

JUDGE ROBERT J. BRYAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	No. CR15-5351RJB
)	
Plaintiff,)	RESPONSE TO GOVERNMENT’S
)	SUBMISSION REGARDING
v.)	DISCOVERY SANCTION AND
)	DEFENDANT’S MOTION TO
)	DISMISS
JAY MICHAUD,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Jay Michaud, through his attorneys Colin Fieman and Linda Sullivan, respectfully submits this Response to the Government’s Submission Regarding Discovery Sanction. Dkt. 207. In its Response, the Government offers a mix of objections to the Court’s rulings; a repetition of disagreements with defense experts; and some suggestions for sanctions that are not only unworkable but would place the defense at a further disadvantage.

The Government begins its submission with a non sequitur: It asserts that since the Court has found that the Government has a legitimate law enforcement interest in withholding the NIT discovery, it can proceed to prosecute Mr. Michaud without any consequences, regardless of the fact that the discovery is critical to the defense. Govt. Submission at 1-2. The Government cites no relevant authority for this proposal, but it

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1 is fair to say that describing the remedy for non-disclosure as a “sanction” may not be
2 accurate. It is true that there has been no allegation that the individual prosecutors in
3 his case have acted in bad faith, and the Court is not seeking to punish the Government
4 for its non-disclosure.

5 Rather, the issue is what action the Court should take given that Mr. Michaud is
6 unable to receive a fair trial because of the Government’s decision to withhold the NIT
7 discovery, regardless of the prosecution’s reasons for doing so. And there should be no
8 confusion about the fact that the decision about how to proceed has until now rested
9 with the Government. While the Court has decided that the Government is not *required*
10 to disclose, the Supreme Court has held that the ultimate choice between disclosure and
11 dismissal in this type of situation rests with the Government.

12 As noted in prior briefing, “[t]he burden is the Government’s, not to be shifted to
13 the trial judge, to decide whether the public prejudice of allowing the [alleged] crime to
14 go unpunished is greater than that attendant upon the possible disclosure of state secrets
15 and other confidential information in the Government’s possession.” *Jencks v. United*
16 *States*, 353 U.S. 657, 671 (1957) (“The rationale of the criminal cases is that, since the
17 Government which prosecutes an accused also has the duty to see that justice is done, it
18 is unconscionable to allow it to undertake prosecution and then invoke its governmental
19 privileges to deprive the accused of anything which might be material to his defense”)
20 (quotation and citation omitted). Simply put, the Supreme Court has held that dismissal
21 is not only an appropriate remedy in those rare cases where there is an impasse between
22 a legitimate governmental interest in non-disclosure and a defendant’s right to a fair
23 trial, but dismissal is in fact required.

24 Nevertheless, the defense believes that there is an alternative, narrower and
25 sufficient remedy available to the Court that may also offer some procedural
26 advantages. Rather than dismiss the indictment outright, the Court can enter an

1 exclusion order pursuant to Fed. R. Crim P. 16(d)(2)(D) and *United States v. W.R.*
2 *Grace*, 526 F.3d 499 (9th Cir. 2008). The order should exclude from trial all fruits of
3 the FBI's NIT search of Mr. Michaud's computer. The Government would then have
4 the opportunity to either proceed to trial with evidence that is independent of the NIT
5 search (such as untainted inculpatory statements or testimony from witnesses who have
6 independent knowledge of alleged illegal activities), or it can seek an interlocutory
7 appeal.

8 Frankly, the defense believes that the Government will not be able to prove its
9 case under such an exclusion order. Nevertheless, the prosecution would have an
10 opportunity to make that assessment and, as with a suppression order that excludes key
11 evidence, pursue an immediate appeal if it cannot proceed. *W.R. Grace*, 526 F.3d at
12 508. Further, an exclusion order would be tailored to the facts in this case. While the
13 Government has adopted a "stonewall" approach to the NIT discovery with Mr.
14 Michaud, it may seek to be more flexible in other "Operation Pacifier" cases and an
15 exclusion order is less likely than dismissal to be viewed as a judicial condemnation of
16 the Government's entire case.¹

17 Accordingly, the defense requests that the Court either dismiss the indictment in
18 its entirety or enter an order excluding all fruits of the NIT search warrant.

23 ¹It is worth noting that Congress may be moving in a somewhat different direction, as a
24 bipartisan group of senators have proposed legislation entitled "Stopping Mass Hacking" to
25 block proposed changes to Fed. R. Crim. P. 41 that would allow the Government to "use one
26 warrant to hack an unlimited number of computers." Rudy Takala, *Senators Propose Bill to
Stop Mass Hacking Policy*, The Washington Examiner (May 19, 2016). Available at:
[http://www.washingtonexaminer.com/senators-propose-bill-to-stop-fbi-mass-hacking-
policy/article/2591776](http://www.washingtonexaminer.com/senators-propose-bill-to-stop-fbi-mass-hacking-policy/article/2591776)

II. ARGUMENT

A. The Government’s Continuing Arguments About the Materiality of the NIT Discovery are Not Helpful to Determining the Appropriate Remedy for Non-Disclosure.

The Court has concluded that non-disclosure of the NIT discovery in this case fundamentally affects the fairness of the proceedings in three ways. First, as the Court found in its May 18, 2016 Order (dkt. 205), the non-disclosure undermines Mr. Michaud’s ability to engage in informed settlement discussions and the ability of his attorneys to provide meaningful advice about the merits of the Government’s case. *See United States v. Muniz-Jaquez*, 718 F.3d 1180 (9th Cir. 2013).

Second, non-disclosure prevents Mr. Michaud from fully investigating and raising additional pre-trial challenges to the Government’s search and seizure methods. As discussed further below, this particular prejudice that Mr. Michaud would suffer became even more acute last Thursday, in light of testimony about the NIT that Agent Daniel Alfin gave at a suppression hearing in the Eastern District of Virginia.

And, most critically, non-disclosure prevents Mr. Michaud from developing defenses for trial or, equally importantly, abandoning potential defenses in favor of others that are better supported by the evidence that the Government is withholding. In this regard, the Court has found that while “[t]he government asserts that the N.I.T. code will not be helpful to the defense. . . that information may well, in the hands of a defense lawyer with a fertile mind, be a treasure trove of exculpatory evidence.” May 18 Order at 4.

The Government is free to note its disagreements with the Court, but instead of focusing on the question of remedies much of its Sanctions Memo revisits arguments about the materiality of the NIT discovery, an issue that the Court has now ruled on twice. For example, the Government reminds the Court that Agent Alfin has examined the NIT “data stream” and continues to insist that it contains “everything [Mr.

1 Michaud] needs” to address the many complicated issues detailed by the defense’s
2 experts. Govt. Sanctions Memo at 8. The Government’s persistence in flogging this
3 particular evidentiary horse is notable only because it is coupled with an absurd
4 misreading of Prof. Matthew Miller’s declaration.

5 According to the Government, Prof. Miller “discussed the value of the network
6 data Michaud refuses to review in another case [*Cottom*],” and then supposedly
7 contradicts himself by stating that the “data stream will not suffice.” Govt. Sanctions
8 Memo at 8-9. As the Government is surely aware, “network data” and a “data stream”
9 are not the same thing. Moreover, Prof. Miller explained that in the *Cottom* case the
10 Government provided access to *all* of the NIT components, and it was only *after* having
11 reviewed everything (including source code and identifiers) that the defense was able to
12 determine whether the data seized from Mr. Cottom’s computer was accurate. Dkt.
13 191, exh. A (Miller Declaration) at ¶¶ 9-11. Indeed, in the very same paragraph cited
14 by the Government, Prof. Miller stated that the issues raised by the defense “cannot be
15 resolved by reference to the ‘data stream’ or other fragments of discovery that the FBI
16 is now offering to share.” *Id.* at ¶ 10; *see also* dkt. 191, exh. B (Declaration of Robert
17 Young) at ¶ 10.

18 Given the clarity of Prof. Miller’s statements, it is hard to see how the
19 Government was confused by them. The problem may be attributable to the lack of
20 expert support for the Government’s arguments about the materiality of the NIT
21 discovery and the insufficiency of the minimal discovery that has been offered. In this
22 regard, it is telling that the Government has not offered the Court a single declaration
23 from a true forensic or code expert.

24 Instead, the Government has submitted a declaration from another case agent,
25 Samuel Mautz, and a third declaration from Agent Daniel Alfin. Agent Mautz has no
26 expertise in forensic or code analysis, and it appears that the Government has offered

1 his declaration to bolster its argument (made several times previously and implicitly
2 rejected by the Court with its May 18 Order) that the NIT discovery is not relevant to
3 analyzing thumb drives or a cell phone. The fallacy underlying the lines the
4 Government has been trying to draw around various parts of the evidence is fully
5 addressed in the declarations of Prof. Miller and Shawn Kasal. *See* dkt. 191, exh. A. at
6 ¶ 7 (“Without knowing what exploit was used by the FBI in this case, we cannot
7 determine whether the files the government says were located on various storage
8 devices were put on those devices by Mr. Michaud”); exh. C (Kasal Declaration) at ¶ 7.
9 In any event, even if Agent Mautz were a qualified forensics expert, in the final analysis
10 all his declaration does is revisit one of the prosecution’s disagreements with the
11 defense’s experts and the Court’s findings.

12 The upshot of Agent Alfin’s third declaration is much the same, and basically
13 restates the Government’s view that the defense can do a forensic analysis of Mr.
14 Michaud’s data storage devices to identify malware that may be on those devices. But
15 as Robert Young explained in his declaration, the NIT malware cannot be “reverse
16 engineered” because of, among other technical problems, the prevalence of “hidden
17 code,” the use of encryption, and the fact that malware is often stored in temporary or
18 volatile memory that is routinely deleted or lost when a computer’s power is turned off.
19 *See* dkt. 191, exh. B (Young Declaration) at ¶¶ 6-9. The same problems apply to
20 viruses and malware in general, which is why one of the main technical issues for the
21 defense is determining what type of system *vulnerabilities* were created by the NIT.
22 *See also* dkt. 195 (Mozilla Motion to Intervene) at 10 (“The information contained in
23 the [second] Declaration of Special Agent Alfin suggests that the Government exploited
24 the very type of vulnerability that would allow third parties to obtain total control [of]
25 an unsuspecting user’s computer.”).

1 Moreover, Agent Alfin fails to mention in his new declaration that the
2 Government has notified the defense that all of the data on Mr. Michaud’s hard drive
3 has been deleted, rendering a forensic analysis of the primary data storage device all but
4 pointless. The cause of this deletion is unclear, and it may well have been caused by
5 viruses or malware; by the failure of law enforcement agents to properly preserve the
6 hard drive when they seized the computer; or by errors during the Government’s own
7 attempts to forensically analyze the drive.

8 Finally, Agent Alfin’s knowledge about how the NIT works and what it actually
9 does has been cast in doubt by testimony he gave on May 19. As this Court is aware,
10 the Government has long maintained that Mr. Michaud’s IP address (perhaps the key
11 piece of information for establishing probable cause to search his home) was seized by
12 the NIT *directly* from Mr. Michaud’s computer. *See, e.g.*, dkt. 41, exh. C-004 (the NIT
13 warrant application) (stating that the items to be seized “from any ‘activating’
14 computer” includes the computer’s “actual IP address, and the date and time that the
15 NIT determines what that IP address is”); Dkt. 74 at 7 (the information seized from Mr.
16 Michaud’s computer included his IP address).

17 On May 19, however, Agent Alfin was called as a witness at a suppression
18 hearing in *United States v. Matish*, an “Operation Pacifier” case pending in the Eastern
19 District of Virginia. CR16-00016 (The Hon. Henry Coke Morgan, Jr. presiding).
20 During that hearing, Agent Alfin asked to “clarify” the information that the NIT seized
21 from target computers, and then stated that “the IP address, that was not actually
22 resident on [the defendant’s] computer. *After* the NIT collected information it sent it
23 over the regular Internet to our server, and his IP address was *observed at that time.*”
24 *See* exh. A (relevant portions of the May 19 transcript) (emphasis added). Agent Alfin
25 then went on make an additional “clarification,” agreeing that “multiple computers can
26 be logged on to the Internet through the same IP address.” *Compare, e.g.*, Dkt. 47

1 (Govt. Response to Motion to Suppress) at 3, n. 2 (“An Internet Protocol address or
2 “IP” address refers to a *unique* number used by *a computer* to access the Internet”)
3 (emphasis added).

4 This testimony is very problematic. If the NIT did not seize IP addresses
5 directly from target computers, as the NIT warrant stated it would and the Government
6 has previously maintained, then it is less clear than ever what the FBI’s malware
7 actually did to those computers. *See also United States v. Arterbury*, CR15-182JHP (D.
8 Okla. April 25, 2016), dkt. 42 at 6 (suppressing all fruits of NIT search based in part on
9 finding that the NIT acted as “data extraction software” to seize IP addresses from the
10 target computers). If Agent Alfin’s recent testimony is correct, there are now additional
11 data verification and probable cause issues that need to be resolved. Yet it is only now,
12 almost a year after this case began and after the Court has already held a suppression
13 hearing, that the defense was alerted by Mr. Matish’s attorneys to this perplexing new
14 information. Agent Alfin’s recent testimony is just one more example of how the
15 defense has been kept largely in the dark about important evidence and issues, and why
16 (as the Court has noted) “the defendant is not required to accept the government’s
17 assurances that reviewing the N.I.T. code will not be helpful to the defense.” May 18
18 Order at 4.

19 **B. The Government’s Proposed Remedies Are Not Remedies at All.**

20 The Government suggests that since it has not acted in “bad faith” and “the law
21 enforcement privilege properly shields the discovery,” there should be no consequences
22 at all for its withholding of discovery. Govt. Sanctions Memo at 4. The Government
23 offers no direct authority for this argument, but it later cites *United States v. Finley*, 301
24 F.3d 1000 (9th Cir. 2002), for the proposition that “[e]ven exclusion of evidence is an
25 ‘appropriate remedy for a discovery rule violation only where the omission was willful
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1 and motivated by a desire to obtain a tactical advantage.” Govt. Sanctions Memo at 5,
2 quoting *Finley*, 301 F.3d at 1018.

3 This citation is highly misleading. Six years after *Finley* was decided, the Ninth
4 Circuit revisited the case when it decided *W.R. Grace* and held that trial courts have
5 broad discretion to use exclusion orders to regulate discovery and ensure fair criminal
6 trials, regardless of whether the Government has acted in bad faith. *W.R. Grace*, 526
7 F.3d at 503. In *W.R. Grace*, the trial court had set deadlines for discovery in a complex
8 criminal case, including a finalized list of the prosecution’s expert witnesses. *Id.* The
9 Government filed its list before the deadline, but “reserved the right” to expand it, while
10 the defendant disputed the sufficiency of the prosecution’s expert disclosures. *Id.* The
11 court, after several hearings and “chiding the government for its ‘impermissibly narrow
12 view of the obligations under *Brady*,” ultimately issued an order excluding some of the
13 prosecution’s witnesses and evidence. *Id.*

14 On appeal, the Government cited *Finley* to make the exact same argument it has
15 presented to this Court: “[T]he government relies on *United States v. Finley*. . . for the
16 proposition that the exclusion of witnesses [or other evidence] can be imposed as a
17 sanction *only* when the district court finds the violation of a disclosure order was
18 ‘willful and motivated by a desire to obtain tactical a tactical advantage.’” *W.R. Grace*,
19 526 F.3d at 514-15 (emphasis in original) (citations omitted). What the Government
20 now overlooks is that the Ninth Circuit rejected this argument in *W.R. Grace* because
21 *Finley* “involved a defendant’s right to present evidence, not the government’s,” and
22 therefore it has “no bearing” when it is the *Government* that is withholding evidence
23 that is material to a defendant’s ability to get a fair trial. *Id.* at 515.

24 The Ninth Circuit in *W.R. Grace* went on to affirm the trial court’s exclusion
25 order (which was not premised on a finding of bad faith), and in doing so provided
26 helpful guidance for this case. The Court of Appeals began with the principle that the

1 discovery rules, and a trial court’s “inherent powers” to regulate discovery and “to
2 manage their cases and courtrooms effectively,” must “be interpreted to provide for the
3 just determination of every criminal proceeding.” *Id.* at 510; *see also id.* at 512 (“[T]he
4 essential premise of the court’s inherent power to manage its cases [is] to ensure the fair
5 and effective administration of the criminal justice system.”). As a result, once a trial
6 court has determined that discovery is material to the defense, it has broad discretion to
7 enforce discovery orders and redress potential prejudice to a defendant if the
8 government (for whatever reason) does not provide discovery in a timely manner (as in
9 *W.R. Grace*) or, worse yet, does not provide material discovery at all (as in this case).
10 *See id.* at 515 (“The government’s discretion to investigate and present its case does not
11 override the district court’s authority to manage the trial proceedings.”).

12 In addition, since the exclusion of evidence in this context is directed to
13 regulating discovery and ensuring a fair trial, an exclusion order is not even properly
14 characterized as a “sanction.” *Id.* at 514. This is because a trial court need *not* find that
15 the Government acted in bad faith when it withheld discovery, and an exclusion does
16 not necessarily mean that nondisclosure was “willful and motivated by a desire to
17 obtain a tactical advantage.” *Id.* at 515 (citation omitted). Instead, the exclusion is
18 simply a necessary means of ensuring that the discovery rules are applied fairly and
19 guaranteeing the defendant a fair trial. *Id.* at 514; *see also United States v. Peters*, 937
20 F.2d 1422, 1424 (9th Cir. 1991) (exclusion orders as a remedy for withholding
21 discovery are reviewed under an abuse of discretion standard).

22 At this juncture, the Court has twice found (after exhaustive briefing and two
23 hearings) that the NIT discovery is material to the defense. And not just for trial, but
24 also for purposes of informed settlement discussions and pretrial motions. Indeed, the
25 Court has recognized that the discovery may include exculpatory information and have
26 substantial *Brady* implications. May 18 Order at 4. Under these circumstances,

1 dismissal of the indictment is an entirely appropriate and legally sound course of action.
2 *See United States v. Roviato*, 353 U.S. 53, 60-61 (1957) (When a trial court has found
3 that discovery “is relevant and helpful to the defense” and the Government persists in
4 withholding it, the court may “dismiss the action”).

5 This is especially true given that the Government has not offered the Court any
6 coherent alternatives. Indeed, apart from maintaining that no remedy at all is needed,
7 the Government offers little meaningful advice to the Court on possible remedies short
8 of dismissal or exclusion.

9 Specifically, the Government’s notion that the nondisclosure issues “will not
10 ripen until trial” is nonsense, since the defense cannot effectively prepare for trial.
11 Govt. Sanctions Memo at 2; 13-14. It is equally unhelpful for the Government to revisit
12 the arguments it has previously made about trying to separate evidence and charges
13 based on where alleged contraband was found (*see* Govt. Sanctions Memo at 7),
14 especially since it fails to address the opinions offered by the defense’s experts about
15 how all the data storage devices and evidentiary data are “networked.” *See, e.g.*, dkt.
16 191, exh. A (Miller Declaration at ¶ 5) (“Once a computer system’s security has been
17 compromised, the computer and any devices that have been connected to it (such as
18 thumb drives, discs or other data storage devices) are also deemed to have been
19 compromised and vulnerable to attack.”).

20 The Government’s alternative suggestion that the Court should merely preclude
21 it from “offering evidence about the NIT” at trial is both disingenuous and unworkable.
22 *See* Sanctions Memo at 12. Such a “remedy” would only place Mr. Michaud at a
23 greater disadvantage, since the keystone of his likely defense is the Government’s use
24 of an NIT in the first place and all of the “reasonable doubt” consequences that flow
25 from it. *See* dkt. 91 (Reply to Govt. Response to Motion to Dismiss) at 6 (responding
26 to this proposal when the Government first made it). The Government’s suggestion that

1 the Court should only exclude pictures that can be traced to the “Playpen” site or
2 dismiss counts that rely on those pictures is also misguided. Govt. Sanctions Memo at
3 11. The Government has informed the defense that it cannot identify the source of most
4 or all of the non-“Playpen” pictures it has allegedly found, and in any event the defense
5 needs the NIT discovery to determine the extent to which Mr. Michaud’s devices were
6 exposed to viruses and third party attacks.

7 Further, the Government has acknowledged several times that its targeting of
8 Mr. Michaud with an NIT is interwoven with the entire narrative of this case. *See* May
9 5, 2016 Hearing Transcript at 13 (“[T]he government acknowledges that this would be
10 – it would certainly not be a normal presentation at trial”); Govt. Consolidated
11 Response to Second Motion to Dismiss (dkt. 188) at 15; February 17, 2016 Hearing
12 Transcript (dkt. 178, exh. A) at 13. It would be all but impossible for a jury to make
13 sense of the case without substantial testimony about the NIT and what it did. As a
14 result, trying to excise “testimony relating to the use of the NIT” (Govt. Sanctions
15 Memo at 12) would be, at a minimum, fundamentally misleading and lead the jury to
16 speculate about many important facts and issues. *See United States v. Katakis*, 800
17 F.3d 1017, 1025 (9th Cir. 2015) (finding evidence insufficient to support conviction
18 where, under Government’s theory, “the jury was left to speculate” as to the factual
19 predicate of a link in chain of inference); *United States v. Del Toro–Barboza*, 673 F.3d
20 1136, 1144 (9th Cir. 2012) (“[A] reasonable inference is one that is supported by a
21 chain of logic, rather than mere speculation dressed up in the guise of evidence”)
22 (quotation marks and alteration omitted).

23 III. CONCLUSION

24 In sum, the Government has not offered any fair or workable remedies other than
25 dismissal or an exclusion order encompassing all fruits of the NIT search warrant. In
26 any event, dismissal or a comprehensive exclusion order are the appropriate and

1 necessary remedies under *Jencks*, *Roviaro* and *W.R. Grace*. The defense defers to the
2 Court as to which of these two remedies is most appropriate in this case.

3 DATED this 23rd day of May, 2016.

4 Respectfully submitted,

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6 s/ *Colin Fieman*

s/ *Linda Sullivan*

7 Attorneys for Jay Michaud
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered with the CM/ECF system.

s/ Amy Strickling, Paralegal
Federal Public Defender Office