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

19 United States of America,  
20 Plaintiff,

21 v.

22 Michael Lacey, et al.,  
23 Defendants.

No. CR-18-422-PHX-SMB

**UNITED STATES' MOTION TO  
PRECLUDE DEFENDANTS'  
ADVICE OF COUNSEL DEFENSE**

1 Defendants should be precluded from soliciting testimony or otherwise suggesting  
2 that they relied upon the advice of their attorneys as a defense to the charged offenses.  
3 Defendants have not waived any applicable attorney-client privilege. Without such a  
4 waiver—and a subsequent opportunity for the United States to review the information  
5 Defendants provided to their attorneys to determine whether counsel knew the full scope  
6 of Backpage’s business practices—black letter law prohibits Defendants from making an  
7 advice of counsel defense. This includes any argument that Defendants possessed “good  
8 faith” based on the advice they may have received from their attorneys.

9 **I. Defendants’ Recent Disclosures**

10 In a recent disclosure, Defendants produced legal memoranda that—on their face—  
11 appear to be protected by the attorney-client privilege. (Letter from W. Bernstein dated  
12 July 2, 2021, attached as Exhibit A.) These memoranda—authored by various attorneys—  
13 include one titled, “Why Village Voice Media’s Backpage.com Service Does Not Create  
14 Liability for Promoting Prostitution.”<sup>1</sup> This 31-page-memorandum was written by  
15 attorneys at a law firm in St. Louis, Missouri.

16 In response to the government’s inquiry regarding whether the disclosure waived  
17 Defendants’ privilege as to those particular attorneys, defense counsel claimed that there  
18 was no waiver because the disclosure tracked the Court’s recent Order (Doc. 1169 at 9-  
19 11). (Email exchange between A. Stone and W. Bernstein, attached as Exhibit. B.) That  
20 Order analyzed Defendants’ claims that certain statements made by Carl Ferrer were  
21 privileged. In that context, the Court found that “Defendants have not satisfied their burden  
22 of establishing an attorney-client relationship and/or attorney-client communications.”  
23 (Doc. 1169 at 9.) Here, Defendants produced (seemingly) complete legal memoranda  
24 prepared by their former attorneys. But when the government inquired as to whether

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25 <sup>1</sup> This memorandum includes, among others, the following sections: “Section 230  
26 Immunizes Interactive Computer Service Providers From Liability For Third Party  
27 Content;” “Village Voice Cannot Be Liable Under Missouri Law For Promoting  
28 Prostitution;” “Backpage.com Is Engaged In Protected Speech;” and “Even If Section 230  
And The Scierter And Remoteness Doctrines Of Criminal Law Did Not Apply, The First  
Amendment Would Prevent Imposition Of Criminal Liability On Village Voice In This  
Situation.”

1 Defendants were waiving the privilege, Defendants were adamant that they were not. (Ex.  
2 B at 1) (“the disclosure . . . is not a waiver of a privilege”). Instead, Defendants claimed  
3 that they may use legal memoranda at trial to negate the United States’ evidence of criminal  
4 intent, by arguing that reliance on their attorneys’ advice demonstrates Defendants’ “good  
5 faith.” (Exs. A & B.)

## 6 **II. Advice of Counsel Defense Isn’t Available Without a Privilege Waiver**

7 A trier of fact may consider advice of counsel as a partial defense to disprove a *mens*  
8 *rea* element, but “only upon the showing that [a defendant] made a full disclosure of all  
9 relevant and material facts to his attorney.” *Bisno v. United States*, 299 F.2d 711, 719-20  
10 (9th Cir. 1961). Accordingly, “[t]o qualify for an advice of counsel instruction, the  
11 defendant must show that there was full disclosure to his attorney of all material facts, and  
12 that he relied in good faith on the specific course of conduct recommended by the attorney.”  
13 *United States v. Ibarra-Alcaarez*, 830 F.2d 968, 973 (9th Cir. 1987). When the evidence  
14 shows that a defendant failed to make a full disclosure of the underlying facts to his  
15 attorney, then an advice of counsel defense is not available. *See id.*

16 Here, Defendants are explicit that they have not waived any attorney-client  
17 privilege. (Exs. A & B.) Without doing so, they are precluded from invoking an advice of  
18 counsel defense. *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888) (when  
19 defendant entered into a defense which relied upon what her lawyer told her, she waived  
20 her right to object to him giving his own account); *United States v. Bush*, 626 F.3d 527,  
21 539 (9th Cir. 2010) (an advice-of-counsel instruction requires the defendant to show he  
22 made a full disclosure of all material facts to his attorney); *United States v. Pinson*, 584  
23 F.3d 972, 977 (10th Cir. 2009) (when defendant invoked an advice of counsel defense, he  
24 waived his attorney-client privilege as to all advice received concerning the same subject  
25 matter); *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998) (attorney-client  
26 privilege can be implicitly waived by raising an advice of counsel defense). This includes  
27 any “good faith” arguments based on attorneys’ advice. *Ibarra-Alcaarez*, 830 F.2d at 974  
28 (no error when trial court refused to instruct the jury on defendant’s good faith reliance on

1 the advice of counsel, because defendant failed to disclose all the material facts to his  
2 attorney).

3 Accordingly, at trial, Defendants should be precluded from both (a) soliciting  
4 testimony suggesting that attorneys made statements to Defendants or that Defendants  
5 relied upon such statements in an attempt to negate intent; and (b) a formal advice-of-  
6 counsel defense and the associated jury instruction.<sup>2</sup> Defendants' stated "good faith"  
7 defense—based on attorneys' advice—appears an attempt to avoid the affirmative  
8 obligations an "advice of counsel" defense places upon them. Without adhering to these  
9 obligations, *i.e.*, waiving the privilege and disclosing all their relevant communications  
10 with the attorneys offering advice, Defendants should be precluded from eliciting  
11 testimony in this area or making any arguments related to an attorney's advice.

### 12 **III. Conclusion**

13 Defendants have not waived any attorney-client privileges. Without such a waiver,  
14 they are precluded from raising either (a) a "good faith" defense based on advice received  
15 from attorneys, or (b) a formal advice of counsel defense.

16 Respectfully submitted this 24th day of August, 2021.

17 GLENN B. McCORMICK  
18 Acting United States Attorney  
19 District of Arizona

19 *s/ Andrew C. Stone*  
20 KEVIN M. RAPP  
21 MARGARET PERLMETER  
22 PETER S. KOZINETS  
23 ANDREW C. STONE  
24 Assistant U.S. Attorneys

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23 <sup>2</sup> The Ninth Circuit Manual of Model Criminal Jury Instruction 5.10 Advice of  
24 Counsel reads:

25 One element that the government must prove beyond a reasonable doubt is  
26 that the defendant had the unlawful intent to [specify applicable unlawful  
27 act]. Evidence that the defendant in good faith followed the advice of counsel  
28 would be inconsistent with such an unlawful intent. Unlawful intent has not  
been proved if the defendant, before acting, made full disclosure of all  
material facts to an attorney, received the attorney's advice as to the specific  
course of conduct that was followed, and reasonably followed the attorney's  
recommended course of conduct or advice in good faith.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 24, 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/ Marjorie Dieckman  
U.S. Attorney’s Office

# Exhibit A



Bienert Katzman  
Littrell Williams LLP

July 2, 2021

Via E-Mail

AUSAs Rapp, Stone, Jones, Kozinets, Perlmeter, & Boyle  
Kevin.Rapp@usdoj.gov, Andrew.Stone@usdoj.gov, Reginald.Jones4@usdoj.gov,  
Peter.Kozinets@usdoj.gov, Margaret.Perlmeter@usdoj.gov, &  
Daniel.Boyle2@usdoj.gov

RE: *U.S. v. Michael Lacey, et al.*, 18-CR-00422-PHX-SMB

Dear Counsel:

On behalf of Mr. Lacey, Mr. Larkin, Mr. Spear, Mr. Brunst, Mr. Padilla, and Ms. Vaught, we write to advise that Defendants are still evaluating what documents they may use in a defense case, which will depend in part on what evidence actually comes in during the prosecution case. Nevertheless, we hereby provide as reciprocal discovery the attached documents from Backpage's former counsel relevant to the Defendants' good faith, Bates-numbered DEFENSE 015280-015364. This production is being made because, in light of the Court's order at Dkt. 1168, it cannot be deemed to waive any otherwise applicable privilege. Please let us know if you have any questions.

Very truly yours,

BIENERT KATZMAN LITRELL WILLIAMS LLP

Whitney Z. Bernstein

cc: Paul Cambria, Erin Paris, Thomas H. Bienert, Bruce Feder,  
Gary Lincenberg, Ariel Neuman, Gopi Panchapakesan, David Eisenberg,  
Joy Bertrand

# **Exhibit B**



**From:** [Whitney Bernstein](#)  
**To:** [Stone, Andrew \(USAAZ\)](#); [Jones, Reginald \(CRM\)](#); [Rapp, Kevin \(USAAZ\)](#); [Kozinets, Peter \(USAAZ\)](#); [Perlmeter, Margaret \(USAAZ\)](#); [Boyle, Daniel \(USACAC\)](#)  
**Cc:** [Thomas H. Bienert](#); [Toni Thomas](#); [pcambria@lglaw.com](#); [Erin McCampbell Paris](#); [bf@federlawpa.com](#); [Feder Law](#); [Gary S. Lincenberg](#); [Ariel A. Neuman](#); [Gopi K. Panchapakesan](#); [David Eisenberg](#); [Joy Bertrand](#)  
**Subject:** RE: US v. Lacey, et al. - 18-CR-00422-PHX-SMB  
**Date:** Friday, July 9, 2021 4:03:15 PM

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Hi Andy,

As to your first question, when we challenged the government's repeated interviews of Ferrer about attorney advisals that Backpage's actions were legal, the government claimed that these communications were not subject to attorney-client privilege and the Court agreed in Dkt. 1168 at 9-11. Accordingly, the disclosure tracks the Court's order and is not a waiver of a privilege that the government argued and the Court agreed did not apply to these communications.

As to your second question, our clients' good faith is always a defense to specific intent crimes like those charged in this case. The documents you are asking about are among several that Defendants may use at trial to negate your purported evidence of criminal intent and to establish their good faith, and they were provided pursuant to Rule 16. At this time Defendants don't know what documents, if any, they may introduce at trial, but are continuing to review discovery and documents and will make such decisions based on evidence and arguments presented by the government during its case. Whether an advice of counsel jury instruction will be sought by the defense will be determined only after hearing and assessing the evidence the government puts on in its case.

Thank you,

Whitney

**Whitney Z. Bernstein** | Partner  
Bienert Katzman Littrell Williams LLP  
[Website](#) | [vCard](#) | [Profile](#)

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**From:** Stone, Andrew (USAAZ) <Andrew.Stone@usdoj.gov>  
**Sent:** Thursday, July 8, 2021 3:38 PM  
**To:** Whitney Bernstein <wbernstein@bklwlaw.com>; Jones, Reginald (CRM) <Reginald.Jones4@usdoj.gov>; Rapp, Kevin (USAAZ) <Kevin.Rapp@usdoj.gov>; Kozinets, Peter (USAAZ) <Peter.Kozinets@usdoj.gov>; Perlmeter, Margaret (USAAZ) <Margaret.Perlmeter@usdoj.gov>; Boyle, Daniel (USACAC) <Daniel.Boyle2@usdoj.gov>  
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**Subject:** RE: US v. Lacey, et al. - 18-CR-00422-PHX-SMB

Whitney,

In your cover letter from Friday evening, you wrote that you “attached documents from Backpage’s former counsel relevant to the Defendants’ good faith.” And that the production was made “because, in light of the Court’s order at Dkt. 1168, it cannot be deemed to waive any otherwise applicable privilege.”

Two questions:

- With respect to your latter statement, what’s your reasoning for why this disclosure isn’t a waiver of the attorney-client privilege?
- With respect to your former statement, are Defendants asserting an advice of counsel defense? If not, what is the distinction between a “good faith” defense that relies on attorneys’ legal memoranda and an “advice of counsel” defense?

Thanks,  
Andy

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**From:** Whitney Bernstein <[wbernstein@bklwlaw.com](mailto:wbernstein@bklwlaw.com)>

**Sent:** Friday, July 2, 2021 5:09 PM

**To:** Jones, Reginald (CRM) <[Reginald.Jones4@usdoj.gov](mailto:Reginald.Jones4@usdoj.gov)>; Rapp, Kevin (USAAZ) <[KRapp@usa.doj.gov](mailto:KRapp@usa.doj.gov)>; Stone, Andrew (USAAZ) <[AStone1@usa.doj.gov](mailto:AStone1@usa.doj.gov)>; Kozinets, Peter (USAAZ) <[PKozinets@usa.doj.gov](mailto:PKozinets@usa.doj.gov)>; Perlmeter, Margaret (USAAZ) <[MPerlmeter@usa.doj.gov](mailto:MPerlmeter@usa.doj.gov)>; Boyle, Daniel (USACAC) <[DBoyle@usa.doj.gov](mailto:DBoyle@usa.doj.gov)>

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**Subject:** US v. Lacey, et al. - 18-CR-00422-PHX-SMB

Counsel:

Please see attached.

Thank you,

Whitney

**Whitney Z. Bernstein**

**Partner** | Orange County

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