JUDGE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID TIPPENS, Defendant.	No. CR16-5110RJB **CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTON TO COMPEL**
UNITED STATES OF AMERICA, Plaintiff, v. GERALD LESAN, Defendant.	No. CR15-387RJB **CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTON TO COMPEL**
UNITED STATES OF AMERICA, Plaintiff, v. BRUCE LORENTE, Defendant.	No. CR15-274RJB **CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTON TO COMPEL**

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I. REPLY ARGUMENT

A. There Is Substantial Unrefuted Evidence of an Unlawful Investigation by the FBI That Resulted in the Needless and Widespread Revictimization of Minors.

The Government maintains that "[t]here can be little doubt the government's investigation approach was necessary," dkt. 56 at 9, and that "reasonable people may debate whether law enforcement could have used other methods." *Id*. at 2. To the contrary, the Government has previously been excoriated for distributing child pornography as part of a sting operation and warned against doing so again. Having elected to ignore that warning, the Government cannot complain if this Court takes appropriate measures to hold it accountable.

In *United States v. Sherman*, 268 F.3d 539 (7th Cir. 2001), federal agents supplied the defendant "with a literal catalog of child pornography, and then delivered to him materials that depicted actual children, allowing him enough time to view and even copy the materials before arresting him." *Id*. at 548. The Government justified its investigatory methods by arguing that its "larger purpose" was preventing further crimes. *Id.* at 548-49. The court was unpersuaded by that justification and firmly rebuked the Government for its tactics:

> [T]he government's participation in criminal activity in the course of an investigation should rarely, if ever, involve harming actual, innocent victims…. We are aware of the necessity of such tactics in so-called victimless crimes such as drug offenses, but the use of these methods when victims are actually harmed is inexplicable. Moreover, the government's dissemination of the pornographic materials to Sherman could hardly be described as a "controlled" delivery of the materials. Given the length of time that Sherman was allowed to possess these materials before he was arrested, the government's conduct here could easily have led to further victimization of the children depicted because the defendant had an opportunity to copy the materials and disseminate them to others.

Id. at 549.

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While recognizing that investigating pornography offenses can be difficult, the court went on to state that "[w]e have no doubt that creative investigative techniques and tight controls on the materials used as bait for the consumers of child pornography can lead to better protection of the victims of child pornography." *Id.* at 550. While the defendant had not raised an outrageous conduct claim, and such a defense at trial is not viable in the Seventh Circuit, the court nevertheless took it upon itself to "caution the government that its investigative technique in this case was inconsistent with its position. . . that the children depicted are harmed by the continued existence of and mere possession of child pornography." *Id.*

The heedlessness and harm that so troubled the Seventh Circuit in *Sherman* pales in comparison to the FBI's methods in Operation Pacifier. This Court need only consider the facts that are known about the operation at this point to conclude that the Government may well continue to use unethical and unlawful investigatory methods in Internet investigations unless the Court orders full disclosure of the operation and imposes appropriate sanctions.

First, the Government does not dispute that the FBI distributed 1,000,000 or more picture and videos of child abuse. *See* Motion to Dismiss (dkt. 32) at 4.[1] While the Government maintains that it did not "post" any child pornography on Playpen because it was members who were loading or linking content (dkt. 56 at 2), it is the FBI that maintained the "file hosting" features that enabled users to do that and also allowed them to download and redistribute all of the postings. In addition, the available visitor comments that were posted while the FBI was running Playpen show much improved "customer satisfaction." If nothing else, it appears that the FBI's relocation of the server to a government facility resulted in faster and more reliable "connectivity" to the site. As a result, to use an analogy from drug investigations, the visitors who posted on

[1] Docket references, unless otherwise indicated, are to entries in the *Tippens* docket.

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Playpen may have been pornography couriers, but it was the FBI that assumed the role of distribution kingpin.

Second, in the course of a 14 page reply to the defendants' motion, the Government is silent on the issue of its violation of 18 U.S.C. § 3509(m), which expressly requires law enforcement agencies to maintain "custody and control" of any child pornography that they seize. The Government has construed this and related provisions in other contexts so strictly that it has even supported imposing damages on a defense expert who digitally altered stock pictures to make it appear that children were engaged in sexual activity, as part of misguided trial demonstrations showing the difficulty of determining whether a picture depicts a real child. Brief of the United States in Opposition to Petition for Writ of Certiorari in *Boland v. Doe* (No. 12-987) (United States Supreme Court, May 17, 2013), 2013 WL 2152662. But when it comes to the FBI operating, at least briefly, as the world's largest distributor of child pornography, the Government is unable to direct the Court to any statutory or other exemption for the FBI's actions. And, perhaps most tellingly, it makes no attempt to explain how the FBI's redistribution of a 1,000,000 or more images can be reconciled with the Government's oft-expressed concerns about revictimization. Whatever merit there may be to a Government argument that the laws *in general* do not apply to law enforcement investigations (such as, for example, possession of narcotics), that argument cannot encompass a specific Congressional directive that law enforcement not redistribute a particular type of contraband .

Third, the Government suggests that in this case the ends justified the means because a number of children have been saved from abuse as a result of Operation Pacifier. However, every one of the scores of Pacifier cases that the defense is aware of have involved routine possession charges. The Government has not identified any cases where there was direct intervention on behalf of a child, and in fact it has declined to

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disclose related information, such as how it selected a relatively small number of defendants for prosecution amidst approximately 100,000 Playpen visitors.

Fourth, the fact that the Government may have rescued children as a result of Operation Pacifier is both laudable and irrelevant. The core of the defendants' argument is that the FBI could have accomplished all of its investigatory goals (including identifying new victims) without becoming the world's largest distributor of child pornography. It was the methods used during investigation, not the results of the investigation itself, that so troubled the court in *Sherman*.

Here, the NIT warrant allowed the FBI to identify targets when they were still on Playpen's home page. Having sought such sweeping search authorization, there was no need to allow users to upload or download anything in order to locate targets. Hence, the fact that children may have been rescued because particular users were identified by the NIT in no way explains why the FBI kept Playpen "fully functional" and allowed pictures of those children to flood the Internet.

The Government is also silent about why the FBI kept the "How To" section up and running on Playpen, which was essentially an advice forum on how to molest children. *See* Motion to Dismiss at 4.

Fifth, the Government does not dispute that there are viable technical means of maintaining the credibility of a site like Playpen for undercover purposes while at the same time limiting the ability of visitors to post or download actual child pornography. *See* Motion to Dismiss at 9. While the Government has previously claimed that it did not want to do anything to alter the site in order to avoid alerting visitors to possible law enforcement intervention, that rationale has proven to be specious.

Specifically, when confronted with evidence suggesting that the FBI improved the functionality of its site, the Government submitted a declaration from Agent Daniel Alfin in which he states that the FBI closed down an entire section of Playpen, the

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"producers forum." September 22, 2016, Declaration of Alfin (dkt. 56-1) at ¶ 7. Alfin goes on to explain that "[p]ostings made by the undercover FBI agent [posing as the site's administrator] that the section would eventually return were intended to keep users from discovering the law enforcement takeover." *Id*. The Government makes no attempt to explain why similar (and quite simple) efforts were not taken to slow or impede the redistribution of at least the most egregious images that the FBI maintained on the site.

Equally problematically, Alfin notes in his latest declaration that "connectivity issues" are common with Tor sites, and that not even Tor developers can explain why users often have problems viewing and downloading content on the network. Dkt. 56-1 at ¶ 11. In fact, slowdowns, interrupted downloads, blocked files, and other problems are so commonplace on Tor sites that the FBI was unconcerned about users receiving "error messages" (like "file not found" or "file hosting is temporarily down while we fix a bug") when they tried to follow various links that were no longer available after the FBI rebooted Playpen. Exh. A (*United States v. Anzalone*, CR15-10347PBS, Transcript of October 14, 2016 Hearing) at 57-58.[2] If all that is true, then the Government is hard pressed to explain why it did not make even a minimal effort to curtail the redistribution of Playpen's content.

Finally, Agent Alfin has recently testified that Operation Pacifier was approved and supervised at senior levels of DOJ and the FBI. *Id.* at 43-46. Incredibly, while Alfin indicated that there was at least some high level review of the operation, DOJ and the FBI established *no protocols whatsoever* for the handling and containment of the pornography on the site. *Id*. at 57.

[2] Agent Alfin offered his testimony during a limited hearing on the defendant's motion to dismiss based on outrageous governmental conduct, which the court ultimately denied.

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In short, reasonable people may debate whether using an undercover site like Playpen is appropriate if the FBI makes every effort to avoid the revictimization of children. But no reasonable person can condone an operation that is so focused on pushing the legal and technical envelopes for deploying "network investigative techniques" that the lawyers and agents involved in that operation make no effort to minimize the revictimization and collateral damage caused by their investigation.

The Government avoids explaining its actions by offering a purely legalistic response to the defendants' motion that, even from a legal standpoint, misses the mark. The Government measures its conduct against a list of factors, most of which are inapplicable to the type of harm involved here, that are discussed in *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013). *See* dkt. 56 at 5-8. Those factors are relevant to assessing the outrageousness of governmental action when a defendant has specifically alleged that law enforcement officers involved the defendant in a crime. *See id.* at 302. The defendant's claim in such cases is akin to a claim of entrapment, but where the facts fall short of the legal criteria for entrapment (such as, for example, where the defendant had a predisposition to commit the offense). *See*, *e.g.*, *United States v. McClelland*, 72 F.3d 717, 726 (9th Cir. 1995).

But that is not at all the kind of outrageous conduct that the defendants have identified. Rather, their argument is that the Government has violated the law by distributing child pornography; subjected those portrayed in a million or more images to revictimization; and set loose those images for untold number of repostings that the Government cannot ever control or recover.

More specifically, as *Black* itself states, the factors it lists are not a "formalistic checklist," and whether "law enforcement conduct crosses the line between acceptable and outrageous" requires that "every case must be resolved on its own particular facts."

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733 F.3d at 302, 303 (citation omitted). The ultimate test is one of the "totality of circumstances[.]" *Id.* at 304. A totality of the circumstances test requires the Court to focus its analysis on the relevant circumstances, not ones the Government would prefer to highlight but that are unrelated to the defendants' claim.

Here, the first four factors suggested in *Black* relate to the defendant, the grounds for targeting him, and the relative responsibility that the Government and the defendants each have for their alleged involvement in the crime. These factors are not relevant to a claim that the Government has acted outrageously by committing unethical or illegal acts as part of an investigation. Accordingly, given the type of conduct at issue here, the relevant inquiry is the nature of the harm to those victims, along with the last two *Black* factors, namely the nature of the Government conduct and the necessity for that conduct. As addressed above, the available facts amply demonstrate that (according to the Government's own views) there was substantial harm to victims; the nature of the Government's conduct was both unlawful and callous; and there was no investigatory need for that conduct.

In the final analysis, the FBI could have maintained Playpen as a credible undercover site and deployed its NITs without becoming a massive distributor of child pornography. The fact that it chose not to do so should lead to the Court to conclude that further discovery is appropriate, and ultimately grant the defendants' motions for dismissal.

B. The Defendants are Entitled to Discovery That is Material to Their Pending Dismissal, Suppression and *Franks* Motion, as well as Other Important Issues.

The Government wants this Court to ignore recent Ninth Circuit law that supports our discovery requests and instead apply cases from 20 or more years ago. *See* Govt. Response at 2-3 (citing, *inter alia*, *United States v. Armstrong*, 517 U.S. 456

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(1996)). The Court of Appeals, however, has explained the evolution of its discovery requirements and that "our post-*Armstrong* case law within the Ninth Circuit indicates that Rule 16(a)(1)(E) permits discovery related to the constitutionality of a search or seizure." *United States v. Soto-Zuniga*, __ F.3d __, 2016 WL 4932319 *6 (9th Cir. Sept. 16, 2016) (9th Cir. Sept. 16, 2016). Although the court referred to discovery related to search and seizure issues, the opinion makes clear that the Rule requires discovery so long as it is material to legitimate pretrial motions or potential defense. The court went on to explain the limited scope of *Armstrong* (contrary to the Government's reliance on it here): "[W]e do not read *Armstrong* to preclude Rule 16(a)(1)(E) discovery related to the constitutionality of a search or seizure. In our view, the holding of *Armstrong* applies to the narrow issue of discovery in selective-prosecution cases." 2016 WL 4932319 at *6.

Nevertheless, relegating *Soto-Zuniga* to a footnote (and ignoring all the other cases this Court relied on for the discovery orders in *Michaud*), the Government maintains that our requests for documents related to the outrageous conduct, *Franks* and jurisdictional issues are not discoverable since judges have declined to suppress evidence based on those issues. Govt. Response at 5. Of course, what judges in other circuits have done provides limited guidance here, and in fact those denials only underscore the need for disclosure in the instant cases.

For reasons that are unclear, none of the defendants in the cases cited by the Government moved for dismissal based on outrageous governmental conduct or raised *Franks* issues. They also did not seek additional discovery related to the jurisdictional issues and the Government's invocation of the "good faith" exception. Any shortcomings in the issues raised by defendants elsewhere should not be held against Mr. Tippens, Mr. Lorente or Mr. Lesan. It is also a complete *non sequiter* for the Government to cite cases where the defendants failed to seek or obtain material

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discovery, and then maintain that the resulting court decisions (based on incomplete discovery) somehow demonstrate why that discovery is not needed. Furthermore, the Government's argument flies in the face of *Soto-Zuniga*, by suggesting that a defendant must first show that a motion will succeed in order to obtain discovery that might support the motion.

If this Court concludes that the discovery sought by the instant defendants is material, the only remaining question is whether the Government has legitimate grounds for continuing to withhold it. The problem for the Government is that, even if it is entitled to withhold the discovery, the Court must then determine what sanctions for non-disclosure are needed to ensure fair trials for the defendants. To do otherwise would be an abuse of discretion, as the decision in *Soto-Zuniga* makes plain.

And there can be no credible dispute that the fundamental fairness of these proceedings are at stake. To begin, the Government wants to have it both ways when it comes to maintaining that it did not deliberately violate Rule 41 and its assertion of the good faith exception. On one hand, the Government maintains that it "reasonably concluded" that it could seek a worldwide warrant and therefore the jurisdictional violations were not deliberate. *See* Govt. Response to Motion to Suppress (dkt. 60) at 40. It has also repeatedly touted the training and experience of the agents who prepared and submitted the NIT warrant application as a reason to find "good faith." *See, e.g., id.* at 9.

At the same time, however, we know that DOJ's internal policies and guidelines considered multi-jurisdictional warrants to be invalid. *See* Defendants' Motions to Suppress (dkt. 35) at 21-23. We also know, based on Agent Alfin's testimony on October 14, that there were some debate within the higher ranks of DOJ and the FBI about Operation Pacifier. *See* exh. A. Having claimed that it did not act deliberately and

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invoked the good faith exception, the Government should not be allowed to withhold discovery that the defense needs to challenge those arguments.

It is also no answer for the Government to claim a work product privilege or other exemptions for the discovery. *See* Govt. Response at 4. Even if these privileges are valid, all that means is that if the Government continues to stand on its privileges, the Court will have to determine an appropriate discovery sanction that vindicates their rights to effective representation and due process.

Thus, in *Soto-Zuniga*, the Ninth Circuit recognized that some of the law enforcement records sought by the defendant were "sensitive" and the Government was not necessarily required to disclose them. Yet, "[w]hile we recognize the sensitive nature of the documents in question, Soto-Zuniga's interest in government materials that are pertinent to his defense takes precedence." or 2016 WL 4932319 at *8. The Court then instructed the trial court that it should allow the Government a "window of time" to choose between waiving its privileges and disclosing, or discovery sanctions. *Id*.

Consistent with the instructions in *Soto-Zuniga*, the defense submits that if the Government does not provide items 1, 7 and 8 of the discovery sought by the defendants based on an assertion of privileges (*see* Govt. Response at 4 and 9), it should be precluded from arguing that its violations of the Federal Magistrate Act and Rule 41 was not deliberate. It should also be precluded from relying on the good faith exception.

As to the remaining discovery requests (including, *inter alia*, documents and records relating to the FBI's operation of Playpen), the Government cannot assert any privilege for the reports of agents or others who administered Playpen, or similar records related to the site's operation. Instead, ignoring the broad materiality standards summarized in *Soto-Zuniga*, the Government simply maintains that these records are irrelevant. Govt. Response at 6-8.

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Likewise, requests 10-12 concerning investigative targets are plainly relevant to our overbreadth argument; the NIT warrant's lack of particularity and other potential suppression issues; and the governmental misconduct issues.

Finally, the defendants reiterate that they have no objection to whatever protective measures the Court deems appropriate for review of the requested discovery, including limiting review to counsel of record at a Government office.

II. CONCLUSION

For the reasons stated above, the defendants respectfully request that the Court grant the defendants' Motion to Compel Discovery or, in the alternative, impose appropriate sanctions for non-disclosure.

DATED this 18th day of October, 2016.

Respectfully submitted,

s/ *Colin Fieman*
Colin Fieman
Attorney for David Tippens

s/ Robert Goldsmith
Robert Goldsmith
Attorney for Gerald Lesan

s/ Mohammad Hamoudi
Mohammad Hamoudi
Attorney for Bruce Lorente

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
-VS-	)	Criminal No. 15-10347-PBS
	)	Pages 1 - 78
VINCENT C. ANZALONE,	)	
	)	
Defendant	)	

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES CHIEF DISTRICT JUDGE

A P P E A R A N C E S:

DAVID C. TOBIN, ESQ., Assistant United States Attorney, Office of the United States Attorney, 1 Courthouse Way, Room 9200, Boston, Massachusetts, 02210, for the Plaintiff.

TIMOTHY G. WATKINS, ESQ., Federal Public Defender Office, District of Massachusetts, 51 Sleeper Street, 5th Floor, 02210, for the Defendant.

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
October 14, 2016, 10:12 a.m.

LEE A. MARZILLI
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Those are the internal deliberations of law enforcement that aren't --

THE COURT: Sustained.

MR. WATKINS: Your Honor, I'm not asking what they discussed. I'm asking who participated, and it's not internal deliberations. I should say, where this is --

THE COURT: For me, the issue is not so much who is involved. It was to use the NIT. That's just beyond the scope of what we're doing here. If you want to limit it to who was keeping it up and running it, I'm happy to have you do that.

MR. WATKINS: That's what I was asking, whose decision was it to keep it up and running in government control.

THE COURT: It was a two-part question. Anyway, so we're just going to limit it to, who decided to keep it going?

THE WITNESS: These were discussions that were had between the FBI and the Department of Justice, and we ultimately decided that we had a solid investigative plan, and we executed it.

Q. And when you talk about the Department of Justice, this was Main Justice in Washington that was part of these discussions?

A. Yes. We partner on this investigation with the Department of Justice Child Exploitation and Obscenity Section.

Q. And also with the Computer Crime and Intellectual Property Section?

A. Lawyers from CCIPS may have been consulted or involved at some point in time.

THE COURT: CCIPS?

THE WITNESS: I'm sorry, your Honor. The Computer Crime and Intellectual Property Section at the Department of Justice.

Q. So several arms of Main Justice were involved in the deliberations as to whether to continue the website with the government operating it?

A. Yes. We worked very closely with the Department of Justice on this operation.

Q. At the same time that you're working very closely with Main Justice about whether to keep it going, you are also drafting or getting ready to draft the NIT warrant?

A. Yes.

Q. And the people you were consulting with at Main Justice are also aware of the NIT warrant? It goes hand in glove?

MR. TOBIN: Objection. Again, beyond the scope of the focus here. I mean, the NIT warrant is the NIT warrant. It was decided and they did it. I don't know --

THE COURT: Well, I don't know whether it is, but let me just ask you, was the -- I don't want to go into the techniques of the NIT at all. It's just about the issue of why did you decide to keep it open?

THE WITNESS: We decided to keep the website running,

your Honor, because we could have just shut it down and hopefully removed Playpen from existence, but it would have left us with no ability to identify the members of the Playpen website, the individuals who were distributing child pornography or the individuals who were actual contact offenders who were members of the Playpen website. And so without going forward with this operation, we would have had no capability to identify anyone other than the creator of the Playpen website.

Q. So just to be clear, when you say "we," it's much more than you and Special Agent McFarland, who actually was the affiant on the search warrant, right? It's not just the two of you talking about this, right?

A. Correct. It's both the FBI and the Department of Justice, several individuals and levels of management from both organizations.

Q. There was an Assistant U.S. Attorney involved in the Eastern District of Virginia to issue the NIT warrant, but this went far beyond that as far as people having input?

A. There was an AUSA in Virginia that we worked with, yes.

Q. But it was not his or her decision either, right? This was a decision made higher up?

MR. TOBIN: Again, your Honor, with regard to the deliberative process at the Department of Justice --

THE COURT: I'll allow that it was made higher up.

THE WITNESS: It was, your Honor. It was done with the approval of executives in both the FBI and the Department of Justice.

Q. When you say executives, FBI general counsel?

A. The FBI Office of General Counsel was aware of the operation, yes.

Q. I don't want to get into the details of the NIT, but I do want to ask that you understood that the NIT would be deployed from the server to whatever computer logged into and went through the Playpen site, right?

MR. TOBIN: Objection. That essentially is a detail, and it goes beyond the scope of this.

THE COURT: Yes, let's just move ahead.

MR. WATKINS: If I may just have two quick questions on that.

THE COURT: I don't know what they are, but that one is just already established, so it --

MR. WATKINS: I was trying to do it as background more than anything. I think this is background also.

Q. So you knew it was going to be deployed domestically and internationally both, right?

A. Well, the NIT is installed on the server in the Eastern District of Virginia, and but for someone logging into the server in the Eastern District of Virginia, it would remain there. But, yes, we reasonably believed that there were

members of the Playpen website throughout the country and throughout the world.

Q. And this NIT, if it weren't the government doing it, it would be identified as malware or hacking other computers?

MR. TOBIN: Objection.

THE COURT: Sustained. We're just dealing with this.

MR. WATKINS: I understand.

Q. Are you aware of what the vulnerable equities --

MR. WATKINS: I'm sorry?

THE COURT: I just wondered, was there a specific protocol for addressing the ethical issues that come with keeping something like this alive?

THE WITNESS: I don't know if there is a specific protocol, your Honor, but we did have discussions on that very topic. It was decided that based on the population of the Playpen website, based on historical analysis of investigations of individuals who trade and distribute child pornography, that this was a rare opportunity to not only identify a large number of distributors of child pornography but to identify and rescue a large number of victims, as that is the primary focus of our work is to identify and rescue victims. And so opportunities such as the one presented in this case are incredibly rare, and so the benefits of engaging in this operation, we determined that they outweighed the option of just removing Playpen from existence and waiting until another such website popped up

24 hours later.

Q. I want to talk about the actual website as you found it. You mentioned that there was a typo in the code that made it misfigured, where actually it could be seen even if you didn't have a Tor browser?

A. Yes.

Q. There are also other amateurish features to it? The log-in page, right, you talked about that in one of your affidavits?

A. What do you mean, amateurish? I don't understand the question.

Q. Well, let me put it up on the screen, if I may. Do I have this -- I can move my computer over here.

THE CLERK: I can switch it, no. One second. It's up now.

MR. WATKINS: Sorry, your Honor. If I may just have a moment. Well, I'll just do it on the --

THE COURT: What are you showing?

MR. WATKINS: I'm going to the document camera.

THE CLERK: Okay, I switched it to doc camera.

Q. This log-in page, the administrator, Steven Chase, advised people just to enter in a random e-mail address because the software required it, but they weren't going to do anything about it, right?

A. Yes, that's correct.

Q. And indeed when the site first started, that didn't have to happen, right? You didn't have to put in a user name or a password, right?

A. Uhm, during the first maybe two or three days, I think you could access the website as a guest, but that functionality I don't think lasted for more than a week.

Q. And indeed that is functionality that Steven Chase could have put in if he knew what he was doing?

A. I don't know what that has to do with him knowing or not knowing what he's doing. That's just a configuration option on the website.

Q. Right, but instead of getting rid of this user name and password, he just had people put in random e-mail addresses?

A. I think you're confusing the registration page and the log-in page.

Q. Well, perhaps. So tell me what the difference is.

A. When you register an account on the Playpen website, you have to choose your user name, and you also have to enter an e-mail address. Now, the website warned you: Hey, don't enter a real e-mail address. Just enter something that looks like an e-mail address like Bob@aol.com. The website software is just going to check to make sure it looks like a real e-mail address: Don't worry, we're not going to send you any actual e-mails. So create your user name, enter a fake e-mail address, and then you get your account.

Q. He was telling users that the software requires that?
A. Correct.
Q. But you've actually learned that the software didn't require that?
A. No, that's not accurate.
Q. It could be configured so that you did not need to put in an e-mail and --
THE COURT: Why are we doing this?
MR. WATKINS: I was just asking, your Honor.
THE COURT: I know. We've just got to finish up. Are you done?
MR. WATKINS: I'm sorry?
THE WITNESS: Are we done?
MR. WATKINS: I've got a couple more questions, your Honor, if I may. I have till noon, I think.
THE COURT: I know, but I don't want to stray off into issues which may be relevant to the trial or something like that.
Q. When you started up the website under government control, the file-hosting feature was not working?
A. So the file-hosting feature was in Canada, and so we learned that pursuant to the arrest of Steven Chase. And so when we took control of the website in its initial period, that file-hosting feature was not available.
Q. And how many days before you took control of the website

was the file hosting not available?
A. It was available up until we took control of the website.
Q. I see, so it was available at that time. It's whatever happened that day when you took it that it went down?
A. As soon as we learned that that feature of the website was in Canada, we contacted Canadian authorities and alerted them to it.
THE COURT: To do what?
THE WITNESS: To take it down, your Honor.
Q. And why did you do that?
A. Our operation was such that we were going to take control of the Playpen website, move it to our own server in the Eastern District of Virginia, and operate it from there. We couldn't just download code from a foreign country without their permission and put it up on our server, so we alerted Canada. We told them this server is the Playpen file-hosting feature, and then they eventually shut it down, seized a copy of it, and sent us a copy of it.
Q. So I just want to unpack that for a minute because, as I understand it, you didn't move the actual server from North Carolina to Virginia. You made a copy of that server to move to Virginia, right?
A. Yes, that's correct.
THE COURT: How do you make a copy of a server as opposed to the software?

THE WITNESS: So, your Honor, when we arrested Steven Chase at his residence in Naples, Florida, he was actively logged into the administrative account of the server that was hosting the website, and so we had the administrative user name and password for that server. And so having that information, we were able to remotely log into the server and download a copy of the website that we --

THE COURT: When you say copy the server, what you're actually doing is copying the website?

THE WITNESS: Yes, your Honor.

THE COURT: That's a shorthand?

THE WITNESS: Yes, your Honor.

Q. The server is actually the physical thing that contains the website, website's data, right?

A. Yes.

THE COURT: The server is the computer, the hardware?

THE WITNESS: Yes, your Honor.

THE COURT: I just want to make sure.

Q. And so during that time actually Playpen is running, the file-hosting service is up in Canada while you're getting the copy and starting it up anew in Virginia, right?

A. No. So during the search of Steven Chase's residence, we assessed the situation. We find the usernames and passwords for the Playpen website. We determine that the file hoster is in Canada, and from there, we put the website into what we call

"maintenance mode." And so this makes it so that the front page of the website just says, "Hey, website currently down for maintenance. Come back later."

So we immediately put it in the maintenance mode, and at this point no features of the Playpen website are available. And while it is in maintenance mode, we are transferring a copy to our server in Virginia. After that, it's done. We power off the server in North Carolina, and we bring the website up on our server in Virginia.

Q. How long did that maintenance period last?

A. I would estimate eight to twelve hours. I don't remember exactly.

Q. You talked about calling up the Canadian -- was it the actual server company up there, or was it authorities in Canada?

A. I believe we contacted either the RCMP, the Royal Canadian Mounted Police, or the Ontario National Police. I don't remember exactly where the server was hosted, but we reached out to law enforcement in Canada.

Q. Was that before or after the maintenance period?

A. Around the same time. While this process was going on, we alerted Canadian officials.

Q. And then once you started the server up again in Virginia, you had to reboot that file-hosting service to put it back in with Playpen to allow Playpen to access it?

A. So we never enabled access back to that server in Canada while the FBI had control of it. That was not a part of our operation. We just enabled the file-hosting feature on the server that we had in Virginia after we brought the website back online. We did not actually keep anything running in Canada that anyone was accessing during our operation.

Q. So you moved the file-hosting service feature which was in Canada to the server in Virginia?

A. No. It was just incorporated into the existing website copy that we had moved to Virginia.

Q. And, as I understand it, there's also content up there in Canada on that server?

A. Yes, there was content on that server in Canada.

Q. And that server in Canada, the content there, Playpen users would not be able to get to it at that point, right, while the government was operating it?

A. Generally, yes. I don't know exactly when Canada pulled the plug, but, yes.

Q. When you say Canada pulled the plug, I thought they pulled the plug while you were doing the maintenance --

A. So we alerted them during the maintenance. I don't know exactly when they got out there and actually disconnected anything from the Internet, but that portion of the website, the Canada file-hosting service, was not available during the FBI operation.

Q. And so if someone clicked on a link that was supposed to get them the images up there, they wouldn't be able to go there?

A. Correct. You couldn't just access links to the Playpen image uploader or file uploader. The servers were configured in such a manner that just an external person with a link would get an error trying to access them. You had to actually access them from within the Playpen website.

Q. So when there is a message from the undercover to the Playpen community saying "File hosting is up and running again," what did that mean at the back end? What had you all done at that point to make that message?

A. We just re-enabled that feature of the Playpen website on the server in the Eastern District of Virginia, again, a feature that existed prior to the FBI takeover of the website.

Q. Sure. File hosting, what does that feature permit on the website?

A. So Playpen had two different hosting features on their own Tor hidden services. One was image hosting, which generally speaks for itself. It allowed users to upload individual images of child pornography. File hosting allowed users to upload larger files, generally encrypted archives that contained either multiple images or larger videos.

Q. So by re-enabling that file-hosting feature, you permitted users to upload content to Playpen?

A. To the file-hosting service, yes, we maintained that existing feature of the website.

Q. And the file-hosting feature was the more active of the two, right? You can upload more there?

A. I don't believe it was more active. Its life span was shorter, I believe, than the image uploading feature. I think it was used less frequently than the image uploading feature.

Q. But during the period of time the government was running, by doing the file-hosting service feature, re-enabling it, that did enable people to upload large files or large amounts of child pornography?

A. As they could do before the government takeover, yes.

Q. As there were discussions concerning whether to continue the operation of the website, there was also discussion about whether to shut down portions of the website? You talked about The Producer's Pen.

A. Yes. We did immediately shut down The Producer's Pen after we assumed control of the website.

Q. Following up on the Judge's question, was there any criteria about which parts of the website you would shut down versus keep going?

A. There was never any time where we entertained the idea of allowing a section or of operating a website that encouraged active rape of children, so it was always understood that any such features would be removed from the website when we assumed

control of it.

Q. When you say it was always understood, was there a protocol, a written protocol?

A. Not that I'm aware of.

Q. So, for example, the file-hosting feature, was there a discussion about whether to re-enable that or to just keep it down while you operated it?

A. There may have been discussions along those lines. I don't recall specifics of them. Obviously we came to the conclusion that we were going to keep the feature alive as it was before the takeover because we did.

Q. Were there discussions about other portions of the website, whether to close that down or to mitigate what was going on in other portions of the website?

A. So it was determined that if we had disabled features of the website, shut down sections of the website, it generally would have alerted people immediately to the FBI takeover, and so we generally let the website continue as it was prior to the FBI takeover.

Q. But I think you just told us, for images that were in Canada, somebody clicks on that, they get an error message.

A. Yes, in some circumstances.

Q. And there was quite a bit that was held on that Canadian server, right, quite a bit of content?

A. There were numerous images and videos. I don't know the

exact number.

Q. So because of that alone, people were going to get a lot of error messages off of the website, right?

A. Uhm, well, no, there was a message that was posted that says "File hosting is temporarily down while we fix a bug," or something of that nature, I believe.

Q. And then file hosting was back up?

A. Yes. That feature was brought back to an active state as it was prior to the FBI takeover.

Q. And, as I understand it, but to get to that Canadian content, you still wouldn't be able to do that?

A. That's correct, you couldn't get to that Canadian content after the FBI takeover.

Q. And a user on Playpen would start to get error messages anytime they tried to click on that content?

A. You would get a "File not found" message, something of that nature.

Q. In discussing the criteria about what to shut down or what to keep going, were there discussion about other ways to mitigate downloading of child pornography or uploading of child pornography?

A. So the majority of the child pornography that was distributed through the Playpen website was not actually on the Playpen servers. It was a minority of the content that was on that server in Canada or the servers in North Carolina. The

majority of the content that was distributed through the Playpen website was hosted on external hosting providers, generally outside of the United States. So there is no action that the FBI could have taken to remove that content. It wasn't under our control.

Q. In previous pleadings, the government has indicated that during a time they were operating Playpen, there was 67,000 links within the site that were accessed. Is that accurate?

A. I would have to read the pleading. I don't know if that's exactly what we stated in there, but if you have the document, I can clarify.

(Pause.)

Q. This is the United States' response to defendant's motion to dismiss indictment as a response to a discovery order in the *United States v. Michaud* that's been submitted to the Court before. I want you to look at the last paragraph on there.

A. Okay.

Q. And that indicates 67,000?

A. Yes.

Q. Does it also indicate how many links went out externally?

(Witness examining document.)

A. That may be on the next page. The sentence is cut off.

(Document passed to the witness.)

A. Thank you.

(Witness examining document.)