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UNITED STATES DISTRICT COURT
 DISTRICT OF OREGON
 PORTLAND DIVISION

SECURITIES AND EXCHANGE
 COMMISSION,

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

Plaintiff,

v.

**INDIVIDUAL DEFENDANTS’
 OBJECTIONS TO THE JULY 7, 2017
 OPINION AND ORDER OF THE
 MAGISTRATE JUDGE**

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

**PURSUANT TO 28 U.S.C. § 636 AND
 FED. R. CIV. P. 72(A)**

(ORAL ARGUMENT REQUESTED)

Defendants.

OBJECTI



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Attorneys for Defendant Brian A. Oliver

I. INTRODUCTION

Pursuant to 28 U.S.C. § 636(b) and Rule 72(a) of the Federal Rules of Civil Procedure, individual Defendants Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (the "Individuals") object to Magistrate Judge Papak's July 7, 2017 Opinion and Order (the "Opinion & Order") (ECF No. 470), which denied the Individuals' Motion for Protective Order and Memorandum of Law in Support Thereof (the "Motion") (ECF No. 428). The Individuals are attempting to prevent communications protected by the joint defense privilege from being produced to U.S. Securities and Exchange Commission ("SEC") against their wishes. In denying the Motion that would have protected these privileged communications, the Opinion & Order ignored Ninth Circuit precedent in favor of a Third Circuit standard that neither the Individuals nor the SEC espoused. The Opinion & Order is thus clearly erroneous and contrary to law, and therefore either the Motion should be granted, or alternatively it should be remanded for further proceedings pursuant to the correct Ninth Circuit standard.

II. BACKGROUND

A. Events Leading to the Individuals' Motion for Protective Order

Until shortly before the Receiver's appointment in this case, the Individuals were executives at Aequitas, a group of affiliated investment companies. *See* Answer (ECF No. 169) ¶ 12; Answer (ECF No. 170) ¶ 13; Answer (ECF No. 438) ¶ 14. In early 2016, at the recommendation of then Aequitas general counsel, Mr. Robert Holmen, and Aequitas outside counsel, Sidley Austen LLP ("Sidley"), each of the Individuals retained personal counsel in connection with an SEC investigation concerning Aequitas (together with this litigation, the "SEC Matter"). *See* Robertson Decl. Exs. D, E (ECF No. 429); Fagel Decl. (ECF No. 430) ¶ 4; Raissi Decl. (ECF No. 431) ¶ 4; Sprague Decl. (ECF No. 432) ¶ 5. Through their personal

counsel, the Individuals entered into an oral agreement with each other and with counsel for Aequitas, including Sidley and Mr. Holmen, regarding their common interest in responding to the SEC Matter (the "Joint Defense Agreement"), and had communications pursuant to that common interest that they understood to be confidential. *See* Fagel Decl. ¶¶ 7, 10; Raissi Decl. ¶¶ 7, 9; Sprague Decl. ¶¶ 5-6. In February 2016, Pepper Hamilton LLP ("Pepper") replaced Sidley as counsel for Aequitas, and took its place as a party to the Joint Defense Agreement. *See* Fagel Decl. ¶ 8.

The SEC filed this action in March 2016, after which a Receiver was appointed for Aequitas. *See* Stipulated Interim Order Appointing Receiver (ECF No. 30). The Receiver subsequently agreed to produce additional materials that the SEC had requested during its investigation, and informed Mr. Jesenik's counsel that the Receiver intended to waive Aequitas' corporate attorney-client privileges. *See* Fagel Decl. ¶ 11. Counsel for the Individuals objected to the waiver insofar as the Receiver was not authorized to waive the Individuals' *personal* privileges, and requested the opportunity to review all documents that could implicate such privileges before they were produced to the SEC. *See id.* Following their review, the Individuals submitted privilege logs to the Receiver and the SEC identifying communications they assert are privileged, including as joint defense communications. Robertson Decl. ¶¶ 4-5.

Though the SEC agreed not to challenge the Individuals' privilege assertions regarding joint defense communications concerning the SEC Matter on which the Individuals' personal attorneys were copied, it disputed whether communications on which the Individuals' personal counsel were not copied were protected by the Individuals' joint defense privilege. *Id.* ¶ 12. This is despite the fact that all but one of the communications in dispute were either sent to or

originated from Mr. Holmen, who the SEC now does not dispute was a party to the Joint Defense Agreement. *See* SEC Opposition (ECF No. 440) at 3.

B. The Individuals' Motion for Protective Order

The Individuals' Motion sought a protective order regarding the communications the SEC did not concede were in furtherance of the Joint Defense Agreement. The Individuals' Motion provided legal analysis for why the communications at issue were privileged, including an analysis of relevant Ninth Circuit precedent establishing that the joint defense privilege covers not only communications from one attorney to another, but also communications from one party to the attorney for another party. *See* Motion at 9-10. The Motion furthermore provided information on the regular communications Mr. Holmen had with the Individuals regarding the SEC Matter in his capacity as Aequitas' in-house counsel and a party to the Joint Defense Agreement. *Id.* at 10-11.

In its Opposition to the Motion, the SEC explicitly stated that it "has not, and does not" take the position "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." SEC Opposition at 7. Rather, the SEC acknowledged that "the case law makes clear" that whether a communication is "made in furtherance of the joint defense effort" determines if it is "protected under the joint defense privilege." *Id.*

C. Magistrate Judge Papak's July 7, 2017 Opinion and Order

Magistrate Judge Papak denied the Motion in its entirety by an Opinion & Order issued on July 7, 2017. Opinion & Order at 7. In the Opinion & Order the majority of the Discussion section is a quotation from a Third Circuit case, *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 353 (3d Cir. 2007), *as amended* (Oct. 12, 2007). Opinion & Order at 4-6. The Opinion & Order

goes on to conclude that, contrary to the briefing by both the Individuals and the SEC, because "the communications were not shared between an Aequitas attorney and an attorney for the individual defendants," the Individuals did not establish "that the joint defense privilege attached at any time to any of the communications." *Id.* at 6. Critically, the Opinion & Order does not address the relevant Ninth Circuit precedent that the Individuals' Motion cited, which establishes that the joint defense privilege is not limited to communications between attorneys. Nor does the Opinion & Order discuss why the Third Circuit's *Teleglobe* standard should be applied, rather than the legal standard used by the Ninth and other Circuits. *See supra* Part III.

III. STANDARD OF REVIEW

A District Judge shall "modify or set aside any part of the order that is clearly erroneous or is contrary to law" when reviewing such an order on a non-dispositive matter. Fed. R. Civ. P. 72(a).¹ A "finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Woody*, 652 F. App'x 519, 520 (9th Cir. 2016) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).² "A decision is contrary to law if it applies an incorrect legal standard or fails to consider an element of the applicable standard." *Lifestyle Ventures, LLC v. Cty. of Clackamas*, No. 3:15-CV-01291-SB, 2017 WL 384030, at *1 (D. Or. Jan. 26, 2017) (quoting *Na Pali Haweo Community Ass'n v. Grande*, 252 F.R.D. 672, 674 (D. Haw. 2008)).

¹ The Court also has the discretion to make a *de novo* determination of a Magistrate Judge's opinion and order denying a motion for protective order. *Rapid Funding Group, Inc. v. Keybank Nat. Ass'n*, No. 2008 WL 4681611 *1 (D. Or. Oct. 22, 2008).

² Internal quotation marks are omitted throughout.

IV. ARGUMENT

It was clear error for Magistrate Judge Papak to apply the Third Circuit's *Teleglobe* standard for determining whether the communications at issue were protected by the joint defense privilege, rather than using the standard required by controlling Ninth Circuit precedent. Under the Ninth Circuit standard—the same standard used by many Circuits that have addressed this issue—communications to or from one party (here, one of the Individuals) to or from the attorney of another party (here, Mr. Holmen, as an attorney for Aequitas), are protected by the joint defense privilege so long as the communications were made in furtherance of the parties' joint defense agreement.

As set forth in the Motion, Ninth Circuit precedent holds that a "joint defense agreement establishes an implied attorney-client relationship" among the members to the agreement. *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). Thus, the "joint defense privilege...protects not only the confidentiality of communications passing from a party to his...attorney *but also from one party to the attorney for another party.*" *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (emphasis added) (quoting *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (holding that "[n]either is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney")); *see also United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005)).³ That the joint defense privilege protects communications from one party to the attorney of another party is so well established in the Ninth Circuit that it has been described as an

³ *Cf.* Or. Rev. Stat. Ann. § 40.225(2) ("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 . . . [b]y the client *or* the client's lawyer *to a lawyer representing another in a matter of common interest.*" (emphasis added)).

uncontroversial premise. *Waymo LLC v. Uber Techs., Inc.*, 319 F.R.D. 284, 289 (N.D. Cal. 2017).

The only two Ninth Circuit cases to cite *Teleglobe* (of which counsel are aware)⁴ do so, not for the proposition that the joint defense privilege covers only communications between attorneys, but for the proposition that former co-clients who had the same attorney have the power to waive privilege over their communications with that attorney. See *In re Pac. Pictures Corp.*, 679 F.3d 1121, n.6 (9th Cir. 2012); *Gonzalez*, 669 F.3d at 982. That is the opposite of the situation here, where the Individuals were represented by separate counsel at the time of the relevant communications with Mr. Holmen, in-house counsel for Aequitas. Fagel Decl. ¶ 7; Raissi Decl. ¶ 7; Sprague Decl. ¶¶ 5-6. In fact, in *Gonzalez*, the Ninth Circuit held that the *Teleglobe* standard is inapposite for situations like this where parties did not have the same counsel. *Gonzalez*, 669 F.3d at 982.

In applying the *Teleglobe* standard, the Opinion & Order ignored controlling Ninth Circuit precedent that the joint defense privilege is not limited to communications between lawyers. The Motion cited this precedent, and the SEC explicitly did not dispute it. The Opinion & Order's use of *Teleglobe* furthermore places it at odds with significant Circuit precedent, including the precedent in this Circuit. As such, the Opinion & Order is both clearly erroneous and contrary to law.

⁴ The only District of Oregon case to cite *Teleglobe* (of which counsel are aware) does so to analyze an "attorney's continuing duty to maintain client secrets and confidences against joint clients even if the attorney fails to follow the proper course of withdrawal." *Vanguard Prods. Group v. Merch. Techs., Inc.*, 3:07-cv-01405-BR, 2009 U.S. Dist. LEXIS 7306 at 19-20 (D. Or. Jan. 16, 2009).

V. CONCLUSION

The Individuals respectfully request that Magistrate Judge Papak's July 7, 2017 Opinion & Order be vacated, and that the Court grant the Individuals' Motion for Protective Order. Alternatively, the Individuals request that the Opinion & Order be vacated and that the Motion be remanded for further proceedings pursuant to the correct Ninth Circuit standard.

DATED: July 21, 2017

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DATED: July 21, 2017

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LR 11-1(D)(2) CERTIFICATION

I hereby attest that all other signatories listed, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing.

/s/ Peter H. White

PETER H. WHITE (*Pro Hac Vice*)