UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. CR15-5351RBJ**
	)	
vs.	)	
	)	
JAY MICHAUD,	)	
	)	
Defendant.	)	

MOTIONS HEARING

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

May 5, 2016

APPEARANCES:

Keith Becker
U.S. Department of Justice Criminal Division
Matthew Hampton
Assistant United States Attorney
Representing the Plaintiff

Colin Fieman
Linda Sullivan
Federal Public Defender's Office
Representing the Defendant

09:32:48AM 1 **THE COURT: This is further in United States**
09:32:52AM 2 **versus Michaud, No. 15-5351. Present for this hearing is**
09:33:02AM 3 **Mr. Michaud and his lawyers, Ms. Sullivan and Mr. Fieman;**
09:33:07AM 4 **and for the government, Mr. Becker and Mr. Hampton.**
09:33:12AM 5 **Right?**
09:33:13AM 6 **MR. HAMPTON: That's correct, your Honor.**
09:33:15AM 7 **THE COURT: Also, I understand Special Agent Alfin**
09:33:19AM 8 **is on the telephone so he can hear these proceedings as**
09:33:23AM 9 **well.**
09:33:26AM 10 **This comes on on the plaintiff's motion for**
09:33:30AM 11 **reconsideration, which is Docket No. 165. I have**
09:33:36AM 12 **determined that I should give the government the benefit**
09:33:38AM 13 **of the doubt on this request for reconsideration. I think**
09:33:47AM 14 **it is a close question, but under Local Criminal**
09:33:52AM 15 **Rule 12(c)(2)(a), I think they are -- they desire to**
09:34:02AM 16 **present new facts which could not have been brought to the**
09:34:05AM 17 **court's attention with reasonable diligence.**
09:34:08AM 18 **I guess that's a way of saying plaintiff's counsel was**
09:34:12AM 19 **diligent in their choice not to submit evidence that now**
09:34:17AM 20 **they wish to offer. That may be more tactics than**
09:34:26AM 21 **anything, but it seems to me in the interest of a full and**
09:34:34AM 22 **fair hearing on the merits that I should reconsider my**
09:34:43AM 23 **prior ruling in the order granting the third motion to**
09:34:45AM 24 **compel discovery.**
09:34:51AM 25 **You know, in motions to reconsider we speak of them as**

though when they are granted, the relief underlying the motion for reconsideration is granted. Really, when you make a motion for reconsideration, you are asking the court to reconsider its prior ruling. I am going to do that. The motion should be granted to that extent. But the ruling granting the motion for reconsideration should not be read as, of course, leaning one way or another on the underlying issue. We will just take another look at it.

Now, as part of the motion to reconsider, which was Docket 165, the plaintiffs have requested leave to present Federal Rules of Criminal Procedure 16(d)(1) evidence. I am satisfied from the showing made that the plaintiff has made a sufficient showing to justify an in camera presentation.

Such proceedings should be and are rare, because they fly in the face of due process considerations. But the rule allows it and the showing is sufficient, and so the court will grant leave for such a presentation.

MR. FIEMAN: Your Honor, I don't suppose it is necessary for me --

THE COURT: I can't hear you.

MR. FIEMAN: Let me step up to the platform. Your Honor, I was just wondering if it was necessary for the record for us to note our objection to that ruling, or is

09:36:41AM 1 **it assumed from our prior pleadings?**
09:36:43AM 2 **THE COURT: I understand you object. I**
09:36:45AM 3 **understand. There is some ground rules for such a**
09:36:49AM 4 **hearing. First, the rule contemplates a written statement**
09:36:52AM 5 **only. I am not going to conduct an evidentiary hearing**
09:36:55AM 6 **in camera, although I may question plaintiff's counsel**
09:37:03AM 7 **ex parte after I review their presentation.**
09:37:10AM 8 **It should be noted this is not a Classified**
09:37:12AM 9 **Information Procedure Act hearing, but is only under**
09:37:21AM 10 **Rule 16.**
09:37:24AM 11 **And, third, we will conduct this proceeding in the**
09:37:28AM 12 **jury room in camera and ex parte.**
09:37:34AM 13 **Now, you should understand, I think, where we are**
09:37:39AM 14 **going from here. After the in camera proceeding I will**
09:37:45AM 15 **rule on the question of whether the information that was**
09:37:50AM 16 **ordered produced -- by the order granting the third motion**
09:37:53AM 17 **to compel should be produced to the defendant or whether**
09:37:56AM 18 **it may be withheld by the government.**
09:38:01AM 19 **If I order production, that will essentially end this**
09:38:07AM 20 **hearing and motion for reconsideration, and would amount**
09:38:14AM 21 **to a denial of the motion -- the underlying motion for**
09:38:20AM 22 **reconsideration.**
09:38:20AM 23 **If I allow the government to withhold the evidence, we**
09:38:24AM 24 **will then proceed with the pending motion to strike under**
09:38:28AM 25 **Docket 193, and argument on the materiality of the**

withheld information, and what sanctions, if any, are appropriate. That includes the pending defendant's motion to dismiss.

Now, that's how we are going to proceed this morning. So we will recess this court proceeding, and the court reporter and I will go into the jury room, and Mr. Rucker or one of plaintiff's counsel can also come in.

MR. HAMPTON: Your Honor.

THE COURT: Mr. Hampton.

MR. HAMPTON: The information security officer has asked if we could have about ten minutes to prepare the jury room, and then make the materials available to the court.

THE COURT: Whatever it takes. As soon as that is completed we will come back to court. Mr. Rucker, I guess if you will let me know when it is all set up.

(At this time the ex parte in camera proceeding followed.)

THE COURT: It is my judgment that the showing made in camera is sufficient, and the government is not required to produce the information that was ordered produced in the order granting the third motion to compel.

So let's turn our attention to the question also raised in the motion for reconsideration as to the materiality of that information, and what sanctions, if

any, might be appropriate if the government does not produce the information, the source code, and so forth. It is your motion.

MR. FIEMAN: Your Honor, just to see where we are on the record, are we moving now on the motion to dismiss --

THE COURT: Wait a minute.

MR. FIEMAN: Are we moving now to the consideration on the motion to dismiss and possible sanctions?

THE COURT: I would assume we will address that.

MR. FIEMAN: I am unclear whose motion you are referring to and who should speak first. That's what I was trying to clarify.

THE COURT: The motion for reconsideration comes first.

MR. FIEMAN: Thank you, your Honor.

THE COURT: I should tell you, I have reread all of the original papers in the original motion, and in the second motion to compel, most of them twice or three times, and all of the supporting documents. It is well over an inch, nearly two, of paper. So anything you want to add to the showing you have made in your briefing?

MR. HAMPTON: Thank you, your Honor. The first point I think we would note is that in light of the

court's finding the government is not obligated to turn --

THE COURT: I don't think I have my hearing aids adjusted right. A lot of problems go along with being old. Speak into the mic.

MR. HAMPTON: Can your Honor understand me now?

THE COURT: You've got it right. Go ahead.

MR. HAMPTON: Yes, your Honor. The first point the government would make then is, in light of the court's finding the government is not obligated to turn this material over, that in fact no sanction would be appropriate. The government has made a showing as to the law enforcement privilege. The government believes that balancing the government's interests in nondisclosure against the defendant's need weighs in favor of the government, and certainly does not justify any sanction.

In particular, that is because the government continues to believe that the defendant simply has not made that materiality showing. The defense argues that it needs this information to verify the NIT data. The government has provided ample opportunity and discovery for the defense to make just that analysis.

It has the data obtained by the NIT, it has the NIT code that got that data from Mr. Michaud's computer, and the government is, as noted previously, willing to make available that network data, the network data that would

10:15:23AM 1 **show exactly what was sent from Mr. Michaud's computer by**
10:15:29AM 2 **the NIT to the government. So if the concern is about**
10:15:31AM 3 **verifying the government's information, the defense has**
10:15:33AM 4 **all it needs to do.**
10:15:35AM 5 **Now, in response, what we have heard from the defense**
10:15:38AM 6 **is, well, that is all well and good, but that network**
10:15:41AM 7 **data, that is a red herring, that doesn't matter. What is**
10:15:44AM 8 **important, though, is the defense hasn't actually looked**
10:15:47AM 9 **at that network data. It has so far declined to**
10:15:50AM 10 **investigate that, and has simply said in conclusory**
10:15:54AM 11 **fashion, both counsel -- defense counsel and also in an**
10:15:59AM 12 **expert declaration, that that data simply wouldn't help.**
10:16:02AM 13 **But the government has looked at that. Special Agent**
10:16:06AM 14 **Alfin looked at the network data. He confirmed that the**
10:16:09AM 15 **information that the government sent -- pardon me, the**
10:16:13AM 16 **information that the government received from the NIT for**
10:16:18AM 17 **Mr. Michaud's computer -- or what was ultimately**
10:16:22AM 18 **determined to be Mr. Michaud's computer was exactly what**
10:16:27AM 19 **the NIT sent to the government when it was deployed to**
10:16:30AM 20 **Mr. Michaud's computer.**
10:16:32AM 21 **The defense, of course, also says that it needs this**
10:16:35AM 22 **discovery, because absent that, how can it know if the**
10:16:41AM 23 **government exceeded the scope of its search. Well, your**
10:16:47AM 24 **Honor, as the government has stated, it did not. The NIT**
10:16:51AM 25 **seized several pieces of specified information and**

10:16:57AM recorded them. And that's all it did. The defense had
10:17:00AM the code that actually conducted that search, seized that
10:17:04AM information. It can confirm whether or not in fact the
10:17:09AM code did what the government says it did. And at no point
10:17:13AM has the defense suggested that the code did otherwise.
10:17:18AM At most, what the defense has been able to put forth
10:17:21AM is the theoretical possibility that the government could
10:17:26AM have exceeded the scope of its warrant. Well, the same
10:17:31AM could be said, frankly, of any warrant.
10:17:34AM The fact is, when the government obtains a warrant to
10:17:37AM search a home, any defendant could say, while you were
10:17:40AM there seizing the drugs that you had probable cause to
10:17:43AM seize, you also seized some special property that I care
10:17:47AM deeply about, and that you had no authority to take.
10:17:51AM Short of the government saying we did not and we don't
10:17:54AM have it, I don't know what more certainty we can provide
10:17:57AM to the defense. I say that not to be flip. I understand
10:18:02AM the defense's concern, but to simply claim that it is
10:18:06AM possible that the government exceeded the scope of a
10:18:08AM search warrant is no answer to the question of
10:18:11AM materiality.
10:18:12AM And I would also note that even if the government did
10:18:16AM exceed the scope of its warrant -- and it did not -- but
10:18:20AM if it did, if in fact the government seized some
10:18:23AM information that it was not entitled to, the remedy would

10:18:28AM 1 **be suppression of that information, information that I am**
10:18:31AM 2 **not aware of and that the government does not intend to**
10:18:34AM 3 **use. And so verifying the scope is not a reason for this**
10:18:40AM 4 **discovery.**
10:18:41AM 5 **And, finally, the defense says, well, we need this**
10:18:43AM 6 **information because it is possible that a virus or malware**
10:18:49AM 7 **is responsible for the thousands of images of child**
10:18:56AM 8 **pornography organized into folders found on Mr. Michaud's**
10:18:58AM 9 **computer.**
10:18:59AM 10 **The government agrees it is a theoretical possibility.**
10:19:03AM 11 **The defense is free to make that argument. It is free to**
10:19:07AM 12 **analyze the devices to see if there is any trace of this**
10:19:12AM 13 **supposed malware or this virus that could have done this.**
10:19:17AM 14 **The defense is free to argue to a jury that that is**
10:19:22AM 15 **exactly what happened. The government will in turn be**
10:19:26AM 16 **free to present its own evidence of user attribution, the**
10:19:31AM 17 **evidence of where the materials were found, what was found**
10:19:37AM 18 **on them, and the jury can decide. That is why we have**
10:19:42AM 19 **trials.**
10:19:45AM 20 **But it is not for the defense to simply say, well, I**
10:19:48AM 21 **would really like to know what else the government has,**
10:19:51AM 22 **because if I do, then I will know whether or not there was**
10:19:56AM 23 **malware on my computer. It simply doesn't make sense.**
10:19:59AM 24 **There is no support for that position in the record. And**
10:20:04AM 25 **the defense has made no showing. Indeed, the defense**

hasn't even reviewed those devices, to the government's knowledge.

The government has made that point several times, and the defense has responded most recently with new declarations. I would note specifically the declaration of Mr. Young, in which he says --

THE COURT: I meant to -- You have a motion to strike pending on those additional things that we should resolve.

MR. HAMPTON: Yes, your Honor. What I would ask -- I will turn to that right now then, just so it is clear. The government believes at this point that striking those motions would be appropriate, given that there has been ample opportunity to present them.

If the court is not inclined to do that -- Although I am prepared to respond to the best of my ability at this time, the government hasn't had an opportunity to share those declarations with its own technical experts and determine what, if any, response is appropriate. And so if the court is not inclined to strike those declarations, and if the court considered those declarations meaningful or important in its ultimate determination, the government would simply ask for an opportunity to provide some rebuttal declaration from its own technical expert, as appropriate.

10:21:29AM **Your Honor, to turn back to Mr. Young's declaration,**
10:21:34AM **his response --**
10:21:34AM **THE COURT: I don't think you ought to go into**
10:21:36AM **that until I determine the motion to strike.**
10:21:40AM **MR. HAMPTON: Pardon, your Honor? Oh, yes, of**
10:21:44AM **course, your Honor.**
10:21:56AM **Your Honor, then that leaves the matter -- the**
10:22:04AM **ultimate matter of sanction, if in fact the court is**
10:22:07AM **unpersuaded as to the government's position on materiality**
10:22:13AM **and the effect of the law enforcement privilege here. If**
10:22:16AM **the court does believe that some sanction is appropriate**
10:22:20AM **and reflects the appropriate balancing of the interests of**
10:22:22AM **the parties, then the government would certainly**
10:22:25AM **respectfully suggest that dismissal of the indictment in**
10:22:28AM **its entirety is not appropriate.**
10:22:32AM **What the defendant is prevented from doing is**
10:22:37AM **receiving discovery that he claims is relevant to the NIT.**
10:22:40AM **And so the appropriate sanction there is to deny the**
10:22:44AM **government use of the evidence obtained by the NIT at**
10:22:46AM **trial.**
10:22:48AM **THE COURT: Well, all of the evidence was obtained**
10:22:51AM **by the use of the NIT, was it not?**
10:22:54AM **MR. HAMPTON: Well, your Honor, the evidence**
10:22:57AM **obtained by the NIT established the finding of probable**
10:22:59AM **cause that led to the search warrant.**

To be clear, the government's position is that what the government should be barred from doing at trial is presenting specifically the information obtained by the NIT and its attribution to Mr. Michaud. So instead, leave the government in the position of presenting its case based on the search that was conducted of Mr. Michaud's home and the evidence found therein.

THE COURT: The search was based on what was found by the NIT, right?

MR. HAMPTON: The probable cause finding supporting the search, in part -- mostly relied on information obtained from the NIT, that is true.

Your Honor, that would be a separate question from whether the evidence obtained by the NIT is admissible -- the actual data obtained by the NIT would be admissible at a trial to, say, prove that the IP address the government identified was in fact tied to Mr. Michaud. And that would be a separate question.

And the government acknowledges that this would be -- It would certainly not be a normal presentation at trial. In the normal case, where the government has other information that explains the story of its investigation, it would normally present that. But it also understands if the court believes a sanction is the appropriate outcome here, that then it will have to accept that it

10:24:34AM 1 **cannot tell the full story, and that the jury would need**
10:24:37AM 2 **to hear only about the evidence obtained from**
10:24:41AM 3 **Mr. Michaud's home.**
10:24:43AM 4 **The government also recognizes, as noted in its**
10:24:46AM 5 **pleadings, that if the court were to impose such a**
10:24:49AM 6 **sanction, it would likely place the government in the**
10:24:53AM 7 **position of having to dismiss one of the counts in the**
10:24:55AM 8 **indictment, and that is Count 2, one of the two receipt**
10:25:01AM 9 **counts, because that count is premised on attribution --**
10:25:05AM 10 **largely premised on attribution that would come from the**
10:25:10AM 11 **NIT and from Mr. Michaud's activity on Playpen -- his**
10:25:14AM 12 **alleged activity on Playpen.**
10:25:16AM 13 **We understand that may well be the final outcome of**
10:25:18AM 14 **that sanction. But that is the most to which the defense**
10:25:21AM 15 **would be entitled, because the remaining evidence that was**
10:25:24AM 16 **obtained from Mr. Michaud's home is not tied to the NIT,**
10:25:33AM 17 **and it would be appropriate for a jury to consider.**
10:25:51AM 18 **Your Honor, given the court's suggestion as to the**
10:25:56AM 19 **matter of the declarations, I will leave it there at this**
10:25:58AM 20 **point.**
10:26:00AM 21 **THE COURT: Just a second. What do you make of**
10:26:08AM 22 **the Ninth Circuit cases, in particular United States**
10:26:11AM 23 **versus Hernandez-Meza, that tend to indicate that**
10:26:20AM 24 **inculpatory information is material even if it only tells**
10:26:30AM 25 **the defendant that he might as well abandon defenses and**

10:26:35AM 1 **plead guilty?**
10:26:36AM 2 **MR. HAMPTON: Well, your Honor, I acknowledge that**
10:26:39AM 3 **the Ninth Circuit has made such pronouncements. I don't**
10:26:43AM 4 **believe that in this case the discovery that is at issue**
10:26:47AM 5 **would shed really any light on whether or not there is a**
10:26:51AM 6 **viable defense. And certainly --**
10:26:53AM 7 **THE COURT: How does the defense know that?**
10:26:56AM 8 **MR. HAMPTON: Well, your Honor, the defense -- one**
10:27:02AM 9 **way the defense could know that is to at least examine the**
10:27:05AM 10 **devices that are at issue here to determine if in fact**
10:27:08AM 11 **there is any evidence, any factual support, for its claim**
10:27:12AM 12 **that somehow someone or something else is what placed the**
10:27:17AM 13 **child pornography on these devices.**
10:27:20AM 14 **The most the defense can say is that is a theoretical**
10:27:24AM 15 **possibility, and that because it is a theoretical**
10:27:26AM 16 **possibility they would like to know more about certain**
10:27:29AM 17 **information that the government has, but that has no**
10:27:33AM 18 **bearing on that.**
10:27:34AM 19 **The real answer as to whether or not there is any**
10:27:37AM 20 **evidentiary support for such a theory can be found by**
10:27:41AM 21 **searching those devices.**
10:27:45AM 22 **THE COURT: Why do they have to believe what you**
10:27:47AM 23 **say about that? I mean, your briefing is full of**
10:27:58AM 24 **statements that they won't find anything anyway, that it**
10:28:05AM 25 **is not going to help them anyway. I guess you know what's**

10:28:14AM 1 in there and they don't. And you say you don't need it.
10:28:18AM 2 Why do they have to believe what you say?
10:28:24AM 3 MR. HAMPTON: Well, your Honor, because what
10:28:30AM 4 they -- To take, for example, one of the pieces of
10:28:32AM 5 information that they wish to know about, which relate to
10:28:35AM 6 how in fact the NIT was deployed to Mr. Michaud's
10:28:40AM 7 computer, that is one aspect of their request, there is
10:28:48AM 8 no -- the defense has -- it does not explain how exactly
10:28:53AM 9 that would help them know whether or not someone or
10:28:55AM 10 something else got into Mr. Michaud's computer.
10:29:02AM 11 It would be to say that a home with an open window,
10:29:10AM 12 someone went in the open window -- Pardon me. It would
10:29:22AM 13 be as if -- To take, say, a lock pick example. If
10:29:26AM 14 someone picked the defendant's lock, for the defense to
10:29:29AM 15 say, well, we need to know how you picked our lock because
10:29:33AM 16 someone else could have also picked our lock, and they
10:29:36AM 17 could have planted evidence there, well, the answer is did
10:29:40AM 18 someone plant evidence there, not how someone got in.
10:29:42AM 19 That doesn't actually shed any light on whether or not
10:29:45AM 20 there was some other entity that caused that harm.
10:29:54AM 21 I apologize, your Honor. I need some assistance
10:29:57AM 22 reading a note that I received. If you will give me a
10:30:00AM 23 moment.
10:30:17AM 24 Thank you, your Honor. The last point I will make is
10:30:21AM 25 if the court has some concern at the end of the day that

10:30:25AM 1 some broader sanction is appropriate, given the
10:30:28AM 2 materiality, then we would ask the court to then give us
10:30:32AM 3 an opportunity and give the parties an opportunity to more
10:30:35AM 4 fully brief that issue. That issue was raised in part of
10:30:39AM 5 a response brief in the defense renewed motion to dismiss.
10:30:43AM 6 And so a more detailed understanding of exactly what the
10:30:46AM 7 prejudice, if any, the defendant might suffer, and how
10:30:49AM 8 exactly that could be cured with a remedy. If the court
10:30:54AM 9 has lingering doubts that the government's proposed
10:30:56AM 10 sanction is insufficient, we would urge the court to ask
10:31:00AM 11 for additional briefing to fully assess that.
10:31:06AM 12 THE COURT: Mr. Fieman, address the motion to
10:31:08AM 13 strike first, please.
10:31:09AM 14 MR. FIEMAN: Thank you, your Honor. I think the
10:31:11AM 15 very presentation you heard just a few minutes ago from
10:31:14AM 16 Mr. Hampton demonstrates why we ultimately elected to
10:31:17AM 17 submit those declarations.
10:31:19AM 18 Let me explain the posture of where we are at in
10:31:22AM 19 trying to defend the court's original disclosure order,
10:31:29AM 20 bolster our commitment to the dismissal that we have
10:31:33AM 21 requested, and at the same time try and preserve some
10:31:37AM 22 ability to work out our theories and develop our expert
10:31:40AM 23 witnesses for trial without disclosing our entire case.
10:31:44AM 24 It has been a very difficult act to balance that.
10:31:47AM 25 The government has from its initial pleadings back in

10:31:50AM 1 **January -- And the court has to remember where this**
10:31:53AM 2 **started. We requested this discovery in September. The**
10:31:57AM 3 **government filed a motion opposing it. It then withdrew**
10:32:00AM 4 **that motion, said they would turn it over, submitted a**
10:32:02AM 5 **proposed protective order, then gave us a mere fragment of**
10:32:05AM 6 **what was covered by the discovery agreement. We had a**
10:32:09AM 7 **hearing, the court found materiality.**
10:32:12AM 8 **The government then requested until March 28th to work**
10:32:16AM 9 **out its internal agency and bureaucratic process, and**
10:32:20AM 10 **discuss additional protective measures with the defense,**
10:32:23AM 11 **with a deadline of March 28th for production. On**
10:32:26AM 12 **March 28th we get the motion to reconsider. And now we**
10:32:29AM 13 **are in the position of re-briefing, as I tried to outline**
10:32:32AM 14 **in the original pleadings, issues that we thought the**
10:32:34AM 15 **court had already resolved. Because the standard here**
10:32:37AM 16 **isn't even materiality. It is whether the discovery is**
10:32:40AM 17 **relevant and helpful to the defense, in ways the court**
10:32:43AM 18 **already pointed out.**
10:32:44AM 19 **Let me just focus on that, your Honor, because there**
10:32:47AM 20 **are two aspects, which is the pretrial aspect --**
10:32:48AM 21 **THE COURT: Wait a minute. Wait a minute. Let's**
10:32:50AM 22 **talk about the motion to strike.**
10:32:51AM 23 **MR. FIEMAN: I apologize, your Honor. We**
10:32:53AM 24 **submitted that -- That's the reason we submitted it. We**
10:32:55AM 25 **got yet again a pleading on May 6th, repetitively saying**

10:33:01AM 1 **that we have not demonstrated a need.**

10:33:05AM 2 **In that, also, in direct response to our motion to**

10:33:07AM 3 **dismiss, was a proposal that Mr. Hampton has made for a**

10:33:10AM 4 **lesser sanction. That lesser sanction only works to the**

10:33:13AM 5 **government's advantage.**

10:33:15AM 6 **And what we felt we needed to demonstrate further if**

10:33:18AM 7 **the court was considering a lesser sanction was how this**

10:33:23AM 8 **discovery -- the entire discovery issue goes to the heart**

10:33:26AM 9 **of the defense case. It is not simply a matter of carving**

10:33:29AM 10 **out discussion of the NIT. This is the core of our**

10:33:35AM 11 **defense, is wrapped up with this discovery.**

10:33:37AM 12 **And to the extent that the government proposed in its**

10:33:40AM 13 **May 6th reply that a lesser sanction is appropriate, we**

10:33:43AM 14 **decided that despite the fact that we did not want to**

10:33:46AM 15 **continue putting our experts before the government with**

10:33:49AM 16 **sworn statements pretrial, despite the fact that we were**

10:33:53AM 17 **reluctant to continue making demonstrations of our defense**

10:33:56AM 18 **theories after the court had already ruled that we had**

10:33:59AM 19 **made a sufficient showing of materiality, the issue was**

10:34:02AM 20 **simply too important.**

10:34:03AM 21 **Now, if the government wants more time to respond, and**

10:34:06AM 22 **the court deems that appropriate, and that is the court's**

10:34:09AM 23 **decision, we do not object.**

10:34:11AM 24 **If we -- We suggested that this could be converted to**

10:34:13AM 25 **a surrebuttal, which the court has previously allowed**

10:34:16AM parties to submit, even one day before, we make that
10:34:19AM motion.

10:34:19AM But the core of this, your Honor, is that it is not
10:34:22AM supposed to be a mini-trial. The court is not supposed to
10:34:25AM be assessing at this point whose experts are more
10:34:28AM persuasive, whether the defense has a theory that is
10:34:33AM ultimately going to persuade the jury. That is what the
10:34:37AM trial itself is for.

10:34:39AM The standard here is simply do we have a good-faith
10:34:42AM basis for believing the discovery, which the court last
10:34:44AM already ordered the government to produce, is essential to
10:34:48AM Mr. Michaud getting a fair trial.

10:34:49AM And we believe that the government's repeated
10:34:51AM invitation, even in its prior pleading, in its response to
10:34:55AM our motion to dismiss, forced us over that weekend to
10:34:57AM decide do we disclose more, do we present more, do we hold
10:35:01AM back for trial. Quite frankly, we are uncomfortable being
10:35:05AM in this position to begin with, given the court's
10:35:08AM February 17th ruling. But we elected on that morning to
10:35:11AM file our remaining declaration so there is a complete
10:35:14AM record.

10:35:15AM Now, I don't know what more to say on that point, your
10:35:18AM Honor, except to explain the position we were in and the
10:35:20AM reasons we filed it. And we also believe it is directly
10:35:23AM responsive as a reply briefing to the government's May 6th

10:35:27AM arguments in relation to the motion to dismiss and the
10:35:30AM proposed sanctions.
10:35:33AM THE COURT: Let me just address the motion to
10:35:37AM strike. You put in additional evidence as part of your
10:35:45AM reply, basically. They had no chance to respond to that.
10:35:51AM For purposes of this hearing today those -- that
10:35:55AM additional evidence should be stricken. Those are the
10:36:03AM attachments to Docket No. 191, and Part A of the
10:36:08AM defendant's reply to the government's response to the
10:36:12AM second defense motion to dismiss the indictment.
10:36:22AM If those things should be considered in terms of what
10:36:26AM sanctions, that's a different issue.
10:36:30AM MR. FIEMAN: That's what we are proposing, your
10:36:32AM Honor.
10:36:32AM THE COURT: This question now that we are talking
10:36:35AM about requires that those things not be considered by the
10:36:38AM court.
10:36:38AM MR. FIEMAN: Your Honor, that's fine. You already
10:36:40AM ruled on the relevance and helpful issue.
10:36:41AM THE COURT: Pardon me?
10:36:42AM MR. FIEMAN: You have already ruled on the
10:36:44AM question of whether the proposed discovery is relevant and
10:36:47AM helpful. So to the extent --
10:36:48AM THE COURT: I know what my previous ruling is.
10:36:51AM The question here is whether it was correct, and what I

10:36:54AM should consider is the stuff that is properly submitted, not stuff that comes in after the fact.

10:37:02AM MR. FIEMAN: Your Honor, I must strongly object to that for several reasons. One is, the government was on notice that we would consider submitting supplemental declarations after the May 6th pleading, and they have the same option. The court has previously allowed the government to file a surrebuttal on this discovery issue on February 16th, by the government, for the February 17th hearing --

10:37:24AM THE COURT: No. You are telling me you disagree with me. I appreciate that. Go ahead with your argument on the question of materiality or relevance.

10:37:32AM MR. FIEMAN: That's fine, your Honor. So what we are -- At this juncture now, it seems to me, the bottom line of what is going on here is that the court is trying to balance three competing and legitimate interests.

10:37:44AM The first is the government's need to investigate internet crimes. We have never disputed that that is a fair and legitimate law enforcement purpose.

10:37:55AM Mozilla is here today wanting to protect its customers. There is enormous privacy interests at stake.

10:38:01AM Mr. Michaud would like a fair trial that is not based on speculation about how he was targeted, and allows the defense to fully present its defense at the trial. Only

10:38:14AM 1 **one set of those interests is founded on the Constitution.**
10:38:18AM 2 **All right. What is fundamentally at stake here is**
10:38:22AM 3 **Mr. Michaud's right to a fair trial.**
10:38:24AM 4 **The government, as we have said all along, has the**
10:38:28AM 5 **right to withhold the discovery, ultimately, if the court**
10:38:32AM 6 **decides that is appropriate. But that does not resolve**
10:38:36AM 7 **the fundamental tension here. And that's why we put in**
10:38:40AM 8 **our pleading, your Honor, that even if the ex parte**
10:38:43AM 9 **proceeding established the worst possible potential harms**
10:38:47AM 10 **from disclosure, we are in the same position.**
10:38:52AM 11 **And the Supreme Court said in Jencks, almost 50 years**
10:38:55AM 12 **ago -- And I am quoting directly from the opinion, "It is**
10:39:00AM 13 **unconscionable to allow the government to undertake**
10:39:04AM 14 **prosecution and then invoke its governmental privilege to**
10:39:08AM 15 **deprive the accused of anything" -- This is in the**
10:39:13AM 16 **Supreme -- "of anything that might be material to the**
10:39:15AM 17 **defense."**
10:39:16AM 18 **Now, it is rare that we find in our courts this kind**
10:39:20AM 19 **of impasse. And we have strived mightily over the last**
10:39:24AM 20 **eight months since we put in this discovery request to**
10:39:28AM 21 **reach some accommodation with the government. They**
10:39:32AM 22 **submitted a proposed protective order. And then -- I**
10:39:35AM 23 **don't know whether that was simply a misdirection, or**
10:39:38AM 24 **whatever, but apparently they are not satisfied with that.**
10:39:40AM 25 **They will now not turn it over under any circumstances.**

10:39:44AM 1 **We have agreed, consistent even with Mozilla's own privacy**
10:39:48AM 2 **interests, to abide by any security conditions they think**
10:39:50AM 3 **are appropriate and the court approves. Any. There is**
10:39:53AM 4 **nothing more we can offer.**
10:39:55AM 5 **And if there is any doubt about how critical this**
10:39:57AM 6 **is -- I refer to the operator of this browser itself, who**
10:40:04AM 7 **has informed the court now in its pleading that the**
10:40:06AM 8 **information contained in the declaration of Special Agent**
10:40:10AM 9 **Alfin -- It has nothing to do with our declaration. It**
10:40:12AM 10 **is from Special Agent Alfin's declaration -- suggests that**
10:40:16AM 11 **the government exploited the very type of vulnerability**
10:40:19AM 12 **that would allow third parties to obtain total control --**
10:40:23AM 13 **this is Mozilla, total control of an unsuspecting user's**
10:40:27AM 14 **computer. That's our defense. That's what we believe**
10:40:31AM 15 **happened here.**
10:40:32AM 16 **Because right now Mr. Michaud stands an innocent man.**
10:40:35AM 17 **There is a presumption of innocence here. No matter how**
10:40:38AM 18 **much the government wants to say, oh, we found pictures**
10:40:40AM 19 **here, we found pictures there, we are starting from a**
10:40:42AM 20 **presumption of innocence.**
10:40:44AM 21 **And we have clearly established that the key issue,**
10:40:47AM 22 **given this technology, goes beyond even the pretrial**
10:40:50AM 23 **issues of whether this was a suppression (sic) warrant**
10:40:54AM 24 **properly founded on probable cause, whether the government**
10:40:57AM 25 **has disclosed everything in its warrant application that**

10:41:00AM it was supposed to, which we know they have routinely not done -- not done with sophisticated technology in other cases in recent years. It goes to the heart of our defense.

10:41:10AM And what the government would very much like with its proposed sanction is that the jury doesn't really hear very much about the government's malware. And I can see us standing at trial, trying to argue to the jury, ladies and gentlemen, you have heard that Mr. Michaud's computer was attacked by malware. We are telling you that even according to the experts, the people who make this browser, and all the other experts who the court has seen in our supplemental declarations, and will be testifying at trial, that this opens up a Pandora's box of security issues and third-party attacks. But the government doesn't want you to hear about that, and we really can't tell you anything more about it, your Honor, because we haven't seen what they did to the computer.

10:41:54AM The idea that we can reverse engineer this is something that we discussed back in February as an impossibility. And the government has never disputed that. You can't reverse engineer this.

10:42:04AM So, your Honor, it is both a question of fairness in pretrial -- Honestly, quite frankly, we are very skeptical about the government's assurances. I am not

10:42:18AM 1 **saying I am skeptical of Mr. Hampton's assurances, or**
10:42:22AM 2 **Mr. Becker's assurances, or Agent Alfin's assurances.**
10:42:25AM 3 **They are the AUSAs and the case agents assigned to this**
10:42:28AM 4 **case. I have interacted -- I know they are operating in**
10:42:30AM 5 **good faith. That is not the issue. They are not even in**
10:42:32AM 6 **the loop on most of this stuff. They are not**
10:42:35AM 7 **technically-trained agents.**
10:42:35AM 8 **You have seen not a single declaration from a**
10:42:38AM 9 **qualified expert or somebody who is working at the FBI**
10:42:42AM 10 **research facility that even addresses our preliminary**
10:42:44AM 11 **issues about the identifiers and chain of custody issues,**
10:42:47AM 12 **basic issues, of which now over the course of the last**
10:42:50AM 13 **nine months the government has done nothing more than**
10:42:52AM 14 **repeat and repeat and repeat again, make a showing,**
10:42:55AM 15 **Mr. Michaud, make a showing. And then when we continue to**
10:42:58AM 16 **supplement it, they ask for those showings to be stricken.**
10:43:02AM 17 **I don't know what more we can offer the court except**
10:43:04AM 18 **to spell out much more than we are normally required to in**
10:43:07AM 19 **terms of just showing relevance and helpfulness, where we**
10:43:10AM 20 **think this trial is going.**
10:43:12AM 21 **So for the government to say, oh, that is not a good**
10:43:15AM 22 **theory, they don't need the identifiers, they can**
10:43:19AM 23 **reconstruct this from things that our experts say are**
10:43:21AM 24 **relevant (sic), are relevant (sic) to the core technical**
10:43:24AM 25 **issues that we are dealing with.**

10:43:26AM **Frankly, your Honor, it puts us in an impossible**
10:43:28AM **position. And that is a position that the Supreme Court**
10:43:31AM **has clearly stated once it is arrived at between the**
10:43:37AM **government's legitimate interests in investigating its**
10:43:40AM **crimes, its legitimate interests in wanting to be able to**
10:43:46AM **keep secret information secret, taking all of that at face**
10:43:50AM **value and in good faith, with that on one hand, and**
10:43:54AM **Mr. Michaud's right to present his case to the jury not**
10:43:57AM **built on speculation, not built on bits and pieces of**
10:44:01AM **testimony that has been excised -- I don't even envision**
10:44:05AM **how this would work. But he is entitled to present his**
10:44:08AM **case.**
10:44:08AM **The Supreme Court has said, in that case, when that**
10:44:11AM **fundamental impasse is reached, what gives is the choice**
10:44:14AM **of the government, disclose or dismiss.**
10:44:19AM **And the court was aware of this three months ago,**
10:44:23AM **because you told the government at that time, having**
10:44:26AM **established -- without any of the supplemental**
10:44:28AM **declarations or anything to the court's satisfaction that**
10:44:31AM **this evidence at issue was relevant and helpful to the**
10:44:34AM **defense, you told the government it seems to me you can**
10:44:36AM **either produce or dismiss. So the court knows the**
10:44:39AM **standard.**
10:44:45AM **Your Honor, it is not just a matter of protecting**
10:44:49AM **Mr. Michaud's constitutional rights, which, if anything,**

10:44:54AM 1 **has to trump all the other interests. I mean, that's got**
10:44:57AM 2 **to be it. Otherwise, what are we doing here in this**
10:45:00AM 3 **courtroom if the Fifth and Sixth Amendment isn't at some**
10:45:04AM 4 **point in this process going to be the deciding factor?**
10:45:09AM 5 **This also affects, your Honor, the court's ability to**
10:45:11AM 6 **exercise effective judicial oversight over the**
10:45:15AM 7 **government's exercise of law enforcement powers.**
10:45:19AM 8 **We are in the middle of a new and very complex age,**
10:45:24AM 9 **that things like Rule 41 and the Fourth Amendment, as**
10:45:27AM 10 **envisioned by the Founders, and a lot of the case law that**
10:45:30AM 11 **we are relying on, didn't really anticipate.**
10:45:36AM 12 **But what is a guiding principle through all of that is**
10:45:40AM 13 **that whatever emerging complexities surround evidentiary**
10:45:43AM 14 **issues, and a defendant's right to present his case and**
10:45:47AM 15 **make his arguments to a jury, is that if there comes a**
10:45:52AM 16 **point where there is an irreconcilable conflict, something**
10:45:57AM 17 **very clearly has to prevail on behalf of the defendant.**
10:46:01AM 18 **Now, let me tell your Honor it is not just about**
10:46:07AM 19 **somebody sneaking into somebody's house and taking some**
10:46:10AM 20 **special property. Whatever photographs or dog toys or**
10:46:15AM 21 **anything Mr. Hampton was referring to in terms of search**
10:46:18AM 22 **warrants, that has nothing to do with this case. Because**
10:46:22AM 23 **what they want to submit is a core aspect of their**
10:46:25AM 24 **evidence. All right. So judicial oversight about how**
10:46:28AM 25 **they obtained and our ability to challenge the reliability**

10:46:31AM 1 **of their identifiers, and all the other issues that remain**
10:46:34AM 2 **unanswered in this case, is a key aspect of the search**
10:46:37AM 3 **itself.**
10:46:40AM 4 **And then, of course, there is the trial.**
10:46:46AM 5 **The government has not even condescended to**
10:46:50AM 6 **disclose -- despite our endless efforts to reach an**
10:46:54AM 7 **accommodation with them, they have not even condescended**
10:46:58AM 8 **to disclose how their identifiers were generated.**
10:47:02AM 9 **They have given us no information whatsoever about**
10:47:09AM 10 **whether their data storage, and all of the other things**
10:47:11AM 11 **that go to chain of custody, meet National Institute of**
10:47:15AM 12 **Science and Technology standards.**
10:47:17AM 13 **They have refused to answer questions about whether**
10:47:19AM 14 **their NIT went through the required vulnerabilities**
10:47:22AM 15 **equities process, which is where a panel of experts is**
10:47:25AM 16 **supposed to weigh the reliability and the need for this**
10:47:29AM 17 **type of technology against the public interest.**
10:47:33AM 18 **They have refused to discuss additional protective**
10:47:39AM 19 **measures.**
10:47:39AM 20 **And they did not seek an appeal of your February 17th**
10:47:43AM 21 **order, which the court invited them to do.**
10:47:48AM 22 **So we are at the point, your Honor, where our ability**
10:47:51AM 23 **to defend Mr. Michaud, the rubber for that is really**
10:47:55AM 24 **hitting the road. And I don't make a motion to dismiss**
10:48:00AM 25 **lightly. I haven't made it in any other case in my entire**

career.

But what the government is proposing as a lesser sanction is only going to benefit them. Mr. Michaud is facing a five-year mandatory minimum sentence because of the way the government has elected to charge this case. There is no difference between receipt and possession, except the fact that receipt carries that hammer.

They would like very much to see all these cases plead out without further litigation, despite the ongoing litigation about the suppression issues.

And, frankly, I don't know what our options are going to be in terms of trying to prepare this case for trial at this point, if the court either vacates its prior order or declines to take the remedy that I believe the Supreme Court has said is required at this juncture.

We have done everything possible to put before the court our theory of defense, anticipated testimony at trial, the reasons why this information is critical both to pretrial motions and our case to the jury. We have gone far beyond the proffer required by the Ninth Circuit, which is simply a good-faith showing that it is relevant and helpful. If there is something more I can offer the court at this time to explain why this goes to the heart of the defense, we will submit it. You merely need to instruct us.

But short of that, and absent a dismissal, it comes down to this: Mr. Michaud is not going to get a fair trial. And that is the first time I have said it to a court. And I have no other way of putting it to your Honor at this point.

Your Honor, we have briefed this thing to death. It has been going on for nine months. I don't know if I need to talk any more, but I, in trying to impress upon the court we have struggled with this in good faith, and in good faith with them as well, to try to find a middle ground, I just don't know what it is.

THE COURT: Response.

MR. HAMPTON: Your Honor, we are at a point where the court has found that the government has a legitimate interest in withholding its discovery. And given that legitimate interest, given the fact that the defense simply has not shown why this discovery will aid its cause, there is no reason to go further. That should be the end of the matter.

To address just one aspect, and I will be brief, nothing is preventing the defense from assessing and mounting whatever defense it believes is appropriate. I do not mean to suggest that this is a trial on the validity of the defense theories. What I wanted to underscore was the defense has what it needs to test its

10:51:59AM theories. If it believes that someone tampered with
10:52:05AM Mr. Michaud's devices, that someone else is responsible
10:52:09AM for what was found on those, then it should analyze those
10:52:13AM devices, it should determine the viability of that
10:52:18AM defense, and it should proceed with that defense as
10:52:20AM appropriate.
10:52:22AM If it believes that instead it should argue that the
10:52:28AM government used malware on Mr. Michaud's computer and
10:52:32AM won't tell him anything about that, and the jury should be
10:52:34AM distrustful of everything the government does --
10:52:39AM everything the government did in his case, he can also
10:52:41AM proceed under that theory. It is the defendant's choice.
10:52:45AM But simply because the defendant -- or the defense
10:52:48AM says that discovery is necessary or he can't possibly
10:52:55AM proceed with his defenses, just as he -- just as the
10:52:59AM defense asks the court not to take the government's word,
10:53:03AM we would ask the court not to simply accept the defense's
10:53:06AM word.
10:53:09AM Discovery and materiality -- Materiality does not
10:53:14AM exist by force of will on the part of the defendant, but
10:53:18AM by an actual showing that it is relevant. The defense has
10:53:21AM what it needs to do what it says it wishes to do. And I
10:53:25AM would urge the court not to sanction the government at
10:53:29AM all.
10:53:31AM THE COURT: Thank you, counsel. Just a second

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

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

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

I think we are right back where we were when I granted the order, with one exception, and that is the government is not required to produce this information. What difference that really makes is that the lawyers that are

10:57:03AM holding it are not subject to a contempt order for failure
10:57:07AM to produce it. They have a right to hold it back.
10:57:14AM It seems to me that the harder question that remains
10:57:21AM here is a question of what should be done about things as
10:57:28AM they stand, what sanctions, if any, should be imposed.
10:57:39AM The government has asked for more time on that. The
10:57:43AM defense, I think, asked me to consider the things I struck
10:57:47AM from this hearing. If you want more time, I have no
10:57:51AM objection to that. But it shouldn't be very much in terms
10:57:56AM of time.
10:58:11AM MR. HAMPTON: Your Honor, would the court be
10:58:13AM willing to give the government two weeks?
10:58:16AM THE COURT: A little louder.
10:58:17AM MR. HAMPTON: The government would propose
10:58:19AM responding on the question of sanctions in two weeks.
10:58:31AM MR. FIEMAN: Your Honor, we have no objection to
10:58:33AM any time the court deems appropriate for briefing on this
10:58:36AM issue, but we do have one concern, which we have raised
10:58:40AM previously and the court commented on in the February 17th
10:58:43AM hearing.
10:58:43AM THE COURT: I'm sorry.
10:58:44AM MR. FIEMAN: We do have one concern. As the court
10:58:48AM indicated, we cannot even -- if there is a plea offer from
10:58:50AM the government, we can't even assess that at this point.
10:58:52AM So we are concerned that additional time would allow the

government to just try and leverage the existing receipt count, with its five-year mandatory minimum, to try to shut this case down in the next few weeks. Mr. Michaud has given no indication that he wants to or could do that.

I would ask the court as a preliminary sanction, based on its finding this is material, that it dismiss the receipt count --

THE COURT: What?

MR. FIEMAN: The court dismiss, as a preliminary sanction, the receipt count. That would leave the possession count, which does not carry a mandatory minimum sentence.

We can then proceed to provide any additional information, which I think will leave the court dismissing the entire indictment. But otherwise we are twisting in the wind in a very vulnerable way because of the way the government elected to charge this case. And at a minimum, I don't think any mandatory minimum in this case should apply.

So that would be our preliminary request, that pending further briefing, if the government is requesting it, that the court dismiss the receipt count.

THE COURT: I don't think I can deal with sanctions piecemeal. It just doesn't make sense to me. I don't have a calendar in front of me.

11:00:43AM **MR. HAMPTON: Your Honor, I believe today is the**
11:00:45AM **12th. Two weeks would be the 26th, if my math is correct.**
11:00:54AM **THE COURT: I am thinking about laying a briefing**
11:00:57AM **schedule on you. The court will consider the attachments**
11:01:08AM **that I struck earlier, the attachments to Docket 191.**
11:01:21AM **Let's say any response by the government by the 20th, and**
11:01:30AM **any further pleading by the defense by the 26th.**
11:01:39AM **Do we have time on the 27th? You want to be heard on**
11:01:44AM **this, I suppose. Is there any time on the 27th?**
11:01:57AM **THE CLERK: 9:00 a.m. or 11:00 a.m.**
11:02:00AM **THE COURT: 9:00 or 11:00.**
11:02:05AM **MR. FIEMAN: Mr. Michaud is scheduled for surgery**
11:02:07AM **on the 26th. If we could move it up a day or two, he can**
11:02:13AM **be here on the 25th.**
11:02:18AM **THE COURT: By move it up, you mean before that?**
11:02:23AM **MR. FIEMAN: Your Honor, for example, the**
11:02:24AM **government's brief -- I don't know what the weekdays are,**
11:02:27AM **but let's say it is due on the 19th, and ours is due one**
11:02:31AM **week later, in trying to schedule the hearing for the**
11:02:33AM **25th -- It is just he is going to be out of commission**
11:02:37AM **for a little while as a result of the surgery.**
11:02:49AM **THE COURT: We might still be going on Young. Can**
11:02:54AM **we set this for 9:00 on the 25th? At 9:30 on the 25th, I**
11:03:32AM **will hear brief, brief, brief oral argument. The response**
11:03:40AM **from the government by the 19th, and anything further from**

11:03:46AM **the defense by the 23rd -- by the end of the workday on**
11:03:54AM **the 23rd.**
11:03:57AM **Further briefing should be limited to the question of**
11:04:03AM **sanctions based on the oral rulings that I have made**
11:04:09AM **today.**
11:04:11AM **The motion to reconsider is granted in part, in that**
11:04:19AM **the government need not produce the code information that**
11:04:29AM **I requested and ordered in my previous order. But it**
11:04:35AM **remains that the defendant has a right to that**
11:04:41AM **information. So that's where we are, and we will consider**
11:04:51AM **sanctions on that day.**

(Proceedings adjourned.)

C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

_____
/s/ Barry Fanning
Barry Fanning, Court Reporter