

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 3:22-cr-23-BJD-MCR

AARON ZAHN and
RYAN WANNEMACHER,
Defendants.

DEFENDANTS' MOTION TO CONTINUE TRIAL¹

Defendants Ryan Wannemacher and Aaron Zahn respectfully request that the Court continue the trial of this matter, currently set for May 2023.² As discussed below, Defendants need a continuance, and they will not be able to adequately represent their clients at trial without it. Most importantly, the Defendants require substantial additional time to complete their review and

¹ Certificate of Conferral: Brian Albritton, counsel for Defendant Zahn, spoke with government's counsel, Assistant United States Attorney Tysen Duva, by phone on December 20, 2022, about Defendants' request for a continuance. AUSA Duva did not oppose Defendants' request to continue the trial from the current May 2023 trial date, but he believed the trial should be re-set for mid-August 2023. Additionally, AUSA Duva reserved the government's right to respond to this motion as well as to address the Court about it at the upcoming January 10, 2023, status conference.

² Pursuant to Local Rule 3.08(b), counsel for the Defendants have conferred with their respective clients about the continuance requested herein and certify that their clients consent to the continuance.

analysis of the terabytes of discovery that the government has produced *and* the 80+ gigabytes of evidentiary material that Defendants have subpoenaed from third parties. As counsel for Mr. Zahn expressed to the Court at the November 14, 2022, hearing, the review and analysis of this voluminous material has taken substantially more time than counsel originally anticipated. Despite their best efforts, Defendants' counsel anticipate it will take several more months to complete their review and be ready for trial. The Defendants' counsel also face personal conflicts that make the present trial date impractical. Ultimately, an additional continuance in this complex white-collar prosecution is neither extraordinary nor prejudicial to the government.

For these reasons explained below, the Defendants' motion should be granted, the Court should continue the May trial date, set the matter for status in August 2023, and reset the trial no earlier than the Court's October 2023 trial calendar.

Procedural Background

On March 2, 2022, the grand jury returned a 28-page, two-count indictment against Mr. Zahn and Mr. Wannemacher related to their prior employment as Chief Executive Officer and Chief Financial Officer, respectively, of the Jacksonville Electric Authority (JEA). Doc. 1. The Indictment alleges a scheme occurring over nine months that involved a complex "invitation to negotiate"

process conducted by JEA; a multi-month strategic planning process that evaluated the identifiable contingencies impacting the industry as a whole and JEA specifically. This detailed analysis required input from numerous JEA personnel, including every JEA department head, and was led by expert consultants from a leading national consulting firm that examined JEA's 10-year future³; and the analysis and development of a long-term incentive plan for JEA that did not finish legal review by OGC and outside national law firms and was never implemented. The Indictment also alleges a substantive wire fraud count in connection with the July 23, 2019, JEA Board Meeting. *Id.* at 26-27.

Following a status conference on April 19, 2022, the Court granted the Defendants' motions to set trial for May 1, 2023. Doc. 51. The Court recognized the parties' agreement that this case involves complex issues, voluminous discovery, many witnesses, and forthcoming suppression and dismissal motions. *Id.* at 1. As a result, the Court found that "the discovery needed, motion practice expected, and the complexity of this case" justified continuing the trial under the Speedy Trial Act. *Id.*

³ Defending this claim alone is a massive undertaking. Not only because of the extensive analysis conducted by JEA personnel and the outside consultants, but also because it requires defense counsel to have a significant and granular understanding of the industry and the challenges it is facing. This goes far beyond a simple review of discovery, which as previously explained is a massive undertaking.

Defendants received about 3.5 terabytes (TB) of discovery from the government under Federal Rule of Criminal Procedure Rule 16. Roughly speaking, 1 TB of Word documents is equivalent to 83.3 million pages of text,⁴ so the task of reviewing this data is enormous. Defendants worked cooperatively with the government to assess what items the government intends to use as exhibits in its case-in-chief. *See* Doc. 80 at 4-5. As described below, Defendants have worked hard to manage and review the government's discovery productions efficiently to determine what items are material to the defense. *Id.* at 5.

In addition to reviewing the government's discovery, the Defendants have sought to gather evidence relating to the Indictment's allegations and their *Kastigar* motions using pretrial subpoenas under Federal Rule of Civil Procedure 17(c). The Court granted the Defendants leave to serve pretrial subpoenas for relevant, admissible, and specific evidence from several law firms that represented JEA during the pertinent time period (Nixon Peabody, LLP; Pillsbury Winthrop Shaw Pittman, LLP; Foley & Lardner, LLP; Smith, Hulsey & Busey; and Nelson Mullins), as well as the City of Jacksonville's Office of General Counsel, the City of Jacksonville's Office of the Council Auditor, and JEA itself. *See* Docs. 60, 68, 73, 76 (orders granting leave to serve pretrial subpoenas).

⁴ *See* article, "How Many Files Can I Store?", University of Alaska Anchorage, <https://service.alaska.edu/TDClient/36/Portal/KB/ArticleDet?ID=95> (last viewed on Dec. 19, 2022).

The Defendants have also filed numerous comprehensive motions: (1) the Defendants' Motion to Dismiss the Indictment for Failure to State an Offense, Doc. 93; (2) the Defendants' Motion for a Pretrial James Hearing, Doc. 101; (3) Mr. Wannemacher's Motion to Sever, Doc. 102; (4) Mr. Wannemacher's Motion for *Kastigar* Hearing, Doc. 114; (5) Mr. Zahn's Motion for *Kastigar* Hearing, Doc. 115; and (6) Mr. Zahn's Motion for Intradistrict Transfer, Doc. 118. These motions raise complex factual and legal issues that will impact the future course of this prosecution.

Legal Standard

Under the Speedy Trial Act, "a district court may grant a continuance of the trial date when the 'ends of justice' support the continuance." *United States v. Ammar*, 842 F.2d 1203, 1206 (11th Cir. 2016) (quoting 18 U.S.C. § 3161(h)(7)(A)). The Court's considerations must include "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by" the Speedy Trial Act. 18 U.S.C. § 3161(h)(7)(B)(ii).

Argument

For the reasons explained below, Defendants anticipate at least several additional months beyond the May trial date are necessary for them to adequately prepare for trial.

I. Additional time is necessary for the Defendants to review the government's discovery and the materials obtained (or to be produced) in response to pretrial subpoenas.

The complexity of this case is best illustrated by the government's discovery – more than 400,000 native files, 41 forensic images, and gigabytes of grand jury materials. Defendants' counsel have expended thousands of hours and utilized several personnel to assist with reviewing the government's discovery and materials obtained pursuant to Rule 17. Unfortunately, their review cannot be completed by the May trial date.

Counsel have engaged in a strategic linear (or "file-by-file") review of discovery to assess the relevance to this prosecution and potential defenses. Because linear review is time-consuming and could continue indefinitely in light of the volume of discovery, counsel are also employing a technology-assisted review (TAR) platform. Though intended to speed up the document review process as well, TAR review also takes significant time and effort.

For example, the TAR protocol for the government's initial production of 333 GB of data⁵ required the Defendants to review over 10,000 "seed" documents to achieve acceptable precision and recall rates for the predictive coding algorithm to identify relevant documents in the larger set. The coding algorithm was successfully applied to the initial production and after de-duplication yielded 26,301 documents that are currently being reviewed in a linear review by a five-person document review team.

Moreover, the Defendants are utilizing a second TAR protocol for the additional 292 GB of emails produced by the Government on August 25, 2022. The initial review of approximately 3,000 files again yielded a low "reliability" rate. As a result, the Defendants need to review additional seed documents to train the predictive coding algorithm. Presently, the algorithm is identifying 96,711 de-duplicated documents with attachments for review, with an additional 24,270 documents not well covered yet in the review. It is unclear at this time how many additional seed documents and validation review rounds will be needed to improve the precision and recall rates and apply the algorithm to the larger set.

⁵ The Government's initial production comprised 335 GB. Defendants excluded the FBI interview reports and the grand jury materials from the TAR review protocol because those documents are being reviewed by counsel through a linear review.

In addition to review of the government's discovery, the Defendants have issued pretrial subpoenas for relevant, specific, and admissible files from important entities—the City of Jacksonville's Office of General Counsel, the Council Auditor's Office, Special Counsel to the City Council Committee (Smith, Hulsey & Busey), and various law firms that JEA retained during the pertinent time period to advise them on the ITN and long-term incentive plan. To date, Defendants have received more than 80 gigabytes (or 589,000 pages) of communications, notes, drafts, and other documents.

Unfortunately, the Defendants have not yet received all of the items that they subpoenaed. While the Defendants diligently served each subpoena when they were granted leave of court, counsel has coordinated with each subpoena recipient to agree on the scope of a responsive production that would avoid unnecessary litigation by nonparties in this case. That has taken more time than counsel anticipated, and some of those conferrals about obtaining responsive documents are still ongoing. Additionally, Defendants have been coordinating with the Office of General Counsel and JEA on a substantial production in response to the court subpoena for devices that JEA stored for key City and JEA employees, which the government thought it obtained during its pre-indictment investigation. *See* Doc. 76 (order granting leave to serve pretrial subpoena to JEA).

At bottom, the Defendants' counsel require additional time to investigate and build their defenses to the Indictment's allegations. Not only is that task constitutionally required, *see Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995) ("An attorney rather clearly has a duty to familiarize himself with the discovery materials[.]"), but it is one the Eleventh Circuit has recognized as warranting a continuance. *See Schwarz v. United States*, 828 F. App'x 628, 634 (11th Cir. 2020) ("[K]nowledge of the government's key evidence for conviction and reassurances that most of the discovery was produced in an abundance of caution are not a substitute for defense counsel reviewing the evidence and preparing a case for acquittal. Loyalty to [the] client's interests required [defendant's] counsel to view the discovery with an independent eye.").

II. Personal obligations make the trial date impractical.

The Defendants also respectfully request a continuance in light of counsel's other professional and personal obligations between May and September 2023. Brandon Breslow, counsel for Mr. Wannemacher, anticipates taking parental leave beginning in May 2023 immediately following the birth of his first child. Niels Murphy, co-counsel for Mr. Wannemacher, plans to attend his son's out-of-state college graduation the weekend of May 19, 2023.⁶

⁶ Looking forward, Mr. Murphy has a trial scheduled in Texas between July 17, 2023, and July 28, 2023. Catherine Licandro, co-counsel for Mr. Wannemacher, has a trial scheduled for the week of September 18, 2023.

The Defendants should not have to proceed to trial without their choice of counsel, especially when counsel has provided the Court reasonable notice of unavailability during the trial term. *See United States v. Zangwill*, 197 F. App'x 888, 891 (11th Cir. 2006) (recognizing “delicate balance between the defendant’s right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice”).

III. An additional continuance is neither extraordinary nor prejudicial to the government.

The Defendants’ request for a continuance is not extraordinary. *See United States v. Vernon*, 593 F. App'x 883, 886 (11th Cir. 2014) (voluminous discovery and scheduling conflicts warranted three “ends-of-justice” continuances under Speedy Trial Act). And there is no prejudice to the government that should caution the Court against granting this motion to continue. The government’s investigation began in January 2020 and spanned *26 months* until the Indictment was returned on March 2, 2022. *See* Doc. 63 at 3 (“federal investigation ... began in January 2020”). The government has since had additional time to investigate and prepare for trial. On the other hand, the Defendants’ ongoing work that necessitates a continuance of the trial – review of discovery, investigation through pretrial subpoenas, and motions practice – could only *begin* in the last *nine months* since they were indicted. The Defendants’ interest in presenting an informed defense should not yield to the government’s interest in an expeditious

prosecution. *See United States v. Jeri*, 689 F.3d 1247, 1258 (11th Cir. 2017) (“The costs attendant to a continuance [are] low, but the potential risk to the defendant [is] real.”).

Conclusion

For these reasons, the Defendants’ motion should be granted. The Court should continue the trial date set for May 2023. The Court should set the matter for status in August 2023 and reset the trial no earlier than the Court’s October 2023 trial calendar.

Respectfully submitted,

/s/ James E. Felman

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CERTIFICATE OF SERVICE

I certify that on December 21, 2022, the foregoing motion was electronically filed with the Clerk of the Court using the Electronic Filing System, which will serve a copy on all counsel of record.

/s/ James E. Felman
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