

The Honorable Robert J. Bryan

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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 UNOPPOSED
MOTION TO DISMISS INDICTMENT
WITHOUT PREJUDICE

Noting Date: March 17, 2017

I. INTRODUCTION

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, the government moves to dismiss the indictment in this case without prejudice. The suppression order entered by the Court in May 2016 has deprived the government of the evidence needed to establish Defendant Jay Michaud’s guilt beyond a reasonable doubt at trial. Because the government remains unwilling to disclose certain discovery related to the FBI’s deployment of a “Network Investigative Technique” (“NIT”) as part of its investigation into the Playpen child pornography site, the government has no choice but to seek dismissal of the indictment.

The government fully and forcefully litigated the discovery issue that gave rise to the Court’s suppression order. It has undertaken this litigation in good faith and in an

1 effort to balance the many competing interests that are at play when sensitive law
2 enforcement technology becomes the subject of a request for criminal discovery. And
3 dismissal without prejudice is therefore warranted. Counsel for the United States has
4 conferred with counsel for the defendant, Colin Fieman, who has stated that Defendant
5 does not oppose the government's request.

6 II. DISCUSSION

7 The Ninth Circuit has long held that Rule 48(a) requires dismissal without
8 prejudice "provided [the government] is not acting in bad faith." *United States v.*
9 *Hayden*, 860 F.2d 1483, 1488 (9th Cir. 1988); *see also United States v. W.R. Grace*, 429
10 F. Supp. 2d 1207, 1247 (D. Mont. 2006) ("Dismissal under Rule 48(a) is without
11 prejudice unless the court finds that the dismissal is sought for some improper purpose.").
12 Indeed, a district court is "'duty bound' to grant the government's Rule 48(a) motion to
13 dismiss an indictment without prejudice unless 'it specifically determines that the
14 government is operating in bad faith' in pursuing the motion. *United States v. Mujahid*,
15 491 F. App'x 859, 860 (9th Cir. 2012) (quoting *Hayden*, 860 F.2d at 1487).

16 The government must now choose between disclosure of classified information
17 and dismissal of its indictment. Disclosure is not currently an option. Dismissal without
18 prejudice leaves open the possibility that the government could bring new charges should
19 there come a time within the statute of limitations when and the government be in a
20 position to provide the requested discovery.

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1 The government has not sought unfair advantage over Michaud, nor has it acted
2 with any improper motive. It simply acted to protect highly sensitive information from
3 criminal discovery as was its obligation. The Court should therefore dismiss this case
4 without prejudice.

5 DATED this 3rd day of March, 2017.

6 Respectfully submitted,
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9 United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, 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

EMILY MILLER

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