UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:14-cr-140-SDM-MAP

THOMAS E. BIDDIX,
KEVIN BRIAN COX a/k/a Brian Cox,
and LEONARD I. SOLT,
_____/

GOVERNMENT'S MOTION TO DISMISS COUNTS 1-12 OF THE INDICTMENT

Pursuant to Fed. R. Crim. P. 48(a), the Government moves to dismiss Counts 1-12 of the Second Superseding Indictment (Doc. No. 240) as to all defendants without prejudice.

I. GOVERNING LAW

Pursuant to Fed. R. Crim. P. 48(a), the government may dismiss an indictment prior to trial with leave of court. *See* Fed. R. Crim. P. 48(a). As a general rule, dismissals under Rule 48(a) are without prejudice to the government's right to reindict for the same offense. *See United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991); *United States v. Beidler*, 417 F.Supp. 608, 616 (M.D. Fla. 1976). Dismissal with prejudice is appropriate, however, where a prosecutor's request for dismissal is made in bad faith. *See United States v. Dyal*, 868 F.2d 424, 428 (11th Cir. 1989); *United States v. Welborn*, 849 F.2d 980, 984 (5th Cir. 1988). *See also United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (noting that Rule 48(a)'s "leave of court" requirement is designed "to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy"). When the court considers a prosecutor's motion under Rule 48(a), it must begin with the presumption that the prosecutor acted in good faith. *See Matta*, 937 F.2d at 568; *Welborn*, 849 F.2d at 983. To overcome the presumption of good faith, the

defendant must show that the dismissal is in bad faith or that the defendant is prejudiced in his ability to challenge the prosecutor's motives because the government failed to articulate its reasons for the dismissal. *Matta*, 937 F.2d at 568. *Cf. United States v. Hayden*, 860 F.2d 1483, 1487 (9th Cir.1988) (holding a district court is "duty bound" to grant the government's Rule 48(a) motion to dismiss an indictment without prejudice unless "it specifically determines that the government is operating in bad faith" in pursuing the motion).

II. DISCUSSION

This case revolves around the defendants' involvement with a company called Associated Telecommunications Management Service ("ATMS") and its involvement with the Lifeline program administered by the Universal Service Administrative Company ("USAC"). One of the critical questions in the case is whether ATMS collected necessary Lifeline certification forms from its customers. Throughout the case, the Government has focused on whether ATMS collected the necessary forms in hard-copy form; the evidence demonstrated that ATMS had collected only approximately 30% of the necessary forms, and that the defendants all knew of this significant deficiency.

In early December 2015, the Government interviewed the former director of USAC's low income program. During that interview, the former director for the first time stated that during the relevant time period (2009-2011), USAC would have accepted audio files as a form of certification under the Lifeline program. Prior to that interview the evidence, obtained from multiple sources, was uniform that USAC would not have accepted such audio certifications. Accordingly, the Government had not inquired further on this issue until this interview. The Government recognized this as new information, and memorialized it in an FBI FD-302, which

was approved by the FBI on December 18, 2015 and produced to the defense on December 30, 2015.

On December 28, 2015, counsel for Defendant Cox filed a trial brief which for the first time specifically raised the important legal question of whether audio files could be "signed" Lifeline certification forms under the E-Sign Act, 15 U.S.C. § 7001 *et seq.* (See Doc. No. 404 at 15.) Defense counsel previously raised the validity of audio files as a potential defense (*see, e.g.*, Doc. No. 251 at 5), but not with the specificity of Defendant Cox's trial brief.

On January 1, 2016, counsel for Defendant Cox contacted Government counsel and further elaborated the arguments made in Defendant Cox's trial brief and their interplay with the interview of the former USAC low income program director. That night, government counsel re-interviewed the former director on these subjects, and promptly disclosed the additional information the Government learned from that interview to the defendants.

This series of events raised new legal and factual questions about the evidence in this case: (1) whether the audio recordings in this case are legally and factually sufficient certifications for the purposes of the USAC Lifeline program and (2) whether the defendants were aware of and/or caused any deficiencies in the audio recordings.[1] A preliminary review indicates that, like the written certifications, the audio files collected by ATMS were deficient in quality and quantity; however, the Government has not completed its investigation into these two issues and cannot today conclude with certainty that the audio certifications were deficient and defendants knew it. For example, the government produced 1.4 million audio files and has not

[1] After learning about these issues, the Government asked Defendant Cox to consent to a brief continuance to further investigate these issues. Defendant Cox, as is his right, declined to consent to the continuance. Because Defendant Cox raised these issues and declined to consent to a continuance, the Government did not inquire into the positions of the other defendants.

systematically reviewed all of those files to address whether the audio recordings are legally sufficient.

It is possible that the Government will be able to resolve the legal and factual issues raised by the defense, but it is also possible that the Government will not. Moreover, should the Government renew the charges in this case, defendants will of course maintain their ability to raise the same defenses in any such action. This dismissal is not made in bad faith, and the Government has articulated its reasons for the dismissal. *Matta*, 937 F.2d at 568. Therefore, the Court should dismiss Counts 1-12 without prejudice.

This case is similar to *United States v. Hovind*, Case No. 3:14cr91/MCR, 2015 U.S. Dist. LEXIS 65228 (N.D. Fla. May 18, 2015), in which the Government moved to dismiss the remaining charges against the defendants shortly before trial. *Id.* at *1-*2. The Government in *Hovind* moved to dismiss the charges on the eve of trial "based on the Defendants' concerns, expressed in their motions, regarding the technical sufficiency of the Superseding Indictment and to ensure that the Defendants are adequately apprised of the nature of the accusation against them." *Id.* at *4. Applying *Matta*, the Court found "that the Government's motion is brought in good faith and is due to be granted without prejudice." *Id.* The same is true here.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Counts 1-12 without prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Counsel of record.

/s/ Thomas B.W. Hall
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