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 UNITED STATES OF AMERICA

14  
 15 UNITED STATES DISTRICT COURT  
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,  
 18 Plaintiff,  
 19 v.  
 20 MICHAEL JOHN AVENATTI,  
 21 Defendant.

No. SA CR 19-061-JVS

GOVERNMENT'S EX PARTE APPLICATION  
 FOR (1) CONTINUANCE OF TRIAL DATE  
 ON COUNTS 1-10 AND (2) FINDINGS  
 OF EXCLUDABLE TIME PERIOD  
 PURSUANT TO SPEEDY TRIAL ACT

**CURRENT TRIAL DATE:**  
 February 23, 2021 (Counts 1-10)

**CONTINUED TRIAL DATES:**  
 July 13, 2021 (Counts 1-10)

22  
 23  
 24  
 25  
 26 The United States of America, by and through its counsel of  
 27 record, the Acting United States Attorney for the Central District  
 28 of California and Assistant United States Attorneys Julian L. André

1 and Brett A. Sagel, seeks entry of an order (1) continuing the trial  
2 date on Counts 1 to 10 of the Indictment and (2) excluding time from  
3 the Speedy Trial Act calculation of excludable delay. Defendant  
4 MICHAEL JOHN AVENATTI ("defendant") does not appear to oppose this  
5 ex parte application, but opposes continuing the government's  
6 Jenck's Act disclosure deadline.

7 **BACKGROUND**

8 The Indictment in this case was filed on April 10, 2019.  
9 Defendant first appeared before a judicial officer of the court in  
10 which the charges in this case were pending on April 1, 2019. The  
11 Speedy Trial Act, 18 U.S.C. § 3161, originally required that the  
12 trial commence on or before June 19, 2019.

13 On April 29, 2019, the Court set a trial date of June 4, 2019,  
14 at 8:30 a.m., and a status conference date of May 20, 2019, at 9:00  
15 a.m. The Court has previously continued the trial date in this case  
16 from June 4, 2019, to December 8, 2020, and found the interim period  
17 to be excluded in computing the time within which the trial must  
18 commence, pursuant to the Speedy Trial Act. (CR 34; CR 66; CR 126;  
19 CR 171.)

20 On October 19, 2020, the parties appeared before the Court for  
21 a pretrial motions hearing. (CR 364.) During the hearing, the  
22 Court granted defendant's motion to sever Counts 1 to 10 of the  
23 Indictment from Count 11 to 36 of the Indictment. (CR 364.) The  
24 Court also indicated that, due to the COVID-19 pandemic's impact on  
25 Court operations, the trial would not be able to proceed on December  
26 8, 2020.

27 On November 13, 2020, the Court continued the trial date in  
28 this case on Counts 1-10 from December 8, 2020, to February 23,

1 2021, and continued the trial date in this case on Counts 11-36 from  
2 December 8, 2020, to October 12, 2021, and found the interim periods  
3 to be excluded in computing the time within which the trial must  
4 commence, pursuant to the Speedy Trial Act. (CR 386.)

5 On January 5, 2021, defendant filed a "submission in advance of  
6 January 6, 2021 status conference," in which defendant stated "the  
7 current February trial date is no longer realistic and should be  
8 rescheduled." (CR 395 at 2.) Defendant requested that trial on  
9 Counts 1 to 10 "be set no earlier than August 24, 2021." (Id. at  
10 6.)

11 On January 6, 2021, the parties participated in a status  
12 conference to discuss new trial dates. (CR 396.) After hearing  
13 argument from the parties, the Court ordered that the trial on  
14 Counts 1 through 10 be continued until July 13, 2021, and the trial  
15 on Counts 11 to 36 remain on October 12, 2021. (Id.)

16 Defendant is on temporary release until March 31, 2021. The  
17 government estimates that its case-in-chief on Counts 1-10 of the  
18 Indictment will last approximately 6-8 days.

19 Defendant is charged in a 36-count indictment with: ten counts  
20 of wire fraud, in violation of 18 U.S.C. § 1343; eight counts of  
21 willful failure to collect and pay over withheld taxes, in violation  
22 of 26 U.S.C. § 7202; one count of endeavoring to obstruct the  
23 administration of the Internal Revenue Code, in violation of 26  
24 U.S.C. § 7212(a); ten counts of willful failure to file tax returns,  
25 in violation of 26 U.S.C. § 7203; two counts of bank fraud, in  
26 violation of 18 U.S.C. § 1344(1); one count of aggravated identity  
27 theft, in violation of 18 U.S.C. § 1028A(a)(1); three counts of  
28 false declaration in a bankruptcy, in violation of 18 U.S.C. §

1 152(3); and one count of false oath in a bankruptcy proceeding, in  
2 violation of 18 U.S.C. § 152(2). The government's Prosecution Team  
3 has produced to defendant approximately 1,141,174 Bates-labeled  
4 pages of discovery, including early Jencks Act disclosures. (See CR  
5 99; CR 195; CR 293 (describing government discovery productions).)  
6 The government's Privilege Review Team has separately produced to  
7 defendant additional discovery materials, as well as complete  
8 forensic copies of certain digital devices obtained during the  
9 course of the government's investigation. (See CR 99; CR 195; CR  
10 293.)

11 In February 2020, defendant was convicted in the Southern  
12 District of New York of two extortion-related offenses and honest  
13 services wire fraud. United States v. Avenatti, No. 1:19-CR-373  
14 (the "SDNY Extortion Case"). Sentencing in the SDNY Extortion Case  
15 is currently scheduled for May 7, 2021. Defendant is represented by  
16 separate counsel in the SDNY Extortion Case.

17 Defendant is separately charged in a two-count indictment in  
18 the Southern District of New York with wire fraud and aggravated  
19 identity theft relating to the embezzlement of funds from one of  
20 defendant's legal clients. United States v. Avenatti, No. 1:19-CR-  
21 374 (the "SDNY Fraud Case"). At the time of the status conference  
22 on January 6, 2021, the trial for defendant's SDNY Fraud trial was  
23 set for April 26, 2021, but that trial has since been continued  
24 until January 10, 2022. Defendant is represented by separate  
25 counsel in the SDNY Fraud Case.

26  
27 By this application, the government moves for an Order that the  
28 trial on Counts 1 to 10 be continued to July 13, 2021, at 8:30 a.m.,

1 and the trial on Counts 11 to 36 remain on October 12, 2021, and for  
 2 an Order from this Court finding that the time between February 23,  
 3 2021, and July 13, 2021, should be excluded from the calculation of  
 4 the time in which trial must commence under the Speedy Trial Act.

5 By this application, the government further moves for the Court  
 6 to continue the following dates and deadlines, consistent with the  
 7 pretrial deadlines to which the parties have stipulated and agreed -  
 8 - and the Court has ordered -- since the outset of this case, with  
 9 respect to the trial on Counts 1 to 10 of the Indictment:

	<u>Current Date</u>	<u>Proposed Date</u>
Government Witness List Disclosure Deadline	January 25, 2021	June 14, 2021
Deadline to Disclose Jencks Act Materials and Witness Statements	January 25, 2021	June 14, 2021
Final Pretrial Conference	February 8, 2021	June 28, 2021
Government Exhibit Disclosure Deadline	February 16, 2021	July 6, 2021

#### THE COVID-19 PANDEMIC

20 On March 13, 2020, following the President's declaration of a  
 21 national emergency in response to COVID-19, the Court entered a  
 22 General Order suspending jury selection and jury trials. C.D. Cal.  
 23 General Order No. 20-02, In Re: Coronavirus Public Emergency, Order  
 24 Concerning Jury Trials and Other Proceedings (Mar. 13, 2020). That  
 25 suspension remains in place until a "date to be determined." C.D.  
 26 Cal. General Order No. 20-09, In Re: Coronavirus Public Emergency,  
 27 Further Order Concerning Jury Trials and Other Proceedings (Aug. 6,  
 28 2020); see also C.D. Cal. Order of the Chief Judge No. 20-179, In

1 Re: Coronavirus Public Emergency, Activation of Continuity of  
2 Operations Plan, at 3 (Dec. 7, 2020) ("Jury trials remain  
3 suspended.").

4 Also on March 13, 2020, the Court imposed health- and travel-  
5 related limitations on access to Court facilities. C.D. Cal.  
6 General Order No. 20-03, In Re: Coronavirus Public Emergency, Order  
7 Concerning Access to Court Facilities (Mar. 13, 2020). On March 19,  
8 2020, by Order of the Chief Judge, the Court implemented its  
9 Continuity of Operations ("COOP") Plan, closing all Central District  
10 of California courthouses to the public (except for hearings on  
11 criminal duty matters) and taking other emergency actions. C.D.  
12 Cal. Order of the Chief Judge No. 20-042 (Mar. 19, 2020). On March  
13 29, 2020, the Court authorized video-teleconference and telephonic  
14 hearings. C.D. Cal. Order of the Chief Judge No. 20-043 (Mar. 29,  
15 2020). Two days later, on March 31, 2020, the Court suspended all  
16 grand-jury proceedings. C.D. Cal. Order of the Chief Judge No. 20-  
17 044 (Mar. 31, 2020). That suspension was subsequently extended  
18 through June 1, 2020. C.D. Cal. General Order No. 20-05, In Re:  
19 Coronavirus Public Emergency, Further Order Concerning Jury Trials  
20 and Other Proceedings at 3 ¶ 7 (Apr. 15, 2020).

21 On August 6 and September 14, 2020, the Court slightly relaxed  
22 its restrictions to permit in-person criminal hearings for  
23 defendants who do not consent to remote appearance and to allow up  
24 to 10 members of the public to attend. General Order No. 20-09, at  
25 2-3; C.D. Cal. General Order No. 20-12, In Re: Coronavirus Public  
26 Emergency Order Concerning Reopening of the Southern Division, at 2  
27 (Sept. 14, 2020).

1           However, on December 7, 2020, following "an unprecedented surge  
2 of COVID-19 cases, hospitalizations, and test positivity rates in  
3 the Central District," the Court reinstated its COOP Plan. Order  
4 of the Chief Judge No. 20-179, at 1-2. Pursuant to the COOP Plan,  
5 from December 9, 2020 at 5:00 p.m. through and including January 8,  
6 2021, all grand jury proceedings are suspended and court facilities  
7 are once again closed to the public except for hearings on certain  
8 criminal duty matters. Order of the Chief Judge No. 20-179, at 2-3.  
9 On January 6, 2021, the Court extended the COOP plan through and  
10 including January 29, 2021. Order of the Chief Judge, No. 21-02.

11           These orders were imposed based on (1) the California  
12 Governor's declaration of a public-health emergency in response to  
13 the spread of COVID-19, as well as (2) the Centers for Disease  
14 Control's advice regarding reducing the possibility of exposure to  
15 the virus and slowing the spread of the disease. See, e.g., General  
16 Order 20-02, at 1. The Chief Judge has recognized that, during the  
17 COVID-19 crisis, all gatherings should be limited to no more than 10  
18 people and elderly and other vulnerable people should avoid person-  
19 to-person contact altogether. See Order of the Chief Judge No. 20-  
20 042, at 1-2. The Court has more broadly recognized CDC guidance  
21 advising "precautions to reduce the possibility of exposure to the  
22 virus and slow the spread of the disease[.]" General Order 20-09,  
23 at 1.

24           Consistent with this Court's orders, the Judicial Council of  
25 the Ninth Circuit Court of Appeals declared an emergency in the  
26 Central District of California, pursuant to 18 U.S.C. § 3174. In re  
27 Approval of Judicial Emergency in the Central Dist. of Cal., 955  
28 F.3d 1140 (9th Cir. 2020). The Judicial Council's order recognizes

1 that "under the emergency declarations of national, state, and local  
2 governments, as well as recommendations from the Centers for Disease  
3 Control and Prevention to convene groups of no more than 10 people,  
4 the Court is unable to obtain an adequate spectrum of . . . grand  
5 jurors." Id. at 1141.

6 Local and state governments have adopted similar policies. On  
7 March 19, 2020, both Los Angeles Mayor Eric Garcetti and California  
8 Governor Gavin Newsom issued emergency orders requiring residents to  
9 "stay home," subject to limited exceptions. California Executive  
10 Order N-33-20 (March 19, 2020); accord Safer at Home, Public Order  
11 Under City of Los Angeles Emergency Authority ¶ 1 (March 19, 2020).  
12 Subject to similarly limited exceptions, all travel was prohibited.  
13 Safer At Home ¶ 4. Non-essential businesses requiring in-person  
14 attendance by workers were ordered to cease operations. Id. ¶ 2.  
15 All schools in the Los Angeles Unified School District remain closed  
16 to in-person classes.

17 On December 3, 2020, the Acting State Public Health Officer of  
18 the State of California issued a Regional Stay at Home Order based  
19 on the "unprecedented surge in the level of community spread of  
20 COVID-19." California Regional Stay at Home Order 12/03/2020 (Dec.  
21 3, 2020). That order went into effect on December 6, 2020 and  
22 restricts business and social activities, including by suspending  
23 outdoor restaurant operations, in California regions for which ICU  
24 bed capacity is less than 15%. As the Chief Judge's December 7,  
25 2020 Order reactivating the COOP Plan recognizes, ICU availability  
26 in the Southern California region, which includes the entire Central  
27 District of California, fell below 15% as soon as the Regional Stay  
28



1 at Home Order went into effect. Order of the Chief Judge No. 20-  
2 179, at 2.

3 Based on these facts, the Court's August 2020 order concluded  
4 that it was necessary to suspend criminal jury trials until further  
5 notice "in order to protect public health, and in order to reduce  
6 the size of public gatherings and reduce unnecessary travel."  
7 General Order 20-09, at 1. Given the increased rates of COVID-19-  
8 related hospitalization and death over the 30 days preceding the  
9 August 2020 order, the Court found that "holding jury trials  
10 substantially increases the chances of transmitting the  
11 Coronavirus," and it would thus "place prospective jurors,  
12 defendant, attorneys, and court personnel at unnecessary risk." Id.  
13 at 3. The Court concluded that suspending jury trials thus served  
14 the ends of justice and outweighed the interests of the public and  
15 defendants in a speedy trial. Id. The COOP Plan continues the  
16 suspension of all jury trials. Order of the Chief Judge No. 20-179,  
17 at 3; Order of the Chief Judge No. 21-02.

18 The Central District of California has not adopted any  
19 protocols for safely conducting jury trials. See id.

#### 20 **DISCUSSION**

21 Here, the time between February 23, 2021, and July 13, 2021,  
22 should be excluded from the Speedy Trial Act calculation of the date  
23 by which trial must commence for Counts 1 to 10 of the Indictment.

24 The Speedy Trial Act generally requires a trial to begin within  
25 70 days of indictment or initial appearance, whichever occurs later,  
26 18 U.S.C. § 3161(c)(1), and entitles the defendant to dismissal of  
27 the charges (with or without prejudice) if that deadline is not met,  
28 § 3162(a)(2).

1 Certain periods of time, however, are excluded from the Speedy  
2 Trial Act's trial clock. Id. § 3161(h). Some periods of time are  
3 automatically excluded, including periods of delay resulting from  
4 the absence or unavailability of the defendant or an essential  
5 witness. Id. § 3161(h)(3)(A). Other periods of time are excluded  
6 only when a judge continues a trial and finds, on the record, that  
7 "the ends of justice served by taking such action outweigh the best  
8 interest of the public and the defendant in a speedy trial." Id.  
9 § 3161(h)(7)(A).

10 In this case, the time between February 23, 2021, and July 13,  
11 2021, for Counts 1 to 10 of the Indictment should be excluded from  
12 the Speedy Trial Act under the ends-of-justice provision, 18 U.S.C.  
13 § 3161(h)(7)(A).

14 Although the General Orders address district-wide health  
15 concerns and make Speedy Trial Act findings under § 3161(h)(7)(A),  
16 individualized findings are also required. See General Order 20-02  
17 at 2 ¶ 4; General Order 20-09 at 2 ¶ 6(a). Ends-of-justice  
18 continuances are permissible only if "the court sets forth, in the  
19 record of the case, either orally or in writing, its reasons for  
20 finding that the ends of justice served by the granting of such  
21 continuance outweigh the best interests of the public and the  
22 defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A).

23 "[W]ithout on-the-record findings, there can be no exclusion."  
24 Zedner v. United States, 547 U.S. 489, 507 (2006). The period of  
25 exclusion must also be "specifically limited in time." United  
26 States v. Lewis, 611 F.3d 1172, 1176 (9th Cir. 2010).

27 As the above facts reflect, the ends of justice justify  
28 excludable time here. Pandemic, like natural disaster or other

1 emergency, grants this Court the discretion to order an ends-of-  
2 justice continuance. "Although the drafters of the Speedy Trial Act  
3 did not provide a particular exclusion of time for such public  
4 emergencies (no doubt failing to contemplate, in the more innocent  
5 days of 1974, that emergencies such as this would ever occur), the  
6 discretionary interests-of-justice exclusion" certainly covers this  
7 situation. United States v. Correa, 182 F. Supp. 2d 326, 329  
8 (S.D.N.Y. 2001) (addressing September 11 attacks); see Furlow v.  
9 United States, 644 F.2d 764, 767-69 (9th Cir. 1981) (affirming  
10 Speedy Trial exclusion after eruption of Mount St. Helens); accord  
11 United States v. Stallings, 701 F. App'x 164, 170-71 (3d Cir. 2017)  
12 (same, after prosecutor had "family emergency"); United States v.  
13 Hale, 685 F.3d 522, 533-36 (5th Cir. 2012) (same, where case agent  
14 had "catastrophic family medical emergency"); United States v.  
15 Scott, 245 Fed. Appx. 391, 394 (5th Cir. 2007) (same, after  
16 Hurricane Katrina); United States v. Richman, 600 F.2d 286, 292,  
17 293-94 (1st Cir. 1979) (same, after a "paralyzing blizzard" and the  
18 informant was hospitalized).

19 Here, a continuance is warranted to protect public health.  
20 Federal, state, and local authorities, along with this Court's  
21 orders, have recognized that we are in the midst of a grave public-  
22 health emergency requiring people to take extreme measures to limit  
23 contact. The Central District of California has no established  
24 jury-trial protocol at present; instead, the Court has concluded  
25 that jury trials would "place prospective jurors, defendant,  
26 attorneys, and court personnel at unnecessary risk." General Order  
27 20-09 at 3 ¶ 6(a). In the absence of such a district-wide protocol,  
28 proceeding with a jury trial is unsafe.

1 An ends-of-justice delay is particularly apt in this case  
2 because:

- 3 • The trial involves witnesses with high-risk factors, who  
4 would endanger themselves by attending court during this  
5 pandemic. Specifically, several witnesses have had  
6 health issues that place them at high-risk factors to  
7 attend trial during the pandemic.
- 8 • This trial involves witnesses who must travel, and thus  
9 would put themselves and others at risk if they were to  
10 come to court during this crisis. Multiple public  
11 agencies have recommended against unnecessary travel,  
12 particularly for vulnerable populations.

13 Based on the foregoing, the Court should enter a case-specific  
14 order finding excludable time under the Speedy Trial Act by which  
15 defendant's trial on Counts 1 to 10 of the Indictment must commence.  
16 Specifically, the time period of February 23, 2021, to July 13,  
17 2021, inclusive, should be excluded pursuant to 18 U.S.C.  
18 §§ 3161(h)(7)(A) and (h)(7)(B)(i) because the delay results from  
19 continuance granted by the Court, without objection from defendant  
20 or the government, on the basis of the Court's finding that: (i) the  
21 ends of justice served by the continuances outweigh the best  
22 interest of the public and defendant in a speedy trial; and  
23 (ii) failure to grant the continuance would be likely to make a  
24 continuation of the proceeding impossible, or result in a  
25 miscarriage of justice.

26 However, nothing in the Court's order should preclude a finding  
27 that other provisions of the Speedy Trial Act dictate that  
28 additional time periods are excluded from the period within which

1 trial must commence. Moreover, the same provisions and/or other  
2 provisions of the Speedy Trial Act may in the future authorize the  
3 exclusion of additional time periods from the period within which  
4 trial must commence.

5 **ADDITIONAL DEADLINES**

6 The parties conferred regarding a stipulation but were unable  
7 to reach an agreement. The government sent a proposed stipulation  
8 and proposed order to defendant on January 11, 2021, and January 13,  
9 2021, based on prior stipulations by the parties and the Court's  
10 ruling at the January 6, 2021, status conference. On January 14,  
11 2021, defendant replied with proposed changes to the stipulation.  
12 Defendant appears to agree to the bases for which this Court can  
13 continue the trial on Counts 1 through 10 to July 13, 2021, and the  
14 exclusion of time pursuant to the Speedy Trial Act; however,  
15 defendant wants the government's deadline to disclose Jencks Act  
16 Materials and Witness Statements to remain January 25, 2021, despite  
17 the trial date getting continued.

18 First, the government voluntarily provided defendant with  
19 witness statements as early as May and June 2019, and provided  
20 defendant additional statements as the government met with  
21 witnesses. Defendant has nearly all -- if not all -- witness  
22 statements from the likely witnesses at his trial on Counts 1 to 10,  
23 and has had these statements for over 18 month. Second, the  
24 government has and will agree to early compliance with the Jencks  
25 Act, however, the Jencks Act relates to trial witnesses, which the  
26 government will be in a better position to know specifically closer  
27 to the trial date. The government proposes June 14, 2021, which is  
28 approximately one month prior to trial, and is consistent with the

1 parties' prior stipulations and the Court's prior orders setting the  
2 deadline one month prior to trial.

3 On January 20, 2021, the government sought defendant's position  
4 on this ex parte application, and defense counsel provided a  
5 response that again does not appear to oppose the continuance or the  
6 exclusion of time pursuant to the Speedy Trial Act, but raises  
7 objections to other matters.

8

9 Dated: January 20, 2021

Respectfully submitted,

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BRANDON D. FOX  
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/s/

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