IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. 4:16cr16 |
| | ) | |
| EDWARD JOSEPH MATISH, III | ) | |

**DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO FIRST MOTION TO SUPPRESS**

Edward Matish, through counsel and pursuant to Local Rule of Criminal Procedure 47(F)(1) and this Court's April 7, 2016 Order, respectfully submits this Reply to the Government's Response to Defendant's First Motion to Suppress (ECF No. 24).

* * *

The government's search pursuant to the NIT warrant was unconstitutional. In its Response, the government defends the constitutionality of the challenged search and asks the Court not to suppress any evidence even if the government obtained it illegally. Mr. Matish asks the Court to decline the government's invitation to uphold this unconstitutional search, and to suppress all evidence obtained in violation of the Fourth Amendment. The triggering event contemplated by the NIT warrant never occurred; the warrant was overbroad, lacked particularity, and was unsupported by probable cause; and the government now admits that it misrepresented critical facts when it applied for the warrant. Under these circumstances, suppression is appropriate.

## THE WARRANT'S TRIGGERING EVENT NEVER OCCURED

The government and the defense agree that the NIT warrant was an "anticipatory" warrant. The government suggests that the relevant "triggering event" was navigating through

an internet homepage. (ECF No. 24, 35.) But that's not quite right. The relevant triggering event was navigating through the internet homepage *described in the warrant application*. That never happened.

The Fourth Amendment's constitutionally mandated procedure requires the Executive to present facts to a neutral and detached magistrate who makes a probable cause determination based on the facts presented. Here, members of the Executive Branch—first the FBI and now the U.S. Attorney—contend that they can describe one set of facts, obtain judicial approval for a search supported by those facts, and then use that legal authority to conduct a search under materially different facts. Such circumvention of the Constitution's procedural safeguard against unchecked Executive intrusion requires suppression.

Although the government and the defense disagree over whether the warrant application's false description of Playpen's homepage established probable cause to search,[1] clearly an accurate description of the website's homepage weakens the government's case for probable cause. Through the NIT warrant, the government obtained authorization to search the computers of people who navigated through a homepage that displayed "two images depicting partially clothed prepubescent females with their legs spread apart." Ex. B, ¶ 12.[2] Instead, the government searched the computers of people who navigated through a homepage that displayed one image of a fully-clothed female, who cannot be described as prepubescent, sitting in a chair with her legs crossed.

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[1] *See infra* at 3-8.

[2] Exhibits cited herein refer to the exhibits attached to the Defendant's First Motion to Suppress. One additional exhibit, Ex. E, is attached to this Reply.

The government now contends that this difference is "hardly [a] game changer." (ECF No. 24, 26.) Of course, the Constitution's procedural requirements are designed to remove this kind of discretion from the Executive. As the Supreme Court has explained,

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

*United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317 (1972). In sum, it was not for the FBI to decide whether the admittedly different facts were a "game changer." The facts anticipated by the NIT warrant—the facts upon which probable cause would be triggered according to the prior judicial assessment—did not occur. And a neutral magistrate, rather than the Executive, is designated by the Fourth Amendment as the authority tasked with deciding whether some different set of facts established probable cause to search.

The triggering event contemplated by the anticipatory NIT warrant did not occur. Accordingly, the search conducted here was not authorized by the NIT warrant. *See United States v. Vesikuru*, 314 F.3d 1116, 1119 (9th Cir. 2002) (holding that "[i]f the triggering event does not occur, probable cause to search is lacking"). Evidence obtained from this unconstitutional search must be suppressed.

## THE WARRANT WAS OVERBROAD & LACKED PROBABLE CAUSE

There is no dispute that the Playpen site contained child pornography. And there is no dispute that the NIT warrant application set out sufficient facts to support that finding. But, as the Ninth Circuit recognized in *United States v. Gourde*, establishing that a website contains child pornography is not the same as establishing that a visitor to that site necessarily intends to view or download child pornography. 440 F.3d 1065, 1070 (9th Cir. 2006). In *Gourde*, the

court's support of the probable cause determination turned on the fact that—for the member-only site at issue there—one "could not have become a member by accident or by a mere click of a button." 440 F.3d at 1070. In *Gourde*, entry to the site required a user "to submit his home address, email address and credit card data, and [to] consent[ ] to have $19.95 deducted from his credit card every month." *Id.* Critical to the Ninth Circuit's decision was the fact that the warrant specifically avoided targeting "someone who took advantage of the free tour but, after viewing the site, balked at taking the active steps necessary to become a member and gain unlimited access to images of child pornography." *Id.* Not so for the NIT warrant.

The NIT warrant here authorized searches against anyone "who logs into the TARGET WEBSITE." Ex. A, 2. Anyone who clicked past the homepage is subject to search. This did not require payment or the entry of credit card information; just the mere click of a button. And the NIT warrant contained no narrowing provisions to avoid targeting people who—upon initial entry to the site—balked and clicked away.[3] The question presented here is whether merely

[3] The overbreadth and lack of particularity of the NIT warrant is not limited to the fact that the scope of the authorized searches exceeded the scope of any existing probable cause. Indeed, the NIT warrant also purported to authorize searches that exceeded the geographic restrictions imposed by both Section 636(a) of the Federal Magistrates Act and Rule 41(b) of the Federal Rules of Criminal Procedure. Under these rules, a magistrate judge lacks any legal authority to issue a warrant authorizing the search or seizure of property located outside of her judicial district. *See United States v. Levin*, Case No. 15-10271 (D. Mass. Apr. 20, 2016) (suppressing evidence obtained through this exact NIT warrant because magistrate judge in the Eastern District of Virginia lacked authority to issue warrant authorizing the search of a computer located in the District of Massachusetts). In this case, it appears likely that the government did not have the ability to determine *ex ante* whether it was searching a computer located in the Eastern District of Virginia or a computer located outside this district. That is, the government had to search first and then only later determine whether the area it just searched was within the geographic area that the NIT warrant could have legally authorized a search. The government essentially lucked out when it discovered that the user's computer in this case just so happened to be located in the Eastern District of Virginia. There are 94 federal judicial districts.

clicking past the Playpen homepage—without more—provides probable cause to search. To be sure, Playpen's content is relevant to that determination. But only insofar as the Court is convinced that someone clicking past the homepage was knowingly and intentionally accessing illicit content on the site. Here, the Court cannot make that assumption for two reasons. First, the Playpen homepage did not unambiguously identify the site as a child pornography site. And, second, because Playpen was not dedicated exclusively to illegal content, even users who knowingly accessed the website were not necessarily accessing its illegal content.

Playpen's homepage did ***not*** contain a "welcome message unabashedly announc[ing] that its essential purpose was to trade child pornography." *United States v. Martin*, 426 F.3d 68, 75 (2d Cir. 2005). As noted in the defense Motion, the "Playpen" name is associated with a legal adult magazine and popular West Coast strip clubs—it is not conspicuously associated with child pornography like the "Lolitagurls.com" site name at issue in *Gourde*. 440 F.3d at 1065. Indeed, the homepage allegedly contained two images of two prepubescent minors, described as "partially clothed … with their legs spread apart." Ex. B at ¶ 12. The affiant did not attach the images for the magistrate to consider. He did not state that the images revealed the subject's genitals—they did not. He did not even conclude that they were lascivious or "sexually explicit." *Cf. United States v. Gatherum*, 338 F. App'x 271, 275 (4th Cir. 2009) (criticizing

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It cannot be that the government is allowed conduct searches so broad that each search has a 1.06% chance of later being confirmed to have been within the legal geographic scope of a warrant.

Again, the defense has requested in discovery the actual NIT source code and without this information the defense is left to rely on bits and pieces of discovery apparently provided in other litigation related to the NIT warrant (which was obtained through the defense's independent investigative channels) or by gleaning information from judicial opinions related to this NIT warrant. The government must possess documents that would answer these critical questions. Thus, the defense again reserves the right to supplement this filing and the underlying motion if and when the government provides responses to these outstanding discovery requests.

affidavit that arguably "failed to provide sufficient information to permit the magistrate to make an independent determination of whether probable cause existed"). In its Response, the government focuses heavily on the contents of the full Playpen site. But the probable cause determination must be made based on the information that a person accessing the site would have had when the search was carried out. That information is limited to the homepage. And the homepage did not announce to a first-time visitor the illicit content of the website such that there is a "fair probability" that this first-time visitor accessed Playpen with the intent to view child pornography.

Unable to rely on the contents of the homepage to meet its burden, the government suggests that it is reasonable to infer from Playpen's location on the Tor network that anyone navigating to the site knew its full contents. The warrant application sought to establish this point by noting that Playpen would not have been returned by a "Google" search. Of course, Tor search engines might have led a user to the site, notwithstanding the fact that such search engines—*like Google*—nominally restrict access to child pornography sites. *Compare* ECF No. 24 (citing Tor search engine's content filtering policy), *with* Hayley Tsukayama, *Google, Microsoft modify searches to exclude more child pornography results*, Wash. Post (Nov. 18, 2013) (describing Google and Microsoft policies under which "100,000 search terms and phrases will no longer receive content related to the sexual abuse of kids").[4] The warrant application did not even contemplate available Tor search engines as a possible avenue to Playpen. But having ruled out a "Google" search, the warrant application suggests that a user "might" obtain the web

[4] Available at https://www.washingtonpost.com/business/technology/google-microsoft-modify-search-in-britain-to-exclude-more-child-pornography-results/2013/11/18/c2105c5c-5058-11e3-9e2c-e1d01116fd98_story.html (last accessed Apr. 15, 2016).

address directly from another user or from other Internet postings. Ex. B, ¶ 10. Sure. Or he "might" have obtained it from a Tor search. Or he "might" have obtained it by some other means. The affiant's speculation over how a user "might" have reached the homepage does not establish a probability that individuals who navigated to the Playpen homepage were looking for child pornography or that they knew that's what they would find.[5] Indeed, as the NIT application contradictorily[6] states, Playpen housed forums containing child erotica[7] and others dedicated to fictional stories.[8]

In this sense, the Playpen site was analogous to a "high crime area." To be sure, someone's presence in a high crime area is relevant in assessing reasonable suspicion. "However, mere presence in a high crime area alone does not support reasonable suspicion." *United States v. Washington*, 346 F. App'x 950, 953 (4th Cir. 2009). For the same reason, mere presence on a site that contains—but is not limited to—illicit content does not meet the more stringent probable cause standard. The person in a high crime area may just be driving to 7-Eleven, and the Playpen site entrant might just be navigating to a forum containing "fiction"

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[5] The government contends that the defense position on probable cause depends on there being "some chance" that someone might accidentally reach the Playpen homepage. (ECF No. 24, 24.) That's not entirely correct. The defense position is that someone might reach the homepage without the intent to access child pornography—perhaps by accident, or perhaps to access other parts of the website, or with the expectation of finding other content, or without knowing what content to expect. Importantly, however, the inverse of the government's argument is correct: The government's position on probable cause depends on there being virtually *no chance* that someone might accidentally (or innocently) navigate to Playpen's homepage.

[6] The application's concession that Playpen's content was not limited to child pornography seems to internally contradict other statements in the under-oath statement, namely that "the ***entirety*** of the TARGET WEBSITE is dedicated to child pornography." Ex. B ¶ 27 (emphasis added).

[7] *See* Ex. B at ¶ 18. Notably, the NIT warrant application itself defines its use of the term "child erotica" to include "fantasy writings" and "images or videos of minors that are ***not sexually explicit***." Ex. B, ¶ 5(b) (emphasis added).

[8] *See* Ex. B, ¶ 14.

stories. *See* Ex. E, Playpen Table of Contents (allowing user to navigate from homepage to table of contents to "Stories" - "Fiction" part of website without ever viewing image of child pornography). Notably, ***nothing*** in the warrant application addressed what percentage of Playpen site entrants accessed the legal portions of the site versus the illegal portions. Thus, more was required.

In sum, the warrant application fails to establish that merely navigating to Playpen's homepage creates probable cause to search. And the homepage itself does not unabashedly announce that the primary purpose of the site was to view child pornography. The government clearly could have narrowed its application so that searches were authorized only when a user clicked on links that opened images of child pornography like those described in the application. That is to say, this warrant application likely supported probable cause to search. But it did *not* establish probable cause to conduct the broad searches that the NIT warrant eventually authorized. Because probable cause did not support this warrant, searches pursuant to the NIT warrant violated the Fourth Amendment.

## A *FRANKS* HEARING IS REQUIRED

The government concedes that the description of the homepage contained in the NIT warrant application was false at the time it was written. (ECF No. 24, 26.) The government has backed off of the affidavit's assertion that "the ***entirety*** of the TARGET WEBSITE is dedicated to child pornography," Ex. B ¶ 27 (emphasis added), now hedging that the "vast majority" of Playpen's content was related to child pornography while conceding the existence of a personal messaging feature, story-telling forums, and pornography-related sections that "perhaps" focused on adults. (ECF No. 24, 20.) Yet the government contends that—despite these acknowledged falsities—the defense has made no preliminary showing that the affiant's false statements were intentionally or recklessly made.

As noted in the Motion, the defense's discovery requests on topics related to the NIT warrant application and the circumstances under which it was drafted remain outstanding. The government has not represented that no discoverable material exists, yet has failed to provide any discovery on the circumstances surrounding the February 19, 2015 search of the Florida residence where the Playpen server was seized. *Cf.* Ex. B, ¶ 30 (describing search). Some material that was arguably responsive to the outstanding discovery requests was attached to the government's Response, but no other discovery has been provided.

Still, the defense has made a sufficient showing at this time to warrant a *Franks* hearing. The most egregious falsity in the warrant application is the affiant's description of the Playpen homepage. As noted above, the affiant's description of the homepage was wrong:

| **Affiant's Description of Homepage** | **Truthful Description of Homepage** |
|---|---|
| [T]wo images depicting partially clothed prepubescent females with their legs spread apart. | One image depicting a fully-clothed female of indeterminate age sitting in a chair with her legs crossed. |

The government explains this falsity by noting that "with the benefit of hindsight, it would have been better for the affiant to have reviewed Playpen the morning the warrant was signed, as opposed to two days before." (ECF No. 24, 26.) Yet it appears from sworn testimony in other proceedings that FBI agents did review the Playpen website and its homepage after the homepage changed but before the affidavit was submitted. It appears that they did review the homepage on the morning the affidavit was signed. FBI Special Agent Daniel Alfin recently testified:

01:12:31PM 6 Q. Let me refer then to A15 and 16 -- Defense A15 and
01:12:37PM 7 A16. Those show the website as it appeared on
01:12:44PM 8 February 19th or on the morning of February 20th; is that
01:12:48PM 9 correct?
01:12:48PM 10 A. That's correct.
01:12:49PM 11 Q. And those pictures were taken as you were -- the FBI
01:12:53PM 12 was in fact in the process of seizing the control of the
01:12:57PM 13 website, correct?
01:12:59PM 14 A. It happened in a similar -- closely-related
01:13:02PM 15 timeframe, yes.
01:13:02PM 16 Q. And then shortly afterwards, on the 20th, the NIT
01:13:06PM 17 warrant application was completed and presented to the
01:13:09PM 18 judge in Virginia, correct?
01:13:11PM 19 A. That is correct.
01:13:11PM 20 Q. So now you can see in the upper left-hand corner that
01:13:15PM 21 there is a logo that appears there?
01:13:17PM 22 A. Yes, there is.
01:13:18PM 23 Q. And do you see any lascivious display of prepubescent
01:13:24PM 24 girls in that left corner?
01:13:26PM 25 A. The logo depicted in this image depicts what appears

01:13:30PM 1 to be a prepubescent female posed in a sexually suggestive
01:13:35PM 2 manner.
01:13:36PM 3 Q. Do you see any nudity or -- Do you see two females
01:13:41PM 4 anywhere there?
01:13:41PM 5 A. I do not.
01:13:42PM 6 Q. Do you see their legs spread apart?
01:13:45PM 7 A. I do not.
01:13:46PM 8 Q. It is fair to say that the February 3rd logo that we
01:13:50PM 9 saw earlier did not exactly match what you seized on the
01:13:53PM 10 19th, correct?
01:13:54PM 11 A. The logo did change.
01:13:56PM 12 Q. At any point is the warrant application amended or
01:14:02PM 13 corrected to change the description of the images that
01:14:08PM 14 appeared with the logo?
01:14:09PM 15 A. The warrant for the NIT reflected a specific period
01:14:14PM 16 of review, and it was not updated to include my
01:14:17PM 17 observations from the night of February 19th and morning
01:14:20PM 18 of February 20th.

Hrg. Tr. (Jan. 22, 2016), in *United States v. Michaud*, Case No. 15-5351 (W.D. Wash. Jan 26, 2016) (emphasis added). SA Alfin testified that, at the time of the residential search in Florida on February 19, 2015, "I would have clearly seen the website and would have seen the new logo, [but] it did not jump out to me as a significant change to the website or a material change to the website." *Id.* at 84:12-15. It appears therefore that 1) the FBI clearly saw the changed version of the homepage, 2) they saw it before the NIT warrant application was submitted, 3) the NIT

warrant application was not updated to include observations from the Florida residential search, and 4) FBI agents determined that the change to the website was not "significant" or "material."

Having established at least the strong likelihood that the FBI knew about and had observed the change to the homepage before the NIT warrant was submitted for judicial review, the question is: Why was the affidavit not updated? The affiant noted other changes that had been made to the Playpen website in NIT warrant application, even changes made as late as February 18, 2015, one day before the change to the homepage. Ex. B, ¶ 2 n.3. Perhaps more importantly, the affidavit described the residential search in Florida during which changes to the Playpen homepage were observed. Ex. B, ¶ 30. Yet, for some reason, the content of Playpen's homepage was misrepresented in the warrant application. In fact, even though the Playpen site was being run by the government and was constantly monitored by the government, the government never went back to the magistrate judge and to say they previously got it wrong. The government's failure to correct its false statements at any time during this month *after* the warrant was issued also speaks to the diligence and/or intent of government agents when they submitted the warrant for approval in the first place.

Under these circumstances, the defense has made a substantial preliminary showing that a false statement was at least recklessly included in the NIT warrant application. Because the triggering event contemplated by the warrant was navigation through Playpen's homepage, the contents of the homepage were clearly material to the magistrate's probable cause determination. Indeed, it appears that after the FBI decided to maintain the *altered* homepage, visitor traffic to Playpen increased from 11,000 per week to approximately 50,000 per week. This otherwise unexplained massive increase in visitors strongly suggests that many new visitors viewed the

revised Playpen homepage as a typical adult site (and had no trouble finding it by Tor search engine or otherwise). It seems quite plausible that the different content of the Playpen homepage—the misrepresentation at issue here—significantly affected a potential user's expectations as to the site's contents. The materiality of this misrepresentation is clear. Accordingly, a *Franks* hearing is warranted.

**THE GOOD FAITH DOCTRINE CANNOT SAVE FRUITS OF THIS UNCONSTITIONAL SEARCH FROM SUPPRESSION**

In its Response, the government contends that after the Court finds the government's search here unconstitutional, the usual remedy of suppression should not be applied because of the "good faith" exception. The government's position is erroneous.

"Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (citing *Weeks v. United States*, 232 U.S. 383, 391-93 (1914)). Since 1914, therefore, the Supreme Court has concluded that the exclusionary rule "is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" *Id.* (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). In addition to deterrence, suppression "serves another vital function—'the imperative of judicial integrity.'" *Id.* at 12-13 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)). Suppression prevents the federal courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.*

Because of the central importance of suppression to the integrity of the criminal justice system, the government can meet its burden of demonstrating an exception to the exclusion of unconstitutionally obtained evidence in only limited circumstances. The good faith exception

will not apply if (1) "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) "the issuing magistrate wholly abandoned his judicial role"; (3) "the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" or (4) "the warrant is so facially deficient" that the executing officers cannot reasonably presume it to be valid. *United States v. Doyle*, 650 F.3d 460, 467 (4th Cir. 2011) (internal quotation marks omitted).

At the threshold, it is important to recognize that the good faith exception is *per se* inapplicable to two of the constitutional violations asserted here. If the Court were to find that the triggering condition underlying the NIT warrant never occurred, then the good faith exception does not apply. This is because "*Leon*'s good faith rule [does] not excuse full-blown mistakes in the execution of a warrant." *United States v. Ricciardelli*, 998 F.2d 8, 17 n.10 (1st Cir. 1993). Thus, the First Circuit has held that "***if a situation arises in which officers wrongly conclude that the triggering event needed to animate an anticipatory warrant has occurred, and proceed to execute a full search in the face of this mistake, we would not review that mistake under* Leon*'s good faith standard***." *Id.* (emphasis added); *see also United States v. Moore*, 742 F. Supp. 727, 738-39 (N.D.N.Y. 1990), *aff'd*, 968 F.2d 216 (2d Cir. 1992) ("To permit the good-faith exception to save the anticipatory aspect of the warrant would be to disregard the Second Circuit's clear direction that if the planned event does not transpire an anticipatory warrant is void.").

Likewise, if the Court finds—after a *Franks* hearing—that the FBI misled the magistrate either intentionally or recklessly, then the good faith exception is explicitly inapplicable. *United*

*States v. Leon*, 468 U.S. 897, 923 (1984) ("Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.").

With respect to Mr. Matish's other Fourth Amendment claims, the government's unsupported assertion that the officers in question acted in good faith is just that: an unsupported assertion. "The burden is on the government to demonstrate the objective reasonableness of the officers' good faith reliance on an invalidated warrant." *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011) (internal quotation marks omitted). No affidavit or other evidence has been offered to support the government's conclusory statement. Accordingly, even where the good faith exception might theoretically apply, the government has failed to meet its burden of proof to show that it should be applied in this case. Suppression is the appropriate remedy.

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Through the NIT, the government entered a brave new world of electronic surveillance. Although the government now possesses the technological capability to gather troves of information from nearly every computer connected to the Internet, the Fourth Amendment applies with full force in this context.

The prerequisite to *any* search is a judicial determination that an honestly affirmed factual predicate is sufficient to justify governmental intrusion. Here, the government's affirmation was recklessly false, the predicate facts never occurred, and the judicial determination of probable cause was erroneous. As a result, government deemed itself authorized to search over 150,000 computers located across the country. Suppression here is required to deter similar government overreach in the future.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 21st day of April, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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