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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-PHX-SMB

**DEFENDANTS' STATUS REPORT
 AND REQUEST FOR
 CONFERENCE ADDRESSING
 EXHIBITS, WITNESSES, AND JURY
 INSTRUCTIONS**

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1 Defendant James Larkin, Michael Lacey, Scott Spear, John Brunst, Andrew Padilla, and
 2 Joye Vaught (collectively, “Defendants”) submit this status report and request for a conference
 3 to address the government’s proposed witness and exhibit lists and jury instructions in advance
 4 of the commencement of trial. While Defendants believe a three-week continuance is necessary
 5 due to the ongoing COVID-19 infection of one defense counsel and his staff,¹ Defendants
 6 believe the Court and parties can use the time in the interim to address witnesses, exhibits, and
 7 jury instructions in a way that will reduce the overall length of trial and allow trial to conclude
 8 within the previously scheduled timeframe.

9 **A. Defendants are concerned for the safety of all trial participants given the**
 10 **rise of the COVID-19 Delta variant.**

11 As this Court is aware from the previously filed under seal Notice (Dkt. 1184) and Motion
 12 to Continue Trial (Dkt. 1198), one of the defense attorneys and his staff contracted COVID-19
 13 despite being vaccinated. The attorney and his staff have been symptomatic and quarantined for
 14 nearly two weeks and remain symptomatic and quarantined as of this filing. Consequently,
 15 Defendants’ ability to jointly prepare for trial has been severely limited. Afflicted counsel has
 16 requested a three-week continuance at this time, though may require a longer continuance
 17 depending on his symptoms and recovery. Other Defendants join in the request for the three-
 18 week continuance to protect all Defendants’ due process rights.

19 Defendants fear that counsel’s breakthrough infection, fortunately detected prior to
 20 exposing 40-50 daily trial participants, is the tip of the iceberg should trial begin in two weeks.
 21 Amidst the rise of a new dominant COVID variant (Delta), Defendants remain concerned for the
 22 safety of the jury and all trial participants. For example, as of July 19, 2021, 82% of COVID-19
 23 cases sampled in the United States were the Delta variant as opposed to 2% in April 2021.²
 24 Additionally, the rate of COVID-19 cases is increasing. Maricopa County had over 5,000 reported
 25 cases of COVID-19 between July 27, 2021, and August 2, 2021, placing it in the CDC’s highest

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 27 ¹ See Motion to Continue Trial, filed under seal today at Dkt. 1198.

28 ² See “Demystifying the Delta Variant with Data,” Johns Hopkins University of Medicine
 (July 19, 2021), available at <https://coronavirus.jhu.edu/pandemic-data-initiative/news/demystifying-the-delta-variant-with-data> (last accessed August 3, 2021).

1 level, and community transmission in Maricopa County is also currently at the CDC's highest
 2 level.³ On August 3, 2021, Maricopa County reported 1,974 new cases and 30 new deaths that day
 3 alone.⁴ Today, Maricopa County reported another 2,289 new cases and 11 new deaths since
 4 yesterday.⁵ Further, the CDC reports that COVID-19 Delta variant infections are associated with
 5 a higher viral load that makes the infected individual contagious for a longer period of time (a
 6 median of 18 days for Delta infection vs. 13 days for non-Delta infection) and that the risk of
 7 reinfection with Delta may be higher.⁶ On July 29, 2021, the CDC also reported that breakthrough
 8 cases of Delta amongst vaccinated individuals may be as transmissible as non-variant COVID-19
 9 amongst unvaccinated individuals, may cause a more severe disease course.⁷ The situation is
 10 expected to get worse: the Institute for Health Metrics and Evaluation (IHME), an independent
 11 global health research center at the University of Washington, forecasts that Arizona will have over
 12 6,700 cases per day by August 23, 2021, and over 10,000 cases per day by September 14, 2021.⁸

13 Given the current pandemic and public health crisis, it is almost inevitable that commencing
 14 trial at this time may very likely endanger the jury (16 jurors), all trial participants (nearly 30
 15 attorneys and support staff on both sides), court staff, and their families, particularly with 88
 16 witnesses (and counting) from across the country for the government's case-in-chief. It is also
 17 predictable that trial will be disrupted by frequent breaks when any of the 40-50 daily participants
 18 and non-sequestered jurors have any symptoms or exposure to anyone with symptoms. Separate

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 20 ³ See COVID Data Tracker, Centers for Disease Control and Prevention, *available at*
<https://covid.cdc.gov/covid-data-tracker/#county-view> (last accessed August 3, 2021).

21 ⁴ See COVID-19 Data, Arizona Department of Health Services, *available at*
<https://www.azdhs.gov/covid19/data/index.php> (last accessed August 3, 2021).

22 ⁵ See COVID-19 Data, Arizona Department of Health Services, *available at*
 23 <https://www.azdhs.gov/covid19/data/index.php> (last accessed August 5, 2021).

24 ⁶ See "Improving communications around vaccine breakthrough and vaccine effectiveness,"
 25 Centers for Disease Control and Prevention (July 29, 2021), *available at*
<https://www.azdhs.gov/covid19/data/index.php> (last accessed August 3, 2021).

26 ⁷ *Id.*

27 ⁸ See Arizona: Daily infections and testing, Institute for Health Metrics and Evaluation,
 28 University of Washington, *available at* <https://covid19.healthdata.org/united-states-of-america/arizona?view=infections-testing&tab=trend&test=infections> (last accessed August 5, 2021).

1 from the three-week continuance, to protect Defendants' due process rights from repeated
2 interruptions and jurors focusing on safety concerns rather than the trial, the Court and counsel
3 should address how this trial can proceed reasonably unabated in the current environment.

4 **B. The government's final exhibit and witness lists ignore the Court's motion**
5 **in limine rulings and contain irrelevant, cumulative, confusing, and time-**
6 **wasting exhibits and witnesses.**

7 The government's final exhibit list is *159 pages* and contains more than *2,500 separate*
8 *exhibits* (including numerous exhibits with subparts), totaling tens of thousands of pages. *See*
9 Exhibit A, Government's Final Exhibit List, August 2, 2021, filed under seal. Many of these
10 proposed exhibits are irrelevant, cumulative, confusing, time-wasting, and at odds with the Court's
11 rulings on the motions in limine. Similarly, the government's final witness list includes 88
12 witnesses, many of whom are also at odds with the Court's rulings on the motions in limine. Many
13 of the government's exhibits and witnesses are clearly inadmissible in this trial. Moreover, if the
14 government is permitted to introduce all its exhibits and call all its witnesses, it would obviously
15 take more than the 51 trial days that the Court has set aside for jury selection, opening arguments,
16 the government's case, six different Defendants' cases, closing arguments, and jury deliberations.
17 Defendants request that the Court address the government's limitless exhibit and witness lists
18 pretrial at the August 9 conference to both shorten the length of trial and limit the jurors' time that
19 will be wasted during sidebars and objections in the course of trial.

20 For example, one of the government's 2,500+ listed exhibits is a 6,000+- line excel
21 spreadsheet chronicling over 5,500 press articles related to Backpage.com. (Gov't. Exh. 260).
22 Another exhibit is an over 200-page transcript of a city council meeting discussing Backpage (Gov't
23 Exh. 152). Defense counsel does not believe there are any valid bases on which to admit such
24 "evidence." As Defendants argued in their response to the government's outstanding motion in
25 limine to determine admissibility of certain evidence (Dkt. 1139), much of the evidence the
26 government intends to introduce is irrelevant, confusing, cumulative, or time-wasting, violates Fed.
27 R. Evid. 401 or the rule against hearsay, and also should be excluded under Fed. R. Evid. 403.

28 Further, the government's final exhibits list indicates that it is not taking the Court's rulings
seriously. For example, the Court ruled that the government was precluded from presenting a

1 letter from the Auburn Theological Society without redacting statements on morality and was
2 precluded from presenting a Chase Bank email without redacting its statements on ethics (Dkt.
3 1159 at 3-4), yet the government finalized its exhibit list without producing redacted versions of
4 these exhibits.

5 Similarly, the government's final witness list also ignores the Court's ruling on the motions
6 *in limine*. The Court ruled that the government may only present *one expert* as to various topics
7 (Dkt. 1081), but the government's final witness list contains the exact same experts, including all
8 of the experts who were on its witness list prior to the Court's ruling. The Court also ruled that
9 the government was precluded from introducing details of murders (Dkt. 1155), but the
10 government's final witness list contains the exact same witnesses, number of witnesses, and
11 numerous exhibits related to murders that were on its lists prior to the Court's ruling.

12 Equally troubling, the government's final list remains incomplete as the first witness is still
13 identified as "NAAG members." Defense counsel cannot competently prepare cross examination
14 for this currently unknown witness. And despite numerous requests, the government has still not
15 provided any *Jencks* materials, interview notes, or FBI 302s for at least six of its current witnesses.

16 Additionally, defense counsel cannot and should not be required to prepare to cross
17 examine witnesses and evidence that is not admissible. The government's lists of 2500+ exhibits
18 and 88 witnesses prohibit the defense from preparing for trial in an efficient way. Defendants
19 should only have to prepare for a realistic and reasonable list of witnesses and exhibits.

20 The Court has repeatedly reminded the parties that this trial is about *50 ads and six*
21 *Defendants*, and not about every single allegation ever levied against Backpage.com, a company
22 that certain of the Defendants sold in April 2015. *See* Court's order at Dkt. 946 at 13
23 ("[Defendants] were not indicted for facilitating the amorphous notion of 'prostitution.' They were
24 indicted for facilitating (via publishing ads) on fifty distinct occasions where prostitutes,
25 prostitution-related businesses, or other groups were involved in the business of prostitution.");
26 *see also* Transcript of December 4, 2020, Hearing ("And I think one of the key things in my reason
27 for denying the recusal is that this case is not about Backpage. Backpage was prosecuted in a
28 separate case, entered a plea in a separate case. This case is about these individual defendants and

1 whether they had specific knowledge of these ads as facilitating illegal activity.”). The Court has
2 set aside and asked the potential jurors to set aside 51 days for this trial, which includes jury
3 selection, opening statements, the government’s case-in-chief, six different Defendants’ cases
4 (which the defense estimates will take approximately 15 trial days), closing arguments, and jury
5 deliberations. Out of respect for the jurors, and to protect Defendant’s due process rights, it is
6 imperative for the Court to limit the government’s case to the charges against Defendants and
7 preclude irrelevant, cumulative, confusing, and time-wasting witnesses and exhibits. Defendants
8 submit that setting a pre-trial hearing to address many of the government’s proposed witnesses
9 and exhibits will appropriately result in significant shortening of the trial length.

10 **C. Defendants request that the Court hold the jury charge conference prior to**
11 **opening arguments.**

12 This prosecution of first impression charges Defendants with a novel, unprecedented
13 theory of culpability that has never been put to any jury. Defendants must know the legal
14 instructions that will guide the jurors to competently present their defense, deliver opening
15 arguments, and cross examine the government’s witnesses. Unsurprisingly, Defendants and the
16 government have dramatically different views of the jury instructions the Court should give.
17 Because of this, and because of the importance of a jury charge conference prior to opening
18 arguments and the government’s case-in-chief, Defendants request that the Court schedule a
19 pretrial conference to address the jury instructions. *See* Defendants’ Joint Submission of Proposed
20 Statement of the Case, Verdict Form, and Jury Instructions.

21 **D. To maximize efficiency, Defendants request that the Court address trial**
22 **logistics.**

23 To streamline this trial for the Court and the jury, Defendants request that the Court require
24 the parties to advise every Thursday of the following week’s witnesses and exhibits and thereafter
25 confirm those witnesses and exhibits 48 hours in advance. Given the number of witnesses and
26 length of trial, the timeframe for parties to provide their good-faith sealed impeachment materials
27 to the Court should be Monday of each week following the opposing party’s Thursday advisal (as
28 opposed to having to supply all impeachment materials ahead of a three-month trial).

1 RESPECTFULLY SUBMITTED this 5th day of August 2021,

2 BIENERT KATZMAN LITTRELL
3 WILLIAMS LLP
4 s/ Whitney Z. Bernstein
5 Thomas H. Bienert, Jr.
6 Whitney Z. Bernstein
7 Attorneys for James Larkin

8 *Pursuant to the District's Electronic Case Filing Administrative Policies and Procedures Manual (Oct. 2020) §
9 II(C)(3), Whitney Z. Bernstein hereby attests that all other signatories listed, and on whose behalf this filing is
10 submitted, concur in the filing's content and have authorized its filing.*

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12 s/ Paul J. Cambria, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance as counsel of record.

/s/ Toni Thomas
Toni Thomas

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Exhibit A

Filed Under Seal