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17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE DISTRICT OF ARIZONA**

19 United States of America,  
20  
21 Plaintiff,

22 v.

23 Michael Lacey, et al.,  
24 Defendants.  
25

CR-18-422-PHX-DJH

**UNITED STATES' MOTION  
IN LIMINE TO PRECLUDE  
DEFENDANTS' PURPORTED GOOD  
FAITH RELIANCE ON ADVICE OF  
COUNSEL**

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1 Order, the Court addressed Defendants’ renewed motion to dismiss (Doc. 1250). (Doc.  
2 1444 at 15.) The Court wrote that “the trial court previously issued a Sealed Order [Doc.  
3 1168] addressing these very same allegations,” and found that the United States had neither  
4 “invaded the Defendants’ attorney-client privilege” nor engaged in outrageous conduct.  
5 (Doc. 1444 at 15.) The Court did not, however, address the United States’ motion to  
6 preclude Defendants’ advice of counsel defense. Accordingly, the United States certifies  
7 that while the prior trial court may have considered the motion, no ruling has yet issued.

### 8 Argument

9 Defendants may not raise an advice of counsel defense without first showing that  
10 they disclosed all relevant and material facts to their attorneys. *Bisno*, 299 F.2d at 719-20.  
11 Defendants agree. In their earlier response, they referred to the “uncontroversial  
12 proposition that an advice of counsel defense requires the defendant to show that he ‘made  
13 a full disclosure of all relevant and material facts to his attorney.’” (Doc. 1250 at 10.)  
14 Despite this understanding, however, Defendants invoked an advice of counsel defense no  
15 less than five times during their opening statements—without first demonstrating that they  
16 had made the required full disclosures to their attorneys:

- 17 • “So, if Mr. Padilla needed advice, he didn’t rely on himself. He relied on the  
18 attorneys and he relied on Mr. Ferrer.” (Doc. 1343, Trial. Tr. 9/8/21, at 7:2-4.)
- 19 • “Not pornography, not sex for money, but legal ads predicated upon standard  
20 that he learned, not that he developed, but that he learned. And so, as a worker,  
21 as an operational person, [Padilla’s] goal was to follow the standard that had  
22 been set for him principally by Mr. Ferrer and by the attorneys.” (Doc. 1343 at  
23 8:5-10.)
- 24 • “And they were advised by their attorneys and others that, if you shut down the  
25 adult section, like Craigslist, they’re just going to move to something else.”  
26 (Doc. 1343 at 30:19-21.)
- 27 • “However, [Lacey] was told repeatedly by Carl Ferrer and a number of attorneys  
28 that Carl and others had hired to advise them as to how to – how do you preserve

1 the First Amendment for all the people that have now been deprived of that when  
2 the government shut them down?” (Doc. 1343 at 33:16-20.)

- 3 • “And a number of attorneys advised them.” (Doc. 1343 at 33:23.)

4 By making these arguments without first satisfying *Bisno*, Defendants attempted to  
5 circumvent the threshold requirement of showing that they had made a full and complete  
6 disclosure of all relevant and material facts to their counsel. Without such a showing,  
7 however, evidence of their reliance on advice of counsel isn’t reliable and shouldn’t be  
8 presented to the jury. *See* Fed. R. Evid. 403.

9 In the *Holmes* matter, the Northern District of California recently articulated what  
10 must occur before a defendant may present evidence related to advice of counsel:

11 Prior to invoking an advice-of-counsel defense, however, *Holmes* must  
12 establish the foundational prerequisites for the advice-of-counsel defense,  
13 namely: (1) waiver of the applicable attorney-client privilege, (2)  
14 demonstrating that there was a full disclosure to her attorney of all material  
15 facts, (3) and that she relied in good faith on the specific course of conduct  
the attorney recommended.

16 *United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at \*51 (N.D. Cal.  
17 May 22, 2021).

18 Unless and until Defendants establish these “foundational prerequisites,” the Court  
19 should preclude Defendants from invoking an advice of counsel defense, which would  
20 include any references in their opening statements (like those quoted above) to Defendants’  
21 purported reliance on attorneys’ advice.

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1 Respectfully submitted this 8th day of June, 2023.

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on June 8, 2023, I electronically transmitted the attached  
23 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
24 Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance  
25 as counsel of record.

26 *s/ Daniel Parke*  
27 Daniel Parke  
28 U.S. Attorney's Office