

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 United States of America,  
10 Plaintiff,  
11 v.  
12 Michael Lacey, et al.,  
13 Defendants.

No. CR-18-00422-001-PHX-SPL  
**ORDER**

14  
15 On April 25, 2018, the Government filed a motion (the “Motion”) to disqualify the  
16 law firm of Henze Cook Murphy (“HCM”) from representing Defendant Michael Lacey  
17 (“Lacey”) and the law firm of Davis Wright Tremaine (“DWT”) from representing Lacey  
18 and Defendant James Larkin (“Larkin”). (Doc. 118) The Motion was fully briefed on July  
19 2, 2018, and the Court heard oral argument at a hearing on October 5, 2018. As set forth  
20 below, the Court finds that Carl Ferrer (“Ferrer”) expressly waived his right to seek  
21 disqualification of HCM and DWT in previous joint representation and joint defense  
22 agreements; accordingly, the Motion is denied.

23 **I. Procedural Background**

24 On March 28, 2018, a federal grand jury returned a ninety-three count indictment  
25 against several Defendants, including Lacey and Larkin, alleging that the Defendants  
26 engaged in various crimes related to the operation of the website Backpage.com, including  
27 conspiracy, facilitating prostitution, and money laundering. (Doc. 3) The indictment also  
28

1 includes forfeiture allegations.<sup>1</sup> *Id.* Lacey and Larkin were arrested on April 6, 2018. The  
2 docket reflects that attorneys from DWT entered appearances on behalf of Lacey and  
3 Larkin, and attorneys from HCM entered appearances on behalf of Lacey.

4 On April 5, 2018, Ferrer pleaded guilty to conspiracy to facilitate prostitution and  
5 money laundering. (CR 18-464-SPL, Doc. 7) The charges against Ferrer were based on  
6 his work at Backpage.com (“Backpage”). (Doc. 118 at 6) On April 13, 2018, Ferrer sent  
7 letters to DWT and HCM asking that the firms comply with their ethical duties to him, as  
8 a former client, and withdraw from representing Lacey and Larkin. (Doc. 118, Exs. A and  
9 B) On April 20, 2018, DWT sent Ferrer a letter stating that they would “withdraw from  
10 representation in all matters and cases as counsel for you, Backpage.com, LLC, and all  
11 related entities owned or controlled by you . . . .” (*Id.* at Ex. U) HCM states that it withdrew  
12 from its representation of Backpage.com and Ferrer on October 17, 2017. (Doc. 176 at 7)  
13 Neither DWT nor HCM withdrew from their representation of Lacey and Larkin in this  
14 matter.

15 The Government asserts that, before filing the Motion, it met with various defense  
16 counsel in an attempt to resolve its concerns regarding potential conflicts of interest. (Doc.  
17 118 at 2; *see also* Doc. 176 at 8 (HCM states that it retained counsel to meet with the  
18 Government to discuss HCM performing a limited role representing Lacey)) The parties  
19 were not able to resolve these issues, and the Government filed the Motion. (Doc. 118)

#### 20 **A. Briefing on the Motion to Disqualify**

21 On June 6, 2018, after receiving extensions of time to respond, Defendants filed  
22 responses to the Motion. (Docs. 130, 134, 147, 149, 154, 156, 160, 162, 163, 172, 174,  
23 176, 177, 180) Lacey filed a response in opposition to the Government’s Motion directed  
24 at HCM, through his separately retained trial counsel. (Doc. 174) HCM also filed a  
25 response in opposition to the Motion, through its separate counsel. (Doc. 176) On June  
26 13, 2018, the Government filed a reply to Lacey’s and HCM’s responses. (Doc. 192)

27 ///

28 <sup>1</sup> On July 25, 2018, the grand jury returned a 100-count superseding indictment against the  
Defendants. (Doc. 230)

1 On June 6, 2018, Lacey and Larkin, through separate counsel, also filed a joint  
2 response to the Government's Motion directed at DWT. (Doc. 180) On June 13, 2018, the  
3 Government filed a reply to Lacey's and Larkin's response to the Motion directed at DWT.  
4 (Doc. 193) On July 2, 2018, the Government filed a supplement to that reply. (Doc. 207)  
5 Defendant Andrew Padilla ("Padilla"), through separate counsel, also filed a response in  
6 opposition to the Government's Motion directed at DWT (Doc. 177), and the Government  
7 filed a reply to Padilla's response. (Doc. 194) In addition, several Defendants filed  
8 joinders to the various responses to the Motion.<sup>2</sup> On October 5, 2018, the Court heard  
9 argument on the pleadings, and the arguments made by each party were taken under  
10 advisement.

## 11 **II. Motion to Disqualify**

12 The Government argues that each firm's prior representation of Ferrer presents an  
13 incurable conflict of interest that should disqualify both firms from participation in this  
14 case. Relying on Ethical Rule 1.9(a) of the Arizona Rules of Professional Conduct (Duties  
15 to Former Clients), the Government asserts that HCM and DWT have incurable conflicts  
16 of interest because (1) they previously represented Ferrer in substantially related matters,  
17 (2) Ferrer's interests as their former client are materially adverse to the interests of their  
18 current clients, Lacey and Larkin, because Ferrer has pleaded guilty to criminal conduct  
19 related to his work at Backpage and is cooperating with the Government in its pursuit of  
20 criminal charges against other Backpage principals, including Lacey and Larkin,<sup>3</sup> and (3)

21 <sup>2</sup> Defendant Joye Vaught ("Vaught") filed a joinder to Padilla's response to the  
22 Government's Motion directed at DWT (Doc. 178), and a joinder to Lacey's and Larkin's  
23 response to the Motion directed at HCM. (Doc. 186) Defendant John "Jed" Brunst  
24 ("Brunst") filed a joinder to Lacey's and HCM's responses to the Motion directed at HCM,  
25 and a joinder to Padilla's response to the Motion directed at DWT. (Doc. 181) Padilla  
26 filed a joinder to Lacey's and HCM's responses to the Motion directed at HCM, and a  
27 joinder to Lacey's and Larkin's response to the Motion directed at DWT. (Doc. 184)  
28 Lacey and Larkin filed separate joinders to Padilla's response to the Motion directed at  
DWT. (Docs. 188, 190) Finally, Defendant Scott Spears ("Spears") filed a joinder in  
Lacey's and HCM's responses to the Motion directed at HCM, a joinder to Lacey's and  
Larkin's response to the Motion directed at DWT, and a joinder in Padilla's response to  
the Motion directed at DWT. (Doc. 191)

<sup>3</sup> The Government appears to use "Backpage" to refer generally to the website  
Backpage.com. (See Doc. 118 at 1-2, 6) The Government asserts that Lacey, Larkin, and  
Ferrer are the founders of the website Backpage.com, and then refers to their "work at

1 Ferrer has not given informed consent, confirmed in writing, to allow HCM and DWT to  
 2 represent Lacey and Larkin. (Doc. 118 at 2, 8) The Government also argues that HCM’s  
 3 and DWT’s continued representation of Lacey and Larkin in this matter would violate  
 4 Ethical Rule 1.7(a)(2) of the Arizona Rules of Professional Conduct (Conflicts of Interest:  
 5 Current Clients) because there is a significant risk that the firms’ representation of Lacey  
 6 and Larkin would be materially limited by their responsibilities to their former client  
 7 Ferrer. (*Id.* at 8–9)

#### 8 **A. Applicable Standards**

9 This Court applies the Arizona Rules of Professional Conduct to evaluate the  
 10 conduct of attorneys admitted or authorized to practice before it and, therefore, the Court  
 11 applies these rules to resolve the Government’s motion to disqualify.<sup>4</sup> *See* LRCiv 83.2(e);  
 12 *Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist.*, 810 F.  
 13 Supp. 2d 929, 944 (D. Ariz. 2011) (“this Court applies the Arizona ethical rules when  
 14 evaluating motions to disqualify counsel.”) (citations omitted); *Amparano v. ASARCO,*  
 15 *Inc.*, 93 P.3d 1086, 1092 (Ariz. Ct. App. 2004) (courts have “looked to the ethical rules for  
 16 guidance on disqualification motions.”).

17 The preamble to the Arizona ethical rules explains that the rules are designed to  
 18 provide guidance to lawyers and a structure for regulating conduct, but cautions that “the  
 19 purpose of the [r]ules can be subverted when they are invoked by opposing parties as  
 20 procedural weapons.” Ariz. R. Sup. Ct 42, preamble at ¶ 20. In addition, the Arizona  
 21 Supreme Court has stated that “[o]nly in extreme circumstances should a party to a lawsuit  
 22 be allowed to interfere with the attorney-client relationship of his opponent.” *Alexander v.*  
 23 *Superior Court*, 685 P.2d 1309, 1313 (Ariz. 1984). “The burden is on the moving party to

24 \_\_\_\_\_  
 25 Backpage,” and “Backpage-related lawsuits.” (*Id.* at 2, 3) The Government also sets forth  
 26 the factual basis from Ferrer’s plea agreement in *United States v. Ferrer*, CR 18-464-SPL,  
 27 in which Ferrer stated, in part, that in 2004 he co-founded “the website  
 www.Backpage.com (‘Backpage’), along with M.L [Michael Lacey] and J.L. [James  
 Larkin.]” (Doc. 118 at 6)

28 <sup>4</sup> The Arizona Rules of Professional Conduct, also referred to as the Arizona ethical rules,  
 are set forth in Rule 42 of the Rules of the Supreme Court and are cited by rule number and  
 the abbreviation “ER.” *See* Ariz. R. Sup. Ct. 42.

1 show sufficient reason why an attorney should be disqualified from representing his [or  
2 her] client.” *Id.*

3 **1. Ethical Rule 1.9(a)—Duties to Former Clients**

4 Ethical Rule 1.9(a) states that “[a] lawyer who has formerly represented a client in  
5 a matter shall not thereafter represent another person in the same or a substantially related  
6 matter in which that person’s interests are materially adverse to the interests of the former  
7 client unless the former client gives informed consent, confirmed in writing.” ER 1.9(a).  
8 For a conflict to exist pursuant to this provision, the moving party must show: (1) the  
9 existence of an attorney-client relationship; (2) that the former representation was “the  
10 same or substantially related” to the current litigation; and (3) that the current client’s  
11 interests are “materially adverse” to the former client’s interests. *Roosevelt*, 810 F. Supp.  
12 2d at 944 (citing *Foulke v. Knuck*, 784 P.2d 723, 726–27 (Ariz. Ct. App. 1989)).

13 **2. Ethical Rule 1.7(a)—Concurrent Conflicts of Interest**

14 Ethical Rule 1.7(a)(2) states that “a lawyer shall not represent a client if the  
15 representation involves a concurrent conflict of interest. A concurrent conflict of interest  
16 exists if . . . there is a significant risk that the representation of one or more clients will be  
17 materially limited by the lawyer’s responsibilities to another client, a former client or a  
18 third person or by a personal interest of the lawyer.” ER 1.7(a)(2). “Notwithstanding the  
19 existence of a concurrent conflict of interest . . . a lawyer may represent a client if each  
20 affected client gives informed consent, confirmed in writing.” ER 1.7(b). However, even  
21 with consent, concurrent conflicts are allowed only if “the lawyer reasonably believes that  
22 the lawyer will be able to provide competent and diligent representation to each affected  
23 client,” “the representation is not prohibited by law,” and “the representation does not  
24 involve the assertion of a claim by one client against another client represented by the same  
25 lawyer in the same litigation or other proceeding before a tribunal.” ER 1.7(b)(1)-(3).  
26 Thus, representation may be undertaken, despite the existence of a conflict, only if the  
27 conflict is “consentable.” *Id.*; Cmt 2 (2003 Amendments).

28 ///

1           **B.     The Joint Representation Agreement and Joint Defense Agreement**

2           In response to the Motion, Lacey and Larkin argue that Ferrer previously waived  
3 any right to seek disqualification of counsel or assert a conflict of interest against DWT  
4 pursuant to certain confidential joint representation and joint defense agreements. (Doc.  
5 180 at 12–13) Specifically, the Defendants argue that Ferrer was party to a Common  
6 Interest and Litigation Management Agreement (the “JRA”), or joint representation  
7 agreement, and a joint defense agreement (the “JDA”) in which Ferrer waived his right to  
8 seek disqualification of counsel in the event that he withdrew from either of the confidential  
9 agreements. (Doc. 180 at 13–14) The JRA was executed by Ferrer on behalf of several  
10 corporate entities including Backpage, and the JDA was executed by Ferrer and HCM  
11 attorneys on behalf of Ferrer, among other parties. Both the JRA and JDA were provided  
12 to the Court for *in camera* review.

13           The Ninth Circuit has long recognized that the joint defense privilege is “an  
14 extension of the attorney-client privilege,” and joint defense agreements allow parties with  
15 cohesive interests to share information without waiving confidentiality. *United States v.*  
16 *Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012). The “joint defense privilege” is designed to  
17 facilitate communication among joint parties regarding matters that are important to protect  
18 their interests in litigation. The concept of a joint defense is not technically a privilege in  
19 and of itself, but instead constitutes an exception to the rule on waiver where  
20 communications are disclosed to third parties. *Continental Oil Co. v. United States*, 330  
21 F.2d 347, 350 (9th Cir. 1964). A joint defense agreement can be written or oral, but joint  
22 defense agreements cannot extend greater protections than the legal privileges on which  
23 they rest. *Stepney*, 246 F. Supp. 2d 1069, 1079–80 (N.D. Cal. 2003).

24           Courts generally encourage parties to enter into written joint defense agreements  
25 that, under the advice of separate counsel, allow each defendant the opportunity to fully  
26 understand his rights prior to entering into the agreement. *United States v. Almeida*, 341  
27 F.3d 1318, 1327 (11th Cir. 2003); *Stepney*, 246 F. Supp. 2d at 1084–86. It is well settled  
28 that waivers of rights in joint defense agreements are valid to cure conflicts with the ethical

1 rules. *Stepney*, 246 F. Supp. 2d at 1085 (recognizing that waiver provisions are appropriate  
2 to avoid conflicts). Additionally, ER 1.10(c) provides that a disqualification prescribed by  
3 ER 1.9 may be waived by the impacted client under the conditions stated in ER 1.7. ER  
4 1.10(c). Ethical Rule 1.7 states that the affected client must give “informed consent,  
5 confirmed in writing” to waive a conflict of interest. ER 1.7(b). Informed consent “denotes  
6 the agreement by a person to a proposed course of conduct after the lawyer has  
7 communicated adequate information and explanation about the material risks of and  
8 reasonably available alternatives to the proposed course of conduct.” ER 1.0(e); *See also*  
9 *Roosevelt*, 810 F. Supp. 2d at 957 (citing ER 1.7 stating informed consent requires that  
10 each affected client be aware of the relevant circumstances and of the material and  
11 reasonably foreseeable ways that the conflict could have adverse effects on the interests of  
12 that client).

13 The Court finds that the express terms of the JRA and JDA<sup>5</sup> are fatal to the  
14 Government’s argument for disqualification because the content of these agreements  
15 demonstrates that Ferrer waived his right to pursue disqualification against HCM, DWT,  
16 and other parties identified in these agreements. Both the JRA and the JDA anticipated  
17 circumstances in which a party to either agreement chose to withdraw. Without directly  
18 quoting the language of the JRA, it is clear to the Court that the plain language of the  
19 agreement prevents Ferrer from seeking disqualification of counsel based on any conflict  
20 arising out of the JRA. Similarly, by joining the JDA, the plain language of the agreement  
21 demonstrates that Ferrer waived his right to assert that any attorney party to the JDA is  
22 barred from continuing his or her representation under the agreement. Per the terms of the  
23 JDA, Ferrer waived his right to seek disqualification as to both HCM and DWT, which  
24 were both parties under the terms of the JDA.<sup>6</sup> Ferrer executed the JRA and JDA in his  
25

---

26 <sup>5</sup> Importantly, the Government does not dispute the existence or validity of either  
27 agreement. (Doc. 193 at 7)

28 <sup>6</sup> The Court recognizes that neither Lacey (Doc. 174) nor HCM (Doc. 176) raised the issue  
of the JDA in their responses to the Motion in defense of HCM. However, the clear terms  
of the JDA demonstrate that HCM was party to the JDA along with DWT.



1 individual capacity and on behalf of Backpage when appropriate. It is undisputed that  
2 Ferrer signed the JDA under advice of counsel. (Doc. 193 at 8) Therefore, the Court finds  
3 that these agreements are valid and enforceable, and that Ferrer's signatures demonstrate  
4 his intent to abide by the terms of these agreements.

5 The Government argues that the JRA and JDA are not controlling because the  
6 agreements were not signed by DWT. (Doc. 193 at 7) The Court finds that this argument  
7 is unavailing and irrelevant because Ferrer signed the agreements, and, per the terms of  
8 each agreement, Ferrer waived his right to seek to disqualify HCM and DWT or assert any  
9 future conflicts of interest. The Government has only provided the Court with precedent  
10 in which no joint defense agreements were present, save for a brief summary of the *Henke*  
11 case, making each case relied on in the Motion substantively distinguishable from the facts  
12 at issue. To cure this defect, the Government relies on *U.S. v. Ross*, a case inapplicable to  
13 circumstances involving a joint defense agreement, for the proposition that it is within the  
14 Court's discretion to refuse to accept a conflict waiver where the interests of justice require.  
15 *United States v. Ross*, 33 F.3d 1507, 1524 (11th Cir. 1994) (stating that trial courts may  
16 refuse waivers of conflicts of interest to ensure adequacy of representation, to protect  
17 integrity of court, and to preserve trial judge's interest to be free from future attacks over  
18 adequacy of waiver and fairness of trial). However, the Court declines to exercise its  
19 discretion to disregard Ferrer's waiver at this time.

20 The Court finds that Ferrer waived his right to seek disqualification of HCM and  
21 DWT or to assert any conflict of interest in this case. Pursuant to the terms of the JRA and  
22 the JDA, the Court finds that Ferrer has provided DWT and HCM with the written informed  
23 consent necessary for each firm to continue its participation as counsel. The Court is  
24 confident that allowing HCM and DWT to continue their participation in this case will not  
25 run afoul of the interests of justice, and Ferrer's executed JRA and JDA provide the written  
26 informed consent necessary to satisfy ER 1.9(a) and ER 1.7(b).

27 ///

28 ///



1 **C. Government's Arguments in Support of Disqualification**

2 The Court recognizes that it may be difficult for the Government to understand what  
3 it cannot see in how the terms of the JRA and the JDA distinguish this decision from the  
4 precedent and ethical opinions identified by the Government in the Motion. First, Arizona  
5 Ethics Opinion 91-5 focuses on how ER 1.9 should be used as a shield to protect a former  
6 client, but the opinion is silent on any situation in which said former client had expressly  
7 waived his right to challenge any continued or future adverse representation by counsel.  
8 Similarly, the *Ross*, *Moscony*, *Williams*, and *Alfonzo-Reyes* cases relied on by the  
9 Government are silent on the issue of waivers appearing in joint representation or joint  
10 defense agreements acting as blanket waivers of future conflicts. Instead, each of the cases  
11 cited by the Government reiterates the Court's power to disregard a defendant's knowing  
12 and intelligent conflict waiver. *United States v. Ross*, 33 F.3d 1507, 1524 (11th Cir. 1994);  
13 *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991) (recognizing that the  
14 presumption in favor of a defendant's counsel of choice can be overcome, and a trial court  
15 may disqualify counsel and reject the defendant's waiver of conflict-free representation);  
16 *United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996) (upholding a district court's  
17 decision to disqualify a defendant's choice of counsel due to conflict of interest); *United*  
18 *States v. Alfonzo-Reyes*, 592 F.3d 280, 294 (1st Cir. 2010) (stating that no conflict waiver  
19 actually occurred). The Court finds these cases unpersuasive.

20 The Court does not find that allowing HCM and DWT to continue to participate in  
21 this case as auxiliary counsel threatens the integrity of the trial process. The only case that  
22 the Government relies on that even mentions a joint defense agreement is the *Henke* case.  
23 *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000). In *Henke*, a client withdrew from a  
24 joint defense agreement, and his counsel moved to withdraw from the case. *Id.* at 637. The  
25 Court denied counsel's motion to withdraw, and counsel chose not to cross-examine its  
26 former client at trial. *Id.* The *Henke* decision addressed conflicts that require withdrawal  
27 of trial counsel. It did not address the issue of waiver under a joint defense agreement.  
28 Further, it has been made clear that neither HCM nor DWT will participate as trial counsel

1 in this matter, and both firms have stated that neither firm will participate in cross-  
2 examining Ferrer. (Doc. 176 at 11; Doc. 180 at 28) Thus, the Court finds that the *Henke*  
3 case is also unpersuasive for ordering disqualification.

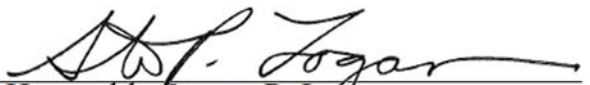
4 **D. Conclusion**

5 At this time, the Court declines to decide whether the terms of Ferrer's proffer  
6 agreement waived his personal attorney-client privilege. The Court also finds that the  
7 arguments advanced by Padilla are moot per the terms of this Order. Moving forward, the  
8 Court will rely on the representations of HCM, DWT, and their respective counsel that the  
9 firms will continue to preserve the confidences of Ferrer as a former client, create ethical  
10 walls where necessary, refrain from engaging in trial preparation or participating as trial  
11 counsel, and only participate in the limited capacity set forth in the pleadings, without an  
12 order from the Court. Accordingly,

13 **IT IS ORDERED:**

14 That Government's Motion to Disqualify Counsel (Doc. 118) is denied.

15 Dated this 12th day of October, 2018.

16  
17   
18 Honorable Steven P. Logan  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28