

JUDGE ROBERT J. BRYAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	No. CR16-5110RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	EXCLUDE EVIDENCE
	)	<i>[Oral Argument Requested]</i>
DAVID TIPPENS,)	
	)	NOTED: September 2, 2016
Defendant.)	

UNITED STATES OF AMERICA,	)	No. CR15-387RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	EXCLUDE EVIDENCE
	)	<i>[Oral Argument Requested]</i>
GERALD LESAN,)	
	)	NOTED: September 2, 2016
Defendant.)	

UNITED STATES OF AMERICA,	)	No. CR15-274RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	EXCLUDE EVIDENCE
	)	<i>[Oral Argument Requested]</i>
BRUCE LORENTE,)	
	)	NOTED: September 2, 2016
Defendant.)	

1 **I. INTRODUCTION**

2 David Tippens, through his attorney Colin Fieman, respectfully moves the Court
3 pursuant to Fed. R. Crim. P. 16(d)(2)(D) for an order excluding all evidence, and the
4 fruits of all evidence, derived from the “Network Investigative Technique” (NIT) code
5 components that the Government used to execute a search of Mr. Tippens’ personal
6 home computer.

7 Gerald Lesan, through his attorney Robert Goldsmith, joins this motion.

8 Bruce Lorente, through his attorney Mohammad Hamoudi, also joins this
9 motion.

10 These motions are filed jointly because they are related “Operation Pacifier”
11 cases and are based on the Court’s May 25, 2016, findings and orders in the related case
12 of *United States v. Michaud*, CR15-5351RJB. *See* exh. A (May 25 *Michaud* Hearing
13 Transcript); *Michaud*, dkt. 212 (Order Granting Motion to Exclude Evidence).

14 **II. STATEMENT OF FACTS**

15 The Court is already familiar with the facts surrounding “Operation Pacifier” and
16 the FBI’s use of NIT malware to search for and seize data from as many as 100,000
17 target computers, including the personal home computers of the defendants. In
18 addition, in conjunction with this motion, the defendants are filing Motions to Dismiss
19 the Indictment (based on outrageous governmental conduct) and Motions to Suppress
20 Evidence. The facts set forth in the accompanying motions and exhibits are
21 incorporated by reference.

22 All three defendants have asked the Government to disclose the NIT components
23 for defense review and analysis pursuant to a comprehensive protective order. In
24 addition, on June 27, 2016, counsel for Mr. Tippens wrote to the Government and asked
25 if there has been any change in its position regarding NIT discovery since the Court
26

1 issued its May 25 exclusion order in *Michaud*. The Government has not responded to
2 this inquiry and no additional code discovery has been provided to the defendants.

3 III. ARGUMENT

4 As the Court is aware, the discovery issues related to the pending NIT cases
5 were extensively briefed and litigated in *Michaud*. See CR15-5351RJB, dkt. 54
6 (Motion to Compel Discovery); dkt. 115 and 115-1 (Third Motion to Compel Discovery
7 and Declaration of Vlad Tsyркlevitch); dkt. 149 (Defendant’s Reply to Govt. Response
8 and Third Motion to Compel); dkt. 161 (Order Granting Third Motion to Compel
9 Discovery); dkt. 178 (Defense Consolidated Response to Govt. Motion for
10 Reconsideration); dkt. 191 (Defense Reply to Govt. Response to Second Motion to
11 Dismiss); dkt. 210 (Response to Govt. Submission on Discovery Sanction); *see also*
12 May 5, 2016, Motion Hearing Transcript (hearing on Govt. Motion for Reconsideration
13 of Discovery Order). In the interest of judicial economy, these pleadings, orders and
14 transcripts are hereby incorporated by reference.

15 In addition, copies of the four defense expert declarations relating to the NIT
16 code that were filed in *Michaud* are attached to this motion. See exhs. B-E; *see also*
17 exh. A at 19 (where the Court found “the declarations from the... defendant’s experts to
18 be credible, Mr. Tsyркlevitch, Mr. Miller, Mr. Young, and Mr. Kasal, notably. I think
19 the information from them basically overwhelms the evidence offered by the
20 government in an attempt to counter those declarations.”).

21 As the Court found in *Michaud*, the defendants are entitled to discovery of the
22 NIT code components because there has been a substantial showing that the discovery
23 would be helpful to their defenses. See generally *United States v. Hernandez-Meza*,
24 720 F.3d 760, 768 (9th Cir. 2013) (“Information is material even if it simply causes a
25 defendant to ‘completely abandon’ a planned defense and ‘take an entirely different
26 path”), quoting *United States v. Doe*, 705 F.3d 1134, 1151 (9th Cir. 2013); *United*

1 *States v Budziak*, 697 F.3d 1105, 1112 (9th Cir. 2012) (“[a] party seeking to impeach
2 the reliability of computer evidence should have sufficient opportunity to ascertain by
3 pretrial discovery whether both the machine and those who supply it with data input
4 and information have performed their tasks accurately.”) (citation omitted).

5 The Court further concluded in *Michaud* that, given the facts and issues in this
6 case, the NIT discovery would not only be helpful to defense trial preparations, but is
7 also important for informed plea negotiations and potential pretrial motions. *See* exh. A
8 at 19; *see also Michaud* May 5, 2016, Hearing Transcript at 33.

9 These conclusions are all the more warranted now in light of recent testimony by
10 the lead FBI agent for Operation Pacifier, Daniel Alfin. On June 23, 2016, Agent Alfin
11 testified in *United States v. Jean*, CR15-50087 (W.D. Ark.), that the data seized from
12 target computers by the NIT was transmitted back to the FBI “as clear text over the
13 regular internet” and without encryption. Exh. F at 92. This is something that even on-
14 line shopping services, banks, and credit card companies do not do with financial
15 information, out of concern for potential tampering or data corruption. Agent Alfin then
16 conceded that the NIT transmissions could have been vulnerable to tampering. *Id.*
17 These statements are difficult to reconcile with statements Agent Alfin has previously
18 made in declarations submitted to this Court extolling the security and reliability of the
19 NIT “data stream” and the NIT evidence. *See, e.g., Michaud*, dkt. 166-2 (March 28,
20 2016 Declaration of Agent Alfin) at ¶¶ 11-15.

21 Given the materiality of the NIT discovery, the Court has concluded that, if the
22 Government elects not to provide that discovery, all evidence derived from the FBI’s
23 use of an NIT should be excluded. Exh. A. at 22. The instant cases are
24 indistinguishable from *Michaud* when it comes to the materiality of the disputed
25 discovery and counsels’ inability to effectively represent their clients and prepare for
26 trial without it. Accordingly, the Court should issue an exclusion order similar to the

1 one in *Michaud*. The Government will then have the option of proceeding to trial with
2 untainted evidence or seek to join these cases to the interlocutory appeal that is pending
3 in *Michaud*.

4 Finally, the defendants request that the Court issue a comprehensive written
5 opinion for publication with its ruling on this motion. As the Court is aware, there are
6 numerous “Operation Pacifier” cases pending across the country and these cases
7 involve novel and important issues. A written opinion by the Court will help clarify
8 and develop the law related to these issues and further develop the record for likely
9 appeals that, as the Court itself has noted, may ultimately reach the Supreme Court.

10 DATED this 22nd day of August, 2016.

11 Respectfully submitted,

12 *s/ Colin Fieman*

13 Colin Fieman

14 Attorney for David Tippens

15 *s/ Robert Goldsmith*

16 Robert Goldsmith

17 Attorney for Gerald Lesan

18 *s/ Mohammad Hamoudi*

19 Mohammad Hamoudi

20 Attorney for Bruce Lorente

CERTIFICATE OF SERVICE

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I hereby certify that on August 22, 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