Docket #0440 Date Filed: 5/10/2017

JINA CHOI (NY Bar No. 2699718)
ERIN E. SCHNEIDER (Cal. Bar No. 216114)
SHEILA E. O'CALLAGHAN (Cal. Bar No. 131032)
ocallaghans@sec.gov
WADE M. RHYNE (Cal. Bar No. 216799)
rhynew@sec.gov
BERNARD B. SMYTH (Cal. Bar No. 217741)
smythb@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2800
San Francisco, California 94104
Telephone: (415) 705-2500
Facsimile: (415) 705-2501

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS,

Defendants.

Case No. 3:16-CV-00438-PK

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR PROTECTIVE ORDER

1600438170510000000000001

I. INTRODUCTION

Plaintiff United States Securities and Exchange Commission ("Commission" or "SEC") respectfully submits this Opposition to the Individual Defendants' Motion for Protective Order. Defendants Robert Jesenik, Brian Oliver, and N. Scott Gillis (collectively, "Defendants") have not met their burden to establish that the communications they seek to withhold are protected by a joint defense or common interest privilege. Their motion should therefore be denied.

As Defendants acknowledge, an essential element of a valid joint defense privilege is that the communications at issue be in furtherance of a joint defense effort. Defendants submit four declarations to establish that a joint defense arrangement existed (a point the SEC does not dispute), but no evidence whatsoever to show that the specific communications they seek to withhold were in furtherance of any joint defense effort. Indeed, none of the four declarants were a party to any of the communications Defendants seek to withhold, and none of the declarations even makes reference to those communications. By contrast, Robert Holmen, who was a party to all but one of the communications at issue, and has reviewed each of the specific communications at issue, has unequivocally declared that none of the communications were in furtherance of a joint defense effort. Thus, the only evidence before the Court regarding the specific communications at issue in Defendants' motion is that they were not in furtherance of a joint defense effort and therefore cannot be protected by a joint defense privilege.

Even were some of the communications in furtherance of a joint defense effort (and there is no evidence that they were), Aequitas' waiver of all privileges appropriately waives the privilege as to any communications that *it* made as a part of a joint defense effort. While a member of a joint defense cannot waive privilege as to the communications it receives from others pursuant to the joint defense, the member can waive the privilege as to its *own* communications. *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001). Thus, to the extent any joint defense privilege existed as to communications made by Mr. Holmen or other non-defendant Aequitas employees, the privilege was appropriately waived.

II. BACKGROUND

The Commission's Complaint (Dkt. No. 1) alleges a massive Ponzi-like scheme to defraud investors through the offer and sale of securities issued by Aequitas Commercial Finance, LLC and the Aequitas Funds. On March 16, 2016, pursuant the Stipulated Interim Order Appointing Receiver, Ronald F. Greenspan was appointed as a receiver over the Aequitas entities on an interim basis. (Dkt. No. 30). On April 14, 2016, Mr. Greenspan's appointment was made permanent. (Dkt. No. 156). Pursuant to his authority as the permanent receiver over the Aequitas entities, Mr. Greenspan "waived all privileges, including the attorney-client privilege, held by the [entities]." Declaration of Ronald F. Greenspan, ¶¶ 5-6.

Since the Commission filed its case it has sought and obtained substantial documents from the receiver. Defendants' email boxes for the relevant time period were among the documents sought by the Commission. Declaration of Bernard B. Smyth ("Smyth Decl."), ¶ 2. Although the receiver waived all privileges held by the Aequitas entities, the Defendants asserted that they believed they had individual privileges that might be implicated by the production of all emails in their email boxes. *Id.*, ¶ 3. However, Defendants were unable to articulate the nature of the privileges they believed might attach to documents within their email boxes. *Id.* Instead, they requested the right to review all emails in which an attorney was a party to the communication (even Aequitas' outside company counsel and in-house counsel) prior to their production. *Id.*

In an effort to be as careful as possible to not infringe on any potential privileges, the receiver and the Commission agreed to allow the Defendants the review they requested. *Id.*, ¶ 4. In November 2016, the receiver provided each defendant with a copy of all emails in the defendant's email box in which an attorney was a party to the communication. *Id.* After more than three months of review and several meet-and-confer conferences, on February 28, 2017, Defendants identified to the receiver what documents they believed might be subject to their individual privilege or a joint privilege held by them and Aequitas. *Id.*, ¶ 5. On March 15, 2017,

Defendants provided privilege logs to the Commission identifying thousands of documents over which they asserted privilege. *Id.*, ¶ 6. Following receipt of Defendants' privilege logs, the Commission and Defendants engaged in at least five separate meet-and-confer calls regarding Defendants' privilege assertions. *Id.*, ¶ 7. At the conclusion of the meet-and-confer process, the Commission agreed not to pursue numerous documents over which Defendants claimed privilege, including numerous documents that the Commission believed it had a strong legal argument were not privileged, and Defendants withdrew their privilege assertions over numerous documents they initially identified as privileged. *Id.*, ¶ 9.

Defendants' claim that the Commission does not concede the existence of a joint defense arrangement (Motion at p. 4) is false. Based on the evidence submitted with their motion – evidence that was never provided to the Commission during the meet-and-confer process (Smyth Decl., ¶ 7) – the Commission does not dispute the existence of a joint defense arrangement.[1] The real issue at stake is whether the communications at issue here fall within the scope of that arrangement. Defendants failed to present such evidence during the meet-and-confer process. They continue to fail to do so now.

The suggestion that the Commission has engaged in an "improper attempt to obtain privileged communications that were made in furtherance of a [joint defense arrangement]" (Motion at p. 2) is also baseless. Indeed, there are more than 700 documents currently withheld on the basis of Defendants' privilege claims that the Commission does not challenge. Smyth Decl., ¶¶ 11-13. Of those, nearly 100 are documents withheld on the basis of the very joint defense privilege that is the subject of Defendants' motion. *Id.*, ¶¶ 11, 12. At issue before the Court is a fraction of the documents currently withheld on the basis of Defendants' privilege

[1] Notably, Defendants define the parties to the joint defense arrangement as outside counsel for the Defendants, outside counsel for Aequitas, and in-house counsel for Aequitas. Declaration of Jahan P. Raissi, ¶ 8; Declaration of William Douglas Sprague, ¶ 7; Declaration of Marc J. Fagel, ¶ 9. There are numerous Aequitas employees that Defendants do not contend were members of the joint defense effort, yet those employees were included on many of the communications they seek to withhold.

claims – those documents for which the Defendants have failed to make the required showing that the communication was in furtherance of a joint defense effort.[2]

During the meet-and-confer process, the Commission repeatedly informed Defendants that Robert Holmen, Aequitas' former General Counsel and a party to nearly all the communications at issue in Defendants' motion, reviewed the documents over which Defendants claimed a joint defense or common interest privilege. *Id.*, ¶ 8. The Commission informed Defendants that based on his review of the documents, Mr. Holmen did not believe that any of the communications were made in furtherance of a joint defense effort and was prepared to sign a declaration to that effect. *Id.* On that basis, the Commission informed Defendants that it did not believe Defendants' privilege assertion over the communications was valid. *Id.* The Commission repeatedly requested Defendants to provide facts to address Mr. Holmen's position. *Id.* Defendants never provided the Commission with any such facts. *Id.* Defendants still fail to provide any facts that address or rebut Mr. Holmen's position.

III. LEGAL STANDARD

As Defendants acknowledge, to establish that a document is protected by the joint defense privilege it must be shown that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the joint defense effort, and (3) the privilege has not been waived." (Motion at p. 6 (citing *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685 (S.D. Cal. 1996)). It is the burden of the party asserting the joint defense privilege to establish the privileged nature of the communications over which the privilege is asserted. *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012) (citing *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)).

[2] The communications at issue are identified in the three privilege logs attached as Exhibits A, B, and C to the Declaration of Jeffrey F. Robertson (Dkt No. 429). In addition, there are two additional communications at issue identified in paragraph 9 of the Declaration of Bernard B. Smyth.

Here, Defendants have failed to meet their burden as to all of the communications at issue because they have failed to establish that the communications were in "furtherance of a joint defense effort." Defendants have further failed to meet their burden as to Aequitas' own communications because any privilege over those communications has been waived by Aequitas.[3]

IV. ARGUMENT

A. Defendants Have Not Met Their Burden To Establish That the Communications At Issue Are Protected by a Joint Defense Privilege

Defendants have presented no evidence that the specific communications they seek withheld on the basis of a joint defense privilege were made in furtherance of a joint defense effort and have, therefore, failed to meet their burden that the communications are privileged. Rather, Defendants submit four declarations in support of their motion, which merely present evidence of the existence of a joint defense arrangement between counsel for Aequitas and counsel for the Defendants. A fact the Commission does not dispute. Significantly, none of those declarants were a party to even a single communication that Defendants seek to withhold pursuant to their motion and none of the declarations even makes reference to the actual communications that Defendants seek to withhold. Not one of the declarations submitted by Defendants present any evidence whatsoever that the communications were actually made in furtherance of a joint defense effort.[4]

---

[3] Defendants also fail to meet their burden as to three documents they seek to withhold because "they were not made in confidence for the purpose of securing legal advice." Declaration of Robert R. Holmen ("Holmen Decl."), ¶ 13(g); *see Graf*, 610 F.3d at 1156 (privilege requires communications to be "made in confidence" and for purpose of seeking legal advice).

[4] Each of the declarations submitted by Defendants and Defendants' motion state that the law firms Sidley Austin LLP and Pepper Hamilton LLP were members of the joint defense arrangement at particular points in time. (*See, e.g.*, Motion at pp. 3, 5, 7, 8). The import of that assertion is unclear as no one from those law firms was a party to any of the documents at issue before the Court.

Defendants suggest that a privilege log alone is sufficient to establish attorney-client privilege. (Motion at p. 5 (citing *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992)). However, they cite to no law that suggests that assertions on a privilege log, without supporting evidence, can establish privilege when the privilege is directly rebutted by a declaration. Indeed, even in the case upon which Defendants rely, the Ninth Circuit found that privilege over certain documents was established by "a privilege log *and affidavits regarding their confidential nature*." *Id.* (emphasis added). Here, Defendants provide no evidence that the particular communications at issue meet the elements of a joint defense privilege other than unsupported and conclusory assertions on their privilege logs.

In contrast, the Commission has submitted the declaration of Robert Holmen, the former General Counsel of Aequitas and a party to all but one of the communications at issue.[5] Mr. Holmen is unequivocal – he reviewed each of the communications that Defendants seek to withhold and not a single communication was in furtherance of a joint defense effort. Declaration of Robert R. Holmen ("Holmen Decl."), ¶ 13. Well aware that Mr. Holmen would swear under oath that the communications at issue were not in furtherance of a joint defense effort, Defendants' meager response is that Mr. Holmen's decision as to whether to include counsel for the Defendants on joint defense communications was "arbitrary." (Motion at p. 12). Not only is that irrelevant (as Defendants themselves note: "[t]he question in determining whether a document is part of the joint defense effort is not the party to whom the document was directed, but rather whether the document reflects material [that] is part of the joint defense effort" (Motion at p. 9 (quoting *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D.

[5] The only communication to which Mr. Holmen was not a party is an email that is included on each of the Defendants' privilege logs. Holmen Decl., ¶ 13 (citing Dkt. No. 429-1 at p. 7, Dkt. No. 429-2 at p. 4, and Dkt. No. 429-3 at p. 2). That communication does not appear to include any attorney and none of the three Defendants has made any showing that the communication involved an attorney-client communication in any way. Defendants have therefore failed to meet their burden that the communication is privileged. *See Graf*, 610 F.3d at 1156 (one of eight essential elements of privilege is that communication reflects advice "from a professional legal adviser in his capacity as such").

Ill. 1980)). Defendants' claim is supported by no evidence and is simply false. Mr. Holmen is clear that he "believed that all communications [he] had in furtherance of a joint strategy included counsel for the [] Defendants on such communications." Holmen Decl., ¶ 12. Defendants' characterization of Mr. Holmen's role in the joint defense effort (*see* Motion at p. 11) is based solely on the declaration of Mr. Jesenik's current counsel who was not even involved in this matter at the time.

Thus, at its heart, Defendants' argument is based on two false premises. First, that the Commission disputes the existence of a joint defense arrangement. It does not, and indeed nearly 100 documents have been withheld on the basis of that joint defense arrangement that the Commission does not challenge. Second, that the Commission's position is that the outside counsel of the member of a joint defense must be a party to a communication for it to be protected pursuant to the joint defense. The Commission has not, and does not, take that position. Rather, as Defendants acknowledge, and the case law makes clear, to be protected under the joint defense privilege a communication must be made in furtherance of the joint defense effort. Given Defendants' failure to present any evidence that the communications at issue were in furtherance of a joint defense effort, it seems that they are simply seeking to exclude damaging documents.[6]

The Court should reject Defendants' efforts to conceal discoverable information through baseless privilege assertions. The uncontroverted evidence before the Court establishes that the communications Defendants seek to withhold were not made pursuant to, or in furtherance of, a joint defense effort. Defendants have therefore not met their burden to establish that the communications are privileged. The Court should deny Defendants' motion in its entirety on that basis alone.

---

[6] That is the same tact they took before Judge Acosta in a related private litigation. Judge Acosta described their approach to privilege issues as "[w]e'd like to go through documents to see if there's any stuff in there that we don't like." Transcript of February 27, 2017 Hearing in *Ciuffitelli v. Deloitte & Touche, LLP* (Case No. 3:16-cv-00580-AC) at 8:24-9:1 (Smyth Decl., ¶ 14, Ex. 5). And as Judge Acosta stated, "[t]hat's not a basis for privilege." *Id.* at 9:2.

B. Even If a Joint Defense Privilege Exists as to Certain of the Communications at Issue, Aequitas Has Appropriately Waived the Privilege With Respect to Its Own Communications

Even if Defendants could establish that the communications at issue were made subject to a joint defense arrangement (and they have not), Aequitas' waiver of all privileges appropriately waives the joint defense privilege over Aequitas' own communications made pursuant to that joint defense. "Even where [the joint privilege rule] applies … a party always remains free to disclose his own communications." *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (citing *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997)).

Defendants cite to the Ninth Circuit's holding that "one party to a JDA cannot unilaterally waive the privilege for other holders," *U.S. v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) (Motion at p. 6), to assert that all parties to a joint defense arrangement must waive the privilege for any joint privilege communications to be discoverable. Defendants miss the point. The Ninth Circuit's holding means that one member of a joint defense cannot waive another member's privilege. The Ninth Circuit did not hold that all members of a joint defense must waive the privilege for a member of the joint defense to reveal its own communications. Indeed, in *Gonzalez*, the Ninth Circuit went on to quote the Restatement (Third) of the Law Governing Lawyers that "[a]ny member [of a joint defense arrangement] may waive the privilege with respect to that person's own communications." *Id.* (quoting Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000)).

That a party to a joint defense can still waive its own privileged communications is clear. As Defendants note, the joint defense privilege "serves to protect the confidentiality of communications passing from one party to the attorney for another party." (Motion at p. 6 (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). Thus, the purpose of the joint defense privilege is to allow a member of the joint defense to share information that is otherwise protected by the attorney-client privilege with other members of the joint defense without waiving the privilege. (*See* Motion at p. 6 (quoting *United States v. Flood*, 713 F.3d

1281, 1284 (10th Cir. 2013)). But it would be an absurd conclusion that a party could not waive its own attorney-client privilege over a communication simply because that party chose to share the communication with other members of a joint defense.

For example, if Mr. Holmen prepared a legal analysis on behalf of Aequitas regarding Aequitas' legal liability in connection with the SEC investigation, such an analysis would be protected by Aequitas' attorney-client privilege if sent only to persons at Aequitas who were seeking the advice. If Aequitas then chose to share that analysis with Defendants as part of a joint defense effort, the joint defense would allow Aequitas to maintain its privilege over the analysis despite sharing it with the other parties. But Defendants' receipt of that analysis does not give rise to a separate privilege that they control that could preclude Aequitas from waiving its own privilege over it. Rather, Aequitas could prevent Defendants from waiving Aequitas' underlying privilege over the analysis. Here, however, Defendants seek to prohibit Aequtias from waiving its own privilege over its own communications simply because Aequitas shared those communications with Defendants. That position is inconsistent with the law. Even were the Court to find that the communications at issue were protected by a joint defense privilege (again, there is no evidence in support of such a conclusion), any privilege as to Aequitas' own communications (*e.g.*, communications by Mr. Holmen and other non-defendant Aequitas employees) has been appropriately waived.

V. CONCLUSION

For each of the reasons set forth above, the Court should deny the Motion for Protective Order.

Dated: May 10, 2017

Respectfully submitted,

/s/ Bernard B. Smyth

Sheila E. O'Callaghan
Wade M. Rhyne
Bernard B. Smyth
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
(415) 705-2500