

The Honorable Robert J. Bryan

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY MICHAUD,

Defendant.

NO. CR15-5351RJB

GOVERNMENT’S EXPEDITED
MOTION TO STRIKE DECLARATIONS
OR CONTINUE HEARING

Noting Date: May 10, 2016

The United States of America, by and through undersigned counsel, files this motion to strike recently-filed defense declarations, or in the alternative, to continue the May 12, 2016, hearing on the government’s motion for reconsideration (Dkt. 165).

Along with his reply brief opposing the government’s motion for reconsideration (Dkt. 191), Defendant Jay Michaud filed three expert declarations relating to several highly technical aspects of this case and the ongoing discovery dispute. It should be noted that although the defense captioned its pleading as a reply brief, the portion pertaining to the government’s motion for reconsideration should be considered a surreply (for which Michaud has not sought leave to file). The only portion of his brief

1 that can conceivably be considered a reply is that pertaining to his renewed motion to
2 dismiss, which he did not file separately, but instead included with his opposition to the
3 government's motion for reconsideration. *See* Dkt. 178.

4 These materials should have been filed, if at all, with the defense's opposition to
5 the government's motion. By instead filing them after the government filed its reply and
6 only three days before the hearing, the defense has placed the government at a distinct
7 disadvantage. As a result, these expert declarations should be stricken as improperly
8 filed. Alternatively, the Court should continue the hearing set for May 12, 2016, and
9 reset it to a date at least two weeks later in order to permit the government adequate time
10 to review this new information and respond to the points raised.

11 **A. The declarations filed with Michaud's reply brief should be stricken.**

12 The expert declarations filed alongside Michaud's reply brief should be stricken.
13 The defense was well aware of the potential relevance of the matters contained within
14 these declarations at the time it filed its opposition to the government's motion for
15 reconsideration. Indeed it had weeks to prepare that opposition and any accompanying
16 declarations. The defense also could have sought additional time if necessary. After all,
17 the parties have worked constructively throughout these proceedings, including with
18 respect to the motion for reconsideration, to craft briefing schedules that permitted each
19 side the necessary time to prepare pleadings. Instead, it filed its opposition and saved
20 these declarations for its reply—which, at least insofar as it pertained to the government's
21 motion to reconsider, the defense was not permitted to file without also seeking leave of
22 the Court.

23 The defense has placed the government at a significant disadvantage. With only
24 three days before the hearing on the government's motion, there is insufficient time for
25 the government to review these declarations with its own experts and prepare an adequate
26 response. The defense had every opportunity to present these declarations with its
27 opposition or seek more time if necessary. That failure has now placed the government at
28 a strategic disadvantage, and the appropriate remedy is for those items to be stricken.

1 **B. Alternatively, the Court should continue the hearing on the government's**
2 **motion for reconsideration to permit the government adequate time to review and**
3 **respond to the defense's expert declarations.**

4 Alternatively, the government asks that the hearing on the government's motion
5 for reconsideration currently set for May 12, 2016, be continued at least two weeks. The
6 declarations that accompanied the defense filing concern highly technical matters and
7 claims about how these apply to the evidence in this case. These claims require careful
8 factual, technical, and legal review. Additional time will give the government an
9 opportunity to consult with technical experts and craft an appropriate response.

10 DATED this 10th day of May, 2016.

11 Respectfully submitted,

12 ANNETTE L. HAYES
13 United States Attorney

STEVEN J. GROCKI
Chief

14
15 /s/ Matthew P. Hampton
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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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/Emily Miller

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