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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 JAY MICHAUD,

13 Defendant.

CASE NO. 3:15-cr-05351RJB

ORDER ON PROCEDURAL
HISTORY AND CASE STATUS IN
ADVANCE OF MAY 25, 2016
HEARING

14 Pending before the Court is Defendant's Second Motion to Dismiss. Dkts. 178, 179. The
15 motion marks the culmination of extensive discovery motions practice that addressed the
16 government's obligation to disclose the Network Investigative Technique ("N.I.T. code"), a new
17 investigative technology that has presented novel Due Process challenges. The motion will
18 ultimately be decided by resolving the issue of what sanction is appropriate, under circumstances
19 where the government prosecutes a person for a crime but justifiably elects to not disclose
20 discovery. The issue highlights the tension between legitimate government interests and the
21 defendant's right to a fair trial.

22 Arriving at the issue reveals a protracted discovery battle between the parties. The
23 defendant first moved to compel the N.I.T. code, among other discovery, in Defendant's Motion
24 to Compel Discovery. Dkt. 54. At a hearing addressing the motion held on December 14, 2015,

1 counsel for Mr. Michaud stated that, “[a]s indicated in my responsive pleading, the government
2 notified us on Thursday that they were in fact willing to turn over the N.I.T. code which we
3 appreciate. . . [we] expect that that part of the discovery will proceed smoothly.” Dkt. 126, at 2,
4 3. It appearing that the defendant had withdrawn his request to compel the N.I.T. code, the
5 Court’s Order addressing the motion did not address compelling its production. *See* Dkt. 81.

6 According to Defendant’s Third Motion to Compel Discovery (Dkt. 115), the
7 government reversed course, ultimately deciding not to disclose the full N.I.T. code, despite Mr.
8 Michaud’s willingness to abide by any required security measure, such as review by a defense
9 expert with security clearance at a secure government location. *See also*, Dkt. 165, at 2. In that
10 motion, the defendant requested “the complete N.I.T. code data, as well as any related records or
11 information that are needed for the defense’s analysis that data.” Dkt. 115, at 5. After oral
12 argument held on February 17, 2016, where the government argued that the N.I.T. code was not
13 material to the defendant’s defense (Dkt. 162, at 12, 13; *see* Dkt. 134), the Court orally ruled on
14 Defendant’s Third Motion to Compel Discovery, finding that the defendant satisfied his
15 threshold burden to show that the N.I.T. code would be material to his defense. *See* Fed.R.Cr.P.
16 16(a)(1)(E)(i). The Court ruled in pertinent part as follows:

17 THE COURT: Well, first I am satisfied that the defense has shown
18 materiality here to preparing the defense. I don’t need to discuss that in depth, in my
19 view. I think the papers speak for themselves. And it may be a blind alley, but we won’t
20 know until the defense can look at the details of what was done.

19

20 It is my opinion that the protective order in place is sufficient to protect this
21 information, and it is my judgment that the motion should be granted

21 ...

22 Now, you know, behind that ruling is this: The government hacked into a whole
23 lot of computers on the strength of a very questionable search warrant. I ruled on the
24 admissibility of that in what I considered to be a very narrow ruling.

23 Much of the details of this information is lost on me, I am afraid, the technical
24 parts of it, but it comes down to a simple thing. You say you caught me by the use of
computer hacking, so how do you do it? How do you do it? A fair question. And the

1 government should respond under seal and under the protective order, but the
2 government should respond and say here's how we did it.

3 So, you know, I guess what I am saying is that this whole thing didn't seem that
4 complex to me

5 Dkt. 162 at pages 17-19. *See also* Dkt. 161, Order Granting Defendant's Third Motion to
6 Compel Discovery.

7 The Court found Mr. Vlad Tsyklevich's declaration¹ to be significant to its finding of
8 materiality. Dkt. 204, at 33. *See* Dkt. 115-1. The government argued in the alternative that, even
9 if the N.I.T. code was material, the government should not be compelled to produce it. The
10 government justified this argument based on sensitive information that it maintained could only
11 be revealed in an *ex parte, in camera* hearing, a request the Court, at that time, denied.² Dkt. 162,
12 at 18.

13 The government asked the Court to reconsider its Order. Dkt.165. At a hearing on May
14 12, 2016, the Court reconsidered its Order and granted leave to the government for the requested
15 Fed.R.Cr.P. 16(d)(1) *ex parte* and *in camera* submission of evidence. At the conclusion of the
16 Fed.R.Cr.P. 16(d)(1) hearing, the Court ruled orally that the government had made a sufficient
17 showing and was not required to disclose the entire N.I.T. code to the defendant, even with a
18 Protective Order in place. Dkts. 199; 204, at 5. The Court modified its Order on Defendant's
19 Motion to Compel accordingly. Dkt. 200.

21 ¹ The transcript mistakenly identified the declarant as "Mr. Cirkovic." *See* Dkt. 204, at
22 33.

23 ² In subsequent briefing the government has referred to its request for an *ex parte, in*
24 *camera* (Dkt. 134, at 13) hearing as "withdrawn," a characterization that is not borne out by the
record. Dkt. 162, at 18. Whether it was withdrawn or later reconsidered is ultimately
inconsequential to the merits of Mr. Michaud's discovery motions.

1 At the May 12, 2016 hearing, the Court also affirmed its prior finding of materiality
2 under F.R.Cr.P. 16(a)(1)(E)(i) and denied any further modification of the Order. Dkt. 200. *See*
3 Dkt. 161. The Court ruled orally as follows:

4 Well, this question of relevance or materiality or what should be turned over to
5 the defense under the rules is what we are talking about here. I have not changed my
6 opinion on that based on what has been presented here on this motion to reconsider.

7 I was earlier, and still am, impressed by the material from Mr. [Tsyklevich]. It
8 seems to me, as I said before, that the defense has the right to know what tools you used
9 to hack into his computer.

10 I am impressed -- I don't think anything that the government has said has
11 overcome that showing. The response to that is substantially that the defense hasn't
12 proved what they don't know -- they haven't proved what they don't know, but what they
13 want to know is what they don't know so they can determine what defenses are
14 appropriate, or, I might say, under the Ninth Circuit cases, in particular the *Hernandez-*
15 *Meza* case, which is 720 F.3d 760, they have a right to consider this information partly to
16 determine whether it should lead to a plea, whether there are any defenses. And I think
17 they have a right to that information.

18 Dkt. 204, at 33.

19 The government's oral arguments on February 17 and May 12, 2016 and its related
20 briefing addressing materiality essentially amount to an *ipse dixit* argument, without convincing
21 expert support, that 1) giving the defendant full access to the N.I.T. code will not turn up
22 anything helpful to the defense, and 2) a showing of materiality demands facts, not hypotheses,
23 and the defendant has done nothing more than fabricate guesses about what the N.I.T. code could
24 show. These arguments bear little fruit. The defendant is not required to accept the government's
25 assurances that reviewing the N.I.T. code will yield no helpful information. The government
26 asserts that the N.I.T. code will not be helpful to the defense, but that information may well, in
27 the hands of a defense lawyer with a fertile mind, be a treasure trove of exculpatory evidence.
28 Furthermore, even if the defendant's review of the N.I.T. code ultimately only yields inculpatory
29 evidence, "[e]ven inculpatory evidence may be relevant [because a] defendant who knows that
30 the government has evidence that renders his planned defense useless can alter his trial strategy.

1 Or he can seek a plea agreement instead of going to trial.” *United States v. Muniz-Jaquez*, 718
2 F.3d 1180, 1183 (9th Cir. 2013). Depriving the defendant an opportunity to review the N.I.T.
3 code denies the defendant the chance to determine if any line of defense is available – or if no
4 line of defense is available—but in either case, the defendant has made a sufficient showing of
5 materiality. *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010)(“defendant must make a
6 threshold showing of materiality, which requires a presentation of facts which would tend to
7 show . . . information helpful to the defense”).

8 The resolution of Defendant’s Third Motion to Compel Discovery places this matter in an
9 unusual position: the defendant has the right to review the full N.I.T. code, but the government
10 does not have to produce it. Thus, we reach the question of sanctions: What should be done
11 about it when, under these facts, the defense has a justifiable need for information in the hands of
12 the government, but the government has a justifiable right not to turn the information over to the
13 defense?

14 That issue will be addressed on consideration of Defendant’s Second Defense Motion to
15 Dismiss Indictment. Dkts. 178, 179. The Court will consider the defendant’s attachments to his
16 briefing, which it did not consider for purposes of the May 12, 2016 hearing, *see* Dkts. 191-2 and
17 191-3, as well as the parties’ additional briefing and oral argument. Oral argument on the motion
18 is set for May 25, 2016, at 9:30 a.m.

19 IT IS SO ORDERED.

20 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
21 to any party appearing *pro se* at said party’s last known address.

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1 Dated this 18th day of May, 2016.

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4 ROBERT J. BRYAN
United States District Judge

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