. *Id.* The court stated
27 “[t]he indictment on its face [was] deficient” and reversed the defendant’s conviction. *Id.* The
28 court held that the defendant’s conviction “must be overturned because his indictment lacks a

1 necessary allegation of criminal intent, and as such does not ‘properly allege an offense against
2 the United States.’” *Id.* at 1180 (citation omitted).

3 Similarly, in *United States v. Kurka*, 818 F.2d 1427, 1430-31 (9th Cir. 1987), the Ninth
4 Circuit reversed the defendant’s conviction for willful damage to a vehicle with reckless disregard
5 for human safety because the indictment omitted the essential element of willfulness. The court
6 held that “[t]he failure to include the element of willfulness [] render[ed] the indictment
7 constitutionally defective. A correct citation to the statute [was] not sufficient to compensate for
8 the exclusion.” *Id.* at 1431.⁶

9 Here, as in *Du Bo* and *Kurka*, Defendants are charged with a crime that requires willful
10 conduct. Count One of the Superseding Indictment charges Defendants with conspiracy to
11 violate 22 U.S.C. § 2778, which on its face requires that a person “willfully” export defense
12 articles listed on the United States Munitions List. *See* 22 U.S.C. § 2778(c); *see also United*
13 *States v. Schmidt*, 947 F.2d 362, 367 (9th Cir. 1991) (essential element of a conspiracy under 11
14 U.S.C. § 371 is the requisite intent to commit the underlying offense).

15 Like the indictments in *Du Bo* and *Kurka*, the Superseding Indictment fails to include the
16 element of willfulness. In fact, the Superseding Indictment fails to allege any *mens rea*
17 requirement whatsoever for the § 2778 charge. This omission renders the conspiracy charged
18 under section 2778 constitutionally defective and requires dismissal. *See Du Bo*, 186 F.3d at
19 1179; *Kurka*, 818 F.2d at 1431.

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⁶ *Accord United States v. Omer*, 395 F.3d 1087, 1088-89 (9th Cir. 2005) (indictment’s failure to allege essential element of materiality of falsehood was “a fatal defect requiring dismissal of the indictment”); *United States v. Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001) (reversing conviction and ordering district court to dismiss the indictment where it failed to allege the element of specific intent).

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IV. CONCLUSION

Because the Superseding Indictment fails to state a conspiracy to commit any of the offenses alleged under Count One, the Court should dismiss Count One of the Superseding Indictment. In the alternative, the Court should strike those portions of Count One that fail to state a conspiracy under the charged offenses.

Dated: May 19, 2010

Respectfully submitted,

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