The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID TIPPENS, Defendant.	NO. CR16-5110 RJB GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

UNITED STATES OF AMERICA, Plaintiff, v. GERALD LESAN, Defendant.	NO. CR15-387 RJB GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

UNITED STATES OF AMERICA, Plaintiff, v. BRUCE LORENTE, Defendant.	NO. CR15-274 RJB GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

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I. INTRODUCTION

Defendants David Tippens, Bruce Lorente, and Gerald Lesan have been charged with possession and receipt of child pornography following residential search warrants that resulted in the seizure of digital devices containing child pornography. The defendants were identified through an FBI investigation into a child pornography website, "Playpen," operating on the anonymous Tor network. In late February 2015, the FBI seized and assumed administrative control of the site—which had already been operating for six months—for approximately two weeks. During that period and pursuant to a warrant/Title III order obtained in the Eastern District of Virginia, the FBI deployed a Network Investigative Technique (a "NIT") and monitored Playpen traffic in order to identify and apprehend its users.[1]

Defendants request for dismissal on alleged outrageous government conduct, which mirrors a request this Court has already denied, should be denied once again. The government's conduct was not even unreasonable, let alone outrageous. The FBI did not create Playpen, nor did it induce the Defendants to become members. It did not post any child pornography or links to child pornography to the site, and it certainly did not inspire in the Defendants a desire to view and download child pornography. Rather, with 24/7 monitoring and having presented its plan to two different federal judges, the FBI seized on a fleeting opportunity to identify and apprehend pedophiles using an anonymous network to conceal their active participation in sexual exploitation of children.

The FBI's operation was a reasonable response to indisputable investigative challenges. While reasonable people may debate whether law enforcement could have used other methods to identify and capture such serious criminals, settled Ninth Circuit law makes clear that outrageous government conduct is conduct that shocks the conscience and offends fundamental notions of fairness. Applying those factors, there is

[1] A more detailed description of Playpen and the investigation of it are contained in the government's response to the defendants' motion to suppress.

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no question that, as this court has already found, the government's conduct was not outrageous.

Accordingly, Defendants' motion should be denied.

II. LEGAL STANDARDS

Defendants must meet a high bar to justify dismissal. To prevail, they must show that law enforcement's conduct is "'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) (quoting *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). Defendants raising such claims must meet an "extremely high standard." *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993). Dismissal is "limited to extreme cases" in which the defendant can demonstrate that the government's conduct "violates fundamental fairness" and is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (quoting *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991) (internal quotation marks omitted)).

Significantly, the government has found only two reported decisions in which federal appellate courts have reversed a conviction for outrageous government conduct. *See United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978) (holding government conduct outrageous because it "generated new crimes by the defendant merely for the sake of pressing criminal charges against him when . . . he was lawfully and peacefully minding his own affairs"); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (holding government conduct outrageous where it had initiated a criminal scheme and was involved for two and a half to three and a half years "directly and continuously . . . in the creation and maintenance of criminal operations").

In contrast, there are numerous reported decisions where courts have declined to dismiss an indictment in the face of alleged outrageous conduct—even in cases involving so-called "reverse stings"—where the government initiates the criminal conduct by inventing a fictitious criminal scenario and then prosecutes a defendant who attempts to

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participate in it. *See, e.g., United States v. Pedrin*, 797 F.3d 792, 794 (9th Cir. 2015) (affirming finding of no outrageous government conduct where an "undercover agent pose[d] as a disgruntled drug courier with knowledge about a stash house . . . containing a large amount of cocaine," suggested "to targets of the reverse sting that they join forces, rob the house, and split the proceeds,"); *Black*, 733 F.3d at 302 (affirming finding of no outrageous government conduct in similar fictional stash-house sting operation because, when "presented with the fictitious stash house robbery proposal [the targets] . . . readily and actively" joined "as willing participants"). And where, as here, law enforcement was not responsible for creating the criminal scheme, the bar for the defendant is even higher. *See, e.g., United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003) (finding no outrageous conduct where "the government merely infiltrates an existing organization, approaches persons it believes to be already engaged in or planning to participate in the conspiracy, or provides valuable and necessary items to the venture").

> The Ninth Circuit has identified six factors that guide the outrageousness inquiry:
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> (1) known criminal characteristics of the defendant[]; (2) individualized suspicion of the defendant[]; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendant[] to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Black, 733 F.3d at 303. This is not a formalistic checklist, and assessing the government's conduct is not a bright line inquiry. Rather, it involves an evaluation of the totality of the circumstances based on the facts of each particular case. *Black*, 733 F.3d at 302, 304.

Applying these principles, it is clear that nothing about what the government did was unreasonable—let alone outrageous—in light of the problem it faced. As this Court has previously stated denying an identical motion *United States v. Michaud*:

> It is easy to argue, and, my gosh, we hear it in all kinds of cases, that the other side's position is outrageous. Well, you know, that's a high standard.

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> From the standpoint of one who stands between the defendant and the government, and represents neither side, you look at what happened and look inward. I am not shocked by this. I did not find it outrageous.

Ex. 1, *United States v. Michaud*, CR15-5351RJB Hr'g. Tr. 43 (Jan 22, 2016).[2]

III. ARGUMENT

Settled Ninth Circuit law compels the denial of Defendants' motion. The FBI responded reasonably to a host of investigative challenges in an effort to apprehend individuals using technology to hide their active participation in the sexual exploitation of children. The targets of this investigations were not lured by the FBI but voluntarily chose to join a website dedicated to the sexual exploitation of children. Reasonable people may debate whether FBI could have used other means to identify suspects, but that is not the test of outrageousness. Rather, Defendants must demonstrate that the government acted in a way that is so out of bounds as to shock the conscience. This it did not do, and the motion should be denied.

A. Applying the *Black* factors, dismissal is entirely unwarranted.

1. The government had ample reason to believe that Playpen users, including the Defendants, were unlawfully viewing and sharing child pornography.

The first two factors are "[c]losely related" and examine whether, at the time the conduct at issue, the government had reason to suspect "an individual or identifiable group," and whether that individual or group had a "propensity the government knew about when it initiated its sting operation." *Black*, 733 F.3d at 304. When the government seized Playpen, it admittedly had no reason to suspect Defendants specifically as they had not been identified. It did, however, have ample reason to suspect any member of Playpen was actively viewing and sharing child pornography.

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[2] Nearly identical versions of this motion have been filed in various cases in other districts. To date, no court to the government's knowledge has granted such a motion. And at least one other court has denied such a motion. *See, e.g., United States v. Chase*, No. 5:15-CR-015, 2016 WL 4639182, at *2 (W.D.N.C. Sept. 6, 2016) (denying motion to dismiss for outrageous government conduct related to the FBI's conduct of the Playpen investigation).

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As the affidavit in support of the NIT warrant explained, between September 2014 and February 2015, undercover FBI agents documented Playpen's content and attempt to identify site users. Ex. 1 at 13, ¶ 11. Playpen was targeted precisely because its members were actively advertising and trading child pornography. *Id.* at 10, ¶ 6. This illicit content was highly categorized according to the gender and age of the victims portrayed, as well as the type of sexual activity depicted. *Id.* at 15-17, ¶¶ 14-18. The images and videos comprised all manner of child sexual abuse, including "an adult male's penis partially penetrating the vagina of a prepubescent female," and "an adult male masturbating and ejaculating into the mouth of a nude, prepubescent female." *Id.* at 17-20, ¶¶ 18-25. Tellingly, the subsection of Playpen that had the greatest number of postings was one focused on the sharing of hardcore pornographic images of preteen girls. *Id.* at 16, ¶ 14. Playpen also featured image and file hosting and a chat forum, all of which allowed users to upload links to child pornography. *Id.* at 19-20, ¶¶ 23-25. As this Court observed in *Michaud*, the NIT warrant affidavit showed Playpen was "unmistakably dedicated to child pornography." *United States v. Michaud*, No. 3:15-CR-05351-RJB, 2016 WL 337263, at *5 (W.D. Wash. Jan. 28, 2016).

The FBI thus had every reason to suspect Playpen users were actively engaged in the sharing of child pornography. This applies with equal force to Defendants, each of whom had Playpen user accounts. Because this investigation was "focused on a category of persons [the government] had reason to believe were involved" in the crimes being investigated, the first two *Black* factors weigh heavily against any finding of outrageousness. *Black*, 733 F.3d at 304 (citing *United States v. Garza–Juarez*, 992 F.2d 896, 899-900 (9th Cir. 1993)).

2. The government played no role in creating the Defendants' crimes.

The third *Black* factor assesses the government's role in charged offense: that is, whether the government "proposed the criminal enterprise or merely attached itself to one that was already established and ongoing." *Black*, 733 F.3d at 305. This too weighs in the government's favor. The government did not create Playpen or its content. Playpen

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was operating long before the FBI seized it. And it certainly bears no responsibility for Defendants' decision to sign up for Playpen or store the images and videos of child pornography that were recovered from their devices. Indeed, Defendants make no claim to the contrary, nor could they.

This factor is critical because "outrageous" conduct is more likely to be found where the *government* fabricates the crime and then invites the defendant along for the ride. *See, e.g., United States v. Mayer*, 503 F.3d 740, 754 (9th Cir. 2007) (finding no outrageous government conduct and noting that the defendant first broached the subject of traveling internationally to have sex with boys). Here, Defendants were in the driver's seat.

3. The government did not encourage participation in the crime.

The fourth *Black* factor assesses the extent to which the government encouraged the defendant to participate in the crimes at issue. *See Black*, 733 F.3d at 308.

It did not. Indeed, Defendants Tippens and Lorente both confessed they regularly downloaded and viewed child pornography. CR15-274RJB Dkt. 1 at 6, ¶ 16; CR16-5110RJB Dkt. 1 at 5. Although Lesan did not confess to law enforcement, he did make incriminating admissions in emails he sent to his estranged wife following the search of his home, including that he had looked at things he should not have on the Tor network and voyeuristic videos. *See* Ex 5. The most that can be said is that the government briefly operated a pre-existing website that Defendants used to access child pornography. The defendants needed no encouragement from the government to commit their crimes.

4. The government's conduct was not responsible for Defendants' crimes.

The fifth *Black* factor assesses the government's participation in the offense conduct by examining the duration, nature, and necessity of that participation. *See Black*, 733 F.3d at 308-09. Each of these favors finding the government did not act outrageously.

First, the duration of the government's operation of Playpen was exceedingly brief: two weeks. Playpen itself operated for at least six months before that. Two weeks

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falls far short of the multi-year period deemed problematic by the Ninth Circuit in earlier cases. *See, e.g.*, *Greene*, 454 F.2d at 786.

Second, the nature of the government's involvement with Playpen was circumscribed, suggesting the government was more an observer than a partner in the Defendants' crimes. *Black*, 733 F.3d at 308. The FBI did not post any images, videos, or links to child pornography. Playpen's users were responsible for that content. Defendants say that the actions of Playpen's users required "the approval of" and "substantial technical support" from whomever operated the site, meaning the FBI. Motion to Dismiss at 3. Not so. Users posted messages containing child pornography images and/or links to such images or videos without any need for administrative approval or technical assistance. To be sure, content posted by site users (both before and after the FBI assumed administrative control) generally remained available to site users for some limited period of time. But for reasons explained below, removing all of that content would have jeopardized the investigation into the very users who were creating, posting, and viewing that content.

Finally, no one could doubt that Defendants "had the technical expertise" and "resources" to commit the charged crimes "without the government's intervention." *Black*, 733 F.3d at 308. All three signed up for Playpen and accessed its content with no prompting from the FBI. And all three had child pornography on their devices when their homes were searched many months later. Defendants, not the FBI, are responsible their crimes.

5. The government's conduct was necessary given the use of an anonymous network by dangerous offenders to conceal their locations and identities while engaged in the ongoing sexual exploitation of children.

The last and perhaps most important factor in this analysis is the "need for the investigative technique that was used in light of the challenges of investigating and prosecuting the type of crime being investigated." *Black*, 733 F.3d at 309; *see also United States v. Emmert*, 829 F.2d 805, 812 (9th Cir. 1987) (holding $200,000 finder's fee

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inducement was not outrageous because "large sums of money are common to narcotics enterprises and necessary to create a credible cover for undercover agents"); *United States v. Wiley*, 794 F.2d 514, 515 (9th Cir. 1986) (approving of the government's activation of a prison smuggling scheme given the "difficulties of penetrating contraband networks in prisons"); *Twigg*, 588 F.2d at 378 n.6 ("[I]n evaluating whether government conduct is outrageous, the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it.").

There can be little doubt the government's investigative approach was necessary. As the government explained to the judges who authorized the NIT and the Title III, and as those two judges apparently agreed, the brief, continued operation of Playpen in order to deploy the NIT was necessary to identify and apprehend individuals actively sharing child pornography. Defendants used technology to conceal their identities and locations, not for fear of discovery of some lawful, if to many, distasteful, pursuit. To the contrary, they sought a safe haven where they could share child pornography without fear of law enforcement intervention. And but for the government's investigation, these offenders would have succeeded in remaining hidden. Indeed, the government explained in great detail the challenges posed by the technology Defendants used and why other investigative alternatives were simply not likely to succeed. Ex. 1 at 22-24, ¶¶ 29-32; Ex. 2 at 26, ¶ 39 & 30-31, ¶¶ 52-53.

Defendants maintain that that the government should have gone about things differently. They are entitled to their opinions, but that is not the standard for outrageousness. Perhaps unsurprisingly, Defendants fail to account for the sort of advanced technical means that they and other Playpen users employed. As the government explained in the application for the Title III authorization: in order for the NIT to have an opportunity to work, members had to be able to continue to access the site, with as minimal interruption in the operation of the site as possible to avoid any suspicion that a law enforcement interdiction was taking place. Ex. 2 at 37, ¶ 61. The FBI explained that interruptions in the service of the Playpen website, and others like it,

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would be a tip-off to suspects that law enforcement infiltration was taking place. *Twigg*, 588 F.2d at 378 n.6

Defendants claim a whole host of *alternatives* involving some form of disruption of the ability of Playpen users to share and view illicit content would have accomplished the same goals and avoided the continued distribution of child pornography. The veteran agents who crafted and executed this investigation, however, disagreed. Their knowledge of the technology and the offender population, in addition to their investigative experience, told them that continued operation of Playpen was the best and perhaps only chance for identifying and apprehending dangerous predators. Defendants' preference for a less effective investigative technique is understandable – given that they were caught – but hardly relevant to the question of whether the government acted outrageously.

To be sure, agents considered seizing Playpen and removing it from existence immediately. *Id*. at 41, ¶ 72. And indisputably, doing so would have ended child pornography trafficking *on Playpen*. It should come as no surprise, however, that this problem extends far beyond Playpen. *See* Alfin Dec. at 5, ¶ 12. Shutting down Playpen immediately would have squandered any hope of identifying and apprehending the offenders responsible for truly abhorrent conduct. Ex. 2, at 41, ¶ 72. It also would have frustrated agents' attempts to obtain information that could help identify and rescue child victims from ongoing abuse. *Id*. To date, at least thirty-eight such child victims have been identified via the operation. Alfin Dec. at 4, ¶ 8. Accordingly, the "investigative technique that was used" in this case was necessary given the "challenges of investigating and prosecuting the type of crime being investigated challenges of investigating and prosecuting the type of crime being investigated." *Black*, 733 F.2d at 309. Like the others, this last *Black* factor counsels against any finding of outrageousness.

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B. Nothing Defendants' offer in their motion supports a finding of outrageousness.

In seeking dismissal, Defendants do not even cite the relevant legal framework. Rather, they rely on a hodgepodge of unsupported assertions of malfeasance by the FBI. Their assertions are inaccurate and do not support a finding of outrageousness.

Defendants, for example, assert without support that the government "increased the traffic to [Playpen] fivefold" during the operation. MTD at 3. As explained by Special Agent Alfin, while it may appear at first blush that there were more visits during the two weeks of FBI control when compared to estimates of earlier activity, the actual numbers do not bear that out. Those earlier estimates were based on averages that covered the period from the inception of the site to just a few weeks before the FBI took control. Information obtained from the site administrator shows that the level of activity did not change appreciably once the FBI took control of Playpen when compared to activity just before that period. Alfin Dec. at 4, ¶ 10. The FBI did not do anything to cause that increased traffic. Nor do Defendants offer any evidence that it did.

Defendants also assert that the FBI made technical improvements to Playpen. That is simply incorrect. As explained by the attached declaration of FBI Special Agent Daniel Alfin, the FBI made no technical improvements to the website while it was under government control. Alfin Dec. at 3, ¶ 5.

Defendants likewise wrongly assert that the FBI did not seek to determine whether child pornography content was the product of ongoing abuse. Motion to Dismiss at 3, 8. To the contrary, during the period of FBI control, agents monitored all site postings, chat messages, and private messages continuously to comply with Title III monitoring requirements and to assess and mitigate risk of imminent harm to children. When agents perceived a risk of imminent harm to a child, agents took actions to mitigate that risk and immediately forwarded available identifying information, including NIT results, to the appropriate FBI office. Actions taken in any particular instance were tailored to the

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specific threat of harm. And more importantly, these efforts bore fruit, at least thirty-eight children have been identified or rescued so far. Alfin Dec. at 4, ¶ 8.

Defendants also criticize the FBI for permitting the brief, continued distribution of child pornography by Playpen users. But stopping the unlawful possession and dissemination of child pornography and rescuing children from ongoing abuse and exploitation requires more than just shutting down a facility through which such materials are disseminated. Law enforcement must identify and apprehend the perpetrators. Here, the FBI briefly assumed administrative control over Playpen to do just that. And they did so after sharing their plan with two different federal judges, to whom it was explained that this was a necessary and appropriate investigative technique.

The decision whether to simply shut down a website like Playpen or to allow it to continue operating was a difficult one for law enforcement, given that users would continue to be able to post and access child pornography. During the government's operation of Playpen, regular meetings were held to discuss the status of the investigation and assess whether the site should continue to operate. That assessment required a balancing of factors, including site users' continued access to child pornography, the risk of imminent harm to a child, and the need to identify and apprehend perpetrators. On March 4, 2015, after a brief two-week period of operation, it was determined that the balance of those factors weighed in favor of shutting down the website, notwithstanding the fact that the court authorization would have permitted it to continue longer.

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In sum, reasonable people may debate whether the FBI could have used other methods to identify perpetrators like Defendant. That is not the question before the Court, however. The government took reasonable steps to address a significant challenge to its ability to investigate and prosecute serious crimes against children. And it did so after fully disclosing its intentions to two different judges. Whatever may be said about what the government did here, it did not act outrageously and certainly not in a manner that offends fundamental notions of fairness. Defendants' motion should be denied.

DATED this 22nd day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 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 the attorney(s) of record for the defendant(s).

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