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

17
18 United States of America,

19 Plaintiff,

20 vs.

21 Michael Lacey, *et al.*,

22 Defendants.
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28

Case No. 2:18-cr-00422-PHX-SMB

**MOTION TO PARTIALLY VACATE
SEIZURE WARRANTS AND RELEASE
FUNDS TO DEFENDANTS**

(Oral argument requested)

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Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION..... 1
- II. RELEVANT FACTUAL BACKGROUND..... 3
 - A. The Government Wrongly Seized the Entirety of an Untainted Account... 3
 - B. The Government Cannot Trace Loan Payments Tied to the Sale of Backpage’s Foreign Operations to Illegal Activity..... 3
 - C. The Government Impermissibly Seized Over \$10 Million in Funds from Attorney Retainer Accounts..... 4
 - D. Even Under its Own Flawed Theory Regarding “Adult” Ads, the Government Has Over-Seized Defendants’ Funds..... 5
- III. ARGUMENT 7
 - A. The Government May Not Seize Legitimate, Untainted Assets Pre-Trial... 7
 - B. The Government Cannot Trace the Four Asset Categories to Crimes Alleged in the Indictments and Therefore Lacks Probable Cause to Support Their Forfeiture. 9
 - 1. “Proceeds Traceable to” 9
 - 2. Property “Involved In” Money Laundering..... 13
 - C. The Court Can Order the Release of Four Limited Categories of Untainted Assets in the Interest of Justice. 15
 - D. Defendants Are Entitled to Cost and Fee Reimbursement In Light of a Mistrial Caused by the Government..... 15
- IV. CONCLUSION..... 16

Table of Authorities

Cases	Page(s)
620,349.85 U.S. Currency, No. 13-CV-3966-RJD-SMG, 2015 WL 3604044 (E.D.N.Y. June 5, 2015).....	13
<i>Arizona v. Washington</i> , 434 U.S. 497 (1978).....	15
<i>Backpage.com LLC v. Dart</i> , 807 F.3d 229 (7th Cir. 2015).....	10
<i>Backpage.com, LLC v. Cooper</i> , 939 F. Supp. 805 (D. Tenn. 2013).....	10
<i>Backpage.com, LLC v. McKenna</i> , 881 F. Supp. 1262 (W.D. Wash. 2012).....	10
<i>Caplin & Drysdale, Chartered v. United States</i> , 491 U.S. 617 (1989).....	8
<i>Doe v. Backpage.com LLC</i> , 104 F. Supp. 3d 149 (D. Mass. 2015)	10
<i>Fed. Trade Comm’n v. Johnson</i> , No. 210CV02203MMDGWF, 2015 WL 8751693 (D. Nev. Dec. 14, 2015)	8
<i>Honeycutt v. United States</i> , 581 U.S. ___, 137 S. Ct. 1626 (2017).....	7
<i>Kaley v. United States</i> , 571 U.S. 320 (2014).....	7, 8
<i>Luis v. United States</i> , 578 U.S. 5, 136 S. Ct. 1083 (2016)	7, 8, 15
<i>United States v. \$3,148,884.40 U.S. Currency</i> , 76 F. Supp. 2d 1063 (C.D. Cal. 1999).....	14
<i>United States v. \$8,221,877.16 in United States Currency</i> , 330 F.3d 141 (3d Cir. 2003)	7, 9

1 *United States v. \$448,342.85*,
2 969 F.2d 474 (7th Cir. 1992)..... 12, 13
3 *United States v. Abhishek Krishnan's Real & Pers. Prop.*,
4 469 F. Supp. 3d 481 (E.D.N.C. 2020) 14
5 *United States v. All Funds*,
6 832 F. Supp. 542 (E.D.N.Y. 1992)..... 13
7 *United States v. Bornfeld*,
8 145 F.3d 1123 (10th Cir. 1998).....9, 11, 13
9 *United States v. Cosme*,
10 796 F.3d 226 (2d Cir. 2015)9, 11
11 *United States v. Cosme*,
12 No. 17-1759-CR(L), 2021 WL 2964322 (2d. Cir. July 15, 2021) 12
13 *United States v. Crozier*,
14 777 F.2d 1376 (9th Cir. 1985)..... 7
15 *United States v. Grant*,
16 No. S4-05-CR-1192, 2008 WL 4376365 n.1 (S.D.N.Y. Sept. 25, 2008) 9
17 *United States v. Haleaman*,
18 887 F. Supp. 2d 1051 (D. Haw. 2012)..... 12
19 *United States v. Monsanto*,
20 491 U.S. 600 (1989)..... 7, 8
21 *United States v. Seber*,
22 562 F.3d 1344 (11th Cir. 2009)..... 13
23 *United States v. Tencer*,
24 107 F.3d 1120 (5th Cir. 1997)..... 13
25 *United States v. Unimex, Inc.*,
26 991 F.2d 546 (9th Cir. 1993)..... 8
27 **Statutes**
28 18 U.S.C. § 981(a)(1)(A).....9, 11, 13

1 18 U.S.C. § 981(a)(1)(C)..... 9
2 18 U.S.C. §§ 981, 982.....7, 9, 11
3 18 U.S.C. § 983(c)(3)..... 13
4 18 U.S.C. § 984 13, 14
5 21 U.S.C. § 853(e)..... 7

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1 **I. INTRODUCTION**

2 The government has seized and restrained more than \$135 million of liquid assets from
 3 Defendants, their family members, and various companies owned by Defendants, plus tens of
 4 millions of dollars in real estate and other illiquid assets, plus over \$10 million in attorneys' funds.
 5 To understand the sheer breadth of the government's seizures here, Backpage.com's aggregate
 6 revenues over the years exceeded \$500 million (Doc. 230 at ¶ 1)—meaning the 50 charged ads
 7 accounted for roughly 0.0001% to 0.0002% of Backpage's revenues. In other words, roughly
 8 99.9998% to 99.9999% of Backpage's revenues are not derived from the charged ads.¹ But that is
 9 an issue for another day.

10 Counsel for defendants Lacey, Larkin, Brunst, and Spear ("Defendants")² have continued
 11 to prepare for and try this case even as they are incurring substantial debt to do so.³ Now facing
 12 the prospect of a second trial, following a mistrial caused by the government's misconduct (*see*
 13 Docs. 1355, 1355-14), defense counsel requires additional funds to effectively continue. Even their
 14 ability to challenge the full scope of overbroad and unlawful pretrial seizures is curtailed by the lack
 15 of funds.⁴

16 For the sake of judicial efficiency, to fund the continued defense of this case and to ensure
 17 continuity of counsel, and in the interest of time – as a second trial is fast approaching – this motion
 18 does not address all of the government's improper seizures but is instead limited to seeking the
 19 release of some of the specific, identifiable, and untainted funds, funds that the government has
 20 not traced, and cannot trace, to alleged illegal activity. These include: (1) over \$400,000 unrelated

21 _____
 22 ¹ From the millions of adult-oriented classified ads that ran on Backpage.com over the years,
 23 the government identified and charged just one (1) ad that expressly offered sex in exchange for
 24 money. None of the forty-nine other charged ads expressly offered sex in exchange for money,
 25 nor did any other Backpage.com ad that the government has identified in its disclosures to the
 26 defense. The solitary sex for money ad charged in the indictment was a free ad, which generated
 27 absolutely no revenue for Backpage.com.

28 ² Defendants Padilla and Vaught were deprived of their counsel of choice when the
 government refused to return funds and previously received appointed counsel. Docs. 565, 566.

³ Doc. 1355-13, Exh. L at 74:18-21 ("You know, every one of us who are paid counsel are
 under water in this case . . .").

⁴ Importantly, Carl Ferrer has been permitted to keep funds set aside for his attorney's fees.
See United States v. Ferrer, Case No. 2:18-cr-00464-PHX-SMB, Doc. No. 7-2 at 9:7-10.

1 to Backpage.com, seized from an account holding only loan payments from the sale of newspaper
 2 businesses and rent from the sublease of an office building to the buyer of the newspapers, Voice
 3 Media Group (“VMG Depository Account Funds”); (2) assets seized that relate to revenues from
 4 Backpage.com’s operations outside of the United States (“Foreign Loan Payments”); (3) over \$10
 5 million seized from attorney trust accounts (“Attorney Retainer Funds”); and (4) assets seized that
 6 relate to revenues from Backpage’s non-adult advertising, as the government concedes that
 7 advertising was lawful (“Non-Adult Advertising Proceeds”). Because the government has failed
 8 to show that any of these four categories of assets are traceable to the crimes alleged in the
 9 indictment or the civil complaint,⁵ the government lacks probable cause to support their forfeiture
 10 of these assets.

11 The Court should partially vacate the seizure warrants that currently restrain these assets
 12 and order the release of these limited sets of assets to the Defendants.⁶ While the property was
 13 seized pursuant to civil seizure warrants (because of the government’s choice to file its civil
 14 complaints in different district from the criminal case), and there is a pending civil forfeiture case
 15 as to some of these assets, that case has been properly stayed pending the outcome of this criminal
 16 proceeding. Thus, the government’s current forfeiture focus is in the criminal case, where the
 17 government has noticed the potential forfeiture of some of these civilly seized properties in the
 18 indictment. Further, this Court is best positioned to evaluate the relevant facts and equities,
 19 including the Defendants’ Sixth Amendment right to counsel and the need for continuity of
 20
 21

22 ⁵ First Amended Consolidated Master Verified Complaint for Forfeiture, *United States v.*
 23 *\$1,546,076.35 In Bank Funds Seized From Republic Bank of Arizona Account ‘1889, et al.*, No. 18-8420
 (C.D. Ca. June 1, 2021), ECF No. 108 (the “Complaint”).

24 ⁶ Indeed, the government has agreed that this Court is the appropriate forum to litigate these
 25 issues, and has refused to even discuss the possibility of an out-of-court resolution regarding the
 26 restraint of the four categories of assets at issue because this Court is considering the matter. Exh.
 27 L (Email from Scott Garringer Chief of the Criminal Division, U.S. Attorney’s Office, Central
 28 District of California, to counsel for Defendant Larkin, October 18, 2021) (“I have reviewed your
 requests and the four categories of assets you seek to be returned . . . we are not going to intervene
 in the negotiations, particularly given the currently-pending briefing schedule on the motion you
 informed the Court you would be filing, which we do not want to delay.”).

1 counsel through a second trial that only became necessary due to the government’s misconduct at
2 the first trial.

3 **II. RELEVANT FACTUAL BACKGROUND**

4 **A. The Government Wrongly Seized the Entirety of an Untainted Account.**

5 The government seized \$407,686.14 from an account held by Cereus Properties, LLC
6 (“Cereus”).⁷ That account (“VMG Account”) exclusively held proceeds from Defendants’ January
7 2013 seller-financed sale of their sizeable print newspaper business (including, e.g., *The Village*
8 *Voice*) to Voice Media Group (VMG), a media company based in Denver, Colorado. Declaration
9 of Jed Brunst (“Brunst Decl.”), ¶ 2, Exh. A. Through Medalist, Defendants sold their newspaper
10 business to VMG for \$27 million. *Id.* Because the sale was seller-financed, Medalist received the
11 purchase price for the sale over time in the form of loan payments. The corresponding promissory
12 note was held by another one of Medalist’s subsidiaries, and the loan payments went to Cereus
13 Properties. *Id.*, ¶¶ 3-4, Exh. B, Exh. C.

14 Before filing this motion, Defendants sought the release of these funds from the
15 government. Exh. K. The government initially refused, citing several 2017 deposits that the
16 government claims, without proof, were tainted. Exh. J. As the account ledger demonstrates, the
17 only deposits into the account in fact came from VMG and either were payments on “notes
18 receivable,” *i.e.*, payments on the loan that financed VMG’s purchase of the newspapers, or “rent”
19 that VMG paid to sublease an office building. Brunst Decl., ¶ 5, Exh. D.⁸ The funds transferred
20 to the VMG Account were completely unrelated to Backpage.com, and the government has zero
21 evidence to the contrary.

22 **B. The Government Cannot Trace Loan Payments Tied to the Sale of** 23 **Backpage’s Foreign Operations to Illegal Activity.**

24 As the government knows, Defendants, through Medalist, sold the Backpage.com business
25

26 ⁷ Cereus is an entity held by Medalist Holdings, Inc. (“Medalist”). Medalist is primarily owned
by Defendants.

27 ⁸ A government supervisor later conceded that, as to these funds, “there may be room to
28 negotiate” with the line prosecutor. Exh. J. But the defense should not have to “negotiate” the
release of funds that are clearly untainted.

1 to Carl Ferrer, in two *seller-financed* transactions, to two different entities that respectively held
 2 Backpage’s domestic and foreign operations. The foreign sale is relevant for the purposes of this
 3 motion. In April 2015, Medalist sold Backpage’s foreign classified advertising business to an entity
 4 owned and controlled by Ferrer. Exh. M (“Quigley Decl.”), ¶ 4. In short, the sale of Backpage’s
 5 foreign operations involved the sale and assignment of a license to operate Backpage abroad.⁹
 6 Brunst Decl., ¶¶ 6-8, Exhs. E-G. Ferrer, through his entity (“UGC”), purchased that foreign
 7 license for \$74.3 million. *Id.*, Exh. G (Ferrer signed each of these documents as CEO). A
 8 corresponding Purchase and Sale Agreement and Loan Agreement reflects that the sale was seller-
 9 financed. *Id.*, Exh. H. The Loan Agreement covers Backpage’s “Foreign Operations.” *Id.*, p. 1.

10 Under the loan documents, and as Defendants’ internal accounting reflects, they received a
 11 stream of loan payments in connection with their sale of Backpage’s foreign operations and a
 12 separate stream of payments in connection with their sale of Backpage’s U.S. operations. *Id.*, ¶ 10,
 13 Exh. I (accounting ledger). As the ledger demonstrates, through 2018 (when the indictment issued
 14 and the loan payments ceased), the total payments on both loans amounted to more than \$172
 15 million. *Id.* Of that amount, **\$76.3 million, or nearly 45%**, was payments from UGC *on the*
 16 *foreign loan with funds derived from Backpage’s foreign operations. Id.*

17 There are no charges here, nor allegations in the government’s Complaint, concerning
 18 Backpage’s hosting of adult classified advertising in foreign countries or revenues from foreign ads.
 19 Importantly, despite being well-aware of the separate sales of the Backpage.com domestic and
 20 foreign operations to Ferrer’s entities, the government’s affidavits supporting the seizure warrants
 21 said *absolutely nothing* about the separate sales, the agreements documenting the sales, the
 22 promissory notes, or the payments on those notes—but just mentioned a “purported” sale.

23 **C. The Government Impermissibly Seized Over \$10 Million in Funds from**
 24 **Attorney Retainer Accounts.**

25 The government also seized over \$10 million held in trust by lawyers for Defendants or
 26 their companies—retainers that would have been used, in large part, to pay Defendants’ legal fees

27 ⁹ The “Intellectual Property License” granted the seller of the license the right to operate
 28 Backpage in “all countries world-wide, *except for the United States of America.*” Brunst Decl.,
 Exh. E at 2.

1 defending this action.¹⁰

2 Ferrer’s entities owed substantial money to a Medalist subsidiary under the purchase money
3 promissory notes. Quigley Decl., ¶ 4. In 2017 and 2018, Medalist deposited funds into the Rusing
4 Lopez & Lizardi (“RLL”) trust account in anticipation of future litigation. *Id.* To fund those
5 deposits, Medalist directed Ferrer’s entities to pay certain sums they owed Medalist’s subsidiary
6 under the notes directly to RLL. *Id.*, ¶ 5. Ferrer’s entities transmitted \$2 million in payments on
7 the domestic debt to RLL and over \$3.2 million in payments on the foreign debt to RLL. *Id.*, ¶¶
8 6-8, Exh. A.

9 Further, in July 2012, three Medalist subsidiaries were named as defendants in a civil action
10 in Washington state. Counsel for Medalist sought reimbursement for defense costs from a Traveler’s
11 insurance policy Medalist had obtained for itself and its subsidiaries. *Id.*, ¶ 12. In 2018, Traveler’s
12 agreed to reimburse legal fees exceeding \$1.7 million and other defense costs exceeding \$400,000—
13 a total of more than \$2.1 million—which it wired to Perkins Coie’s trust account on March 15,
14 2018. *Id.*, ¶¶ 13-17. The government seeks to forfeit approximately \$2.9 million from the Perkins
15 Coie trust account, but roughly 75% of those funds were the Traveler’s insurance reimbursement.
16 *Id.*, ¶ 18.

17 On behalf of Defendants, counsel for Medalist also arranged trust deposits with numerous
18 other law firms in connection with pending or anticipated litigation, with those deposits funded by
19 Backpage-associated entities pursuant to contractual obligations to advance defense costs for
20 Defendants and their companies. *Id.*, ¶ 19. A substantial portion of the trust deposits the
21 government seized here, including the RLL trust deposits, were sourced from Backpage’s foreign
22 operations, namely loan payments in connection with the sale of Backpage’s foreign operations.
23 *Id.*¹¹

24 **D. Even Under its Own Flawed Theory Regarding “Adult” Ads, the**
25 **Government Has Over-Seized Defendants’ Funds.**

26 The government seized at least \$136 million in liquid assets, and the true value of the total

27 ¹⁰ The companies were obligated to advance defense costs to Defendants.

28 ¹¹ Counsel in this case generally were retained *before* the seizures of the IOLTA accounts and Defendants’ personal assets.

1 assets is likely much higher,¹² under a flawed theory that *all* of Backpage.com’s “adult” ads, and all
 2 revenue from those ads, was criminal. For that reason, the government’s seizures are completely
 3 untethered to the *de minimis* proceeds Backpage received from the 50 charged ads.

4 But the government has never proven that any, let alone all, of the “adult advertisements”
 5 on Backpage.com were criminal. The government’s seizures all were supported by the affidavits
 6 of U.S. Postal Inspector Lyndon Versoza. Versoza admitted that many Backpage ads had
 7 “seemingly innocuous language,” but claimed their “otherwise neutral or innocuous terms” were a
 8 “coded language for sex trafficking and prostitution,” showing the ads related to unlawful conduct.
 9 Exh. N (“Versoza Affidavit”), ¶ 31. In stark contrast, the government’s lead witness in the recent
 10 mistrial, Special Agent Supervisor Fichtner, *testified it was not possible to tell whether any of*
 11 *the scores of classified ads he presented at trial* (ads similar to those described in the Versoza’s
 12 Aff.) *actually related to unlawful conduct.* See, e.g., Doc. 1355-12 at 94-95.

13 Even assuming *arguendo* that the government’s position is accurate, the government itself
 14 admits that it has no claim to non-adult and admittedly untainted revenue. See *infra*, Section
 15 II(B)(1)(d); Complaint at ¶ 107 (arguing that “more than 90 percent of Backpage’s revenue”
 16 “[b]etween 2004 and April 2018” came from Backpage.com’s “adult category”); Doc. 1355-6 at 26
 17 (“And speaking of revenue, evidence will show that during the time of this letter at the end of 2010,
 18 these defendants were generating -- Backpage was generating \$30 million a year in revenue, the vast
 19 majority of which, more than 94 percent, from fees they were charging customers to post their
 20 prostitution ads on the website.”). The government offers no basis to establish that the non-adult
 21 revenue is forfeitable. These seizures are overbroad, even under the government’s own theory,
 22 and the portion of the seized liquid assets attributable to non-adult advertising must be returned.
 23
 24
 25

26 ¹² This is because (a) this amount does not include the numerous real properties the
 27 government has seized, (b) most assets have appreciated since the seizures, and (c) Defendants
 28 lack the exact amount seized, as the government has not identified the amount seized in certain
 instances, alleging only that it has seized “any and all funds in the account;” these seizures are thus
 unaccounted for in this total.

1 **III. ARGUMENT**

2 **A. The Government May Not Seize Legitimate, Untainted Assets Pre-Trial.**

3 To seize or otherwise restrain property pretrial, the government is required to trace the
4 property directly to the offense giving rise to the forfeiture.¹³ The Supreme Court has made clear
5 that the government may not seize or otherwise restrain property pre-trial unless those seizures or
6 restraints are supported by probable cause to believe that the specific property is traceable to the
7 alleged criminal activity, and therefore will be forfeitable.¹⁴ Probable cause determinations are
8 subject to plenary review, and the government must release any property it fails to show is subject
9 to forfeiture.

10 So far, the government has avoided accountability for its excessively broad seizures with
11 the tautologous argument that its civil seizures are unreviewable because the same assets are subject
12 to a restraining order in the criminal case pending before this Court.¹⁵ But that is wrong¹⁶ and, in
13 any event, restraining orders cannot establish probable cause for these indiscriminate and
14 overbroad forfeitures. Rather, they merely allow the government to restrain the assets pending the
15 criminal trial based on a probable cause showing in the civil cases.¹⁷ Where the government failed
16 to trace the assets to the crimes alleged in the indictment or the Complaint, as is the case here,
17 there never was a lawful basis for their pretrial restraint to begin with. Under these circumstances,
18 the government cannot continue to restrain the assets at issue.¹⁸

19
20 ¹³ 18 U.S.C. §§ 981, 982; *United States v. \$8,221,877.16 in United States Currency*, 330 F.3d 141,
21 158 (3d Cir. 2003).

22 ¹⁴ *Luis v. United States*, 578 U.S. 5, 136 S. Ct. 1083, 1090-92 (2016); *Honeycutt v. United States*,
23 581 U.S. ___, 137 S. Ct. 1626, 1633 (2017); *Kaley v. United States*, 571 U.S. 320, 323-24 (2014).

24 ¹⁵ *See In re Any & All Funds Held in Republic Bank of Arizona Accts. 1889, et al.*, Case No. 18-
25 06742-RGK (C.D. Cal.), Doc. No. 53 at 6.

26 ¹⁶ Significantly, most assets the government seized from Defendants, their families, or their
27 companies are *not* subject to a criminal restraining order or preliminary order of forfeiture.

28 ¹⁷ 21 U.S.C. § 853(e) (allowing for pretrial seizure of assets based in part on a finding that
there is “probable cause to believe that the property to be seized would, in the event of a
conviction, be subject to forfeiture”); *see United States v. Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985)
 (“the court may enter a restraining order against property which may be subject to forfeiture under
federal drug laws”).

¹⁸ *See Luis*, 136 S. Ct. at 1092 (distinguishing its prior cases -- *United States v. Monsanto*, 491 U.S.

1 The government also has erroneously argued that Defendants must make the showing
 2 required by *United States v. Monsanto* to successfully move for the release of any assets before trial.
 3 But *Monsanto* applies where the government **has probable cause** to seize defendant’s assets or, in
 4 other words, where the property itself is tainted.¹⁹ Here, because Defendants seek the release of
 5 legitimate, untainted funds for which the government **does not have probable cause** to believe
 6 are subject to forfeiture, a showing under *Monsanto* or *Unimex* is not required. The Supreme Court
 7 has made clear that where untainted funds are concerned – even funds that might be deemed
 8 “substitute assets” following a conviction – the government cannot impose any restraints pretrial
 9 absent a showing of probable cause.²⁰ While a defendant’s need for counsel is one factor the Court
 10 can consider in deciding whether to vacate a pretrial restraint, it is not an evidentiary burden that a
 11 defendant must clear to get judicial review where the assets at issue are legitimate and untainted, as
 12 is the case here. In *Luis*, the Supreme Court distinguished defendant Luis’ circumstances from
 13 those at issue in *Monsanto* and *Caplin & Drysdale*, noting that those cases involved the pretrial
 14 restraint of *tainted* assets.

15 Defendants’ urgent need for defense funds in the face of a second trial is one important
 16 reason why they are bringing this motion now. Because the government has failed to allege
 17 sufficient evidence to show that it has probable cause to believe these four limited categories of

18 600 (1989) and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) -- by emphasizing
 19 that in those cases the seizure of defendant’s assets before trial was permitted only because the
 20 government had *probable cause* to believe the property was proceeds of, or traceable to, a crime).

21 ¹⁹ See *Luis*, 136 S. Ct. at 1106-1107. In *Monsanto*, the Supreme Court held that a defendant
 22 was not entitled to unfreeze seized assets before a trial in order to pay for counsel, as long as the
 23 assets were seized pursuant to a finding of probable cause to believe the assets were
 24 forfeitable. *Fed. Trade Comm’n v. Johnson*, No. 210CV02203MMDGWF, 2015 WL 8751693, at *2
 25 (D. Nev. Dec. 14, 2015) (citing *Monsanto*, 491 U.S. at 615)). The Ninth Circuit has applied *Monsanto*
 while recognizing two exceptions to this rule -- defendants can access the assets held in receivership
 if the defendant can show (1) they have been deprived of counsel or (2) the government has
 engaged in “specific instances of abuse.” *Id.* (quoting *United States v. Unimex, Inc.*, 991 F.2d 546,
 549-50 (9th Cir. 1993)).

26 ²⁰ *Kaley*, 571 U.S. at 327. See *Luis*, 136 S. Ct. at 1091-92 (rejecting the contention that
 27 “property—whether tainted or untainted—is subject to pretrial restraint, so long as the property
 28 might someday be subject to forfeiture” and instead, finding that where the government cannot
 show probable cause to believe property is the proceeds of, or traceable to, a crime, the
 government may not restrain it pretrial).

1 assets will be subject to forfeiture upon conviction, it cannot continue to restrain those assets under
 2 any circumstance. The burden does not fall on Defendants to make a showing that they are entitled
 3 to judicial review. *United States v. Cosme*, 796 F.3d 226, 233-34 (2d Cir. 2015) (requiring a judicial
 4 finding of probable cause if a defendant protests restraints on his property and noting that “[t]he
 5 government’s switch from civil forfeiture to criminal forfeiture in this case does not immunize it
 6 from having to demonstrate probable cause”).

7 **B. The Government Cannot Trace the Four Asset Categories to Crimes Alleged**
 8 **in the Indictments and Therefore Lacks Probable Cause to Support Their**
 9 **Forfeiture.**

10 The Complaint articulates three theories of forfeiture. The first, under 18 U.S.C. §
 11 981(a)(1)(C), alleges that the defendant assets are subject to forfeiture because they “constitute, and
 12 are derived from, proceeds traceable to” alleged criminal activity. The second and third theories,
 13 under 18 U.S.C. § 981(a)(1)(A), seek forfeiture of property alleged to have been “involved in”
 14 money laundering. Complaint ¶¶ 145-47. None of these theories supports the restraint of the four
 15 asset categories at issue here.

16 **1. “Proceeds Traceable to”**

17 The government must, but cannot, demonstrate probable cause to believe Defendants’
 18 assets are directly traceable to the criminal activity because they “constitute, and are derived from,
 19 proceeds traceable to” alleged criminal activity. *\$8,221,877.16 in United States Currency*, 330 F.3d at
 20 158 (“under section 981, the government is *required to trace* the seized property directly to the
 21 offense giving rise to the forfeiture”) (emphasis added). Proceeds “traceable to” means property
 22 where the acquisition is attributable to the alleged criminal activity, rather than from money
 23 obtained from untainted sources. *United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998). In
 24 other words, property one “would not have but for the criminal offense.” *United States v. Grant*, No.
 25 S4-05-CR-1192, 2008 WL 4376365, at *2 n.1 (S.D.N.Y. Sept. 25, 2008). Section 981(a)(1)(C) does
 26 not authorize the seizure and forfeiture of untainted funds solely because they have been
 27 commingled with proceeds.
 28

1 The government's theory is simply that some deposits to certain bank accounts or some
2 assets can be traced to earnings from Backpage.com. The generalized averments in the Complaint,
3 as well as the Versoza Affidavits, at most attempt to establish that some funds in certain bank
4 accounts or some assets can be traced to earnings from Backpage.com generally. The government
5 simply states that certain accounts have received or been maintained with funds "traceable to" the
6 alleged illegal activity. *See e.g.*, Versoza Affidavit, ¶¶ 9, 13. This argument is insufficient for the
7 following reasons:

8 First, the government has never alleged, and cannot truthfully allege, that all revenue from
9 Backpage.com is traceable to alleged illegal conduct. At most the government has alleged that the
10 proceeds from certain adult advertisements are criminal proceeds, so simply showing that certain
11 proceeds are tied to Backpage.com *generally* does not establish that the proceeds are traceable to
12 the alleged criminal activity.

13 Second, while Defendants vehemently deny the allegations in this case, for purposes of
14 restraint of assets, numerous courts have established that at least *some* of Backpage's adult content
15 is legal in the United States. *See, e.g.*, *Backpage.com LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015)
16 ("[N]ot all advertisements for sex are advertisements for illegal sex."); *Doe v. Backpage.com LLC*, 104
17 F. Supp. 3d 149, 156-57 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016) ("The existence of an
18 escorts section in a classified ad service, whatever its social merits, is not illegal."); *Backpage.com,*
19 *LLC v. McKenna*, 881 F. Supp. 1262, 1282 (W.D. Wash. 2012) (escort ads have long been permitted
20 and escort services are licensed and regulated in many states); *Backpage.com, LLC v. Cooper*, 939 F.
21 Supp. 805, 816, 833-34 (D. Tenn. 2013) (ads on Backpage.com are protected speech under the
22 First Amendment).

23 Third, the government does not even attempt to trace any of the four categories of seized
24 assets to the alleged criminal wrongdoing that gave rise to the forfeiture. As such, the government
25 fails to offer any facts that would tend to show that these assets were derived from the criminal
26 activity alleged in the indictment.

1 **a. VMG Depository Account Funds**

2 The VMG Account did not contain any funds traceable to earnings from Backpage.com,
3 let alone the allegedly illegal advertisements, and the government has failed to make any showing
4 to the contrary. The VMG Account exclusively held loan proceeds from Medalist’s seller-financed
5 sale of its print newspaper business and related rent. Therefore, the VMG Account in its entirety
6 was untainted and the government failed to establish probable cause to believe it is subject to
7 forfeiture.

8 **b. Loan Payments Tied to Sale of Backpage’s Foreign Operations**

9 The government is similarly unable to trace loan payments tied to the sale of Backpage’s
10 foreign operations to the alleged illegal activity. *See supra*, Section I(B). Further, the Complaint
11 does not allege forfeiture of these assets based on money laundering under section 981(a)(1)(A).
12 *See* Complaint ¶ 239. Therefore, the loan payments related to the sale of Backpage’s foreign
13 operations do not have the “requisite nexus to the [alleged criminal activity]” to be forfeitable
14 because they are not in any way attributable to such activity. *Bornfield*, 145 F.3d at 1135. And to
15 the extent that any such loan payments were commingled with funds from Backpage’s domestic
16 operations, section 981 does not authorize seizure of untainted funds simply because they have
17 been commingled with allegedly tainted funds. *Id.*

18 **c. Attorney Retainer Funds**

19 Similarly, a large part of the attorney retainers came from the overseas operations or
20 overseas loan payments, and the government has no right to those seize these funds. The
21 government has never filed a sworn, verified complaint supporting its belief that it can seize most
22 of these funds in the nearly three years and counting that the government has held these attorney
23 funds. To date, the government has failed to file any legal instrument that would authorize the
24 continued restraint of these retainer accounts, and thus cannot hold these funds pretrial. Under
25 these circumstances, the Court must order the government to return these funds to the Defendants.
26 *Cosme*, 796 F.3d at 233-34.

2. Property “Involved In” Money Laundering

When the government seeks to forfeit property on the ground that it was allegedly “involved in” money laundering under 18 U.S.C. §981(a)(1)(A), it must establish there is a “substantial connection” between the property subject to forfeiture and the underlying offense. 18 U.S.C. § 983(c)(3). “[P]roperty ‘involved in’ an offense ‘include[s] the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.’” *Bornfield*, 145 F.3d at 1135 (quoting *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997)). These four categories of assets were not “involved in” money laundering.

The commingling of tainted and untainted funds is not itself a basis for forfeiture. Where tainted and untainted funds are held in a financial account, without more, only the tainted funds are subject to forfeiture, and not the entire account. *Bornfield*, 145 F.3d at 1135 (“[T]he mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture”); *\$448,342.85*, 969 F.2d at 476 (“An ‘account’ is a name, a routing device like the address of a building; the money is the ‘property’.”). Once we distinguish the money from its container, it also follows that the presence of one illegal dollar in an account does not taint the rest—as if the dollar obtained from fraud were like a drop of ink falling into a glass of water.”); *Tencer*, 107 F.3d at 1134 (agreeing that merely pooling tainted and untainted funds in an account does not, without more, render that account subject to forfeiture); *United States v. Seher*, 562 F.3d 1344, 1368 (11th Cir. 2009) (“the pooling or commingling of tainted and untainted funds would not by itself render the entirety of an account subject to forfeiture”).

To prove that property – in this case funds in bank accounts – is property “involved in” money laundering, the government must show that the property actually *facilitated* the alleged illegal activity, which requires “more than a mere showing that tainted and untainted funds were pooled together.” *U.S. v. Approximately \$620,349.85 U.S. Currency*, No. 13-CV-3966-RJD-SMG, 2015 WL 3604044, at *3 (E.D.N.Y. June 5, 2015). The government’s approach here is incompatible with 18 U.S.C. § 984, which allows for the substitution of fungible property. *United States v. All Funds*, 832

1 F. Supp. 542, 561-62 (E.D.N.Y. 1992) (allowing the government to seize legitimate “facilitation
2 money”-- the seizure of all monies in an account merely because one illicit transaction was
3 negotiated through that account--would “*completely . . . erode*” Section 984’s one-year limitation
4 on seizing funds in a commingled account) (emphasis added); *United States v. \$3,148,884.40 U.S.*
5 *Currency*, 76 F. Supp. 2d 1063, 1067-68 (C.D. Cal. 1999) (adopting the *All Funds* court’s conclusion
6 that the “facilitation theory is incompatible” with Section 984).

7 Here, the government offers no evidence suggesting that the legitimate, untainted assets at
8 issue in this motion were commingled with any allegedly tainted funds to conceal the tainted funds,
9 or that the assets were commingled to facilitate any alleged illegal activity.

10 For example, the government seeks civil forfeiture of a wholly untainted VMG Account,
11 containing only funds earned from print newspaper proceeds, on the specious theory that those
12 funds were tainted by commingling with funds from Backpage and therefore constitute “property
13 involved in money laundering.” But there is no evidence that anything other than untainted
14 proceeds – loan payments from the sale of newspaper businesses and rent for the sublease of an
15 office building – were deposited into the account.

16 Similarly, the government offers no facts that the “commingling” of foreign loan payments
17 with domestic funds, or the “commingling” of non-adult advertising revenue with adult advertising
18 revenue, was done to facilitate illegal activity, including money laundering. The mere fact that
19 Backpage used bank accounts to hold funds from various sources – as most businesses do – does
20 not suggest that they did so to facilitate money laundering. As for the attorney retainer accounts,
21 those accounts are currently being held by the government without any legal process whatsoever.
22 But, in any case, a law firm’s receipt of untainted funds to pay for legal services cannot possibly be
23 construed as a money laundering transaction.

24 Therefore, the government has no reason believe that the assets will be subject to forfeiture
25 and the assets must be released at this time. *See United States v. Abhishek Krishnan's Real & Pers. Prop.*,
26 469 F. Supp. 3d 481, 496 (E.D.N.C. 2020) (finding that because government did not allege
27 legitimate funds were commingled with illegitimate funds to conceal illegitimate funds nor were
28 funds pooled to facilitate money laundering scheme, the government overreached and claimants

1 were entitled to partial equitable relief).

2 **C. The Court Can Order the Release of Four Limited Categories of Untainted**
 3 **Assets in the Interest of Justice.**

4 The above-described four categories of untainted assets constitute a minor fraction of the
 5 total assets seized by the government in this matter and the minimum of what should be released
 6 at this time. Defendants' inability to use their own untainted funds has severely handicapped their
 7 ability to effectively defend the criminal case for the past three-and-a-half-plus years when
 8 Defendants were faced with just one trial. Now, faced with a second trial because of the
 9 government's misconduct, Defendants lack funds to pay the hard costs necessitated by a second
 10 trial, are unable to mount a constitutionally effective defense, and may lose their choice of counsel
 11 in violation of the Sixth Amendment. *See Luis*, 136 S. Ct. at 1088 (“[T]he pretrial restraint of
 12 legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The
 13 nature and importance of the constitutional right taken together with the nature of the assets lead
 14 us to this conclusion.”). Such a deprivation is especially egregious given the prospect of another
 15 months-long trial due to a mistrial that resulted entirely from the government's misconduct. *See*
 16 Docs. 1355, 1355-8.

17 These assets are not “loot, contraband, or otherwise ‘tainted’” and, therefore, Defendants
 18 are not required to make a showing under *Monsanto* that they have been deprived of counsel or the
 19 government has engaged in specific instances of abuse in order seek the release of the four
 20 categories of funds. *Luis*, 136 S. Ct. at 1090; *see also supra*, Section II(A). By granting Defendants'
 21 motion to release these assets, the Court will enable Defendants' counsel to move forward without
 22 requiring the Court to evaluate the entire universe of seizures in this case.

23 **D. Defendants Are Entitled to Cost and Fee Reimbursement In Light of a**
 24 **Mistrial Caused by the Government.**

25 A court order releasing funds would help ameliorate what the Supreme Court has described
 26 as the “grossly unfair” consequences of forcing a defendant to undergo a second trial. *Arizona v.*
 27 *Washington*, 434 U.S. 497, 503–04 (1978). This is a massively expensive case to defend.²¹ By seizing

28 ²¹ The indictment presents 100 counts. Each has unique evidence. The government has nearly
 80 witnesses and thousands of exhibits. The case involves experts, fourteen years of business

1 virtually all of Defendants’ assets – including over \$10 million in attorney retainer funds from firms
2 like Davis Wright Tremaine and Perkins Coie that could have been used to pay for the defense of
3 this case – the government already hamstrung Defendants’ efforts to defend themselves. Defense
4 counsel had to clear their calendars for September through December of this year just for the trial
5 part of the case.²² Defendants and counsel incurred substantial costs and attorney’s fees,²³
6 including securing a rental house to work out of for four months, transportation, transcripts,
7 experts, jury consultant, and numerous other expenses. Defendants should not be forced to incur
8 these costs and fees twice due to the government’s misconduct; seized funds should be released
9 sufficient to permit continuity of counsel and for defendants to obtain effective assistance of
10 counsel.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Defendants respectfully request this Court (1) partially vacate
13 the seizure warrants to the extent they restrain funds tied to the VMG Account and the attorney
14 retainer funds and (2) order the government to release any seized funds traceable to the foreign
15 loan payments or non-adult advertising proceeds.

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23 activity and correspondence to review, including an extensive history of moderation practices, a
24 large volume of litigation documents and pre-litigation dealings with state and federal prosecutors,
and years of communications with counsel.

25 ²² Additionally, counsel were required to turn away other work during this time period and
26 get other judges and opposing counsel to put off other trials and hearings, and will now have to
forgo additional business during the second trial.

27 ²³ Much of this attorney time is unpaid as retainers for the four retained counsel ran dry at
28 various points in time, with no funds left to conduct what would have been the remainder of the
September trial, much less a whole new ramp of pre-trial and trial work for the possible February
2022 trial.

1 RESPECTFULLY SUBMITTED this 26th day of October 2021,
2

3 PROSKAUER ROSE LLP
4 s/ Seetha Ramachandran
5 Seetha Ramachandran
6 Asset Forfeiture Attorney for James Larkin

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

I hereby certify that on October 26, 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