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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 3:17-cr-00095-SLG
	)	
MATTHEW WILLIAM SCHWIER,	)	
	)	
Defendant.	)	
_____	)	

**MOTION TO DISMISS COUNTS 1 AND 2  
AND REGULATE PRODUCED DISCOVERY**

The United States, through undersigned Assistant United States Attorney, pursuant to Federal Rules of Criminal Procedure 48 and 16(d), moves the Court for an order dismissing Counts 1 and 2 of the Fourth Superseding Indictment and ordering the defense team to certify that they have destroyed all evidence received relating to Torrential Downpour.

## **A) Reasons for dismissal of Counts 1 and 2**

BitTorrent is a peer-to-peer network used by computer-savvy individuals to attempt to hide their receipt and collection of child pornography. Law enforcement officers use Torrential Downpour software to identify distributors of child pornography using the BitTorrent network.

In this case, the Court found “persuasive” the government’s evidence that release of Torrential Downpour to the public would undermine the software’s effectiveness as a law enforcement tool. *See* Dkt. 231 at 9-10. Over an approximate four-month period, the government has diligently worked to craft testing environments and protective orders with the goals of, both, protecting Torrential Downpour from disclosure, and, also, permitting the defense to prepare for trial, thereby satisfying both United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012), and Roviaro v. United States, 353 U.S. 53 (1957). The United States proposed three protective orders, or terms for protective orders, (Dockets 244-1, 253-4, and 288-1) in its attempt to achieve those objectives.

At Dkt. 304, the Court denied the government’s third proposed protective order<sup>1</sup>,

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<sup>1</sup> At the Final Pretrial Conference on January 14, 2020, the Court indicated that it was persuaded by the defense expert’s affidavit (Dkt. 297 at 1-2), which alleged that the government had already released the software by “repeated missteps.”

In an abundance of caution, and to ensure clarity in the record, the government respectfully notes that, to the contrary, the government did not err in producing the virtual machines containing the software; rather, it did so pursuant to the Court’s order at Dkt. 231.

The affidavit at Dkt. 297 is, apparently, referring to virtual machines produced pursuant to the Order at Dkt. 231, which ordered the validation testing in Anchorage and established the original protective order in this case. Specifically, at Dkt. 231 at 12-13, the Court ordered that “the validation process described at Docket 219-1 shall be carried out *U.S. v. Schwier*

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which, in the opinion of the government's subject-matter experts, proposed terms that were essential to protect Torrential Downpour.

The Court gave the government the alternative to “opt to dismiss Counts 1 and 2; if it does so, it is not required to further produce the Torrential Downpour software to the defense.” Dkt. 243 at 7. Under FRCrP 48, “[t]he government may, with leave of court, dismiss an indictment, information, or complaint.”

Therefore, pursuant to FRCrP 48, the government respectfully moves the Court to dismiss Count 1 and Count 2 of the Fourth Superseding Indictment.

**B) Destruction of sensitive evidence and vacation of pending discovery orders**

As indicated in Dkt. 310, the government respectfully requests the Court order that the United States does not have to produce a revised redacted version of the Torrential Downpour manual (per Dkt. 306), nor must it produce the software itself (per Dkt. 305). The government respectfully requests the Court order that the defense file certification that Mr. Herz and Mr. Fischbach have destroyed, and will not access in the future, the Torrential Downpour manuals (including sealed Dkt. 299 and Dkt. 300, and the version produced in discovery); and, further, will not access the virtual machines the government produced to

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for versions 1.15 and 1.23 of the Torrential Downpour software on November 4, 2019, and on November 5, 2019 as necessary.”

Dkt. 219-1 at paragraph 3 includes the following: “Moreover, the computers running the target VM and investigative VM will be available for forensic examination by the defense expert.”

Accordingly, the government lawfully produced, per the Order at Dkt. 231, the virtual machines used during the validation testing that was described at Dkt. 219-1. Those virtual machines contained the software.

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the defense at the Orange County Regional Computer Forensic Laboratory (OCRCFL), pursuant to the Order at Dkt. 231, and referred to by the defense at Dkt. 297.

RESPECTFULLY SUBMITTED January 23, 2020, in Anchorage, Alaska.

BRYAN SCHRODER  
United States Attorney

s/ Jonas M. Walker  
JONAS M. WALKER  
Assistant U.S. Attorney  
United States of America

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2020,  
a true and correct copy of the foregoing  
was served electronically on the following:

Robert M. Herz  
Attorney for Defendant

s/ Jonas M. Walker  
Assistant U.S. Attorney  
Office of the U.S. Attorney