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15
 16 IN THE UNITED STATES DISTRICT COURT
 17 FOR THE DISTRICT OF ARIZONA
 18

19 United States of America,
 20 Plaintiff,
 21 vs.
 22 Michael Lacey et al.,
 23 Defendants.
 24

Case No. 2:18-cr-00422-SMB
MOTION TO CONTINUE TRIAL

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1 **MOTION**

2 The Defendants, by and through their undersigned attorneys, pursuant to the Fifth and
3 Sixth Amendments to the Constitution, move this Court to continue the current trial date for a
4 period of approximately five (5) months to October 1st or 6th, 2020, with a concomitant
5 extension of related deadlines, for the reasons that such continuance is necessary to ensure
6 adequate preparation for trial, ensure effective assistance of counsel, and facilitate a fair trial. The
7 need for continuance is based on several factors, including the voluminous amount of discovery
8 involved and the need to investigate and prepare the defense of this complex and extensively
9 pleaded case.

10 This motion is based on the following memorandum of points and authorities, the file in
11 this matter, and such and further argument and evidence as may be presented.

12 It is expected that excludable delay pursuant to 18 U.S.C. section 3161(h) will occur as a
13 result of this motion or an order based thereon.

14 The government has informed Defendants that it opposes a continuance of the trial date.
15

16 **MEMORANDUM**

17 **I. Continuance of the Trial Date is Necessary for Several Reasons**

18 **A. Scheduling Orders**

19 The original scheduling order of the Court (Judge Logan) called for a December 2, 2018,
20 discovery cutoff for known Rule 16 materials, a date 13 months before the then-scheduled trial
21 date of January 15, 2020. This Court later amended the scheduling order to, in pertinent part, to
22 move the trial date to May 5, 2020.

23 The discovery deadlines appropriately factored in necessary time to adequately prepare
24 for the trial, assuming discovery would be provided by deadlines imposed. The deadlines
25 imposed have not been met for a variety of reasons, resulting in defendants being unable timely
26 review and utilize critical discovery.
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1 **B. The Backpage IT System**

2 Among other things, central to the allegations in the case is the Backpage server system
3 (“the IT System”), an interactive system that housed, maintained and published the ads
4 referenced in the Superseding Indictment (“SI”), as well as significant information related to
5 Backpage’s operations and procedures.¹ To date, as set forth below, defense counsel, through
6 no fault of their own, have been unable to review the IT System.

7 The government seized the IT System prior to indictment in April 2018. Due to
8 complexities in trying to produce it, the government was not able to produce the IT System by
9 the December 2018 Rule 16 discovery deadline. About a week after the discovery cutoff, on
10 December 10, 2018, the government sent a letter indicating that information would require more
11 time to be produced:

12 “[The] raw database files cannot be simply reviewed or loaded into
13 a viewer to reconstruct the data. We are currently working on a
14 solution to review these database files and correlate the images
15 posed to the image server to the posts from the database files. . . .
16 Once all servers are imaged, investigators will be able to provide
hash verified image copies of all imaged drives. Due to the capacity
of the Backpage servers this will be a time intensive undertaking
and the imaged copies will be distributed over hundreds of hard
disks.”

17 In or about February 2019, the government informed the defense that some, but not all,
18 portions of the IT System would be available for pickup at the FBI Office in Phoenix, in the
19 form of hard drives. On March 8 and 11, 2019, counsel for Defendant Spear picked up
20 approximately 56 drives. Those 56 hard drives contained forensic images of, or data from, some
21 of the over 100 seized servers (with those servers containing an unknown number of hard drives).
22 Defendants thereafter engaged forensic expert Tami Loehrs to assist in accessing the information
23 on the 56 hard drives. In April, May and June, Defendants and the government dialogued
24 multiple times about Defendants’ expressed inability to access the information on those hard
25 drives, but reached an impasse on how to resolve the issues.

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27
28 ¹ The Court heard extensive evidence regarding the capabilities of the System during
hearings in October and December 2019 related to Defendants’ Motion to Compel Production
of the IT System.

1 On June 19, 2019, Defendants filed a Motion to Compel Discovery premised on
2 Defendants' position that they were unable to reasonably review the information on the IT
3 System in the manner produced, and seeking an Order that the government produce the IT
4 System to Defendants in the same operable fashion as when seized. The Court set the motion
5 for hearing on September 13, 2019, and thereafter held related evidentiary hearings on October
6 3, October 25, and December 2, 2019. On January 7, 2020, the Court issued its order denying
7 the motion, finding among other things that the IT System was reasonably usable in the form
8 produced by the government, if Defendants retained an expert skilled in SQL and ZFS.
9 Thereafter, Defendants set out to retain an expert(s) with those skills to attempt to access the
10 information in the IT System, with the benefit of the information provided by the government
11 during the hearings. Defense counsel has sent the government's IT System production to a
12 qualified expert, and will be working with that expert to try to access and begin review of the IT
13 System.

14 Separate from Defendants' concerns about the form of the government's production of
15 the IT System, the government acknowledged on November 19, 2019, that three hard drives it
16 provided to defense counsel in March 2019 were physically defective, and it agreed to replace
17 those drives. The government identified one of the defective drives as containing part of a disk
18 array from the master database server from Amsterdam, which contained all marketplace
19 database MySQL files. The government identified two of the defective drives as containing part
20 of a disk array from the image server in Amsterdam, which contained all the images from
21 Backpage ads. The government has just made the replacements for the defective hard drives
22 available to Defendants, informing Defendants yesterday, on January 27, 2020, that the drives
23 were ready to be picked up.

24 The information on the IT System is central to the case and vital to defense preparation.
25 Among other things:

- 26 • The government's allegations in the SI sets forth at least 50 particular ads; the IT
27 System contained information about particular ads and advertisers, as well as relevant
28 potential historical information about those same ads and advertisers.

- 1 • The SI makes broad allegations about common practices at Backpage, alleging for
2 example that Backpage utilized reciprocal links to known prostitution sites and agreed
3 to post ads of known pimps and prostitutes; the IT System contained information
4 indicating banner ads and relationships with particular customers.
- 5 • The SI alleges Backpage laundered money by using particular forms of payment; the
6 IT System contained information about costs and payment methods in general, as well
7 as for particular ads and advertisers.²

8 Defendants cannot adequately prepare for trial without review of and access to the
9 significant information on the IT System.

9 C. Voluminous Document Production

10 In addition to ferreting out the data relevant to the SI from the millions of advertisements
11 and millions of pages of other information on the IT System that would put much of the evidence
12 in perspective, the government has produced millions of pages of discovery, including hundreds
13 of thousands of pages of materials produced since the December 2018, Rule 16 deadline.
14 **Indeed, just last month, *over a year after the initial discovery cutoff*, on December 13 and**
15 **17, 2019, the government produced another 355,000 pages of documents.**³ The December
16 production was password protected, with a password that did not work. The government
17 provided a corrected password to Defendants on January 3, 2020. If Defendants correctly
18 understand the genesis of the large productions the government just made, they expect the
19 government to make additional sizeable productions of similar documents in the future.

20
21 ² The portion of the IT System containing payment information was not produced in
22 March 2019 with the ad information. The government made that information available for
23 pickup by Defendants on July 29, 2019. And, as far as Defendants have been able to ascertain,
24 the government did not extract the SQL tables from the payment system from the disk images –
25 so the data will not be accessible in the manner set forth by Mr. Frost with the ad data during the
26 recent hearings. Therefore, Defendants have been unable to access any payment information
27 and do not currently have any estimate of when, or if, they will be able to access that information.

28 ³ The government's cover letters for this production lists the page amounts as
approximately 158,000 pages. On review, however, the government appears to have only Bates
stamped certain pages but not all, resulting in a lower page count. Defendants' preliminary review
of the production indicates it consists of over 355,000 pages.

1 Review of approximately 50 documents an hour by a first-tier reviewer is standard in the
2 legal industry.⁴ The 355,000 pages of documents recently produced consist of wide-ranging
3 categories of documents, of varying page lengths. Defendants are in the process of organizing,
4 culling, and reviewing the documents, and are not yet able to assess how long it will take to
5 properly review them all; but they clearly will take significant time to review.

6 In short, Defendants still require several months to get through the written discovery
7 production, and thereafter make use of it for investigation and defense preparation for trial.

8 **D. Witness Identification and Preparation**

9 The government provided a witness list on April 1, 2019, that represented it intended to
10 call over 100 witnesses at trial. On January 27, 2020, the government provided a revised list
11 indicating it intends to call over 90 witnesses; 21 of those witnesses are new witnesses who were
12 not on the initial witness list. The deadline for providing *Jencks* and impeachment materials was
13 over four months ago (August 2019), and Defendants are still awaiting production of additional
14 *Jencks*. Among other things, Defendants cannot properly prepare or evaluate witnesses for cross
15 examination and/or consider witnesses to affirmatively present in a defense case without review
16 of the IT System and the information on it relevant to the allegations in the SI, as well as *Jencks*
17 and other materials related to those witnesses. The “who, what, why and where” revealed by
18 those materials as they relate to allegations in the SI will trigger appropriate investigation and will
19 have significant impact on defense counsels’ decisions as to witnesses to call at trial.

20 **II. Conclusion**

21 For all these reasons, Defendants require additional time to adequately prepare for trial.
22 Defendants believe a continuance until at least October 2020 is necessary to provide sufficient
23 time for adequate trial preparation.

24 Excludable delay pursuant to 18 U.S.C. § 3161(h) will occur as a result of this motion or
25 from an order based thereon.

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27 ⁴ David Degnan, *Accounting for the Cost of Electronic Discovery*, 12 Minn. J. L. Sci. & Tech. 151-
28 190 (2011) (noting that reviewer can cover about 400 documents a day).

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RESPECTFULLY SUBMITTED this 28th day of January 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2020, I electronically transmitted the attached document to the Clerk of the Court, using the CM/ECF System, for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants who have entered their appearance as counsel of record.

/s/ Toni Thomas
Toni Thomas

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