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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 RESPONSE TO INDIVIDUAL DEFENDANTS' OBJECTIONS TO THE JULY 7, 2017 OPINION AND ORDER OF THE MAGISTRATE JUDGE

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I. INTRODUCTION

Plaintiff United States Securities and Exchange Commission ("Commission" or "SEC") respectfully submits this Response to the Individual Defendants' Objections to the July 7, 2017 Opinion and Order of the Magistrate Judge (ECF 479) ("Objection").[1]

On July 7, 2017, Judge Papak issued his Opinion and Order (ECF 470) ("Opinion") on the Individual Defendants' Motion for Protective Order (ECF 428), which sought to prevent disclosure of about 200 emails between the Defendants and Robert Holmen, the former in-house counsel of Aequitas, that were exchanged after Defendants had all retained their own counsel and entered into a joint defense arrangement. In contrast to many other emails which are not at issue here, none of the disputed emails copied Defendants' counsel. The in-house counsel, Mr. Holmen, fully aware of these facts, reviewed the disputed emails and declared that they were not subject to the joint defense arrangement.

Judge Papak "conducted an *in camera* review of the communications at issue" and concluded that they "were never subject to the joint defense privilege." *Id*. at 2, 7. Defendants assert that is was "clear error" for Judge Papak to apply Third Circuit authority "rather than using the standard required by controlling Ninth Circuit precedent." Objection at 5. But the Ninth Circuit authority Defendants' Objection cites as "controlling" is inapposite, and the language they rely on is dicta. Given the lack of binding Ninth Circuit precedent, it was appropriate and reasonable for Judge Papak to rely on authority setting forth the "contours of the joint defense privilege," and to conclude, after an *in camera* review, that emails not copying Defendants' own attorneys were not subject to the joint defense privilege. His decision is neither clearly erroneous nor contrary to law, and Defendants' reliance on dicta cannot serve as a basis for finding otherwise. Defendants' Objection should be denied.

[1] The Individual Defendants are Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (hereafter, "Defendants").

II. FACTUAL RECORD BEFORE JUDGE PAPAK

The dispute concerns whether the joint defense privilege applies to about 200 emails between Defendants and Aequitas's former in-house counsel, Mr. Holmen, that were sent after a joint defense arrangement to respond to the SEC's investigation was entered into, but that do not copy the counsel Defendants retained in connection with the investigation.[2] *See* Objection at 1-2 (and evidence cited therein). Mr. Holmen was a party to all but one of these emails and declares under penalty of perjury that he did not intend for any of the communications on which he was copied "to be protected pursuant to a joint defense or common interest agreement," and that he does not believe that these communications "were made in the course of a joint defense effort or designed to further a joint defense effort." Decl. of Robert P. Holmen in Support of SEC's Opp. to Ind. Defs.' Mot. for Protective Order (ECF 442) ("Holman Decl.") ¶ 13. In contrast, none of the three Defendants submitted a declaration stating that they believed the emails on their privilege logs are subject to the joint defense arrangement. Neither did their attorneys.

Thus, Judge Papak had before him the bare assertions in three privilege logs and, in contrast, the above referenced statements under penalty of perjury from Mr. Holmen, who also declares that the disputed emails were just communications between him and officers of the company concerning the general affairs of the company. *Id*. ¶ 13(a)-(c).

III. ARGUMENT

A. There is No Controlling Ninth Circuit Precedent On This Issue

Defendants assert that it was "clear error for Magistrate Judge Papak to apply the Third Circuit's *Teleglobe* [*In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3rd Cir. 2007)], *as amended* (Oct. 12, 2007)] 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." Objection at 5. Not one of the four Ninth Circuit decisions cited in

[2] All but two of the disputed emails are identified on the Defendants' privilege logs. *See* Decl. of Jeffrey F. Robertson in Support of Ind. Defs.' Mot. for Projective Order (ECF 429) ¶¶ 7-9 & Exs. A-C. The remaining two are identified in Mr. Holmen's Declaration. Decl. of Robert P. Holmen in Support of SEC's Opp. to Ind. Defs.' Mot. for Protective Order (ECF 442) ¶ 13.

Defendants' Objection actually holds that a communication between a represented party who was part of a joint defense agreement was subject to a joint defense privilege, where the represented party's counsel was not included in the communication. And the language Defendants quote from the Ninth Circuit stating that such communications can be privileged is dicta. Indeed, in the one Ninth Circuit decision Defendants cite that does concern communications by a defendant without his counsel, *United States v. Austin*, 416 F.3d 1016 (9th Cir. 2005), the Ninth Circuit found that the district court's holding that the communications were not subject to the joint defense privilege was not clearly erroneous as a matter of law.

Thus, contrary to Defendants' assertion, there is no controlling Ninth Circuit precedent on the issue presented. Judge Papak therefore properly relied on "the . . . contours of the joint defense privilege" as recited at length in *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3rd Cir. 2007) ("*Teleglobe*"). Opinion (ECF 470) at 4. These contours include well accepted principles of the joint defense privilege directly relevant to this dispute. As noted in Judge Papak's decision, the joint defense privilege "was developed to allow *attorneys* to coordinate their clients' criminal defense strategies." Opinion (ECF 470) at 5 (citing *Teleglobe*, 493 F.3d at 364-366) (internal modifications omitted; italicized emphasis in original; bolded emphasis omitted). This "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." Opinion at 5 (citing *Teleglobe*, 493 F.3d at 364-366). And the joint defense privilege "is largely inapplicable to disputes like this one that revolve around corporate family members' use of common attorneys (namely, centralized in-house counsel)." Opinion at 6 (citing *Teleglobe*, 493 F.3d at 364-366).

Analysis of the four Ninth Circuit decisions cited by Defendants shows their inapplicability to the facts at issue here. First, Defendants' rely on dicta from the Ninth Circuit's decision in *United States v. Gonzales* stating that 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." Objection at 5 (emphasis by Defendants) (quoting *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). However, *Gonzales*, which was also cited by Judge Papak (*see* Opinion (ECF 470) at 3), concerned whether certain communications between *attorneys* for two co-defendants, "sometimes in the presence of the clients and sometimes not," were privileged pursuant to a joint defense agreement. *Gonzalez*, 669 F.3d at 979. The issue, which was remanded to the trial court for determination, concerned whether the communication had been made after the joint defense agreement may have ended. *Id*. at 981. The communications here involve Defendants who had hired personal counsel in connection with the SEC investigation but whose counsel were not included on the communications.

Second, Defendants cite *United States v. Austin* with no analysis, but *Austin* is not contrary to Judge Papak's Order, it supports it. *See* Objection at 5 (citing *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005)).[3] *Austin* concerned whether the joint defense privilege applied to statements made during discussions between inmates (who had entered into a written joint defense agreement) in their cells without their lawyers present. *See Austin*, 416 F.3d at 1019. The district court ruled that the statements were "not covered as confidential communications under the joint defense privilege." *Id*. Upon defendants' motion for reconsideration, the district court "explained that courts have generally held that the joint defense privilege does not cover conversations among defendants made outside counsel's presence" and ultimately found that "the joint defense privilege did not project the discussions in question because they were not made at an attorney's behest or for the purposes of seeking legal advice or communicating confidential work product." *Id*. On appeal, the Ninth Circuit dismissed for lack of jurisdiction based on, among other grounds, its conclusion that the district court's "decision is

[3] Defendants' pinpoint citation from *Austin* simply quotes the same language from *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) and *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) that Defendants cite elsewhere in their Objection.

not clearly erroneous as a matter of law . . . ." *Id*. at 1025. As with the district court's decision in *Austin*, Judge Papak's decision here is likewise not clearly erroneous.

Third, Defendants cite *United States v. Henke* for the proposition that "a 'joint defense agreement establishes an implied attorney-client relationship' among the members to the agreement." Objection at 5 (quoting *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000)). Judge Papak's Order does not hold otherwise, and Defendants cite nothing from his Opinion to the contrary. Regardless, *Henke* concerned a request for a new trial based on a conflict of interest that arose when defense counsel acquired privilege information as part of a joint defense agreement, an issue far afield from those here. *See Henke*, 222 F.3d at 635, 637.

Finally, Defendants cite *In re Pacific Pictures Corp*. 679 F.3d 1121 (9th Cir. 2012). *See* Objection at 6. That decision, also cited by Judge Papak (*see* Opinion (ECF 470) at 4), concerned whether an attorney waived the attorney-client privilege by voluntarily disclosing privileged documents to the federal government. The Ninth Circuit found that there was no joint defense agreement between the attorney and the government, and for that and other reasons held that the privilege had been waived. *Id*. at 1129-1130. There is no dispute here as the existence of a joint defense arrangement, and no issue regarding waiver.

Defendants remaining cases are not Ninth Circuit decisions; nor are their holdings on point. Defendants cite a Second Circuit decision for the proposition 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." Objection at 5 (quoting *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989)). *Schwimmer* is not controlling Ninth Circuit precedent. Regardless, the facts are inapposite. The Second Circuit in *Schwimmer* found that statements by a defendant to an accountant hired by one defendant's attorney to serve the co-defendants' joint interests were protected by the joint defense privilege. The defendant was directed by his attorney to speak freely with the accountant and was told that any such conversations would be

privileged. *Schwimmer*, 892 F.2d at 244. Mr. Holmen, the in-house counsel for Aequitas, was not hired by defense counsel to represent the Defendants' joint interests.

Defendants also erroneously rely on a decision from the Northern District of California for the notion"[t]hat 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 *uncontroversial premise*." Objection at 5-6 (citing *Waymo LLC v. Uber Techs., Inc.*, 319 F.R.D. 284, 289 (N.D. Cal. 2017) (emphasis by Defendants). Defendants' pinpoint citation from *Waymo* quotes the *same* dicta from *Gonzalez* and *Austin* referenced above. And the case is inapposite. *Waymo* involved a third party's objection to Uber's production of a privilege log based on the third party's claim that Uber, as a signatory to a joint defense agreement, became his personal lawyers, and that the Fifth Amendment prohibited Uber from revealing information through production of a privilege log. *See Waymo LLC*, 319 F.R.D. at 288. The court found that the third party had not carried his burden of showing any privilege, including one based on the joint defense agreement, justifying his requested relief. *Id*. at 292. Defendants here have produced privilege logs. The issue is whether the emails on their logs – communications on which their attorneys are not copied – are covered by the joint defense arrangement.[4]

B. Applying Defendants' Requested Standard Would Not Change the Outcome

Even if the dicta Defendants rely on from *Gonzales* and *Austin* did apply, it would simply mean that the joint defense privilege *could* (not automatically *does*) apply to the disputed emails. But the privilege would still only apply if the facts supported such a conclusion, and here they do not. First, Defendants and Mr. Holmen never had a meeting of the minds that the joint defense arrangement was broad enough to cover emails that did *not* copy Defendants' counsel. Holmen Decl. (ECF 442) ¶ 12 (stating Mr. Holmen's belief that "all communications [he] had in furtherance of a joint strategy included counsel for the Individual Defendants on such

[4] Defendants also cite a case from this Court that addressed an attorney's continuing duty to maintain client confidences against joint clients, which is not at issue here. *See* Objection at 6, n. 4. (*citing Vanguard Prods. Group v. Merch. Techs*. 3:07-cv-01405-BR, 2009 U.S. Dist. LEXIS 7306 at 19-20 (D. Or. Jan. 16, 2009)).

communications."). This lack of agreement precludes even the *possibility* that emails not copying Defendant's counsel were subject to the joint defense privilege. *See Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 285, 287 (4th Cir. 2010) (Noting "[t]he common interest doctrine requires a meeting of the minds" and "[w]hile agreement need not assume a particular form, an agreement there must be."). In addition, Mr. Holmen does not believe that the communications at issue "were made in the course of a joint defense effort or designed to further a joint defense effort." Holmen Decl. (ECF 442) ¶ 13. And notably, neither Defendants nor their attorneys submitted a declaration rebutting Mr. Holmen's statement. And as Defendants concede, the joint defense privilege only applies to communications "made in the course of a joint defense effort" that were "designed to further the joint defense effort." *See* Ind. Defs.' Mot. for Protective Order (ECF 428) at 6 (citing *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685 (S.D. Ca. 1996)).

IV. CONCLUSION

As noted by the authority cited in Judge Papak's Opinion, Defendants here are attempting to abuse the joint defense privilege and supplant the disclosure rule by asserting the joint defense privilege over emails with centralized in-house counsel that do not copy their own counsel. Given the lack of any controlling precedent from the Ninth Circuit, Judge Papak's reliance on *Teleglobe* and the general principles recited in it is neither clearly erroneous nor contrary to law, and in fact is well supported by the record before him. This Court should thus deny the Individual Defendants' Objections.

Dated: August 1, 2017

Respectfully submitted,

/s/Andrew J. Hefty
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SECURITIES AND EXCHANGE COMMISSION