Docket #0470 Date Filed: 7/7/2017

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

Case No. 3:16-CV-438-PK

OPINION AND ORDER

PAPAK, Magistrate Judge:

INTRODUCTION

Plaintiff Securities and Exchange Commission ("SEC") filed this securities fraud action against defendants Aequitas Management, LLC, Aequitas Holdings, LLC, Aequitas Commercial

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Finance, LLC, Aequitas Capital Management, Inc., Aequitas Investment Management, LLC (collectively, "entity defendants"), Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (collectively, the "individual defendants") on March 10, 2016. This court has subject-matter jurisdiction over the SEC's action as expressly provided in the Securities Act, the Exchange Act, and the Advisers Act, and pursuant to 28 U.S.C. § 1331.

Now before the court is individual defendants' motion for protective order (#428) pursuant to Fed. R. Civ. P. 26(c)(1). I have considered the motion, all of the pleadings and papers on file, and conducted an *in camera* review of the communications at issue. For the reasons set forth below, the individual defendants' motion (#428) is DENIED in its entirety.

LEGAL STANDARD

Rule 26 governs discovery in federal civil cases. Pursuant to Fed. R. Civ. P. 26(b)(1), the scope of discovery includes "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Parties may seek protective orders to prevent disclosure of documents protected by attorney-client privilege. *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002); *Anderson v. Country Mutual Ins. Co.*, No. C14–0048JLR, 2014 WL 4187205, at *2 (W.D. Wash. Aug. 25, 2014). Generally, a party seeking a protective order must meet a "heavy burden" to show why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The court has "broad discretion . . . to decide when a protective order is appropriate and what degree of protection is required." *Phillips*, 307 F.3d at 1211 (quoting *Seattle Times Co. v. Rhinehardt*, 467 U.S. 20, 36 (1984)).

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FACTUAL BACKGROUND

The SEC filed this action on March 10, 2016. On April 14, 2016, the court appointed a receiver for the purposes of marshalling and preserving all assets of the entity defendants. (#156). The Receiver subsequently informed the individual defendants that he planned to waive all corporate attorney-client privileges. The individual defendants objected to the planned waiver, asserting that the Receiver's waiver included documents that implicated the individual defendants' personal privileges. The Receiver permitted the individual defendants to review the documents that implicated the individual defendants' personal privileges. The individual defendants claimed personal privilege over some of the documents, claiming that the entity defendants and the individual defendants were parties to a joint defense agreement.

After some disagreement, the individual defendants filed a motion for protective order to prevent disclosure of certain documents to the SEC. The documents at issue consist of emails between various parties operating within the Aequitas entities. The individual defendants' counsel are not party to any of the emails. Aequitas' former general counsel Bob Holmen, and in-house counsel at all relevant times, is a party to all but one of the emails. Mr. Holmen has reviewed the emails to which he was a party and "do[es] not believe any of the communications were made in the course of a joint defense effort or designed to further a joint defense effort."

DISCUSSION

The individual defendants seek to protect the emails at issue based on the joint defense or common interest (or community of interest) privilege. The joint defense privilege was first recognized by the Ninth Circuit in 1964. *United States v. Gonzalez*, 669 F.3d 974, 976 (9th Cir. 2012) (discussing *Continental Oil Co. v. United States*, 330 F.3d 347, 350 (9th Cir. 1964)). "Rather

than a separate privilege, the 'common interest' or 'joint defense' rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (citing *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965)). "However, a shared desire to see the same outcome in a legal matter is insufficient to bring the communication between two parties within this exception." *Id.* "Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten." *Id.*

The Third Circuit has described the history and contours of the joint defense privilege as follows:

> In its original form, [the joint defense privilege] allowed the attorneys of criminal co-defendants to share confidential information about defense strategies without waiving the privilege as against third parties. Moreover, one co-defendant could not waive the privilege that attached to the shared information without the consent of all others. Later, courts replaced the joint-defense privilege, which only applied to criminal co-defendants, with a broader one that protects all communications shared within a proper "community of interest," whether the context be criminal or civil. RICE § 4:35; *see also* Andrew R. Taggart, *Parent-Subsidiary Communications & the Attorney-Client Privilege*, 65 U. CHI. L. REV. 315 (1998). Thus, the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation, and even in purely transactional contexts. RICE § 4:35; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76.
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> Two aspects of the modern community-of-interest privilege are noteworthy. **First, to be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest.** *Cf. Ramada Inns, Inc. v. Dow Jones & Co.*, 523 A.2d 968, 972 (Del. Super. Ct. 1986) (emphasizing that the relevant Delaware evidentiary rule protects communications disclosed to an attorney). Sharing the communication directly with a member of the community may destroy the privilege. **Second, all members of the community must share a common legal interest in the shared communication.** RICE § 4:35. Delaware Rule of Evidence 502(b)(3), which sets out the State's version of the community-of-interest privilege, incorporates both requirements (that the clients'

separate attorneys share information and that the clients have a common legal interest):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.

DEL. R. EVID. 502(b)(3).

The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow *attorneys* to coordinate their clients' criminal defense strategies. *See Chahoon v. Commw.*, 62 Va. 822, 62 Va. 1036, 21 Gratt. 822, 1871 WL 4931, at *11 (Va. 1871). Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a *post hoc* justification for a client's impermissible disclosures. **The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when *attorneys*, not clients, decide to share information in order to coordinate legal strategies.**

Similarly, the congruence-of-legal-interests requirement ensures that the privilege is not misused to permit unnecessary information sharing. In a leading case, a District Court in South Carolina explained the contours of the requirement:

> A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.

Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974).

* * *

> We conclude with two points of caution. **First, the privilege only applies when clients are represented by separate counsel. Thus, it is largely inapplicable to disputes like this one that revolve around corporate family members' use of common attorneys (namely, centralized in-house counsel).** Second, while the Restatement (confusingly) uses the term "common interest" to describe the congruence of the parties' interests in both co-client and community-of-interest situations, the concepts are not the same. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(1) ("If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that . . . relates to matters of common interest is privileged as against third persons."), *with id.* § 76(1) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client . . . is privileged as against third persons."); *cf. id.* § 76 cmt. e & Reporter's Note cmt. b (explaining that co-client and community-of-interest situations differ). In particular, because co-clients agree to share all information related to the matter of common interest with each other and to employ the same attorney, their legal interests must be identical (or nearly so) in order that an attorney can represent them all with the candor, vigor, and loyalty that our ethics require. *See Ogden*, 202 F.3d at 461. In the community-of-interest context, on the other hand, because the clients have separate attorneys, courts can afford to relax the degree to which clients' interests must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer.

Teleglobe Communs. Corp. v. BCE, Inc., 493 F.3d 345, 364-366 (3d Cir. 2007) (internal modifications omitted; italicized emphasis original; bolded emphasis supplied).

In camera review of the emails at issue here establishes that, with no material exceptions,[1] the communications were not shared between an Aequitas attorney and an attorney for the individual defendants. As such, the individual defendants have not established that the joint defense privilege attached at any time to any of the communications for which the individual defendants seek

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[1] Three of the emails at issue are emails between Bob Holmen and Brian Oliver that contain forwarded emails between Brian Oliver and Brian Oliver's personal attorney. *See* LD00499191; LD00499726; LD00504507. These emails strictly relate to Brian Oliver's engagement of his attorney and their arrangement, and not to defense strategy. Even if the court were to consider these emails to be between attorneys, they would not be protected by attorney-client privilege or work product doctrine. *Stanley v. Bayer Healthcare LLC*, No. 11cv862–IEG (BLM), 2011 WL 5569761, at *4 (S.D. Cal. Nov. 16, 2011).

protection. *See id.* at 365 ("the privilege only applies when clients are represented by separate counsel. Thus, it is largely inapplicable to disputes like this one that revolve around corporate family members' use of common attorneys (namely, centralized in-house counsel)").

Because the communications at issue were never subject to the joint defense privilege, I need not consider the parties' proffered arguments as to whether the privilege was at any material time waived. The individual defendants' motion for protective order is DENIED.

Dated this 7th day of July, 2017.

Honorable Paul Papak
United States Magistrate Judge