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Whistleblower Law: Attorney-Client Privilege and Other Lessons from *Bio-Rad*

September 13, 2017 | Telephone Seminar/Audio Webcast

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Study Materials

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PROGRAM
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Program Schedule	Eastern	Central	Mountain	Pacific & Arizona	Alaska	Hawaii
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Adjournment	2:00 p.m.	1:00 p.m.	12:00 p.m.	11:00 a.m.	10:00 a.m.	8:00 a.m.

The Northern District of California ruled recently in a whistleblower retaliation case that a fired general counsel of Bio-Rad Laboratories could use as evidence otherwise privileged materials. This case is on appeal, and its holding on the pre-emption of the attorney-client privilege conflicts with otherwise settled law in other jurisdictions. The *Bio-Rad* case raises a number of questions:

Who can be a corporate whistleblower? Can whistleblower protections under statutes like Sarbanes Oxley or Dodd-Frank pre-empt the attorney client privilege? What are the standing issues? Do whistleblower statutes protect whistleblowers who don't report to the SEC in cases where the SEC has jurisdiction?

Topics to be discussed include:

- Whistleblower protections under Dodd-Frank and Sarbanes Oxley
- How *Bio-Rad* decision affects whistleblower litigation
- SEC rule 205 vs. state ethical rules
- Whistleblower vs. corporate perspective on internal reporting
- Pending Supreme Court case

Program
All times eastern daylight

12:30 p.m. **Whistleblower Law: Attorney-Client Privilege and Other Lessons from *Bio-Rad***

2:00 p.m. Adjournment

Total 60-minute hours of instruction: **1.5**; total 50-minute hours of instruction: **1.8**

Suggested Prerequisite: Two to four years' experience in subject matter

Educational Objectives: Acquisition of knowledge and skills to develop proficiency as a practitioner; maintenance of professional competence as a practitioner; provision of information on recent legal developments

Level of Instruction: Intermediate

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Whistleblower Law:
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Robert E. Hauberg Jr. is a shareholder in the Jackson, Mississippi, and Washington, D.C., offices of Baker Donelson and former leader of the Firm's Government Regulatory Actions Group and current leader of the Firm's Securities and SEC Enforcement Subgroup.

Mr. Hauberg is also a member of industry service teams for Government Contracts and Health Care Government Investigations. He concentrates his practice in antitrust, securities, False Claims Act and RICO litigation; money laundering, white collar crime; post-conviction clemency; internal investigations including foreign corrupt practices, export controls, OFAC sanctions and price fixing; corporate compliance; and litigation for financial institutions, securities broker-dealers, health care and pharmaceutical providers, government contractors, and public officials. He has represented companies and individuals from Canada, China, Denmark, Egypt, Germany, India, Japan, Kuwait, The Netherlands, Russia, Switzerland, Turkey and the United Kingdom.

He has handled dozens of grand jury investigations and criminal trials, as well as civil trials involving mergers, financial institutions, RICO, false claims by government contractors, whistleblowers and bribery. He has participated in mediation/arbitration matters including the Marvin Frankel insurance fraud litigation, KPMG tax shelters, shareholder litigation, securities suitability, sales of marine equipment, antitrust, health care/pharmaceutical contracts, and federal False Claims Act whistleblower litigation. Prior to private practice, Mr. Hauberg was a federal prosecutor as an Assistant U.S. Attorney in the District of Columbia, as a senior official in the Antitrust Division and in the Criminal Division (Fraud Section) of the Department of Justice in Washington.

FACULTY:

Consistently ranked a "Top Lawyer" by *Washingtonian Magazine*, **Lisa Banks** has successfully litigated employment discrimination and whistleblower protection cases at the trial court and appellate level for over 20 years. Ms. Banks is a founding partner of Katz, Marshall & Banks, LLP, where she concentrates her practice on claims related to employment discrimination, sexual harassment, Title IX, whistleblower retaliation, SEC and CFTC whistleblower tips, and contractual

employment disputes. Ms. Banks is an experienced advocate who has consistently achieved outstanding results on behalf of her clients either in court or through negotiated settlement.

Ms. Banks has significant experience in federal and state courts, including courts in D.C., Maryland, Virginia, Georgia, Illinois, Colorado, and Tennessee, and has achieved success at all levels, including appeals in the Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits. She has also represented numerous whistleblowers before the Department of Labor (DOL) in the transportation, nuclear, financial, and pharmaceutical industries.

Ms. Banks recently co-authored a comprehensive whistleblower law treatise, Whistleblower Law: A Practitioner's Guide, an exhaustive guide to the dozens of federal and state whistleblower laws affecting virtually every industry in the country. Available in eBook and print formats from its publisher, ALM's Law Journal Press, the book is a practical, comprehensive guide to rapidly evolving whistleblower law and the numerous and often complex issues facing practitioners today from both sides of the whistleblower bar. She has also published the CFTC Whistleblower Practice Guide, a comprehensive handbook for CFTC whistleblowers and their lawyers.

Best Lawyers in America named Ms. Banks the 2017 "Lawyer of the Year" for Employment Law in Washington, D.C. In 2006, *Washingtonian Magazine* selected Ms. Banks as one of the 40 Best Attorneys under 40 in Washington, D.C., calling her "Washington's hottest young employment lawyer." Ms. Banks was also selected for inclusion in the 2009-2017 editions of "The Best Lawyers in America," and was named by Washington, D.C. Super Lawyers as among the top five percent of attorneys in Washington, D.C. for 2009-2017. Martindale-Hubbell has rated Ms. Banks "AV Preeminent," its highest possible peer review rating.

Ms. Banks regularly speaks on employment law, whistleblower, and litigation matters before the American Bar Association (ABA), the D.C. Bar Association, the National Employment Lawyers Association (NELA), and the Metropolitan Washington Employment Lawyers Association (MWELA), where she has served as the organization's Vice President. Ms. Banks is active in the ABA's Labor and Employment Law Section, where she currently serves as the Employee Co-Chair of the Equal Employment Opportunity (EEO) Committee. She has also been active with the ABA as an Associate Editor to *Lindemann, Grossman and Weirich, Employment Discrimination Law, Fifth Edition*, 2015 Cumulative Supplement; as a Litigation Track Coordinator for the 9th, 10th, and 11th Annual Section of Labor and Employment Law Conferences; and as a Program Chair for the EEO Committee.

Ms. Banks was appointed in 2016 to serve a two-year term as a public representative on the Whistleblower Protection Advisory Committee (WPAC). Established to improve the Occupational Safety and Health Administration's (OSHA) management of whistleblower protections, the committee advises the Secretary and Assistant Secretary of Labor on ways to increase transparency and efficacy.

In 2009, the American Arbitration Association (AAA) named Ms. Banks to its national roster of neutrals, to hear and resolve cases brought for binding arbitration before the AAA. Since then,

she has served as an arbitrator for all manner of employment and contractual disputes brought before the AAA.

Ms. Banks was an attorney in the EEOC's Office of General Counsel, Appellate Services Division, from 1997-2000. In 1999, Ms. Banks served as an Attorney Advisor in the Office of Counsel to the President at the White House. She clerked for the Honorable Gregory K. Scott, Colorado Supreme Court from 1996-1997, and the Honorable Daniel M. Taubman, Colorado Court of Appeals, from 1995-1996. Ms. Banks received a Bachelor of Arts degree from Trinity College in Hartford, Connecticut in 1990, and a J.D. degree from the University of Denver Sturm College of Law in 1995, where she served as an editor on the Denver University Law Review.

Jason C. Schwartz is a litigation partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and a member of the firm's Executive Committee and its five-member Management Committee. He was named one of the top five "MVPs" in employment law for 2016 and 2012, awarded by *Law360* to "attorneys whose achievements in major litigation or transactions have set a new standard for accomplishment in corporate law." He is Co-Chair of the Labor and Employment Practice Group, which was named an Employment Practice Group of the Year for 2011-16 and a 2015 Labor and Employment All-Star by *Law360* and which was recognized as the nation's top employment group by *The American Lawyer* in 2012. He also serves as the firm's General Counsel.

Mr. Schwartz's practice includes high-profile trade secret and non-compete matters, wage-hour and discrimination class actions, Sarbanes-Oxley and other whistleblower protection claims, executive and other sensitive employment disputes, labor union controversies, and workplace safety litigation. In 2015, Mr. Schwartz was named by *Washingtonian Magazine* as one of the Top Lawyers in Employment Defense. He was recognized in 2014, 2015 and 2016 as an "Up and Comer" in labor and employment by *Chambers USA*, which stated, "Clients note: 'He's an excellent litigator with a good sense of the client's needs in a business environment. He's just a pleasure to work with. He's disciplined, a great writer and gets great results.'" He has also been recognized as one of the top five "Rising Stars" in employment law by *Law360* (2012), as a Super Lawyer by Washington, D.C. *Super Lawyers* (2014-16), as one of the 100 Most Powerful Employment Lawyers in the 2017 Guide to World-Class Employment Lawyers by *Lawdragon* and *Human Resources Executive* magazine, as a recommended lawyer in labor and employment litigation and workplace and employment law counseling by *The Legal 500 US* (2007-16), and as a Rising Star by Euromoney Expert Guides (2016).

Mr. Schwartz has litigated employment and trade secret matters in state and federal courts and administrative forums throughout the country, as well as in arbitration, has represented clients before federal, state and local regulatory agencies and has conducted sensitive internal investigations.

Mr. Schwartz has also successfully tried several sensitive whistleblower matters for major national employers, and he prevailed in a precedent-setting Labor Department appeal of one of the first Sarbanes-Oxley whistleblower cases to proceed to trial. In a case of first impression, he successfully argued in the Utah Supreme Court against the recognition of a tort for spoliation of evidence. In addition, he served as lead trial counsel for a retailer in a highly-publicized OSHA enforcement action relating to crowd control at a day-after-Thanksgiving sale.

Mr. Schwartz also has significant experience in administrative law and rulemakings. He served as counsel to the Fair Labor Standards Reform Coalition, and he played a leading role in preparing comments on behalf of the business community relating to the U.S. Department of Labor's overtime exemption regulations.

Mr. Schwartz is the Secretary of the Retail Litigation Center and a member of the U.S. Chamber of Commerce Labor Relations Committee, and he testified before Congress regarding OSHA enforcement programs on behalf of the U.S. Chamber. He frequently speaks and writes on employment law and trade secret related topics. He is the co-author of the treatise *Whistleblower Law: A Practitioner's Guide*, published by American Lawyer Media/Law Journal Press, as well as the annual "Trade Secrets Litigation Round-Up" published in BNA's Patent, Trademark & Copyright Journal.

Mr. Schwartz earned his law degree *magna cum laude* from Georgetown University Law Center, where he was elected to the Order of the Coif and received the George Brent Mickum III Prize and the Charles A. Keigwin Award for the best academic record in first year courses. From 1995 to 1996, Mr. Schwartz worked as a Legislative Assistant to Congressman Jon D. Fox. Mr. Schwartz received a B.A. degree in international affairs *cum laude* in 1994 from The George Washington University.

Mr. Schwartz is admitted to practice in the District of Columbia, Virginia and Maryland, as well as in numerous federal courts. He also serves as secretary of the Board of Directors of the Charles E. Smith Jewish Day School and as a member of the Washington Lawyers Committee of the U.S. Holocaust Memorial Museum, and provides pro bono employment counsel to numerous community organizations.

ADDITIONAL AUTHORS:

Lawrence West is the only senior former SEC enforcement official specializing in counseling whistleblowers. A graduate of Harvard University and Yale Law School, Mr. West is an attorney with decades of SEC enforcement experience. Mr. West served as an Associate Director of the Division of Enforcement at the SEC, where he worked for 12 years, starting as a staff attorney. He knows from personal experience how the SEC enforcement staff builds a case from the ground up, and how their work is vetted by senior officials in the Division of Enforcement and by the SEC Commissioners themselves.

At the SEC, Mr. West frequently collaborated with the Department of Justice on parallel enforcement actions. Parallel enforcement actions can result in bigger SEC whistleblower awards. Mr. West now works exclusively as a consultant to individual whistleblowers, having founded SEC Whistleblower Consultants in Washington, D.C.

Experience
At the SEC, Mr. West was responsible for investigating and supervising numerous large enforcement matters, including Foreign Corrupt Practices Act (FCPA) violations, corporate accounting frauds, investment manager misconduct, and broker-dealer misconduct.

He personally investigated or oversaw the SEC's investigations into some of the largest accounting frauds in history, including WorldCom and Parmalat, and he was a supervisor of the SEC's historic Enron fraud case.

Mr. West supervised one of the SEC's largest FCPA matters ever, and he led numerous large multi-Wall Street-firm investigations. The SEC's yield-burning cases, for which he was the lead investigator, led to tens of millions of dollars in awards to a single Wall Street whistleblower. These awards remain the only whistleblower awards under the False Claims Act in SEC history. Mr. West is a recipient of the SEC's Stanley Sporkin Award, which annually recognizes an SEC official who has made "exceptionally tenacious and insightful contributions" to the enforcement of the securities laws.

After his tenure at the SEC, Mr. West practiced SEC and CFTC enforcement law for ten years as a senior partner in one of the world's largest and most respected law firms, and was ranked by Chambers USA as one of the leading securities regulation attorneys in the US.

Eric Swibel is a partner at Latham & Watkins in Chicago and a member of the firm's Securities Litigation & Professional Liability and White Collar Defense & Investigations Practices. Mr. Swibel represents corporate and individual clients in civil and criminal government investigations and internal investigations, as well as litigation in both federal and state courts.

His practice focuses on SEC enforcement investigations, with recent matters including investigations into alleged misrepresentations to investors, pay-to-play violations, mutual fund fees and disclosures, and insider trading. He also represents clients in shareholder securities fraud lawsuits and other litigation challenging board decision-making. He has represented both public and private issuers, broker-dealers, investment advisers, private equity firms, hedge funds, and officers and directors. Mr. Swibel has developed extensive experience in SEC whistleblower law.

Abigail Raish is an associate in the Chicago office of Latham & Watkins. Ms. Raish's practice focuses on transactional and corporate matters. She represents private equity firms, investment banks, and public and private companies in a variety of financing and other transactions, including mergers and acquisitions, cross-border transactions, leveraged buyouts and initial public offerings.

In addition to her practice, Ms. Raish serves on the firm's Charitable Contributions Committee supporting and promoting involvement in the community through charitable giving and volunteerism. Prior to law school, Ms. Raish worked in commercial real estate investment.

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Whistleblowers:
Brief Overview of *Bio-Rad* and Its Implications for Corporate Counsel and Their Employers

By

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On February 7, 2017, a California federal jury awarded former General Counsel Sanford Wadler damages for his termination by his former employer Bio-Rad Laboratories, Inc. and its CEO Norman Schwartz. The jury awarded $2,900,000 for past economic loss damages and $5,000,000 in punitive damages on three claims; (1) violation of the Sarbanes-Oxley Act; (2) violation of the Dodd-Frank Act; and (3) under California law, wrongful termination in violation of public policy.[1] Preliminary to the trial, and critical for the ability of plaintiff Wadler to present his evidence, the court permitted, over belatedly filed strenuous objection and motions, and after hearing, the introduction of attorney-client privileged materials. In short, the court held that Sarbanes-Oxley Act's whistleblower protections preempt attorney-client privilege, thus allowing Wadler to use otherwise privileged information as evidence in the case.[2] On appeal to the Ninth Circuit, the briefing in the case is set to begin September 15, 2017.[3]

[1]Order Denying Defendants Renewed Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(B) and Motion for New Trial Pursuant to Fed. R. Civ. P. 59, Wadler v. Bio-Rad Laboratories, Inc., et al., Case No. 15-cv-02356, U.S. District Court for the Northern District of California (May 10, 2017).

[2]Amended Order Denying Motion to Exclude, Wadler v. Bio-Rad Laboratories Inc. et al., Case Number 3:15-cv-02356, in the U.S. District Court for the Northern District of California (Feb. 16, 2017) ("Exclusion Order") at 36-37.

[3]See Wadler v. Bio-Rad Laboratories, Inc., et al., No. 0:17-cv-16193 (9th Cir., June 8, 2017).

Several important legal standards are implicated by this case. First, how does it impact the role of general counsel (or other legal advisors) as possible whistleblowers?[4] The Plaintiff Wadler as well as the SEC as amicus curiae took the position that his compliance with SEC Rule 205 and the protections provided there against retaliation permit use of the privileged information. Under Sarbanes-Oxley ("SOX"), Section 307, the SEC in 2003 issued rules "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company," to increasingly higher levels, including the audit committee and board of directors.[5] The subsequently adopted rule covering reporting "up the ladder" is known as Part 205.[6] SOX Section 806 protects attorney-whistleblowers against retaliation for reporting up the ladder. In 2010, these types of whistleblowers gained under Dodd-Frank an expanded remedy through the right to sue in federal court directly.[7]

[4]See generally Latham & Watkins, "Attorneys as SEC Whistleblowers: Can an Attorney Blow the Whistle on a Client and Get a Monetary Reward?" (May 2013); see also Lawrence A. West et al., "Can Attorneys Be Award Seeking SEC Whistleblowers?", Harvard Law School Forum on Corporate Governance and Financial Regulation, (June 12, 2013).

[5]15 U.S.C. § 7245.

[6]17 C.F.R. § 205.1 et seq.

[7]18 U.S.C. § 1514A.

The SEC also promulgated Section 205.3(d) (1) permitting the attorney's use of the report in any responses in litigation about his compliance.[8] In the SEC's view, the rule "shall govern" even if "the standards of a state . . . where an attorney is admitted or practices conflict" with it.[9]

Wadler alleged he was terminated for "engaging in mandatory 'up the ladder' reporting" of possible Foreign Corrupt Practices Act ("FCPA") violations involving operations in China, specifically bribery and books and records violations and others under the securities laws, and reporting them consistent with Part 205. He did not report directly to the SEC.

The company investigated the reported violations, even using outside counsel to prepare a report. The audit committee found no substance to the supposed violations, and management terminated Wadler for alleged other reasons – deterioration of his behavior and performance (including a late-appearing performance review by his CEO).

Wadler initially, under SOX, filed a complaint with the Department of Labor, to which Bio-Rad responded with details of his allegations and a report of outside counsel hired to

[8]Dodd-Frank Wallstreet Reform and Consumer Protection Act, Section 922, codified at Section 21F(h) of the Securities Exchange Act, 15 U.S.C. § 78u-6(h).

[9]17 C.F.R. § 205.3(d)(1).

investigate – both documents based in part on client confidential and privileged information. A second inquiry from the Department of Justice met with a similar defense based in part on privileged material and work product. Wadler then under Dodd-Frank filed a direct action.

Second, what procedural hurdles face such a lawyer-whistleblower? Under the two principal federal laws, Sarbanes-Oxley and Dodd-Frank, whistleblowers are defined are those persons reporting conduct which they reasonably believe constitutes a violation of federal law relating to financial, securities or shareholder fraud.[10] Thus, affirmative steps must be taken by the whistleblower to raise –and articulate in some detail – the basis for the concern.

A relevant question affecting all whistleblowers – not just lawyers – is did the person report concerns not only internally but also to the SEC? Because of a split in the circuit courts, whether reporting to the SEC is a prerequisite under Dodd-Frank is now before the United States Supreme Court, to be decided during its term beginning in October 2017.[11]

[10]Section 806 of the Sarbanes-Oxley Act of 2002 (SOX) and Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[11]Somers v. Digital Realty Trust Inc., 850 F. 3d 1045 (9th Cir. 2017), cert. granted, No. 16-1276 (U.S. June 26, 2017). See also, e.g., Smith v. Raytheon Co., No. 17-cv-00438 (E.D. VA., August 11, 2017) (dismissing retaliation claim which did not allege any disclosure to SEC).

Third, what ethical strictures constrain the ability to present evidence learned by the lawyer during his employment or representation when the lawyer is terminated and sues for retaliation claims? As Wadler and the SEC argued, Rule 205 preempts, under an obstacle conflict preemption analysis, state ethics rules that would frustrate the objects of the Rule and the Congressional acts it implemented.

Bio-Rad posited, however, that Rule 205 (1) did not apply since it permitted use of the lawyer's report only to defend against allegations; (2) was permissive, not mandatory; and (3) the Part 205 report and related material was barred by federal common law privilege and FRE 502.

Rulings contrary to that reached by the *Bio-Rad* Court exist. In New York, for example, where different ethical standard language is used than in many states, the Court ruled that in a qui tam case co-plaintiff general counsel's confidential information was not admissible and did not fall under the crime prevention exception to that state's ethical rules.[12] Thus, as the Latham & Watkins survey and Larry West's summary conclude, the variety of ethical rules differ state to state, which means a range of differing results may arise as to whether SEC Rule 205 is

[12] U.S. ex rel. Fair Lab. Practices Assoc. v. Quest Diagnostics, Inc. , 2013 U.S. App. LEXIS 21709 (2nd Cir., Oct. 25, 2013).

preemptive. For instance, under ABA Model Rule of Professional Conduct 1.6, which has been adopted in 47 states (but not California or New York), a lawyer may use client confidential information to litigate claims or defenses against his or her own client.

Finally, what counseling advice can promote both whistleblower protection and effectiveness from the in-house lawyer's perspective or bolster corporate defenses and protection of privileges?[13] Critical to the court's decision to override the attorney-client privilege in *Bio-Rad* was the confluence of (1) late filing by Bio-Rad of its quasi-dispositive motion and (2) the waiver through prior disclosed reports and proceedings of the ability to preserve privilege and foreclose use of the evidence Wadler presented.[14] Thus consideration as to how to investigate and report internally findings as to a whistleblowing counsel's allegations, when and what to disclose to agencies and government investigators, when to assert the privilege, and what methods are employed to deal internally with the whistleblower's position, duties and compensation must be considered. Keeping the whistleblower within the corporate tent without forcing him or her to go public is a delicate tightrope to walk.

[13]See generally Lisa J. Banks and Jason C. Schwartz, Whistleblower Laws: A Practitioner's Guide, Chapter 13 (Law Journal Press, 2017).

[14]Exclusion Order at 26-31.

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Selected Pleadings from *Sanford S. Wadler, Plaintiff vs. Bio-Rad Laboratories, Inc., et al., Defendants*

Amicus Curiae Brief of the
Securities and Exchange Commission in Support of Plaintiff

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SANFORD S. WADLER, Plaintiff, vs. BIO-RAD LABORATORIES, INC., a Delaware Corporation; NORMAN SCHWARTZ; LOUIS DRAPEAU; ALICE N. SCHWARTZ; ALBERT J. HILLMAN; DEBORAH J. NEFF, Defendants.	No. 3:15-cv-2356 JCS ***AMICUS CURIAE* BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF PLAINTIFF** Hearing Date: December 15, 2016 Time: 10:30 A.M. Place: Courtroom G, 15th Floor Judge: Hon. Joseph C. Spero TRIAL: January 17, 2017

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Interest of the Securities and Exchange Commission

The Commission is the agency primarily responsible for administering and enforcing the federal securities laws, including anti-bribery, books and records, and internal controls provisions of the Foreign Corrupt Practices Act ("FCPA").[1] Attorneys employed by public companies play a significant role in assisting those companies in complying with these important obligations, which are designed to protect investors and the capital markets. As the Commission has observed, "[a]ttorneys [] play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws."[2]

Under Commission rules, attorneys employed by public companies are obligated to report evidence of material violations of law by their companies to company management. Thus, the Commission has a strong interest in ensuring that public companies do not retaliate against attorney-whistleblowers who, upon becoming aware of potential material violations, report them to management. If attorney–whistleblowers cannot use their reports to management of potential violations as evidence in anti-retaliation litigation against their employers, then the Congressional scheme of requiring lawyers for public companies to report potential

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[1] *See* 15 U.S.C. 78dd-1; 78m(b)(2)(A), (B).

[2] *See* Securities and Exchange Commission, Implementation of Standards of Professional Conduct for Attorneys, 68 FR 6295, 6325 (Feb. 6, 2003); *see also* Cong. Rec. S6551 (Jul. 10, 2002) (remarks of Sen. Edwards) ("wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder"); Cong. Rec. S6555 (Jul. 10, 2002) (remarks of Sen. Enzi) ("attorneys are hired to aid the corporation and its accountants in adhering to Federal securities law"); Cong. Rec. S6556 (Jul. 10, 2002) (remarks of Sen. Corzine) ("The bottom line is this. Lawyers can and should play an important role in preventing and addressing corporate fraud."); "The Preliminary Report of the ABA Task Force on Corporate Responsibility," (Jul. 16, 2002) ("our system of corporate governance has long relied upon the active oversight and advice of independent participants in the corporate governance process, such as . . . outside counsel.").

violations, while protecting them from reprisals through the anti-retaliation provisions of the securities laws, would be seriously undermined.[3] Bio-Rad's motion to exclude Wadler's evidence regarding his report to Bio-Rad's management about possible violations of law challenges the supremacy of the Commission's regulations over California state ethics rules that would interfere with the effectiveness of the federal scheme to protect attorney-whistleblowers.[4]

Legal Background and Issue Presented

In 2002, the Sarbanes-Oxley Act ("SOX") mandated a number of reforms to enhance corporate responsibility and combat corporate and accounting fraud. One of those reforms, SOX Section 307, required the Commission to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule **requiring** an **attorney** to **report** evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company * * *" to increasingly higher levels of the company, including if necessary the company's audit committee or the board of directors.[5] An attorney's report of possible violations to company

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[3] In addition to creating a private right of action for whistleblowers, Congress gave the Commission authority to enforce the anti-retaliation laws. *See* Section 21(d) of the Exchange Act, 15 U.S.C. 78u(d): "Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title [or] the rules or regulations thereunder ... it may in its discretion bring an action in the proper district court of the United States * * *."

[4] For example, a decision that California law takes precedence over the Commission's regulations could interfere with California-licensed attorneys' ability to reveal confidential information to the Commission in circumstances where the Commission has determined that the attorneys should be allowed to disclose that information without the client's consent. 17 C.F.R. 205.3(d)(2).

[5] 15 U.S.C. 7245 (emphasis added).

management is commonly referred to as reporting "up the ladder." The Commission rule implementing Section 307 is referred to as "Part 205." 17 C.F.R. 205.1 *et seq.*

In SOX, Congress also enacted protections for employees of public companies[6] against reprisal for reporting potential violations of certain laws, including the federal securities laws and "any rule or regulation of the Securities and Exchange Commission." SOX Section 806, *codified at* 18 U.S.C. 1514A. Section 806 protects attorney-whistleblowers who make an "up the ladder" report against reprisal for that reporting, and provides the right to file a complaint with the Secretary of Labor and, if not decided within 180 days, in federal district court.[7] In 2010, Congress expanded the anti-retaliation remedy by providing the right to file an action directly in district court. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act Section 922, *codified at* Section 21F(h) of the Exchange Act, 15 U.S.C. 78u-6(h).

Wadler alleges that the defendants (collectively, "Bio-Rad") fired him for "engaging in mandatory 'up the ladder' reporting" of potential bribery, books and records, or other violations of the FCPA in the company's Chinese operations." He alleges that he made his Part 205 report to key Bio-Rad officers and directors and ultimately to the audit committee of Bio-Rad's board of directors. *See* Complaint (DE 1) at ¶¶ 1, 22, 29, 72. Bio-Rad has moved the Court to preclude Wadler from introducing any of the following as evidence at trial:

- All testimony by Wadler that may be based on information he learned in the course of his service as Bio-Rad's general counsel.
- All testimony of other lawyers regarding Bio-Rad's confidential information.
- Any reference to or introduction into evidence of Bio-Rad's attorney-client privileged information.

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[6] SOX 806 also protects agents and contractors (such as outside counsel) of public companies. *See Lawson v. FMR LLC*, __ U.S. __, 134 S.Ct. 1158, 1168 (2014).

[7] 18 U.S.C. 1514A(b)(1).

- All questions and responses likely to elicit attorney-client privileged information from any witness and/or confidential information from any lawyer-witness.

DE 94 at ECF p. 2.

The evidentiary limitations Bio-Rad seeks would cover Wadler's Part 205 report as well as any responses thereto. The Commission recognized in promulgating Part 205 that "up the ladder" reports by an attorney-whistleblower would likely include client confidences[8] and that entering those reports into evidence in anti-retaliation litigation would be essential to proving that the attorney was retaliated against for reporting potential wrongdoing. To ensure that attorney-whistleblowers could use those reports as evidence in such litigation,[9] the Commission adopted Section 205.3(d)(1), which provides that "[a]ny report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) **may be used** by an attorney in connection with any investigation, proceeding, or **litigation** in which the attorney's compliance with this part is in issue."[10] The Commission also specified that if "the standards of a state*** where an attorney is admitted or practices conflict with this part, **this part shall govern**."[11]

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[8] While "client confidences" include attorney-client privileged communications, it also encompasses nearly any nonpublic information the attorney becomes aware of as a result of the attorney-client relationship. *See, e.g.*, Model Rule of Professional Conduct ("Model Rule") 1.6, comment 3 ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

[9] According to Bio-Rad, Wadler's claims and the company's own defenses "are inextricably intertwined with Bio-Rad's privileged and confidential information," to the point that Wadler may not be able to proceed to trial. DE 94 at ECF p. 8. As we discuss later, Bio-Rad's suggestion that its privilege concerns warrant dismissing Wadler's claims is not well-founded.

[10] 17 C.F.R. 205.3(d)(1) (emphasis added).

[11] 17 C.F.R. 205.1 (emphasis added).

Bio-Rad grounds its motion on California Business & Professions Code Section 6068(e) and California Rule of Professional Conduct 3-100, each of which generally prohibits an attorney from revealing a client's privileged or confidential information. Bio-Rad has asserted that these state laws are not preempted by federal law because "[n]othing in the Sarbanes-Oxley or Dodd-Frank Acts evidences a clear legislative intent to preempt California's ethical and statutory rules." DE 94 at ECF pp. 12-13.[12] More recently, Bio-Rad has asserted that SOX and Part 205 are permissive—that is, an attorney "may" file suit and "may" use a Part 205 report—and thus there is no actual conflict between those provisions and California law. DE 105 at ECF pp. 11-12. Both assertions are wrong.

The Commission respectfully submits that the principal issue the Court must resolve in deciding Bio-Rad's motion is whether the Commission's Part 205 regulations preempt the California state laws that generally prohibit attorneys from disclosing client confidences.[13] The Commission's view is that Section 205.3(d)(1)—without which attorneys complying with their legal obligation to report possible violations would have limited anti-retaliation protection—preempts the California laws on which Bio-Rad relies because those laws would interfere with the effectiveness of Part 205. Accordingly, the Court should deny Bio-Rad's motion.

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[12] Bio-Rad also cites to Federal Rule of Evidence 501 (which provides that federal common law governs privilege claims in certain circumstances), and continues to rely heavily on authority concerning traditional privilege issues in contexts that are significantly different than the one presented here. As shown below, Bio-Rad's reliance on Rule 501 is misplaced.

[13] The Commission does not have any information about the potential evidence beyond what the parties have stated in redacted public filings. In addition, the parties dispute whether and to what extent privilege has been waived by Bio-Rad's disclosures to various government agencies (including the Commission). The Commission does not express any views on those (or any other) factual or legal questions.

ARGUMENT

I. Section 205.3(d)(1) Applies to This Case.

Bio-Rad contends that Section 205.3(d)(1) does not apply here. DE 105 at ECF pp. 11-12. To the contrary, Bio-Rad's reliance on state laws to exclude evidence of Wadler's Part 205 "up the ladder" reporting presents the precise situation Section 205.3(d)(1) was adopted to address.

The Commission's Part 205 rules explicitly permit attorney-whistleblowers at public companies to use as evidence their "up the ladder" reports of potential wrongdoing in circumstances where the attorney's compliance with Part 205 is "in issue":

> **Any report** under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) **may be used by an attorney in connection with any** investigation, proceeding, or **litigation in which the attorney's compliance with [Part 205] is in issue.**

17 CFR 205.3(d)(1) (emphasis added). In construing Section 205.3(d)(1), courts "must begin with the words in the regulation and their plain language."[14] This regulation plainly authorizes an attorney-whistleblower to use his or her Part 205 report[15] as evidence in litigation so long as the attorney-whistleblower's compliance with Part 205 is "in issue"—*i.e.*, is probative and material to the attorney-whistleblower's claims, allegations, or response to defenses.

The Commission confirmed that it intended this result in its comments adopting the regulation:

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[14] *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984); *see also United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004) ("To interpret a regulation, we look first to its plain language."); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 117 (2nd Cir. 2005) (a rule's plain meaning controls unless it leads to absurd result).

[15] A Part 205 report need not be a formal document or take any particular form. "*Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing." 17 C.F.R. 205.2(n).

> Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA's [Model Rule 1.6(b)(5)][16] and corresponding "self-defense" exceptions to client-confidentiality rules in every state. **The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.**

68 Fed. Reg. 6295, 6310 (emphasis added).

Wadler's complaint alleges that his compliance with his Part 205 obligations was the reason for his termination. His Part 205 report(s)—the information about potential material violations he conveyed to Bio-Rad management and its audit committee—are plainly probative and material to his claims and possibly to his refutation of Bio-Rad's defenses. This action is thus "litigation in which the attorney's compliance with [Part 205] is in issue."[17]

To the extent Bio-Rad suggests that Section 205.3(d)(1) only authorizes an attorney to use his or her Part 205 report in defending allegations against the attorney (*e.g.*, to an allegation that the attorney did not make a required report), the argument lacks any support in the text of the rule. Nothing in the rule (or the Commission's comments in promulgating the rule) limits use of a Part 205 report to defensive purposes. Rather, the clear language of Section 205.3(d)(1) explicitly contemplates an attorney's use of such communications whenever his or her

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[16] The Commission's comments originally cited to then-Model Rule 1.6(b)(3). In August 2003, the ABA reformatted its rules and re-numbered various provisions, including then-Model Rule 1.6(b)(3), which was renumbered as Model Rule 1.6(b)(5). The text and substance of the rule is identical to its prior version. Thus, for purposes of this brief, we refer to both versions of the rule as "Model Rule 1.6(b)(5)."

[17] Section 205.3(d)(1) applies where the client is an "issuer" as defined in 17 C.F.R. 205.2(h). Bio-Rad is an issuer because it maintains a class of publicly-traded securities registered pursuant to Section 12(b) of the Exchange Act. *See, e.g.*, Complaint (DE 1) at ¶ 50.

compliance is "in issue," regardless of whether it pertains to a claim or a defense. Interpreting the rule to only authorize defensive uses of a Part 205 report would be an unduly narrow construction that would require the Court to read non-existent limitations into the clear language of Section 205.3(d)(1) without any textual basis for doing so. *See, e.g., United Cigar Whelan Stores Corp. v. United States*, 113 F.2d 340, 345 (9th Cir. 1940) ("we are not at liberty" to "read into the regulation words not therein contained").

Moreover, such a limitation would incorrectly imply that a whistleblower retaliation action is purely an "offensive" use of a Part 205 report. An attorney-whistleblower retaliation complaint is quintessentially a *defensive* reaction to an employer's allegedly illegal adverse action—discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against the attorney "in the terms and conditions of employment"—in retaliation for whistleblowing. 18 U.S.C. 1514A(a) [SOX]; Exchange Act Section 21F(h)(1)(A) [Dodd-Frank]. Because in such litigation the issuer is alleged to have taken adverse employment action against the employee, and the employee is attempting to restore (rather than preserve) the status quo, it is reasonable to view the employee as acting in self-defense. Put differently, if an issuer had to file suit to fire an employee, and the employee countered by responding that the issuer was illegally retaliating against him for reporting potential violations, no one would doubt that the employee was employing a "whistleblower defense" to protect himself.[18] Indeed, in both situations, the attorney and client have become adversaries, and "[o]nce an adversarial

[18] *See, e.g., Coons v. Secretary of U.S. Dep't of Treasury*, 383 F.3d 879, 891 (9th Cir. 2004) (noting the "whisteblower defense").

relationship has developed, simple fairness demands that the lawyer be able to present her claim or defense without handicap."[19]

In short, nothing in the plain language of Section 205.3(d)(1) can be reasonably construed as barring an attorney's use of his or her Part 205 report offensively, as a "sword," or as limiting an attorney's use of such communications to defensive measures, as a "shield." Bio-Rad's argument that this is not a case in which Section 205.3 applies runs contrary to the broad remedial purpose of the Part 205 regulations[20] and to the well-established proposition that whistleblower protection provisions, such as SOX Section 806, Exchange Act Section 21F(h), and Part 205, should be construed broadly to effectuate their remedial purposes.[21]

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[19] 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* §9.23 at 9-100.

[20] The Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-97 (1983) (*quoting SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180, 195 (1963)); *see also Lowe v. SEC*, 472 U.S. 181, 225 (1985) (White, J., concurring) (noting "our longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly in order to effectuate their remedial purposes"); *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("Congress has broad remedial goals in enacting securities laws.") (internal quotation marks omitted); *SEC v. Ralston-Purina Co.*, 346 U.S. 119, 126 (1953).

[21] *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998); *see also Bechtel Constr. Co. v. Sec. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws"); *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996) ("The overall purpose of the statute– the protection of whistleblowers– militates against an interpretation that would make anti-retaliation actions more difficult."); *Haley v. Fiechter*, 953 F.Supp. 1085, 1092 (E.D. Mo. 1997) ("Courts which have been called upon to interpret different federal whistleblower statutes have uniformly held that such statutes should be broadly construed."); *U.S. ex rel Kent v. Aiello*, 836 F.Supp. 720, 725 (E.D.Cal. 1993) ("Whistleblower protection statutes are remedial in nature and thus should be liberally construed."); *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (noting the "simple [approach], often used in construing statutes designed to protect individual rights", that remedial statutes must be interpreted broadly).

II. Under Well-Settled Principles of Conflict Preemption, the Commission's Part 205 Rules Preempt California Laws that Interfere with the Federal Objectives the Part 205 Rules Address.

"There are three types of preemption: express, field, and conflict preemption."[22] The Commission agrees with Bio-Rad that the issue here is whether conflict preemption applies.[23]

"Conflict preemption consists of impossibility and obstacle preemption. * * * Obstacle preemption arises when a challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[24] Bio-Rad asserts that there is no conflict between Part 205 and California law because Section 205.3(d)(1) and the anti-retaliation provisions at issue are merely "permissive," *i.e.*, an attorney "may" file suit and "may" use a Part 205 report as evidence in such an action but isn't required to do either. DE 105 at ECF pp. 11-12. The practical effect of adopting Bio-Rad's reasoning would be to allow California law to take away the rights given by Congress and the Commission to California attorney-whistleblowers in all but the rare cases where he or she can prevail on a retaliation claim without using any material deemed "confidential" under California laws. The outcome advocated by Bio-Rad is a classic example where obstacle preemption overrides the interfering state law.

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[22] *Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015), *citing Kurns v. R.R. Friction Products Corp.*, --- U.S. ---, 132 S.Ct. 1261, 1265-66 (2012).

[23] Bio-Rad also argues that Congress neither expressly preempted state laws governing attorneys' obligations to their clients nor indicated an intention to occupy that field of law. The Commission does not assert (nor, it appears, does Wadler) that either of those bases apply.

[24] *Nation*, 804 F.3d at 1297, *citing Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

The case on which Bio-Rad principally relies (*Barrientos v. 1801-1825 Morton LLC*[25]) specifically addresses obstacle preemption and supports the Commission's position. In *Barrientos*, a defendant-landlord wanted to evict tenants in order to raise the rent on the apartment units. A Los Angeles law prohibited evictions for that purpose, but a federal regulation by HUD permitted evictions for "good cause * * * which may include [the] desire to lease the unit at a higher rental." *Id.* at 1202. Bio-Rad reads *Barrientos* as suggesting that it is always the case that where state law prohibits what federal law allows, but does not require, there is no conflict. DE 105 at ECF p. 10. But *Barrientos* cannot be read nearly that broadly. It is noteworthy that the Supreme Court decided nearly three decades before *Barrientos* that a conflict between an agency's regulations and state law "does not evaporate because the [agency's] regulation simply permits, but does not compel,' what state law prohibits." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). If the state law's prohibition removes "flexibility" provided by the agency's regulation, then it will be preempted. *Id.* This principle applies here as the relevant California laws would limit the legal right to use probative evidence (the Part 205 report),and the flexibility to bring anti-retaliations claims, that federal laws provide attorney-whistleblowers.

The *Barrientos* court was interpreting *de la Cuesta* as it applied to the conflicting HUD and Los Angeles provisions.[26] While the court found that under the circumstances of that case, the federal law did not preempt the Los Angeles provision, its analysis supports the Commission's argument that Part 205 **does**

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[25] 583 F.3d 1197 (9th Cir. 2009).

[26] "Applying *de la Cuesta*, we consider whether the agency intended to preempt the local law and whether [the Los Angeles law] stands as an obstacle to the accomplishment of Congressional purposes." *Barrientos*, 583 F.3d at 1209.

preempt the California laws relied on by Bio-Rad. The reasons the Court held that HUD's "good cause" regulation did not preempt the Los Angeles ordinance were: (1) HUD did not intend to preempt local eviction controls, (2) the Los Angeles ordinance did not present an obstacle to the accomplishment of federal objectives, and (3) HUD's *amicus* brief and public guidance disavowed an intent to preempt state provisions like the LA ordinance. *Barrientos*, 583 F.3d at 1209-14. Application of these factors leads to the conclusion that Part 205 preempts the California laws at issue here.

First, unlike the situation in *Barrientos*, the Commission expressly intends its regulation to preempt inconsistent state laws. In fact, the first section of Part 205 specifically states:

> Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

17 C.F.R. 205.1 (emphasis added). In its comments adopting the regulations, the Commission explained:

> A number of commenters questioned the Commission's authority to preempt state ethics rules, at least without being explicitly authorized and directed to do so by Congress. * * * The language we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, **the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.**

68 Fed. Reg. at 6297 (emphasis added). Then, in a public statement in response to a Washington State Bar Association Proposed Interim Formal Opinion Regarding the Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorneys' Obligations Under the Rules of Professional Conduct, the Commission (through its then-General Counsel) stated unequivocally that its regulations under Part 205

"will take precedence over any conflicting provision" of state law.[27] Additionally, in two *amicus* briefs (this one, and *Jordan v. Sprint Nextel Corporation*[28]), the Commission reiterated its position that Section 205.3(d)(1) preempts any state law that would present an obstacle to whistleblower-attorneys using as evidence their Part 205 reports in litigating anti-retaliation claims. *Barrientos* recognizes that an agency "'is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.' Further, an agency's position in an amicus brief is entitled to deference if there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.' * * * Agencies 'have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[29]

The California laws involved here clearly present an obstacle to the accomplishment of federal objectives. Congress, in Section 307 of SOX, directed the

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[27] Although the specific provision at issue was Section 205.3(d)(2), which permits attorneys to make disclosures to the Commission in certain circumstances, the preemption analysis and conclusion in the Commission's response applies equally to Section 205.3(d)(1). Statement available at https://www.sec.gov/news/speech/spch072303gpp.htm.

[28] *See* Redacted Brief of the Securities and Exchange Commission, *Amicus Curiae*, Dep't of Labor Admin. Review Bd. Case No. 06-105, filed August 3, 2009, *available at* https://www.sec.gov/litigation/briefs/2009/jordan0809.pdf.

[29] *Barrientos*, 583 F.3d at 1214, internal citations omitted. *See also Roth v. Perseus, LLC*, 522 F.3d 242, 247 (2nd Cir. 2008) ("we defer to the SEC's interpretation of the Rule, including one articulated in its amicus brief, so long as the interpretation is not plainly erroneous or inconsistent with the law"); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulation is controlling even if presented in amicus brief); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2nd Cir. 2000) ("We are bound by the SEC's interpretations of its regulations in its amicus brief, unless they are plainly erroneous or inconsistent with the regulation[s]").

Commission to promulgate "minimum standards of professional conduct for attorneys appearing and practicing before the agency" in representing issuers, specifically "including a rule" requiring them to report material violations up the ladder within the issuer.[30] In response to this Congressional mandate, the Commission promulgated Part 205,[31] which requires an attorney representing an issuer to report material violations "up the ladder" within that issuer. Section 205.3(b) requires an attorney to report evidence of a material violation first to the issuer's chief legal officer. If the attorney does not receive an "appropriate response"[32] from the chief legal officer (or if, as here, the attorney *is* the chief legal officer), the attorney must continue reporting up the management chain, including to the audit committee or the board of directors, until an appropriate response is received.

When an attorney-whistleblower who has made a Part 205 report believes he or she has been retaliated against for making that report, both SOX and Dodd-Frank grant the attorney the right to file an action for unlawful retaliation. A central issue in any such action (including this one) is whether the attorney can use his or her Part 205 report—which will nearly always contain attorney-client communications, client confidences, or both—as evidence. In Section 205.3(d)(1), the

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[30] 15 U.S.C. 7245.

[31] 17 C.F.R. 205.1 *et seq.* *See also* 68 Fed. Reg. 6295 *et seq.*

[32] An "appropriate response" is "a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) ... no material violation ... has occurred, is ongoing, or is about to occur;

(2) ... the issuer ... has adopted appropriate remedial measures ...; or

(3) ... the issuer ... has retained or directed an attorney to review the reported evidence of a material violation."

17 C.F.R. 205.2(b).

Commission specifically addressed this issue and answered it with a clear "yes": any Part 205 report, or the response thereto, "may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue."

Section 205.3(d)(1) is entirely consistent with the rule—established by 47 state bars, the ABA's Model Rules of Professional Conduct ("Model Rules"), as well as the federal common law—that an attorney may use client confidences in support of "claims or defenses" in litigation against a client. Notably, Congress enacted the whistleblower retaliation protections of Dodd-Frank eight years **after** instructing the Commission to issue the regulations that became Part 205, and seven years after those regulations—including Section 205.3(d)(1)—were promulgated. Yet Congress did not single out attorneys as a group without recourse; instead, it extended the broader Dodd-Frank protections to "**any** lawful act done by the whistleblower ... in making disclosures that are **required or protected under the Sarbanes-Oxley Act of 2002** * * *[33]—which would include attorney-whistleblowers. If interfering state laws are not preempted, then Congress's interest in protecting attorney-whistleblowers, reinforced by its extension of those protections in the Dodd-Frank Act, and the Commission's interest in encouraging attorneys to comply with its Part 205 rules, would be seriously undermined.

The Supreme Court has consistently upheld the authority of federal agencies to implement rules of conduct that conflict with state laws that address the same conduct. *See, e.g., Sperry v. State of Florida*, 373 U.S. 379 (1963) (Florida could not enjoin non-lawyer registered to practice before the Patent and Trademark Office from prosecuting patent applications in Florida, even though non-lawyer's actions

[33] Exchange Act Section 21F(h)(1)(A) (emphasis added).

constituted unauthorized practice of law under Florida bar rules). Importantly, the Ninth Circuit has specifically held that ethics rules approved by the Commission in accordance with the Exchange Act preempt conflicting California ethics standards. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005). In *Credit Suisse*, California adopted heightened disclosure and disqualification standards for neutral arbitrators that conflicted with Commission-approved rules of a private self-regulatory organization (the NASD, now known as FINRA).[34] The *Grunwald* court's analysis and conclusion is even more persuasive where, as here, the rules at issue are the Commission's own regulations that were promulgated in response to a Congressional mandate and after robust notice and public comment.[35]

In sum, the Court should reach the same conclusion the Department of Labor's Administrative Review Board (which was entrusted by Congress with the responsibility of deciding SOX whistleblower cases in the first instance) reached in an analogous case: "SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' or 'person' who reports such violations. Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806, even if it necessitates that attorney-client privileged communications be held admissible in a [] whistleblower proceeding.

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[34] The Supreme Court of California reached the same conclusion on nearly identical facts. *Jevne v. Superior Court*, 35 Cal.4th 935, 111 P.3d 954 (Sup.Ct.Cal. 2005).

[35] *See also McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668 (9th Cir. 2013) (state law prohibiting employers from "forced patronage" was preempted by the Exchange Act because the state law restricted what federal law permitted); *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159 (9th Cir. 2008) (plaintiff's state law claims were challenges to Commission-approved rules of self-regulatory organizations and thus preempted).

"Consequently, we conclude that **under [Section] 205.3(d)(1),** if an attorney reports a 'material violation' in-house in accordance with the SEC's Part 205 regulations, **the report, though privileged, is nevertheless admissible** in a SOX Section 806 proceeding **as an exception to the attorney-client privilege** in order for the attorney to establish whether he or she engaged in SOX-protected activity. Furthermore, in accord with the ALJ's rationale that SOX Section 307 should impliedly be read consistent with SOX Section 806, **we similarly conclude** that Congress also intended that **any other relevant attorney-client privileged communication that is not a Part 205 report is also admissible** in a [] whistleblower proceeding in order for the attorney to establish whether he or she engaged in SOX protected activity."[36]

III. Both a Part 205 Report and Other Privileged or Confidential Evidence are Admissible Under the Federal Rules of Evidence and the Federal Common Law.

Bio-Rad argues that Federal Rule of Evidence 501, which incorporates the federal common law on attorney-client privilege, also bars Wadler's use of his Part 205 report as evidence at the upcoming trial. DE 94 at ECF pp. 13-14. But common-law evidentiary principles are trumped where an agency has properly promulgated regulations pursuant to statutory authority, because those regulations "have the force and effect of law" as to the matter covered by the regulations.[37] Section

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[36] *Jordan v. Sprint Nextel Corp.*, Case No. 06-105, 2009 WL 3165850 (Dep't of Labor, Admin. Review Bd. Sept. 30, 2009) (emphasis added). *Jordan* was decided before the Dodd-Frank Act added another set of whistleblower protections for SOX Section 307 reports, but the ARB's rationale and analysis apply equally to SOX and Dodd-Frank claims.

[37] *See, e.g., Milwaukee v. Ill.*, 451 U.S. 304, 314 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("[P]roperly promulgated, substantive agency regulations have the force and effect of law.") (internal quotation marks omitted); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (recognizing that regulations "issued by an agency pursuant to statutory authority and which implement the statute, as, for

205.3(d)(1) is an express provision of federal law that takes priority over the federal common law (even though, as we discuss below, federal common law is consistent with the Commission's Part 205 rule) and permits use of the evidence notwithstanding Rule 501.

Importantly, the Court does not have to parse through the evidence to sort Part 205 evidence from relevant but non-Part 205 evidence, because if there is any of the latter evidence, the federal common law permits its use at trial.[38] Supreme Court Standard 503(d)(3)—often cited as a restatement of the federal common law on attorney-client privilege[39]—states that there is no protection "[a]s to a communication relevant to an issue of **breach of duty** by the lawyer to his client or **by the client to his lawyer**[.]" (Emphasis added.) The natural reading of the anti-retaliation provisions of both SOX and Dodd-Frank is that Congress imposed a legal duty on Bio-Rad not to take an adverse action against Wadler for reporting potential material violations of federal law as required by Part 205. Thus, under federal common law, any communications relevant to Wadler's claim that Bio-Rad breached its legal duty not to retaliate against him are not privileged.

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example, the proxy rules issued by the Securities and Exchange Commission . . . have the force and effect of law.") (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedures Act* 30 n. 3 (1947)).

[38] *See also* the ARB's decision in *Jordan*, quoted above, which reached the same conclusion on the grounds that there is "strong evidence of congressional intent" to allow attorney-whistleblowers to use otherwise privileged materials in a retaliation action even where Part 205 does not apply. *Jordan*, 2009 WL 3165850 at *9-10.

[39] Supreme Court Standard 503 is the proposed, but never adopted, Federal Rule of Evidence 503. *See* Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 235-36 (1972). It is often cited as a restatement of the common law of attorney-client privilege applied in the federal courts at that time. *See, e.g., United States v. Mosony*, 927 F.2d 742, 751 (3rd Cir. 1991).

That conclusion is bolstered by developments in the law since Standard 503 was first proposed in 1972. The federal common law on privilege is meant to reflect "well-established [state law] exceptions" to the attorney-client privilege.[40] Over the past 40-plus years, the Code of Professional Responsibility (from which Standard 503 drew) has been replaced by ABA Model Rule 1.6(b)(5), which has been adopted either in whole or in relevant substance by 47 states (so far).[41] The modern rule clearly permits an attorney to use otherwise privileged or confidential information "to the extent the lawyer reasonably believes necessary: *** to establish a **claim or defense** on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]"[42] (Emphasis added.)

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[40] *See* Advisory Committee Notes to Standard 503, 56 F.R.D. at 239-40 (noting that Standard 503 was drafted with reference to established state rules).

[41] *See* Ala. Rule 1.6(b)(2); Alaska Rule 1.6(b)(2); Ariz. ER 1.6(d)(4); Ark. Rule 1.6(b)(5); Colo. Rule 1.6(c); Conn. Rule 1.6(d); Del. Rule 1.6(b)(5); Fla. Rule 4-1.6(c)(2); Ga. Rule 1.6(b)(1)(iii); Haw. Rule 1.6(c)(3); Idaho Rule 1.6(b)(5); Ill. Rule 1.6(b)(5); Ind. Rule 1.6(b)(5); Ia. Rule 32:1.6(b)(5); Kan. Rule 1.6(b)(3); Ky. Rule 1.6(b)(2); La. Rule 1.6(b)(2); Me. Rule 1.6(b)(5); Md. Rule 1.6(b)(5); Mass. Rule 1.6(b)(2); Minn. Rule 1.6(b)(8); Miss. Rule 1.6(b)(2); Mo. S. Ct. Rule 4-1.6(b)(2); Mont. Rule 1.6(b)(3); Neb. Rule 1.6(b)(3); Nev. Rule 156(3)(b); N.H. Rule 1.6(b)(2); N.J. Rule 1.6(d)(2); N.M. Rule 16-106(D); N. Car. Rule 1.6(b)(6); N. Dak. Rule 1.6(e); Ohio Rule 1.6(b)(5); Okla. Rule 1.6(b)(3); Ore. Rule 1.6(b)(4); Pa. Rule 1.6(b)(4); R.I. Rule 1.6(b)(2); S. Car. Rule 1.6(b)(2); S. Dak. Rule 1.6(b)(3); Tenn. Rule 1.6(b)(3); Tex. Rule 1.6(c)(5); Utah Rule 1.6(b)(3); Vt. Rule 1.6(c)(2); Va. Rule 1.6(b)(2); Wash. Rule 1.6(b)(5); W. Va. Rule 1.6(b)(2); Wisc. Rule 1.6(c)(2); Wy. Rule 1.6(b)(2).

[42] Indeed, the Commission's comments when it adopted Part 205 specifically noted that its rule permitting use of otherwise privileged information at trial "is effectively equivalent to the ABA's [Model Rule 1.6(b)(5)] and corresponding 'self-defense' exceptions to client-confidentiality rules in every state." 68 Fed. Reg. at 6310.

This exception to the general rule of confidentiality is notably broad. Numerous courts, both before and after the Commission adopted Section 205.3(d)(1), have held that the claim-or-defense rule (in some states referred to as the self-defense rule) allows attorneys to use client confidences to prove wrongful discharge or whistleblower claims.[43] Indeed, the ABA has specifically noted that a wrongful-discharge action is a "claim" under ABA Model Rule 1.6(b)(5).[44]

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[43] *See, e.g., Schaefer v. GE Co.*, 2008 WL 649189 at *6 (D. Conn. 2008) ("The plain language of Model Rule 1.6 is quite broad, allowing a lawyer to use the claim . . . exception in a controversy between the lawyer and the client" in an action for sex discrimination); *Van Asdale v. Int'l Game, Tech.*, 498 F.Supp.2d 1321, 1329 (D. Nev. 2007), *overturned on other grounds* (allowing plaintiff to use confidential client information in SOX whistleblower action, explaining that the "Model Rules permit a lawyer to reveal confidential information relating to the representation in order to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client"); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1042 (Mont. 2000) (discharged in-house counsel could use client confidences as reasonably necessary to prove wrongful-discharge claim); *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So.2d 607, 610-12 (Fla. App. 2004) (allowing employer's former general counsel to use client confidences to support claim under Florida's Whistleblower Act); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 608 (Utah 2003) (former in-house counsel could use client confidences to prosecute wrongful-discharge claim); *Crews v. Buckman Labs Int'l, Inc.*, 78 SW.3d 852, 863-64 (Tenn. 2002) (adopting a new provision to its conduct rules that follows Model Rule 1.6 and "permit[s] in-house counsel to reveal the confidences and secrets of a client when the lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer or the client"); Oregon Formal Ethics Op. 136 (1994) (permitting the use of client confidences by attorney in wrongful-termination case after analyzing Oregon's rule that, like Model Rule 1.6(b)(5), expressly applies to either a "claim or defense"). *See also* Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* at 9-99 (Rule 1.6(b)(5) "permits a lawyer to reveal client confidences when needed to 'establish a claim,' which is a matter of offense rather than defense").

[44] The ABA's Standing Committee on Ethics and Professional Responsibility explained that "[r]etaliatory discharge actions provide relief to employees fired for reasons contradicting public policy," and that in-house attorneys who are improperly discharged may rely on the exceptions contemplated in the Model Rule to utilize confidential client information to pursue "a retaliatory discharge claim or similar claim" against their former employers. ABA Formal Op. 01-424 at 3-4 (Sept. 22, 2001) (noting that an attorney cannot divulge client confidences "except . . . as permitted by Rule 1.6" and identifying now-Rule 1.6(b)(5) as such an exception).

IV. The Court Can Use its Equitable Tools to Limit Public Disclosure of Bio-Rad's Sensitive Information at the Upcoming Trial if it Deems Such Protections Advisable.

Bio-Rad argues that even when an attorney-whistleblower case is sufficiently meritorious to warrant trial, the Court should exclude the evidence of the Part 205 report (and other possibly privileged information) to keep it out of the public domain rather than use its inherent equitable powers such as sealing the record or entering a protective order to restrict public access. DE 94 at ECF pp. 18-19 and DE 105 at ECF pp. 17-18. Of course, the attorney-whistleblower will likely rely on the *same* evidence it intends to use at trial to fend off a motion to dismiss and/or for summary judgment. It would be a perverse (and unwarranted) result to allow the attorney-whistleblower to use key evidence to demonstrate to the court that his case has merit, but then be precluded from using the same evidence to prove his claim at trial.

In addition, Bio-Rad's argument is grounded in the mistaken conclusion that the communications reflected in the Part 205 report are still privileged. But as discussed above, Part 205 and the federal common law "claim or defense" provisions are *exceptions* to the general rule of privilege.[45] The evidence supporting Mr. Wadler's claims is thus admissible even if it was once privileged or confidential.

The Ninth Circuit's controlling decision in *Van Asdale v. Int'l Game Tech.* confirms that the attorney-whistleblower's need to use once-privileged information

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[45] For the same reason, Bio-Rad's argument that allowing Wadler to use the evidence is an affront to the purposes of Federal Rule of Evidence 502 (DE 105 at ECF pp. 6-7, 17) is misplaced. Rule 502 addresses litigants' concerns that producing privileged information, even inadvertently, in the discovery process could constitute a waiver. Certainly there are many cases where a party obtains information in discovery that it cannot actually use at trial—because the documents have not lost their privileged status, and no other exception applies. Here, of course, the point is that the evidence **has** lost its protections as a result of Part 205 and/or the federal common law, and accordingly the no-waiver protections of Rule 502 are not implicated.

from his or her Part 205 report is **not** a basis for preventing an otherwise valid SOX retaliation claim from proceeding to trial:

> There are few federal circuit court cases addressing the right of in-house counsel to use attorney-client privileged information in a retaliation suit. In *Willy v. Administrative Review Board,* 423 F.3d 483 (5th Cir. 2005), an in-house attorney brought suit against his former employer, alleging retaliation as a result of a report he had written; it was undisputed that the contents of the report were covered by the attorney-client privilege. *Id.* at 494 n. 48. The Fifth Circuit allowed the suit to go forward, rejecting the notion "that the attorney-client privilege is a *per se* bar to retaliation claims under the federal whistleblower statutes, i.e., that the attorney-client privilege mandates exclusion of all documents subject to the privilege." *Id.* at 500. However, *Willy* involved a claim before an administrative law judge and the Fifth Circuit expressly reserved the question of whether its holding would apply to "a suit involving a jury and public proceedings." *Id.* at 500–01.
>
> Similarly, in *Kachmar v. SunGard Data Systems, Inc.,* 109 F.3d 173 (3rd Cir.1997), the Third Circuit held that a former in-house attorney could maintain a Title VII suit for retaliatory discharge; the Third Circuit reasoned that "concerns about the disclosure of client confidences in suits by in-house counsel" did not alone warrant dismissal of the plaintiff's action. *Id.* at 181. Rather, the Third Circuit suggested that a district court should "balanc[e] the needed protection of sensitive information with the in-house counsel's right to maintain the suit," while considering any protective measures that might be taken **at trial** to safeguard confidential information. *Id.* at 182.
>
> Although neither case is precisely on point, **we agree with the careful analysis of the Third and Fifth Circuits and hold that confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims**. ... [W]e agree with the Third Circuit that **the appropriate remedy is for the district court to use the many "equitable measures at its disposal" to minimize the possibility of harmful disclosures**, not to dismiss the suit altogether. *Id.* at 182.
>
> We also note that the text and structure of the Sarbanes–Oxley Act further counsel against IGT's argument. Section 1514A(b) expressly authorizes any "person" alleging discrimination based on protected conduct to file a complaint with the Secretary of Labor and, thereafter, to bring suit in an appropriate district court. **Nothing in this section indicates that in-house attorneys are not also protected from retaliation under this section**, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud. *See, e.g.,* 15 U.S.C. § 7245. We thus agree with the district court that dismissal of the Van Asdales' claims on grounds of attorney-client privilege is unwarranted.

577 F.3d 989, 995-96 (9th Cir. 2009) (emphasis added).[46]

In short, the Ninth Circuit has already taken a position consistent with the Commission's: the issuer's confidentiality concerns do not warrant dismissing a retaliation lawsuit. The Court may (but does not have to) use its equitable tools to limit public access to sensitive information.[47]

Conclusion

The Commission has a strong interest in ensuring that public companies do not retaliate against the attorneys who often play a key role in protecting investors and the integrity of the securities markets by ensuring their clients' compliance with the federal securities and related laws. The Commission's interest extends to ensuring that attorney-whistleblowers who honor their responsibilities have a meaningful ability to exercise the rights granted by Congress in SOX and Dodd-Frank to bring an action for illegal retaliation. Congress' intent, the Commission's regulations, the Model Rules of Professional Responsibility, the rules governing lawyers in 47 states, and the federal common law are all in accord: An attorney-whistleblower can use otherwise privileged or confidential information to support a

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[46] Bio-Rad cites *Van Asdale* for the proposition that "these issues will rarely, if ever, be appropriately resolved at the motion to dismiss stage." DE 105 at ECF pp. 7, 9. But *Van Asdale* did not involve a motion to dismiss—it involved a motion for summary judgment. After the Ninth Circuit's decision that summary judgment was not appropriate, the case did in fact proceed to trial (where the Van Asdales prevailed).

Bio-Rad also dismisses *Van Asdale* as inapposite because it interpreted Nevada law. DE 105 at ECF p. 9. But the court did not rely on Nevada (or Illinois, or any other state) law. The Ninth Circuit did not even reference Nevada's state ethics rules; rather, both the district and appellate courts indicated that federal law governed. *See* 577 F.3d at 995 *and* 498 F.Supp.2d at 1326-27.

[47] Of all the equitable tools available to the Court—sealing, protective orders, etc.—Bio-Rad focuses on arguing that the Court could limit the admissibility of evidence. DE 105 at ECF p. 17. But as the entire preceding discussion establishes, it would not be appropriate to limit evidence on the grounds of privilege or confidentiality (or state law) alone.

claim of illegal retaliation. We respectfully ask the Court to hold that Part 205 preempts California Business & Professions Code Section 6068(e) and California Rules of Professional Conduct 3-100 to the extent either of those would *preclude* an attorney-whistleblower from using evidence that Part 205 *permits* the attorney to use.

December 13, 2016

Respectfully submitted,

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

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On December 13, 2016, I caused to be served the document entitled ***Amicus Curiae* Brief of the Securities and Exchange Commission in Support of Plaintiff** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: December 13, 2016 */s/ Thomas J. Karr*
Thomas J. Karr

Wadler v. Bio-Rad Laboratories, et al.
United States District Court—Northern District of California
Case No. 3:15-cv-2356-JCS

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THE AMERICAN LAW INSTITUTE
Continuing Legal Education

Whistleblower Law: Attorney-Client Privilege and Other Lessons from *Bio-Rad*

September 13, 2017
Telephone Seminar/Audio Webcast

Selected Pleadings from *Sanford S. Wadler, Plaintiff vs. Bio-Rad Laboratories, Inc., et al., Defendants*

Amended Order Denying Motion to Exclude

Submitted by

Robert E. Hauberg, Jr.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Jackson, Mississippi

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANFORD S. WADLER,

Plaintiff,

v.

BIO-RAD LABORATORIES, INC., et al.,

Defendants.

Case No. 15-cv-02356-JCS

AMENDED* ORDER DENYING MOTION TO EXCLUDE

Re: Dkt. No. 94

I. INTRODUCTION

On the eve of trial, Defendants[1] have brought a Motion to Exclude Protected Information from the Trial of this Action ("Motion" or "Motion to Exclude") asking the Court to exclude virtually all of the evidence and testimony Plaintiff might rely upon to prove his case, including "all testimony that may be based on information [Plaintiff] learned in the course of his service as Bio-Rad's general counsel." A hearing on the Motion was held on December 15, 2016. For the reasons stated below, the Motion is DENIED.[2]

II. BACKGROUND

A. The Underlying Dispute

Bio-Rad Laboratories, Inc. manufactures and sells products and equipment around the world. Complaint ¶ 6. Because Bio-Rad sells many of its products to hospitals, universities, and similar public entities and officials, it must abide by the terms of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-2, 78ff, which forbids the company or its agents from engaging in

* The Court amends its December 20, 2016 Order, Docket No. 139, only to correct a typographical error on page 33, line 17 of that Order. This Order is identical to the Court's previous Order in all other respects.

[1] For the purposes of this Order, the Court refers to Defendants collectively as "Bio-Rad."

[2] The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

bribery and kickback schemes involving public officials and requires that companies maintain accurate accounting records and put in place adequate internal controls or face significant fines and possible criminal punishment. *Id.* ¶¶ 4, 6.

Plaintiff Sanford Wadler became Bio-Rad's general counsel in 1989 and served in that capacity for nearly 25 years. *Id.* ¶ 2. He was terminated by Bio-Rad in June 2013. *Id.* ¶ 35. Wadler asserts he was terminated because he was investigating potential FCPA violations in China and because he reported his concerns to Bio-Rad's Audit Committee "when it became clear that the company was not taking reasonable steps to investigate and remedy FCPA violations." *Id.* ¶ 39.[3] Bio-Rad contends it terminated Wadler "due to poor work performance and behavior." Declaration of Kevin B. Clune in Support of Sanford S. Wadler's Opposition to Defendants' Motion to Exclude Protected Information from the Trial of This Action ("Clune Decl."), Ex. H (Defendant Bio-Rad Laboratories, Inc.'s Second Amended Objections and Responses to Plaintiff Sanford Wadler's First Set of Interrogatories) at 3.

B. Administrative Proceedings

Wadler's allegations were addressed in administrative proceedings conducted by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") in connection with an investigation of potential FCPA violations in China on the part of Bio-Rad ("the SEC Proceedings"). They were also the subject of a whistleblower complaint filed by Wadler with the Department of Labor ("DOL"), which he brought under the 2013 Sarbanes-Oxley Act.

In the SEC Proceedings, Bio-Rad's outside counsel, Davis Polk & Wardwell ("DPW") presented a 41-page Powerpoint presentation ("DPW Presentation" or "Presentation") to the SEC on behalf of the Audit Committee on June 27, 2013 addressing Wadler's concerns about suspected FCPA violations in China. Clune Decl., Ex. I. The presentation begins with an "Investigative Chronology" that provides a timeline of Wadler's communications to the Audit Committee and

[3] The Complaint contains detailed allegations regarding Wadler's suspicions and internal complaints. Because the Court summarized these allegations in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, Docket No.53, it does not do so here.

the investigations of both Steptoe & Johnson – which Bio-Rad hired in 2011 to investigate potential FCPA violations worldwide – and DPW's investigation of Wadler's allegations to the Audit Committee. DPW Presentation at 3-5. The presentation addresses the two "primary issues" raised by Wadler with the Audit Committee regarding Bio-Rad's China operations: 1) "Execution in 2012 of inconsistent Chinese- and English-language versions of CDG distributor agreements," which "[m]ay reflect an attempt to negate more robust anti-corruption provisions contained in post-remediation English model of distributor agreement;" and 2) "apparent inconsistencies in some of the documentation for Bio-Rad's LSG sales into China through I/E companies, including with respect to products purchased and pricing, and inability to obtain complete documentation of sales," which "[m]ay be indicative of corrupt payments to officials at end-users." DPW Presentation at 4-5. The DPW Presentation goes on to address these concerns in detail, and in particular, describes the involvement of the Bio-Rad Legal Department in Hercules and the specific investigative efforts of outside counsel, as well as specific advice provided by counsel as to the issues. *See, e.g., id.* at 16-17, 26-27. The Presentation concludes that "[t]he issues identified by Mr. Wadler do not raise corruption concerns. We have found no evidence that those issues are indicative of any violation – or attempted violation – of the FCPA."[4] *Id.* at 33.

Wadler initiated the DOL proceeding in November 2013, filing a retaliation complaint ("DOL Complaint") that described in great detail his reasons for believing that Bio-Rad had committed violations of the FCPA in China and that it had terminated him for communicating his concerns to the Audit Committee. *See* Docket 25-1 (DOL Complaint, filed in unredacted form in the public record by Bio-Rad in this action in support of its motion to dismiss). Bio-Rad addressed Wadler's allegations in its January 28, 2014 response ("DOL Response"), asserting that Wadler did not use reasonable diligence in investigating Bio-Rad's activities in China and that his accusations were not made in good faith. Clune Decl., Ex. G (DOL Response). The DOL

[4] The DPW Presentation also describes interviews conducted by outside counsel in connection with anonymous complaints it received about possible FCPA violations in China. *See id.* at 35-38.

Response also described the investigations by outside counsel of Wadler's claims and asserted that these investigations established that Wadler's allegations were groundless. Rather than firing Wadler for whistleblowing, Bio-Rad asserted in the DOL Response, it fired Wadler because his behavior and performance had deteriorated over the previous year. Among other things, Bio-Rad said in its Response that Wadler had problems with anger, had unreasonably refused to sign off on a Form 10-k due to an accrual amount he disputed and similarly delayed a quarterly report, acted without support of senior management in settlement discussions with Life Technologies, instructed the legal department not to cooperate with Bio-Rad's compliance officer, and acted irate and with hostility in connection with the question of whether the French legal department would answer directly to him.

Along with the response Bio-Rad filed on January 28, 2014, Bio-Rad also submitted to the DOL five declarations of individuals in high-level positions at Bio-Rad addressing, *inter alia*, Bio-Rad's investigation, through outside counsel, of Wadler's concerns regarding possible FCPA violations in China and the alleged deterioration in Wadler's performance. *Id.* These declarations described interactions and communications between Bio-Rad and Wadler and between Bio-Rad and outside counsel on a wide variety of issues.[5]

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[5] For example director Louis C. Drapeau stated that "Wadler believed that evidence of possible corruption in Bio-Rad's China operations had been uncovered in the course" of an audit conducted at the request of licensee Life Technologies, that Wadler "brought these concerns to the Audit Committee in February 2013, and recommended that a new independent law firm of his choosing, Davis Polk & Wardell . . . be engaged to investigate his suspicion." Clune Decle, Ex. G, Drapeau Decl. at 4. He further stated that Wadler had "grossly overstepped his authority when, without any authorization from management or the Board of Bio-Rad he sought to negotiate a multi-million dollar settlement with Life Technologies, offering far more than management was willing to pay and putting the Company in a deeply compromised position in subsequent negotiations with Life Technologies." *Id.* Drapeau also discusses Wadler's refusal to sign off on a Form 10-k, stating that he "learned during a conference call in March 2013 that, on the very day before the Company intended to file its 10-K, Mr. Wadler for the first time insisted that the preexisting accrual for the Life Technologies audit was too low." *Id.* at 5. According to Drapeau, Wadler also "waited until the last minute to demand that another accrual be increased" in connection with the Company's quarterly report that was due to be filed with the SEC at the end of April 2013. *Id.* Similarly, Bio-Rad's CEO, Norman Schwartz discussed in his declaration Wadler's "last-minute objection" to the accrual stated in the Form 10-K, which he says caused Bio-Rad to have to make an "embarrassing" request for a ten-day extension on the Form 10-K deadline. Clune Decl., Ex. G, Schwartz Decl. at 3. Schwartz also refutes allegations made by Wadler in his DOL complaint that Schwartz prevented Bio-Rad employees from going to China to collect documents related to potential corruption, stating that instead, he "worked with outside counsel to ensure that the matter

Despite discussing the merits of Wadler's allegations in the DOL Response and supporting declarations, Bio-Rad argued in its Response that it had not waived attorney-client privilege. In particular, it stated that "[d]espite Mr. Wadler's disclosure in his complaint of certain attorney-client privileged communications and materials, Bio-Rad has not authorized him to share any confidential information, and has not waived any protections over communications or materials protected by the attorney-client privilege, work product doctrine or any other protection, and does not intend to do so." DOL Response at 13. Bio-Rad further asserted that it would not be proper for DOL's Occupational Safety & Health Administration ("OSHA") "to draw any inferences from Bio-Rad's assertion of attorney-client privilege, as the OSHA Whistleblower Investigation Manual at 1-211 indicates it might do." *Id.*, DOL Response at 13-17. In any event, Bio-Rad argued, the "clear, convincing and unprivileged evidence" showed that Mr. Wadler was terminated "solely because his performance had deteriorated to the point that he seemed incapable of interacting professionally with the Company's senior management and other employees." *Id.* at 17.

In a subsequent letter to DOL responding to requests for further documentation, Bio-Rad characterized all of the previously submitted evidence as "non-privileged." Clune Decl, Ex. I (March 20, 2014 Letter). On the other hand, it claimed that privilege and work product protection applied to Wadler's February 2013 memorandum to the Audit Committee ("Audit Committee Memo") and documentation from DPW's and Steptoe & Johnson's investigation, both of which Bio-Rad refused to produce in the DOL Proceeding. *Id.* Bio-Rad did, on the other hand, provide DOL with a copy of the DPW Presentation, asserting that it would be unlawful and unnecessary for the DOL's investigator to draw an adverse inference based on Bio-Rad's assertion of privilege as to the Audit Committee Memo and investigation documentation because the "DPW presentation addresses Mr. Wadler's allegations and describes the resulting investigation." *Id.*

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was appropriately investigated by that counsel, including making available for interview employees in both Hercules and China, paying for counsel to go to China to interview employees and review documents, and providing all sales documents the Company could recover from third parties." *Id.* at 3-4. An attached performance review that Schwartz said he completed in April 2013 but never gave to Wadler (which Wadler contends was written after the fact to bolster Bio-Rad's assertion that it terminated Wadler for bad performance) lists a number of criticisms relating to specific legal services that Wadler provided to Bio-Rad. *Id.*

C. Treatment of Potentially Privileged or Confidential Information in This Action

Prior to filing the complaint in the instant action, Wadler's counsel provided Bio-Rad's counsel with a copy of the complaint he intended to file to determine whether Bio-Rad had any privilege or confidentiality objections to it. Clune Decl., Ex. J (January 26, 2015 letter with complaint attached). Like the DOL complaint, Wadler's complaint in the instant action contains detailed allegations regarding the conduct Wadler contends is protected, as well as Bio-Rad's alleged retaliation. *See* Docket No. 1. Bio-Rad's counsel did not object to the public filing of the Complaint but informed Wadler's counsel that she had a confidentiality objection to filing Exhibit B to the complaint – the DPW Presentation – in the public record. Clune Decl. ¶ 11 & Ex. K. Consequently, Wadler filed the complaint in the public record, without redaction, but filed Exhibit B under seal. *See* Docket Nos. 1, 15.

Subsequently, in July 2015, Bio-Rad filed a motion to dismiss. *See* Docket No. 24. In the motion to dismiss (which was filed without redaction in the public record), Bio-Rad discussed many of Wadler's substantive allegations without raising any objection on the basis of confidentiality or privilege. *Id.* In addition, as an exhibit to that motion, Bio-Rad filed in the public record the same DOL Complaint it had earlier said disclosed attorney-client privileged materials and communications. *See* Docket No. 25-1; Clune Decl., Ex. G, DOL Response at 13. On October 23, 2015, the Court ruled on Bio-Rad's motion to dismiss. Because no objection had been raised as to potential privileged or confidential information the Court, like the parties, filed its Order in the public record in unredacted form and described Wadler's specific allegations regarding Bio-Rad's suspected FCPA violations in China. *See* Docket No. 53.

Several weeks later, the Court approved a stipulation by the parties pursuant to Rule 502 of the Federal Rules of Evidence, negotiated at the urging of the Court, in which they agreed that production of documents in discovery would not, by itself, give rise to waiver of any attorney-client privilege or work product protections that might otherwise attach to those documents. *See* Docket No.56 ("FRE 502 Order").

D. The Motion to Strike

On September 2, 2016, Bio-Rad filed a Motion to Strike Rebuttal Report of Bradley

Wendel ("Motion to Strike"). *See* Docket No. 82. The main argument Bio-Rad advanced in the Motion to Strike was that Mr. Wendel's opinions, while purportedly rebutting opinions offered by Defendants' expert, Dr. Emre Carr, were instead new opinions that should have been disclosed by the July 1, 2016 expert disclosure deadline. In support of the Motion to Strike, Bio-Rad's counsel filed in the public record a declaration with a number of unredacted expert declarations attached. *See* Docket No. 83. These included reports by Dr. Emre Carr (Docket No. 83-1) and Dr. Donald Walker (Docket No. 83-6), both of whom addressed in detail Wadler's communications with the Audit Committee and whether his concerns about potential FCPA violations in China were justified, as well as the specific criticisms of Wadler's performance that Bio-Rad contends are the actual reason for his termination. These reports cite to or quote scores of documents Bio-Rad marked "SUBJECT TO FRE 502 ORDER."

E. The Court's Dispositive Motion Deadline and the Instant Motion

Following the Initial Case Management Conference, the Court issued a scheduling order setting September 23, 2016 as the deadline for filing dispositive motions in this action. *See* Docket No. 46. On July 29, 2016, Bio-Rad informed the Court that it did not intend to file a summary judgment motion. *See* Docket No. 81. At the October 7, 2016 Case Management Conference, Bio-Rad disclosed to the Court and Wadler's counsel, for the first time, that it intended to bring a motion to exclude on the basis that Wadler would likely be unable to prove his case without using Bio-Rad's privileged or confidential information.

F. The Motion

Bio-Rad contends Wadler's claims and Bio-Rad's defenses are "inextricable intertwined with Bio-Rad's privileged and confidential information," requiring that the Court make a document-by-document, witness-by-witness and question-by-question privilege determination at the upcoming trial. Motion at 2. Bio-Rad points to the stringent ethical and statutory rules that apply to attorneys who practice in California, citing in particular California Rule of Professional Conduct 3-100 and California Business and Professions Code section 6068(e). *Id.* at 4-7. According to Bio-Rad, under these provisions, "client confidences are protected in the face of every peril but one: threatened criminal activity that could lead to death or serious bodily harm."

Id. at 4. This level of protection is more stringent than the standards set forth in Model Rule of Professional Responsibility 1.6, which has been adopted by many other states, Bio-Rad contends. *Id.* at 4-5.

Bio-Rad argues that California's rules and statutes governing attorney conduct apply even in federal court because federal courts look to state ethical rules in areas of "traditional state regulation." *Id.* at 6 (citing *U.S. v. Quest Diagnostics, Inc.*, 734 F.3d 154, 163 (2d Cir. 2013); *U.S. v. Lopez*, 4 F.3d 431, 449 (2005); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Further, it asserts, nothing in the Sarbanes-Oxley or Dodd-Frank Acts "evidences a clear legislative intent to preempt California's ethical and statutory rules regulating an attorney's duty of confidentiality when an attorney brings claims for retaliatory discharge under those Acts." *Id.* at 7 (citing 7 U.S.C. § 7245; *SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296-01, 2003 WL 247093, *6297 (Feb. 6, 2003) (codified at 17 C.F.R. 205)). Bio-Rad acknowledges, however, that the federal common law of privilege applies in federal proceedings under Rule 501 of the Federal Rules of Evidence. *Id.*

Bio-Rad argues that in order to prove his retaliatory discharge claim, Wadler will have to prove that: 1) he engaged in protected activity; 2) Bio-Rad knew that he engaged in protected activity; 3) Wadler suffered an unfavorable personnel action; and 4) the circumstances are sufficient to support an inference that the protected activity was the reason for the unfavorable personnel action. *Id.* at 8 (citing *Van Asdale v. International Game Technology*, 557 F.3d 989, 996 (9th Cir. 2009)). In addition, they contend, Wadler will have to show that he subjectively believed that Bio-Rad had violated the FCPA. *Id.* To establish that these elements are satisfied, according to Bio-Rad, Wadler will likely have to use "(i) confidential information Mr. Wadler learned in the course of his role as Bio-Rad's general counsel; (ii) Mr. Wadler's communications with Bio-Rad and with outside counsel; (iii) outside counsel's communications with Bio-Rad and each other; and (iv) advice of inside and outside counsel reflected in Bio-Rad's documents." *Id.* at 8. All of these categories of documents are protected under the ethical and statutory rules discussed above, Bio-Rad contends. *Id.*

Because Wadler's case is so dependent on privileged and confidential information, Bio-

Rad argues, it is Wadler's burden to show that a fair trial is possible without the disclosure of such information. *Id.* at 9. Bio-Rad concedes that California law does not preclude outright retaliatory discharge claims asserted by in-house counsel, but contends such claims can only be pursued where the claim is capable of resolution without breaching client confidences. *Id.* (citing *General Dynamics v. Superior Court*, 7 Cal. 4th 1164, 1170 (1994)). According to Bio-Rad, sometimes courts applying the rule of *General Dynamics* have found that the only option is dismissal of the plaintiff's claim. *Id.* (citing *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451 (2001); *McDermott, Will & Emory v. Superior Court*, 83 Cal. App. 4th 378 (2000)). Factors that courts may consider in determining whether a claim can go forward are whether: 1) the evidence at issue is the client's confidential information that the client maintains must remain confidential; 2) the confidential information is "highly material" to the defendant's defenses; 3) the trial court cannot effectively use ad hoc equitable measures to allow the action to proceed; and 4) it would be fundamentally unfair to proceed. *Id.* at 10-11 (citing *Dietz v. Meissenheimer & Herron*, 177 Cal. App. 4th 792-94 (2009)).

According to Bio-Rad, a handful of courts have addressed similar issues but in "very different procedural postures (pretrial dispositive motions or before an administrative law judge), under the law of other jurisdictions (the Model rules or other state rules that are far less stringent than California's) or both." *Id.* at 11 (citing *Van Asdale*, 557 F.3d at 995-96; *Carroll v. California ex rel California Comm'n on Teacher Credentialing*, 2013 WL 4482934 (E.D. Cal. 2013)). The case that is the closest to the situation here, Bio-Rad contends, is *Willy v. Administrative Review Board*, 423 F.3d 483, 489 (5th Cir. 2005). In that case, the Fifth Circuit found that attorney-client privilege would not prevent an attorney's offensive use of privileged information in a claim for retaliatory discharge. *Id.* Bio-Rad contends *Willy* is distinguishable, however, because it applied the more lenient standard of Model Rule 1.6 and was decided in the context of an administrative proceeding. *Id.* The case is also an "outlier," Bio-Rad contends. *Id.* at 12. According to Bio-Rad, a Massachusetts court reached a different result in *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 11 (1st Cir. 1998). *Id.*

Finally, Bio-Rad contends, it will suffer "true prejudice" if its confidential information is

disclosed. *Id.* at 12-13. In particular, Bio-Rad asserts, because it is a large, publicly-traded company that holds a large patent portfolio and engages in frequent litigation the confidential information disclosed in this action could be used against it in other actions. *Id.* at 13.

In his Opposition brief, Wadler contends the Motion to Exclude is untimely because it is, in effect, a dispositive motion that had to be filed by September 23, 2016 under the schedule set by the Court. Opposition at 8-9. Even if the Motion is timely, Wadler contends, Bio-Rad is mistaken in its assertion that state privilege law applies. *Id.* at 8. Instead, where an action brought in federal court involves federal and state claims that significantly overlap, Plaintiffs argue, federal privilege law applies. *Id.* (citing *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014)). According to Wadler, federal privilege law allows the use of privileged or confidential information in attorney whistle-blower actions. *Id.* at 9 (citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009); *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005); *Jordan v. Sprint*, ARB Case No. 06-105, 2009 WL 3165850, at *10 (Dep't of Labor, Admin. Review Bd. Sept. 30, 2009)).

Wadler argues that Bio-Rad is incorrect in its assertion that California's law governing attorneys' ethical duties preclude Wadler's claims, citing *Van Asdale*. *Id.* He also argues Bio-Rad's reliance on *Siedle* is misplaced because in that case the defendants vigorously protected the confidentiality of the information at issue, in contrast to the facts here. *Id.* at 11. Moreover, Wadler contends, Sarbanes-Oxley and Dodd-Frank do, in fact, preempt state ethical duties and statutes. *Id.* at 11-12 (citing *SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296-01, 2003 WL 247093, *6296 (Feb. 6, 2003) (codified at 17 C.F.R. 205)). Wadler notes that the SEC has argued in other proceedings that "use of client confidences in Section 806 retaliation proceedings is appropriate, and . . . that Section 205 preempts federal common law." *Id.* at 12.

Wadler further contends Bio-Rad has repeatedly waived any privilege or confidentiality regarding his claims and Bio-Rad's defenses by disclosing such information in government proceedings and in publicly filed documents in this action. *Id.* at 12-18 (citing *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 15-cv-3424-JCS, 2016 WL 6216696 (N.D. Cal. Oct. 25,

2016); *In re Oracle Sec. Litig.*, No. 01-cv-0988 MJJ JCS, 2005 WL 6768164, at *5 (N.D. Cal. Aug. 5, 2005); *In re Pac. PicturesCorp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012)). According to Wadler, it is Bio-Rad's burden to show that the privilege was not waived and Bio-Rad has not met that burden. *Id.* at 14-15.

First, he argues that Bio-Rad's disclosure of privileged information during the SEC and DOL Proceedings resulted in an express waiver of any privilege to which Bio-Rad might have been entitled as to the subject matter of those communications. *Id.* at 15-16 (citing *McMorgan & Co. v. First California Mortg. Co.*, 931 F. Supp. 703, 708 (N.D. Cal. 1996); *IGT v. All Gaming Corp.*, No. 02-cv-1676-RCJ RJJ, 2006 WL 8071393 (D. Nev. Sept. 28, 2006)). In particular, Wadler points to the DPW Presentation summarizing the work and conclusions of Bio-Rad's outside counsel, Steptoe & Johnson and DPW, in connection with the concerns Wadler expressed to the Audit Committee. *Id.* at 15. In addition to presenting this information to the DOJ and SEC, Plaintiff points out, Bio-Rad also transmitted the same presentation to the DOL and Wadler himself after Wadler's termination. *Id.* (citing Clune Decl., Ex. I). In the letter to the DOL from Bio-Rad that accompanied the DPW Presentation, Bio-Rad expressly acknowledged that the presentation described outside counsel's investigations "into Mr. Wadler's allegations and their findings." *Id.* (quoting Clune Decl., Ex. I (March 20, 2014 cover letter)).

Second, Wadler contends, Bio-Rad "aggressively litigated against Mr. Wadler's complaint before the DOL, describing in detail Mr. Wadler's purported failings as general counsel." *Id.* Wadler cites Bio-Rad's assertions that he: "1) 'asserted that the pre-existing accrual for the Life Technologies audit was too low' just before Bio-Rad's filing of its Form 10-K with no event-driven reason, causing Bio-Rad to file late; 2) delayed a disclosure causing Bio-Rad acrimony in the lead-up to its filing of a Form 10Q; and 3) 'without any authorization from management or the Board, he sought to negotiate a multi-million dollar settlement with Life Technologies related to the 2011 audit, offering far more than management was willing to pay." *Id.* (citing Clune Decl., Ex. G attach. 1 at 4-7). Wadler points out that Bio-Rad also submitted detailed declarations from its senior management addressing these same issues. *Id.* According to Wadler, while Bio-Rad has marked many documents that address these issues as being "SUBJECT TO FRE 502 ORDER" in

this litigation, in fact any privilege that might have existed has already been waived as to these issues. *Id.* at 16.

Finally, Wadler contends any privilege that might have been preserved has been waived through Bio-Rad's actions in this litigation. *Id.* at 16-18. Rather than taking steps to protect its confidential information, Wadler argues, Bio-Rad "took affirmative acts to publicly file documents revealing *all* of the information it now claims is privileged, confidential, and 'inextricably intertwined' with the claims and defenses at issue." *Id.* at 16. Wadler points to the fact that Bio-Rad permitted Wadler to file his complaint publicly and did not object on the basis of privilege to Wadler's recitation of the facts in his complaint (or any other pleading), that Bio-Rad disclosed *additional* facts relating to Wadler's claims in its own publicly filed materials, that Bio-Rad did not raise any objections on the basis of privilege in its motion to dismiss, did not include an affirmative defense in its answer based on Wadler's inability to proceed without using privileged information, did not bring a summary judgment motion on this basis and never alerted the Court that this was a disputed legal issue or that it intended to bring a motion seeking to preclude virtually all of the evidence likely to be used at trial. *Id.* By permitting its attorneys to disclose client confidences without objection, Wadler asserts, Bio-Rad has waived any protections of these materials. *Id.* (citing *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 527 (N.D. Cal. 1988)).

Wadler further asserts that Bio-Rad has similarly waived protection of "all communications concerning the investigation into Mr. Wadler's claims to the Audit Committee" by "repeatedly referenc[ing]" the conclusions of Davis Polk and Steptoe & Johnson with respect to their investigation of Wadler's claims. *Id.* at 17 (citing Clune Decl., Ex. G Attach. 2 ¶¶ 8-9; Ex. H (Bio-Rad Interrogatory Responses, Docket No. 101-9, at Response 6 ("Bio-Rad hired two renowned international law firms that conducted a thorough investigation of Plaintiff's allegations and concluded that the allegations had no factual basis"); Docket No. 89 (September 23, 2016 Joint Case Management Statement) (stating that "[t]he law firm of Davis Polk & Wardell and Steptoe & Johnson, the Department of Justice and the SEC all investigated or reviewed Mr. Wadler's claim and *all unanimously concluded* that there was no merit to anything Mr. Wadler

was saying.").

With respect to all of the defenses Bio-Rad has listed, Wadler argues, Bio-Rad has waived confidentiality by its own intentional conduct, namely, its aggressive litigation in the DOL and this action, including its public assertions that Wadler was fired due to his conduct in connection with the late Form 10-K filing, his conduct during the filing of the Form 10-Q and his allegedly unauthorized conducted during settlement negotiations with Life Technologies. *Id.* Bio-Rad's filing of detailed expert reports "replete with 'confidential' information" in support of its motion to strike further supports a finding of waiver, Wadler asserts. *Id.* at 18. According to Wadler, "[t]he FRE 502 Order does not contemplate or cover any of these continuous and intentional disclosures." *Id.*

Wadler contends that if any "shred of confidentiality or privilege remains with respect to the evidence that will be presented in this case . . . the proper remedy is not to bar Plaintiff from presenting his claims altogether but instead using sealing orders, protective orders and other means to address any such concerns." *Id.* at 19 (citing *Van Asdale*, 577 F.3d at 996; *General Dynamics Corp.*, 7 Cal. 4th at 1194; *Jordan*, 2009 WL 3165850, at *10). Wadler further rejects Bio-Rad's suggestion that he should be required to preview his case for the Court and Bio-Rad by identifying all of the evidence he intends to present at trial. *Id.* at 19-20. Wadler argues that there is no authority to support such an approach and that it would be fundamentally unfair for the Court to impose such a requirement. *Id.*

In its Reply brief, Bio-Rad argues that its Motion is timely. Reply at 2. According to Bio-Rad, privilege issues such as those raised here are rarely raised at the pleading stage of the case and are routinely raised in motions in limine. *Id.* at 2-3. A motion to exclude is not the same as a summary judgment motion because it addresses the admissibility of evidence rather than the sufficiency of the plaintiff's claims, Bio-Rad asserts. *Id.* at 3. Nor is there any requirement that the issue must be listed as an affirmative defense, Bio-Rad contends. *Id.*

Bio-Rad also argues that it does not dispute that the federal law of privilege applies here but that this does not change the analysis because "[w]hile federal privilege law governs the admissibility of documents and testimony as an *evidentiary* matter, it does not relieve Plaintiff of

his statutory obligation under California law '[t]o maintain inviolate the confidence, and at every peril to himself . . . to preserve [Bio-Rad's] secrets.'" *Id.* at 4 (quoting Cal. Bus. & Prof. Code § 6068(e)). Bio-Rad argues that *Van Asdale* and *Willy* are not on point for the same reasons discussed in the Motion. *Id.* at 4-5.

According to Bio-Rad, Wadler does "not even attempt to argue that he is not bound by Rule 3-100 and Section 6068(e)" but instead tries to "nullify these obligations by arguing they are preempted by the Sarbanes-Oxley Act." *Id.* at 5. Wadler's preemption argument fails, Bio-Rad argues, because under Ninth Circuit authority, "where . . . 'the state law prohibits acts that the federal regulations allow but do not require,' there is no conflict and the state law is not preempted." *Id.* (quoting *Barrientos LLC v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1211 (9th Cir. 2009)). Bio-Rad further asserts there is no preemption based on "field preemption" because the state rules at issue here relate to states' historic police powers and Congress has not manifested a clear intent to supersede these rules under Sarbanes-Oxley. *Id.* at 5-6 (citing *Barrients LLC*, 583 F.3d at 1209). Finally, Bio-Rad rejects Wadler's reliance on the amicus brief filed by the SEC in *Jordon v. Sprint*, arguing that it is not relevant because it addressed an administrative proceeding rather than litigation involving a jury trial and did not address California's rules of confidentiality. Reply at 7 n. 5.

Bio-Rad also argues that there has been no "blanket subject-matter waiver" of privilege or confidentiality. *Id.* at 7. With respect to the DPW Presentation, Bio-Rad concedes that "its report to the government is not privileged" but contends the waiver of privilege as to that presentation is "limited to communications conveyed during the presentation." *Id.* at 7. According to Bio-Rad, even if there is a waiver as to the communications conveyed during the presentation, this does not address California's duty of confidentiality under Cal. Bus. & Prof. Code § 6068, which is broader than attorney-client privilege. *Id.* (citing *Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 151 (2013)). Furthermore, Bio-Rad argues, under Rule 502 of the Federal Rules of Evidence subject matter waivers arise as a result of disclosures in federal proceedings only in "unusual situations." *Id.* at 7-8. In particular, it contends, such a waiver occurs only when "a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." *Id.* at 8

(quoting Advisory Committee Notes to Rule 502). Bio-Rad has not done this, it asserts. *Id.* Bio-Rad argues that the cases cited by Wadler, *In re Pacific Pictures Corp.* and *Cave Consulting*, in which courts found that a selective presentation of information gave rise to subject matter waiver, are distinguishable. *Id.* at 9.

Bio-Rad similarly contends its disclosures in the DOL proceeding did not give rise to a broad waiver because it "vigorously asserted privilege with the Department of Labor." *Id.* Moreover, Bio-Rad asserts, it revealed "no privileged information" in the DOL Proceeding but only disclosed "specific historical facts necessary to rebut Plaintiff's claims." *Id.* In particular, Bio-Rad contends the declarations merely disclosed "conversations including Plaintiff, the Company, and the Company's outside auditors; facts regarding Plaintiff's abrupt determination that the company's litigation accruals were too low on the eve of its 10-K filing; Plaintiff's allegations that certain documents collected in connection with an audit were insufficient; and Plaintiff's abusive behavior towards his colleagues." *Id.* at 10. According to Bio-Rad, none of this information is privileged because "these facts were either disclosed to Bio-Rad's outside auditors at the time or was never privileged." *Id.* Bio-Rad contends Wadler has "not identified any specific disclosures within these declarations that implicates privilege." *Id.* Bio-Rad also argues that the disclosures in the DOL Proceeding were, in essence coerced to the extent that it was told an adverse inference would be drawn if it invoked attorney-client privilege. *Id.* Bio-Rad argues that it made the disclosures in the DOL Proceeding "on the express condition that it not constitute a waiver of attorney-client privilege." *Id.* (citing *Dukes v. Wal-Mart Stores, Inc.*, No. 01-cv-2252 CRB JSC, 2013 WL 1282982, *4 (N.D. Cal. Mar. 26, 2013)).

Bio-Rad also rejects Wadler's assertion that its conduct in this action has given rise to a subject matter waiver. *Id.* It is dismissive of Wadler's reliance on the fact that it did not object to the public filing of the complaint, contending the complaint contained only "limited historical facts, as opposed to the contents of privileged communications." *Id.* The privilege protects only communications, Bio-Rad asserts, and not underlying facts. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)). Bio-Rad also rejects Wadler's reliance on the fact that it filed various expert reports in the public record in connection with its Motion to Strike. *Id.* at 11.

Bio-Rad contends that a waiver arises only when a party is attempting to use the privileged communication as "both a sword and a shield" and that was not the purpose of the expert reports here. *Id.* Instead, Bio-Rad argues that these reports were offered merely to show that Dr. Wendel's report exceeded the scope of a rebuttal report and therefore was improper. *Id.* (citing *Akamai Techs., Inc. v. Digital Island, Inc.*, No. C-00-3508 CW (JCS), 2002 WL 1285126, at *8 (N.D. Cal. May 30, 2002); *Kirola v. City and County of San Francisco*, 2010 WL 3476681, at *10 (N.D. Cal. Sept. 2, 2010)).

Finally, Bio-Rad argues that Wadler's reliance on sealing orders and protective orders does not offer an adequate solution. *Id.* at 11-12. Bio-Rad asserts that an offer of proof by Wadler that he can try his case without privileged information is necessary because attorney-client privilege is "all but 'sacred'" under California law. *Id.* at 11 (citing *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451, 457 (2001)). Bio-Rad argues that the issue is not only *disclosure* of privileged information but also its use. *Id.* at 12. According to Bio-Rad, "Rule 502 was not intended to give parties a windfall by allowing them to *use* at trial (through sealing orders or otherwise) information they otherwise never would have been entitled to obtain." *Id.* For these reasons, Bio-Rad contends, the Court should either require that Wadler make an offer of proof showing that he can prove his case without relying on Bio-Rad's confidential material or Wadler should "accept that his case cannot fairly proceed." *Id.* at 13.

G. The Amicus Brief

On December 13, 2016, the SEC filed an amicus brief in which it argues, *inter alia*, that the Sarbanes-Oxley Act preempts California's ethical rules regarding the disclosure of attorney-client communications and the client's confidential information. Bio-Rad filed a response to the amicus brief on December 16, 2016.

III. ANALYSIS

A. Whether the Motion is Timely

Under the Standing Order for All Judges of the Northern District of California, parties must inform the Court in their case management statements of "[a]ll prior and pending motions, their current status, and *any anticipated motions*." *See* www.cand.uscourts.gov/judges, Standing

Order for All Judges of the Northern District of California Contents of Joint Case Management Statement. On September 10, 2015, the Court established the schedule in this case in its Case Management and Pretrial Order (Jury), which stated that "[a]ll dispositive motions shall be heard on September 23, 2016." Docket No. 46. At the July 15, 2016 Case Management Conference, the Court asked the parties to advise whether they intended to file summary judgment motions. The parties informed the Court in a July 29, 2016 joint letter that they did not intend to file summary judgment motions. *See* Docket No. 81.

On September 13, 2016, new counsel entered the case on behalf of Bio-Rad. Ten days later, on September 23, 2016, the parties filed a further Case Management Statement informing the Court that they "anticipate[d] filing motions to strike one or more of the opposing side's experts pursuant to *Daubert*." Docket No. 89. No other motion was mentioned. Nonetheless, at the October 7, 2016 Case Management Conference, Bio-Rad's new counsel informed the Court that Bio-Rad intended to file a motion challenging Wadler's ability to prosecute his claims in light of the attorney-client privilege that Bio-Rad said applied to most, if not all, of the evidence Wadler might rely upon. According to counsel, the motion would seek, at a "bare minimum," the preclusion of certain testimony related to privileged communications; but counsel stated that there was also an argument that the case can no longer go forward based on the fact that Wadler's case is predicated on privileged communications. The Court told Bio-Rad's counsel unequivocally that having failed to file a summary judgment motion, it could not file a motion based on the latter theory and that it "did not get to ask that the case be dismissed." It further rejected Bio-Rad's characterization of the anticipated motion as a "garden-variety" motion in limine, stating that the motion Bio-Rad asked to bring was "anything but garden-variety." The Court permitted Bio-Rad to bring a motion to exclude, but cautioned Bio-Rad's counsel that it would be required to "delineate with precision" the specific evidence that Bio-Rad would seek to preclude, on a "line-by-line" basis.

Bio-Rad did not comply with the Court's instructions. Although it is Bio-Rad's burden to establish that attorney-client privilege precludes disclosure of any particular evidence, it has argued in the Motion that if *Wadler* cannot offer a detailed trial plan previewing all of the

evidence he seeks to introduce – and showing that that evidence is not protected – he should "accept that his case cannot fairly proceed." Reply at 13. While studiously avoiding stating outright that the *Court* should hold that the case cannot proceed, that is in essence what Bio-Rad's counsel is asking the Court to hold. That is exactly the sort of motion the Court informed counsel at the October 7, 2016 Case Management Conference it would not permit. There can be no dispute that a motion that seeks such relief is "dispositive" and therefore must be filed by the dispositive motions deadline. Having failed to meet that deadline, Bio-Rad was required to obtain the Court's permission and show good cause to modify the deadline. *See* Fed. R. Civ. P. 16(b)(4). Bio-Rad has not met that standard. Nor did Bio-Rad file the type of motion the Court said it *would* permit, namely, a targeted motion identifying the specific evidence Bio-Rad asks the Court to preclude.

Because Bio-Rad's Motion constitutes a dispositive motion that was filed after the Court's deadline and without the Court's consent, the Motion is DENIED. However, the Court also addresses its arguments on the merits.

B. Ethical and Statutory Requirements Governing the Obligations of In-House Counsel in Whistleblower Retaliation Cases: California Law versus Federal Common Law

1. Legal Standards

a. Rule 501 of the Federal Rules of Evidence

Under Rule 501 of the Federal Rules of Evidence, federal common law governs claims of attorney-client privilege in a civil case except where state law supplies the rule of decision as to a claim or defense, in which case state privilege law applies. Fed. R. Evid. 501. Where evidence relates to both state and federal claims, a federal court applies federal common law to the question of attorney-client privilege. *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014). Because of the overlap between Wadler's retaliation claims under state law and federal law, the Court applies federal common law to Bio-Rad's privilege claims.

b. California Law Governing Ethical Obligations of Attorneys

Under California law, an attorney is required to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof.

Code § 6068(e)(1). The law provides a limited exception, however, permitting an attorney to "reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Cal. Bus. & Prof. Code § 6068 (e)(2). California's ethical rules incorporate this standard, providing that "[a] member [of the State Bar] shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client" unless the member "reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Rule of Professional Conduct 3-100.

2. Whether the California Supreme Court's Decision in *General Dynamics* applies to Wadler's Retaliation Claims Under Sarbanes-Oxley and Dodd-Frank

Bio-Tech relies heavily on *General Dynamics Corp. v. The Superior Court of San Bernadino County*, 7 Cal. 4th 1164 (1994) in support of its contention that Wadler's case cannot go forward in light of California's privilege and confidentiality rules because his claims, and Bio-Rad's defenses, implicate protected information that cannot be used at trial. In *General Dynamics*, the California Supreme Court addressed the question of whether in-house counsel can bring a claim for retaliatory discharge under California tort law, given the conflict between the "fiducial nature of the relationship with the client, on the one hand, and the duty to adhere to a handful of defining ethical norms, on the other." 7 Cal. 4th at 1169.

The *General Dynamics* court recognized that some courts have concluded that the threat to the attorney-client relationship posed by in-house counsel's assertion of a retaliatory discharge claims is so significant that such claims are not maintainable, citing as a leading example *Balla v. Gambro, Inc.*, 145 Ill. 2d 492 (1991). *Id.* at 1182. The California Supreme Court, however, found that this approach left in-house counsel without a remedy, which would "almost certainly foster a degradation of in-house counsel's professional role." *Id.* at 1188. Instead, the court found that in-house counsel should be afforded "a limited remedy under defined circumstances." *Id.* In particular, such claims are permitted only where the attorney's claim is "grounded in explicit and

unequivocal ethical norms embodied in the Rules of Professional Responsibility and statutes" and can proceed only if the claim can be "fully established without breaching the attorney-client privilege." *Id.* at 1190. The court further cautioned that attorney-client privilege should be "strictly observed" and that there should be no "dilute[ion] [of the privilege] in the context of in-house counsel and their corporate clients." *Id.*

The court opined that to the extent California law permits disclosure of client confidences under limited circumstances (e.g., "[m]atters involving the commission of a crime or a fraud, or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm," which are "well-recognized exceptions to the attorney-client privilege"), "many of the cases in which in-house counsel is faced with an ethical dilemma will fall outside the scope of the statutory privilege." *Id.* The Court further found that trial courts "can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." *Id.* at 1191.

While *General Dynamics* addresses the limitations on in-house counsel attempting to bring retaliatory discharge claims under California state law, the Ninth Circuit's decision in *Van Asdale v. International Game Technology*, 577 F.3d 989 (2009) suggests these limitations do not apply under federal common law. In *Van Asdale*, the plaintiffs were attorneys who were licensed in Illinois (and in no other state) and who were hired to work as in-house counsel at a Nevada-based company. 577 F.3d at 991-992. After they were terminated, they brought claims for retaliatory termination under the whistleblower protections of Sarbanes-Oxley and under state law. *Id.* at 994. The defendant cited to the *Balla* decision (discussed above), in which the Illinois Supreme Court held that in-house counsel cannot bring a claim for retaliatory discharge as a tort claim under Illinois law, arguing that the plaintiffs could not maintain the action because they were licensed in Illinois and their claims violated the state's rules of professional conduct. *Id.* at 994. The Ninth Circuit disagreed, however, reasoning that the holding of *Balla* was based, in part, on the purposes served by the Illinois tort of retaliatory discharge. *Id.* at 995. The court further noted that *Balla* had never been applied to claims asserted under federal law and pointed out that federal

courts in Illinois had "uniformly declined to apply *Balla* to claims based on federal law." *Id.*

As in *Van Asdale*, the Court here rejects Bio-Rad's assertion that the rules and limitations adopted by the California Supreme Court in *General Dynamics* as to the contours of the state law tort of retaliatory discharge in cases involving in-house counsel apply to a federal claim asserted under Sarbanes-Oxley. The assertion by Bio-Rad that *Van Asdale* can be distinguished on the basis that Nevada's ethical rules are not as stringent as those in California finds no support whatsoever in that decision. The plaintiffs in *Van Asdale* were licensed *only* in Illinois and there was no suggestion in that case that Nevada's rules of professional conduct even applied. In short, the court's refusal to follow *Balla* had nothing to do with Nevada's rules of professional conduct. Therefore, the Court looks to federal common law for guidance.

3. Federal Common Law Relating to the Use of Privileged Information in Whistleblower Actions Brought Under Federal Law

As the Ninth Circuit recognized in *Van Asdale*, "[t]here are few federal circuit court cases addressing the rights of in-house counsel to use attorney-client privileged information in a retaliation suit." *Id.* at 995. Moreover, the Circuit Court decisions that have addressed the issue do not provide specific guidance with respect to how the privilege issues raised here should be handled at trial. Nonetheless, the cases that have been decided support the conclusion that Wadler's retaliation claim may go forward despite confidentiality concerns and that he may rely on privileged and confidential communications that he reasonably believes are necessary to prove his claims and defenses.

In *Van Asdale*, the Ninth Circuit held that "confidentiality concerns alone [did] not warrant dismissal of the Van Asdale's claims" on summary judgment. *Id.* In reaching that conclusion, the court spoke with approval of the Third Circuit's "suggest[ion] [in *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997)] that a district court should 'balanc[e] the needed protection of sensitive information with the in-house counsel's right to maintain the suit.'" *Id.* (quoting *Kachmar*, 109 F.3d at 182)). The court further explained its conclusion as follows:

> As a threshold matter, it is not at all clear to us to what extent this lawsuit actually requires disclosure of IGT's confidential information. Shawn and Lena allege that they raised claims of

> shareholder fraud at their November 24, 2003, meeting with Johnson and that they were terminated in retaliation for these allegations. There is no reason why the district court cannot limit any testimony regarding this meeting to these alleged disclosures, while avoiding testimony regarding any litigation-related discussions that also took place. To the extent this suit might nonetheless implicate confidentially-related concerns, we agree with the Third Circuit that the appropriate remedy is for the district court to use the many "equitable measures at its disposal" to minimize the possibility of harmful disclosures, not to dismiss the suit altogether.

Id.

The decision referenced by the Ninth Circuit, *Kachmar v. SunGuard Data Systems*, involved a claim for discriminatory retaliation asserted under Title VII. The defendant in that case argued that the claims should be dismissed because "maintenance of [the plaintiff's] retaliatory discharge action would improperly implicate communications subject to the attorney-client privilege and/or information relating to [the plaintiff's] representation of [the defendant]." 109 F.3d 173, 179 (3d Cir. 1997). The Third Circuit disagreed. *Id.* Citing the "important public policies underlying federal antidiscrimination legislation and the supremacy of federal laws," as well as "the policy to liberally construe the discrimination laws to best effectuate their remedial purpose," the court found that concerns about disclosure of client confidences would not "alone . . . warrant dismissing a plaintiff's case, especially where there are other means to prevent unwarranted disclosure of confidential information." *Id.* at 181. The court further recognized that "'[a] lawyer . . . does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him.'" *Id.* at 182 (quoting *Doe v. A Corp.*, 709 F.2d 1043, 1050 (5th Cir.1983)).

The *Kachmar* court opined, "[i]n balancing the needed protection of sensitive information with the in-house counsel's right to maintain the suit, the district court may use a number of equitable measures at its disposal 'designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege.'" *Id.* at 182 (quoting *General Dynamics*, 7 Cal. 4th at 1190). The court acknowledged that such an approach would likely "entail more attention by a judicial officer than in most other Title VII actions," but concluded, "we are not prepared to say that the trial court, after assessing the sensitivity of the information offered at trial, would not be able to draft a procedure that permits

vindicating [the plaintiff's] rights while preserving the core values underlying the attorney-client relationship." *Id.*

The *Van Asdale* court's reliance on *Kachmar* and the "balancing" approach endorsed in that case suggest to the undersigned that the Ninth Circuit envisions that there is *some* room for the use of privileged information, including the use of such evidence offensively, to establish whistleblower retaliation claims under Sarbanes-Oxley. This conclusion also finds support in the Ninth Circuit's reliance on the "text and structure of the Sarbanes-Oxley Act" in support its holding. *Id.* at 996. In particular, it cites Section 1514A(b), which "expressly authorizes any 'person' alleging discrimination based on protected conduct to file a complaint with the Secretary of Labor and, thereafter to bring suit in an appropriate district court." *Id.* The court reasoned, "[n]othing in this section indicates that in-house attorneys are not also protected from retaliation under this section, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud." *Id.* (citing 15 U.S.C. § 7245).

Other federal cases also seem to support the conclusion that privileged communications and confidential information may be used, with appropriate protections, to establish whistleblower retaliation claims under the federal common law. For example, in *Willy*, the Fifth Circuit held that in the context of an administrative proceeding involving a Sarbanes-Oxley whistleblower retaliation claim by in-house counsel, there was "no *per se* bar to retaliation claims under the federal whistleblower statutes, *ie.*, that the attorney-client privilege mandates exclusion of all documents subject to privilege." 423 F.3d 483, 500 (5th Cir. 2005). In that case, the Fifth Circuit addressed the admissibility in the DOL proceeding of an internal audit report that was prepared by the plaintiff and was alleged to have been one of the reasons for his termination by the client. *Id.* at 486-488. The Secretary of Labor concluded that the internal report was admissible under the exceptions to attorney-client privilege set forth in Supreme Court Rule Standard 503(d)(3) and *Doe v. A Corp. Id.* at 494. The Fifth Circuit agreed, citing the same language from *Doe* relied on by the *Kachmar* court (see above) and pointing to Rule 1.6 of the Model Rules of Profession Conduct, explaining its conclusion as follows:

> As noted, the Model Rules specifically provide **that "[a] lawyer**

> **may reveal . . . information [relating to representation of a client] to the extent the lawyer reasonably believes necessary . . . to establish a *claim* or defense *on behalf of the lawyer in a controversy between the lawyer and the client* . . . .**" That a lawyer may assert a "claim" against his client means that the client breached a duty to the lawyer, not the opposite, as the ARB held. The American Bar Association endorses this view as well:
>
> > The Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in-house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client *and may reveal information to the extent necessary to establish her claim against her employer.* The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed.

Id. at 500 (quoting Model Rules of Professional Conduct Rule 1.6(b)(2) (1983) and American Bar Ass'n Formal Ethics Opinion 01–424 (Sep. 22, 2001)(emphasis in italics added by Fifth Circuit in *Willy;* emphasis in bolded supplied by the undersigned)).

While the court in *Willy* expressly declined to reach the question of whether it would have reached the same result in public proceedings involving a jury, *see id.* at 501, it rejected the Labor Administration Review Board's conclusion that either *Siedle v. Putman Investments, Inc.*, 147 F.3d 7 (First Cir. 1998) (cited by Bio-Rad in support of its position) or *Kachmar* "stands for the overbroad proposition that the attorney-client privilege is a *per se* bar to an attorney's use of privilege information in a claim against his former client or employer." *Id.* at 498.

The undersigned agrees with the *Willy* court's reading of *Siedle*; that case does not support Bio-Rad's assertion that Wadler's claims cannot go forward because they will require the disclosure of privileged and confidential information. Rather, in *Siedle* the First Circuit merely held that the district court had erred in unsealing documents that the defendant claimed were subject to attorney-client privilege without addressing the privilege issue at all, or conducting any kind of balancing to determine whether the documents should be under seal. 147 at F.3d at 11. In fact, the court expressly stated that there was no reason the documents could not have remained under seal pending a determination of whether they were privileged, explaining:

> The fact that the allegedly privileged information may be necessary to permit Siedle to plead his claim with the requisite specificity—a fact alluded to both by Siedle and by the lower court—is beside any

> pertinent point. *Merely sealing that information would not in any way render Siedle's complaint inadequate.*

Id. at 12 (emphasis added).

The Court further concludes that the standard set forth in Rule 1.6 of the Model Rules of Professional Conduct is the applicable standard under federal common law and therefore under Rule 501 of the Federal Rules of Evidence in this case. Moreover, there is nothing in the cases discussed above – *Kachmar*, *Doe, Willy* or *Van Asdale* -- that suggests that the reasons for making an exception to attorney-client privilege under federal common law are any less applicable in litigation in federal court than in an administrative proceeding. Rather, they point to the conclusion that the Court may need to take some special measures when Wadler seeks to introduce sensitive communications and to be vigilant in ensuring that such evidence is admitted only when plaintiff's belief that it is necessary to prove a claim or defense is *reasonable*.

In this case, the rules discussed above lead the Court to conclude that Wadler should be permitted to rely on privileged communications and confidential information that is reasonably necessary to any claim or defense in the case, including communications and information pertinent to the following topics: 1) whether the concerns Wadler expressed in the Audit Committee Memo were objectively reasonable and whether Wadler had a subjective belief that his concerns were legitimate; and 2) whether Bio-Rad's claims that Wadler was fired for other reasons, including alleged failure to implement adequate FCPA compliance policies in China, delay in connection with the Form 10-K and quarterly report filings, unauthorized conduct in connection with the Life Technologies settlement negotiations, and difficulties in his relationships with other employees, are credible. While there almost certainly will be evidence on many or all of these topics that is neither privileged not confidential, to the extent that such evidence is "intertwined" with privileged and confidential information (something Bio-Rad itself recognized in the Motion), the Court will permit that evidence where it finds that it meets the standards set forth above.[6]

[6] The list of topics set forth here is non-exclusive. It does not preclude Wadler from introducing privileged or confidential evidence or testimony on other topics so long as it satisfies the requirements of federal common law discussed above. It also does not preclude Bio-Rad from arguing, *with respect to specific evidence and testimony*, that it should be excluded on the basis that Wadler could not reasonably believe that the evidence is necessary to prove a claim or

C. Whether Bio-Rad Has Waived Attorney-Client Privilege and the Scope of the Waiver

Even aside from the latitude afforded under federal common law to use privileged communications in whistleblower retaliation actions, the rules governing waiver of attorney-client privilege also support the conclusion that Wadler may introduce privileged and confidential communications and information on a broad variety of topics because of Bio-Rad's open and aggressive approach to litigation of this case as well as its public disclosures in the SEC and DOL proceedings.

1. Principles Governing Waiver of Attorney-Client Privilege

"Under certain circumstances, the attorney-client privilege will protect communications between clients and their attorneys from compelled disclosure in a court of law." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Court have recognized that such protection is necessary to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* (quoting *Upjohn Co.*, 449 U.S. at 389). Because this privilege "contravene[s] the fundamental principle that the public has a right to every man's evidence," courts "construe it narrowly to serve its purposes" and "recognize several ways by which parties may waive the privilege." *Id.* (citations and quotations omitted).

One way attorney-client privilege may be waived is where there has been an express waiver. "An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). When there is an express waiver, "once documents have been turned over to another party voluntarily, the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries." *Id.* Another basis for finding waiver is under an implied waiver. Such a waiver occurs when "a litigant . . . put[s] the lawyer's performance at

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defense. Bio-Rad may also alert the Court in cases involving highly sensitive information so that the Court can take measures to protect the confidentiality of the information if it deems such measures necessary and appropriate.

issue during the course of litigation." *Id.* at 718. In *Bittaker*, the Ninth Circuit explained that "[t]he principle is often expressed in terms of preventing a party from using the privilege as both a shield and a sword. . . . In practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Id.*

Although the Federal Rules of Evidence were modified in 2008 to add a rule that specifically addresses the result of disclosures made in government proceedings, the Ninth Circuit made clear in *In re Pacific Pictures* that this rule does not create a "new privilege to protect disclosures of attorney-client privileged materials to the government," or adopt a rule of "selective disclosure." *Id.* at 1128. Instead, voluntary disclosures of privileged materials in government proceedings, like other disclosures, generally waive the privilege. *Id.* Rule 502 makes clear, however, that disclosure of privileged communications and information in a federal proceeding does not automatically result in a broad subject-matter waiver. Rather, such a disclosure of privilege material will give rise to a waiver as to undisclosed communications only if the following requirements are met:

> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

Fed. R. Evid. 502(a). The 2007 Advisory Committee Notes explains that under this provision, "a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Advisory Committee Notes to Fed.R. Evid. 502.

Finally, it is the burden of the party who asserts privilege to show that the privilege has not been waived. *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

2. Disclosures to the SEC and DOJ

The primary disclosure in the SEC Proceeding that relates to Wadler's claims in this action is the DPW Presentation. Although that document was filed under seal in this action, by disclosing it to the SEC and DOJ there is no doubt that Bio-Rad waived any privilege it might have claimed as to the document itself. Indeed, Bio-Rad now concedes that it has waived attorney-client privilege as to this document. *See* Reply at 7 ("For the purposes of this Motion, Bio-Rad recognizes that its report to the government of its investigation is not privileged."). The Court further finds that under Rule 502(a), fairness requires that the waiver extend beyond the DPW Presentation because Bio-Rad has repeatedly relied on that document as a sword by citing to its conclusion that Wadler's concerns about possible FCPA violations in China were unjustified.

In *IGT v. Alliance Gaming Corp.*, which involved many of the same parties as the *Van Asdale* case and various overlapping issues, the court addressed a similar issue. No. 04-cv-1676 RCJ (RJJ), 2006 WL 8071393 (D. Nev. Sept. 28, 2006). In that case, which involved a discovery dispute, the defendant ("Bally") asserted that disclosures of privileged communications by IGT in the *Van Asdale* litigation and in the Sarbanes-Oxley DOL proceeding that the Van Asdales had brought had resulted in a subject matter waiver as to those disclosures. 2006 WL 8071393, at *8, 10. In contrast, IGT argued that the waiver extended only to the documents that had actually been disclosed. *Id.* at *8. The court ruled, for the purposes of discovery, that the waiver in that case extended beyond the documents but did not find a broad subject matter waiver, noting that such waivers typically arise only where a party has attempted to assert the waiver as a "sword and shield." *Id.* In particular, the court found that the waiver extended to "only those communications about the matters actually disclosed." *Id. Id.* Notably, the court apparently did not find that the defendant in that case had attempted to use the materials that Bally sought as a "sword and a shield."

Based on the reasoning of *IGT*, the Court concludes that the disclosure of the DPW Presentation, like the disclosures in *IGT*, resulted in waiver of attorney-client privilege not only as to the document itself but also any privileged communications about the specific matters disclosed in the DPW Presentation. For example, the DPW repeatedly references specific issues Wadler

brought to the attention of the Audit Committee relating to possible FCPA violations in China. At a minimum, then, there is a waiver as to Wadler's Audit Committee Memo and any other communications between Wadler and Bio-Rad relating to those concerns. The DPW Presentation also references communications between outside counsel and Wadler and between outside counsel and Bio-Rad as to his concerns. Therefore, the waiver extends to these communications to the extent they are related to the same subject matter as the communications disclosed in the DPW Presentation. As a practical matter, then, this waiver extends to privileged communications and confidential information that Wadler reasonably believes are necessary to show that he had an objectively reasonable belief that Bio-Rad was violating the FCPA in China in the ways suggested in the Audit Committee Memo and addressed in the DPW Presentation.

The Court rejects Bio-Rad's reliance on *In re General Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) in support of its assertion that it may rely on the conclusions of outside counsel without waiving attorney-client privilege as to the underlying communications on which those conclusions were based. In that case, the court held that the disclosure of certain facts from an investigative report in a government proceeding did not defeat attorney-client privilege because privilege does not extend to information but only communications. 80 F. Supp. 3d at 528. It went on to hold that the privilege was not waived under Rule 502 where the defendant "neither offensively used the [Investigative Report] in litigation nor made a selective or misleading presentation that is unfair to adversaries in this litigation or any other." *Id.* at 533. This case differs from *General Motors* in that the DPW Presentation does not just state conclusions; it also describes the underlying investigation by outside counsel in great detail. Moreover, in contrast to the facts of that case, Bio-Rad is poised to use the conclusions of outside counsel offensively at trial to defeat Wadler's retaliation claim while precluding Wadler from presenting related communications to rebut this evidence, as discussed above. Therefore, the *General Motors* case is not on point.

3. Disclosures to the DOL

In the DOL Proceeding, Bio-Rad introduced the same DPW Presentation discussed above, as well as a detailed response offering alternative reasons for Wadler's termination, along with

supporting declarations by high-level managers describing their interactions and communications with Wadler. As discussed above, privilege is waived as to the DPW Presentation, the Audit Committee Memo and communications on the topics addressed in those documents. Thus, the only question is whether the submission of declarations by upper-level management gives rise to any further waiver of privilege. The Court finds that it does.

Bio-Rad contends these declarations do not disclose any privileged communications – that they merely reveal certain "historical facts necessary to rebut Plaintiff's claims," and that they at most reveal facts that were either disclosed to Bio-Rad's outside auditors at the time (thus waiving any privilege) or were never privileged. Reply at 10. Yet Plaintiffs have highlighted at least three examples in the Drapeau Declaration that appear to implicate privilege: 1) his statement that Wadler offered "far more than management was willing to pay" to settle with Life Technologies; 2) his statement that Wadler objected to Bio-Rad's accrual for the Life Technologies Audit prior to the filing of a Form 10-K; and 3) his statement that Wadler "took actions to undermine Bio-Rad's new Compliance Officer." Drapeau Decl. ¶¶ 7, 11, 13. To the extent that these statements disclose privileged communications between Wadler and Bio-Rad, any privilege as to these communications or communications on the same subject matter has been waived (particular as Bio-Rad has now expressly stated that nothing in these declarations is protected by privilege). Further, the response and declarations submitted in the DOL broadly accuse Wadler of misconduct and incompetence even while Bio-Rad attempts to prevent Wadler from introducing any privileged or confidential communications to show that these allegations are pretextual. That is the sort of unfairness that Rule 502 does not permit. Accordingly, the Court finds that the waiver that results from Bio-Rad's submissions to the DOL extends to communications on the topics addressed in those documents relating to his alleged misconduct and incompetence.

The Court rejects Bio-Rad's suggestion that the disclosures to the DOL were, in essence, involuntary and therefore did not give rise to any waiver. *See* Reply at 10. The only case cited for this proposition is *Dukes v. Wal-Mart Stores, Inc.*., No. 01-cv-2252 CRB, 2013 WL 1282892, at *4 (N.D. Cal. Mar. 26, 2013). That case involved a memorandum of counsel that was undeniably privileged that somehow fell into the hands of the New York Times without the authorization of

the client and despite its diligent efforts to protect the confidentiality of the document. Under those circumstances, the court found that there had been no voluntary disclosure. Here, on the other hand, Bio-Rad intentionally submitted the declarations to DOL. When it did so, it did not even claim these declarations disclosed privileged communications, much less seek to protect that privilege. Instead, it characterized them as unprivileged. Therefore, the facts here are distinguishable from those in *Dukes* and the holding in that case does not apply.

4. Disclosures in this Action

Finally, in this action Bio-Rad has repeatedly, and in great detail, described Wadler's communications with the Audit Committee and the investigations of outside counsel (both Steptoe & Johnson and DPW) relating to Wadler's concerns. It has also described Wadler's legal advice to Bio-Rad with respect to the accrual amount for the Form 10-K and his communications with Bio-Rad management relating to the Life Technologies settlement negotiations, among other things, in support of its claim that its termination of Wadler was justified. In addition, Bio-Rad has freely filed in the public record documents that reference or describe communications between Wadler, Bio-Rad and outside counsel in support of its motion to dismiss and its Motion to Strike, and expressly permitted Wadler to file a complaint in this action that mirrored his DOL complaint, even though Bio-Rad had previously told the DOL that Wadler's complaint disclosed privileged communication.

The disclosures have been most glaring in the expert reports Bio-Rad filed in the public record in connection with the Motion to Strike, which repeatedly reference and quote materials that Bio-Rad has claimed are privileged. Although Bio-Rad contends that these reports were filed only to advance its position on a tangential question relating to the propriety of Plaintiff's expert report, by filing them in the public record Bio-Rad has waived attorney-client privilege on the subject matter at issue in all of the communications described in the reports. The Court rejects Bio-Rad's argument that its disclosure of the expert reports does not result in any waiver because they were only offered in support of their Motion to Strike and not to advance their substantive legal positions. The Court finds no authority suggesting that an express and intentional disclosure of privileged communications in litigation does not result in waiver unless it is made in connection

with an attempt to prevail *on the merits* of that party's position rather than simply attempting to gain an advantage on an evidentiary matter.

In addition to the express waiver that arises from Bio-Rad's extensive disclosures of communications that it now claims are privileged, the allegations Bio-Rad has made as to the reasons for Wadler's termination -- for example, that he failed to put into place proper measures to ensure FCPA compliance in China, that he acted unreasonably with respect to various Bio-Rad filings, and that he acted without authorization when he made a settlement offer in the Life Technologies negotiations – give rise to an implied waiver as to communications that are relevant to these allegations.

5. Conclusion

In sum, there appears to be a significant quantity of evidence relating to Wadler's claims and Bio-Rad's defenses as to which privilege has been waived in the course of the administrative proceedings and this litigation. In particular, Bio-Rad has waived attorney-client privilege at least as to:

- The DPW Presentation and all communications between Wadler and Bio-Rad and with outside counsel relating to the concerns described in the presentation and the conclusions of outside counsel relating to the validity of Wadler's concerns;
- Communications involving Wadler, outside counsel and Bio-Rad relating to: 1) Wadler's advice regarding the accrual amount in the 10-K Filing or the reasons for its delay; 2) the alleged delay relating to the quarterly report due in April 2013; 3) Wadler's conduct in the Life Technologies Settlement negotiations with respect to the amount he allegedly proposed to Life Technologies and his authorization to propse that amount; 4) Wadler's alleged failure to ensure adequate FCPA compliance measures were taken in China; and 5) his alleged unprofessional conduct in his interactions with other Bio-Rad employees, including in connection with the reporting requirements for the French legal department.
- Any communications that were referenced or quoted in the expert reports that Bio-Rad filed in the public record in connection with the Motion to Strike, or that are on the

same subject matter of the disclosed communications.

D. Whether California Law is Preempted by the Regulations Promulgated Under the Sarbanes-Oxley Act

The Court further finds that the California ethical rules cited by Bio-Rad in support of its assertion that Wadler may not disclose client confidences in connection with his Sarbanes-Oxley claim are preempted.

In Section 307 of the Sarbanes-Oxley Act, 15 U.S.C. § 7245, Congress instructed the SEC to:

> issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 7245. In addition, Section 806 of Sarbanes-Oxley, 18 U.S.C. § 1514A, prohibits retaliation against any employee of a company that is subject to Sarbanes-Oxley based on that employee's compliance with applicable reporting and disclosure requirements.

The SEC implemented Section 307 by enacting Standards of Professional Conduct for Attorneys, 17 C.F.R. Part 205. Part 205 requires attorneys to report material violations "up the ladder" by making a Part 205 Report and to continue to report up the ladder until the attorney receives an "appropriate response." 17 C.F.R. § 205.3(b) ("Duty to report evidence of a material violation"). It further provides that an attorney may use "[a]ny report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, *or litigation* in which the attorney's compliance with this part is in issue." 17 C.F.R. § 205.3(d)(1) (emphasis added). In the comments accompanying the final rule, the SEC explained:

> Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA's present Model Rule 1.6(b)(3) and corresponding "self-defense" exceptions to client-confidentiality rules in every state. **The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.**

Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01; *see also* Clune Decl., Ex. Q (*Jordon v. Sprint Nextel Corp.*, Amicus brief by SEC in DOL ARB proceeding) at 4 (opining that this rule is "entirely consistent with the rule – established by the vast majority of state bars, the ABA Model Rules of Professional Conduct, as well as the federal common law – that an attorney may use client confidences in support of 'claims or defenses' in litigation against a client.").

There is nothing in this rule that precludes offensive as well as defensive use of these records; it only requires that an attorney's compliance must be "in issue." Moreover, use of such records in a whistleblower action are not offensive in the traditional sense given that it is the attorney who is *defending* against retaliation. *See* SEC Amicus Brief at 8. In this situation, fairness requires that a lawyer be able to present his or her "claim or defense without handicap." *Id.* at 9. This conclusion finds further support in the remedial purposes of securities laws enacted to combat fraud. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983)("Yet we have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'") (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). In addition, the SEC has now endorsed this interpretation of its own regulation in two amicus briefs, including one in this action, and that interpretation is entitled to further deference because it is a reasonable reading of Part 205. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009) ("'[W]hen an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.'") (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 128 S.Ct. 1147, 1154, 170 L.Ed.2d 10 (2008)).

Further, the SEC specifically addressed the possibility that the ethical rules of some states

that have stricter rules regarding attorney disclosures might prohibit an attorney from using a Part 205 Report in connection with a Sarbanes-Oxley retaliation claim. First, in Section 205.1 it described the purpose and scope of the rule as follows:

> This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. *Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.*

17 C.F.R. § 205.1 (emphasis added). Second, the SEC addressed this issue in the comments that accompanied the final rule, explaining:

> Proposed Section 205.1 stated that this part will govern "[w]here the standards of a state where an attorney is admitted or practices conflict with this part." In the proposing release, we specifically raised the question whether this part should "preempt conflicting state ethical rules which impose a lower obligation" upon attorneys. . . . A number of commenters questioned the Commission's authority to preempt state ethics rules, at least without being explicitly authorized and directed to do so by Congress. . . . Another comment letter noted that the Constitution's Commerce Clause grants the federal government the power to regulate the securities industry, that the Sarbanes-Oxley Act requires the Commission to establish rules setting forth minimum standards of conduct for attorneys appearing and practicing before it, and that, under the Supremacy Clause, duly adopted Commission rules will preempt conflicting state rules. . . . Finally, several commenters questioned why the Commission would seek to supplant state ethical rules which impose a higher obligation upon attorneys. . . . **The language which we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.**

Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01.

"Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). The Court in *de la Cuesta* explained that "[w]hen the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is . . .limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it

appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Here, the SEC has adopted a rule that expressly states that Part 205 Reports and any responses to such reports may be used by an attorney "in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue." 17 C.F.R. § 205.3(d)(1). That statement is sufficiently broad to support the conclusion that it applies to whistleblower claims asserted in litigation. Further, such a rule appears to be both within the authority granted under Section 307 and to reflect a reasonable balancing of conflicting policies to the extent it protects attorney whistleblowers from retaliation even as it requires them to report violations. Therefore, the Court concludes that to the extent California's ethical rules allow for more limited disclosures of privileged and confidential communications in connection with Sarbanes-Oxley whistleblower retaliation claims than is permitted under the regulations promulgated by the SEC, there is a direct conflict that gives rise to preemption of California's ethical rules.[7]

Finally, the Court concludes that Bio-Rad's reliance on *Barrientos* is misplaced. In that case, the Ninth Circuit addressed whether a local ordinance limiting evictions was preempted by a regulation promulgated by the Department of Housing and Urban Development ("HUD") where the local law was more stringent than the federal regulation. 583 F.3d at 1202. The court found that it was not, reasoning that while the federal regulation permitted conduct that the state forbade, the state's more stringent limitations did not actually "interfere with the methods by which the federal statute was designed" to reach its objectives. *Id.* at 1211. It further concluded that there was no "unambiguous intent" to preempt state law with respect to HUD's regulation. As a consequence, the Court concluded, there was no actual conflict between the federal regulation and state law. *Id.* at 1215.

In contrast, the rule adopted by the SEC here reflects an unambiguous intent to preempt

[7] In its response to the SEC amicus brief, Bio-Rad asks the Court to limit its holding to the Audit Committee Memo, which Bio-Rad now has conceded may be disclosed. As Bio-Rad challenges the admissibility of other communications that the Court finds are admissible under Sarbanes-Oxley, the Court declines to limit its holding in the manner requested by Bio-Rad.

state ethical rules that prevent attorneys from disclosing privileged information necessary to comply with Sarbanes-Oxley. To the extent that one of the methods Congress chose for achieving that objective was to afford protection from retaliation to those who comply with these reporting requirements, an ethical rule that deprives an attorney of such protection interferes with the methods by which Sarbanes-Oxley was designed to achieve its objective. In other words, this is a textbook example of "obstacle preemption." *See Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015) ("Obstacle preemption arises when a challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal quotation and citation omitted)).

Accordingly, the Court finds that to the extent the ethical obligations governing attorneys who practice in California impose stricter limits on the disclosure of privileged and confidential information in this action than are imposed under the Sarbanes-Oxley Act, as reflected in Part 205, the former are preempted.

IV. CONCLUSION

For the reasons stated above, the Motion is DENIED.

IT IS SO ORDERED.

Dated: February 16, 2017

JOSEPH C. SPERO
Chief Magistrate Judge

THE AMERICAN LAW INSTITUTE
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Whistleblower Law: Attorney-Client Privilege and Other Lessons from *Bio-Rad*

September 13, 2017
Telephone Seminar/Audio Webcast

Selected Pleadings from *Sanford S. Wadler, Plaintiff* *vs.* *Bio-Rad Laboratories, Inc., et al., Defendants*

Order Denying Defendants' Renewed Motion for Judgement as a Matter of Law Pursuant to FRCP 50(B) and Motion for New Trial Pursuant to FRCP 59

Submitted by

Robert E. Hauberg, Jr.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Jackson, Mississippi

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANFORD S. WADLER,

Plaintiff,

v.

BIO-RAD LABORATORIES, INC., et al.,

Defendants.

Case No. 15-cv-02356-JCS

ORDER DENYING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FED. R. CIV. P. 50(B) AND MOTION FOR NEW TRIAL PURSUANT TO FED. R. CIV. P. 59

Re: Dkt. No. 240

I. INTRODUCTION

On February 7, 2017, a jury verdict was entered in favor of Plaintiff Sanford Wadler in this whistleblower action against his former employer, Bio-Rad Laboratories, Inc. ("Bio-Rad") and its CEO, Norman Schwartz, after the Court denied Defendants' motion for judgment as a matter law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. *See* Dkt. No. 215. The jury found that Defendants were liable on all three of Wadler's claims, namely, violation of the Sarbanes-Oxley Act, violation of the Dodd-Frank Act, and wrongful termination in violation of public policy under California law (the "*Tameny* Claim"), and awarded $2,960,000 in past economic loss damages and $5,000,000 in punitive damages. The jury awarded no damages for future economic loss or emotional distress. Presently before the Court is Defendants' Renewed Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(b) and Motion for New Trial Pursuant to Fed. R. Civ. P. 59 ("Motion"). The Court finds that the Motion is suitable for determination without oral argument pursuant to Civil Local Rule 7-1(b) and therefore vacates the hearing set for

May 19, 2017. For the reasons stated below, the Motion is DENIED.[1]

II. BACKGROUND

Throughout trial, the parties presented starkly different theories of the relevant events. Defendants' theory of the case is succinctly summarized in the Motion:

> Bio-Rad terminated Mr. Wadler on June 7, 2013, immediately after serious deficiencies in his legal judgment had been confirmed and after months of obstructive, irrational, and belligerent behavior that no public company should be forced to tolerate from its General Counsel. His behavior led to calls for his termination by the head of Human Resources, the Board of Directors, and the CFO. . . . The Board and the CFO both reached the point of "him or me," i.e., if Mr. Wadler stayed on, they would resign because of his risky and intolerable behavior. . . . Despite his combative stance during cross-examination, Mr. Wadler admitted that a General Counsel needs to show good judgment and work effectively with senior management. By June 7, 2013, Mr. Wadler had long-since ceased doing either of those things. His claim to be a whistleblower—which was not based on even the slightest investigation—was discredited by everyone who reviewed it in real time.

Motion at 2-3.

Plaintiff, on the other hand, asserts Bio-Rad's position is nothing more than "the traditional whistleblower defense, maligning Mr. Wadler, exaggerating a handful of small workplace issues, and arguing that it would have fired him anyway" and contends the jury "correctly disregarded these inconsistent, after-the-fact, and undocumented pretexts." Opposition at 2. According to Plaintiff:

> The evidence clearly showed that Mr. Wadler engaged in protected activity. There was no meaningful evidence at trial challenging his subjective belief in the complaint he made. Moreover, the contemporaneous reaction to the disclosure shows that it was objectively reasonable. Bio-Rad's audit committee, its officers, and its outside counsel all believed that Mr. Wadler's concerns required serious investigation, and they spent substantial time and money investigating them (however unthoroughly as the evidence showed).

Id. at 1. Plaintiff further asserts that the "clear evidence" showed that "[w]hen Mr. Schwartz learned of Mr. Wadler's complaint, his first impulse was to put him on leave. Mr. Wadler was labeled a 'whistleblower threat,' 'loose cannon,' and 'paranoid,' and a secret plan was hatched to

[1] The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

fire him." *Id.* at 1-2.

According to Plaintiff, "Mr. Schwartz repeatedly contradicted his prior sworn testimony and, more disturbingly, was forced to admit that a key piece of defense evidence was a forgery, created and backdated after Mr. Wadler's termination." *Id.* at 2. "This forgery was aided by Ms. Corey both in this trial and before the Department of Labor." *Id.* Thus, Plaintiff contends, "it is little wonder that the jury disbelieved Bio-Rad's implausible claim that, suddenly after 25 years, Mr. Wadler became a monstrous and abusive coworker, too toxic to endure, yet paradoxically no one counseled him or made any effort to determine what was wrong, and Bio-Rad allowed him to keep working without any attempt to warn or improve for months until he was fired without warning in June without any final triggering event." *Id.* at 2.

III. ANALYSIS

A. Legal Standard

1. Rule 50(b)

Rule 50 governs motions for judgment as a matter of law in cases involving jury trials. Rule 50(a)(1) provides as follows:

> 1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). The motion must be made before the case is submitted to the jury and must "specify . . . the law and facts that entitle the movant to the judgment." Fed.R.Civ.P. 50(a)(2). If the court denies the Rule 50(a) motion, "the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed.R.Civ.P. 50(b).

"A jury's verdict must be upheld if it is supported by substantial evidence." *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007). "Substantial evidence is such relevant

evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir.1994); *see also Wallace*, 479 F.3d at 624 ("Judgment as a matter of law may be granted only where . . . the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict."). In ruling on a motion for judgment as a matter of law, "the court must not weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion." *Wallace*, 479 F.3d at 624. In addition, the court views the evidence in the light most favorable to the nonmoving party, and all reasonable inferences are drawn in favor of that party. *Id.*

2. Rule 59

Under Federal Rule of Civil Procedure 59(a)(1), a court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a)(1). A court may grant a new trial "if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). "A judge should grant a new trial only if she 'is left with the definite and firm conviction that a mistake has been committed.'" *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2016 WL 3880774, at *3 (N.D. Cal. July 18, 2016) (quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987) (internal citations omitted)). The court is not required to view the trial evidence in the light most favorable to the verdict when it considers a Rule 59(a) motion. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). Instead, "the district court can weigh the evidence and assess the credibility of the witnesses." *Id.* "Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice." *Id.* (citing *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)).

B. Discussion

Defendants contend they are entitled to judgment as a matter of law in their favor on all three of Plaintiff's claims and as to his request for punitive damages. In the alternative, they seek a new trial on the basis that the jury's verdict was against the weight of the evidence and/or

constitutes a miscarriage of justice. In the Motion, Defendants challenge the jury's verdict on the following grounds:

1) Based on the evidence presented at trial, no reasonable jury could conclude – and the weight of the evidence did not support the conclusion – that Wadler engaged in protected activity, that is, that he held a subjectively *and* objectively reasonable belief that the conduct he was disclosing constituted a violation of the Foreign Corrupt Practices Act ("FCPA");

2) Based on the evidence presented at trial, no reasonable jury could conclude – and the weight of the evidence did not support the conclusion – that Wadler's February 8, 2013 memo to the Audit Committee was a substantial or contributing factor in his termination;

3) Defendants are entitled to judgment in their favor, or at least a new trial, because they presented "overwhelming and unrebutted evidence" that they had legitimate reasons to terminate Wadler;

4) Defendants are entitled to judgment in their favor with respect to punitive damages because none of Wadler's claims allows for an award of punitive damages;

5) Defendants are entitled to judgment in their favor on the Sarbanes-Oxley claim because reporting purported FCPA claims is not protected activity under Sarbanes-Oxley; and

6) Defendants are entitled to judgment in their favor on the Dodd-Frank claim because Wadler did not report the purported violations to the Securities and Exchange Commission.

1. Evidence that Wadler Had a Subjectively and Objectively Reasonable Belief that Bio-Rad Had Violated the FCPA

At trial, the Court instructed the jury that in order to prevail on all three of his claims, Wadler was required to establish by the preponderance of the evidence that he engaged in protected activity under Sarbanes-Oxley Act, that is, that he made a disclosure regarding conduct

that he reasonably believed constituted a violation of any rule or regulation of the Securities and Exchange Commission. *See* Dkt. No. 203 (Final Jury Instructions), Nos. 18-19, 24-25, 27. The Court further instructed the jury that to meet the "reasonable belief" requirement, Wadler was required to establish both that he "personally and in good faith" "believed that the conduct he was disclosing constituted a violation of any rule or regulation of the Securities and Exchange Commission; and . . . [t]hat his belief was objectively reasonable under the circumstances." *Id.*, No. 20. Defendants do not challenge the Court's instructions with respect to the reasonable belief requirement but argue that the evidence shows that Wadler did not actually believe the allegations in his February 8, 2013 memo to the Audit Committee ("Memo") and in any event, that his belief was not reasonable in light of the evidence.

Defendants attempted to establish at trial that Wadler did not actually believe that the allegations in his Memo, relating to possible FCPA violations in China, were true. They point to Wadler's own testimony, asserting that while the Memo stated unequivocally that Bio-Rad had engaged in FCPA violations, he backed away from that position at trial, testifying only that his memo was a *request* for an investigation. *See* Kramer Decl., Exs. 6, 8 & 9. They also point out that Wadler testified that he received the document he attached to the Memo, which purportedly illustrated the possible violations, three months before he alerted the Audit Committee of his concerns. *See id.*, Ex. 10. According to Defendants, Wadler learned during this three month period that there would be a "tone-at-the top" meeting with federal prosecutors and feared that he would face "tough questions questions" about his responsibility for past FCPA violations in Thailand and Russia. *See id.*, Ex. 11. Defendants also point to Wadler's testimony that those who report wrongdoing typically are not held liable for that conduct, *id.*, Ex. 13, and that he searched for employment lawyers in December 2012 and January 2013. *Id.*, Ex. 12.

Further evidence of Wadler's bad faith, Defendants contend, included Wadler's failure conduct his own investigation of possible FCPA violations in China, his refusal to credit the explanation of Christine Tsingos for the apparent discrepancies in some invoices based on a "three-piece suit analogy," and the lack of credible evidence that Wadler discussed his concerns with Schwartz or other top management. *See* Ex. 14-16.

According to Defendants, the evidence presented at trial also supported the conclusion that even if Wadler had a subjective belief that the allegations in the Memo were true, that belief would not have been reasonable. Defendants point to numerous witnesses who offered testimony that Wadler's concerns were baseless and his Memo reflected a lack of understanding of how invoicing was conducted at Bio-Rad, or of business practices in China. *See, e.g.,id.*, Exs. 18 -20.

The Court concludes that the jury's finding was supported by substantial evidence under Rule 50(b) and that the verdict was not against the weight of the evidence under Rule 59. Plaintiffs presented substantial evidence at trial showing that Wadler subjectively believed that Bio-Rad was engaging in conduct in China that violated the FCPA and that his belief was reasonable. Without reciting all of that evidence here, the Court notes that Wadler himself testified extensively as to the reasons for his belief that FCPA violations were likely occurring and his difficulty obtaining documentation showing Bio-Rad transactions in China. *See* Trial Transcript ("TT") 226-301. He also testified that John Cassingham, the outside counsel who was working for Bio-Rad in connection with the Life Tech Audit, discussed his concerns with Wadler that bribery might be occurring in China or that there might be an "under-the-covers" scheme there. *See id.* Wadler further testified that he attempted to discuss his concerns about FCPA violations in China with Schwartz and that Schwartz's response indicated to Wadler that Schwartz was aware of the issue and did not plan to do anything. TT at 268.

Plaintiff presented other evidence supporting the jury's finding as to his subjective and objective belief. Plaintiff cites the testimony of Drapeau that Wadler believed FCPA violations had occurred, and documents showing that upper-level management agreed that the lack of documentation reflecting transactions in China was a source of concern. Plaintiff also points to a December 10, 2012 presentation by Chinese manager George Cao addressing major problems with a distributor in Northern China, Yuan Ye, who had produced no contracts in response to Bio-Rad's request for documentation, and evidence that the Bio-Rad legal department learned in January 2013 of 18 unauthorized contracts in China. TT at 284-285,1495 & Trial Exhibits 8, 69, 89-91, 100 and 242. As to the "three-piece suit" explanation offered by Christine Tsingos, Plaintiff offered contrary evidence reflecting transactions in China that involved free products and

therefore did not fit the analogy. *See* TT at 277-278, 288, 559, 907, 2011 & Trial Exs. 48-49, 133.

The jury's finding was supported by substantial evidence under Rule 50(b) and the verdict was not against the weight of the evidence under Rule 59.

2. Evidence that Wadler's Audit Committee Memo Was a Substantial or Contributing Factor in his Termination

The Court instructed the jury that to prevail on his claims, Wadler was required to demonstrate by a preponderance of the evidence that the protected activity (the Memo) was a "substantial motivating factor," "contributing factor" or "substantial motivating reason" for his discharge. In support of their request for judgment as a matter of law or a new trial, Defendants contend the evidence does not support the jury's finding that this requirement was met. *See* Dkt. No. 203 (Final Jury Instructions), Instructions 18, 22, 24, 27. Defendants cite to Schwartz's testimony that Wadler was terminated for a pattern of behavior involving a series of incidents with coworkers, and that the Davis Polk report was the "last piece of the puzzle" that established that Wadler was incompetent. *See* TT at 892; Kramer Decl., Ex. 35 (including transcript of video deposition clip played at trial but not recorded).

Plaintiff, on the other hand, points to, *inter alia*, a positive review in December 2012, an email from Schwartz sent just two days after Schwartz learned about of the Memo suggesting Wadler be placed on administrative leave, and notes of a conversation with Drapeau in March 2013 indicating that Schwartz saw Wadler as a "loose cannon," and a "whistle-blower threat" and had decided that he would terminate Wadler once the Davis Polk investigation had concluded. *See* TT at 211-223, 593-595, & Trial Exs. 27, 40, 71, 86. He also offered evidence that a negative performance review for 2012 dated April 15, 2013 and provided to the Justice Department, was not created until after Wadler had been terminated, several months later, and that Schwartz himself testified at his deposition that Wadler's Memo was "somewhat" related to his termination. *See* TT at 629-632 &Trial Ex. 87. Again, the jury found Plaintiff's version of events more credible than Defendants', concluding that Wadler had demonstrated causation as to his claims.

The Court concludes that the jury's finding was supported by substantial evidence under

Rule 50(b) and that the verdict was not against the weight of the evidence under Rule 59.

3. Evidence that Defendants had Legitimate Reasons for Terminating Wadler

The Court instructed the jury that Defendants were not liable if they proved "by clear and convincing evidence that they would have terminated Mr. Wadler at the same time based on wholly legitimate reasons even if Plaintiff had not engaged in the protected activity." Dkt. No. 203 (Final Jury Instructions), Instructions 23, 26. Defendants characterize the evidence they presented at trial on this defense as "overwhelming and unrebutted," citing testimony by coworkers and outside counsel that Wadler had "screamed" at them, acted aggressively, or stopped speaking to them. Plaintiff, on the other hand, pointed to, *inter alia*, inconsistencies in the testimony of Defendants' witnesses – particularly Schwartz and Corey – and to evidence that Schwartz (with Corey's knowledge) may have created a false review to bolster Bio-Rad's explanation for Wadler's termination. The Court finds that there was substantial evidence to support the jury's conclusion and the verdict is not against the weight of the evidence.

4. Availability of Punitive Damages

Defendants contend Plaintiff is not eligible for an award of punitive damages because neither the Sarbanes-Oxley Act nor the Dodd-Frank Act provide for punitive damages and a *Tameny* claim cannot expand the scope of the remedy beyond that which is available on the underlying statute that is the basis for the claim. Motion at 20-21 (citing *Dutra v. Mercy Med. Ctr. Mt. Shasta*, 209 Cal. App. 4th 750, 756 (2012) (emphasis in original) (quoting *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1159 (1998)). Defendants' position has been rejected by the Ninth Circuit, however, which has held that "[t]he California Supreme Court has made it clear that damages for wrongful discharge in violation of public policy are not limited to those specified in the underlying statute that was violated." *Freund v. Nycomed Amersham*, 347 F.3d 752, 759 (9th Cir. 2003) (citing *Rojo v. Kliger*, 52 Cal.3d 65, 80-81 (1990)). In *Freund*, the court rejected a similar argument based on *City of Moorpark*, finding that in *Moorpark* the California Supreme Court did not intend to limit or reverse the established law permitting a plaintiff to recover damages on a claim for wrongful discharge in violation of public policy beyond those specified in the underlying statute. 347 F.3d at 760. Therefore, the Court rejects

Defendants' challenge to the award of punitive damages here.

5. Whether Wadler Engaged in Protected Activity Under Sarbanes-Oxley

The Sarbanes-Oxley Act prohibits retaliation against an employee who "provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 1) section 1341, 1343, 1344, or 1348, 2) any rule or regulation of the Securities and Exchange Commission, or 3) any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). Defendants contend the FCPA is not a "rule or regulation" of the SEC and therefore, that Wadler was required to show that he disclosed information "relating to fraud against shareholders" to prevail on his Sarbanes-Oxley claim. As Defendants already expressly conceded, however, "there is a rule or regulation of the SEC regarding the books and records provisions of the FCPA, and so reporting a books and records violation could support a Sarbanes-Oxley claim. " Dkt. No. 128 at 3. Moreover, the FCPA is an amendment to the Securities and Exchange Act of 1934 and is codified within it. *See* 15 U.S.C. §§ 78dd-1(a) (FCPA's anti-bribery provisions); § 78m (FCPA's books-and-records provisions). Accordingly, the Court rejects Defendants' argument that they are entitled to judgment as a matter of law or a new trial because Wadler's disclosure of alleged FCPA violations (both its anti-bribery provisions and its books-and-records requirements) is not protected activity under the Sarbanes-Oxley Act.

6. Whether Wadler Engaged in Protected Activity Under Dodd-Frank

Defendants continue to argue that Plaintiff's claim under the Dodd-Frank Act fails because he did not report the alleged FCPA violations to the SEC. The undersigned has already held in this action that internal whistleblowing is protected under the Dodd-Frank Act and the Ninth Circuit recently reached the same conclusion in *Somers v. Digital Realty, Inc.*, 850 F.3d 1045 (9th Cir. 2017) (holding as a matter of first impression that Dodd-Frank "provide[s] protections to those who report internally as well as to those who report to the SEC."). Accordingly, Defendants are not entitled to judgment as a matter of law or a new trial on this ground.

IV. CONCLUSION

For the reasons stated above, the Motion is DENIED.

IT IS SO ORDERED.

Dated: May 10, 2017

JOSEPH C. SPERO
Chief Magistrate Judge