JOHN M. POTTER (Bar No. 165843)
johnpotter@quinnemanuel.com
KARIN KRAMER (Bar No. 87346)
karinkramer@quinnemanuel.com
JAMES R. ASPERGER (Bar No. 83188)
jimasperger@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

LINDA M. INSCOE (Bar No. 125194)
linda.inscoe@lw2.com
MARCY C. PRIEDEMAN (Bar No. 116680)
marcy.priedeman@lw.com
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 391-0600
Facsimile: (415) 395-8095

Attorneys for Defendants Bio-Rad Laboratories, Inc.; Norman Schwartz; Louis Drapeau; Alice N. Schwartz; Albert J. Hillman; Deborah J. Neff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SANFORD S. WADLER, an individual,

Plaintiff,

v.

BIO RAD LABORATORIES, INC., a Delaware corporation; Norman Schwartz; Louis Drapeau; Alice N. Schwartz; Albert J. Hillman; Deborah J. Neff,

Defendants.

Case No. 3:15-CV-2356 JCS

BIO-RAD DEFENDANTS' NOTICE OF MOTION AND MOTION TO EXCLUDE PROTECTED INFORMATION FROM THE TRIAL OF THIS ACTION

Hearing Date: December 15, 2016
Time: 10:30 a.m.
Place: Courtroom G, 15th Floor
Judge: The Honorable Joseph C. Spero

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on December 15, 2016, at 10:30 a.m., or soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom G—15th Floor, at 450 Golden Gate Ave., San Francisco, California, 94102, before the Honorable Joseph C. Spero, all Defendants in this action, including Bio-Rad Laboratories, Inc., Norman Schwartz, Alice Schwartz, Louis Drapeau, Albert Hillman, and Deborah Neff (together, "Bio-Rad") will and hereby do move for an order requiring Plaintiff to present a specific offer of all proof and evidence he will rely on at trial so that it can be determined whether this case can be tried without implicating Bio-Rad's privileged and confidential information and, if so, what constraints and protections must be put in place. Bio-Rad further moves for an order precluding Plaintiff from introducing the following categories of evidence at trial: (i) all testimony of Plaintiff that may be based on information he learned in the course of his service as Bio-Rad's general counsel; (ii) all testimony of other lawyers regarding Bio-Rad's confidential information; (iii) any reference to or introduction into evidence of Bio-Rad's attorney-client privileged information; and (iv) all questions and responses likely to elicit attorney-client privileged information from any witness and/or confidential information from any lawyer-witness. This motion is brought on the grounds that such evidence is protected from disclosure by the attorney-client privilege and/or Plaintiff's duty of confidentiality pursuant to California Business & Professions Code Section 6068(e) and California Rule of Professional Conduct 3-100.

This motion is based on the this notice, the accompanying memorandum of points and authorities, all other papers submitted in support of the Motion, the records in this case, any additional evidence and argument that may be presented at or before the hearings, and all other matters of which the Court may take judicial notice.

DATED: October 21, 2016

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ John M. Potter
John M. Potter
Attorneys for Defendants Bio-Rad Laboratories, Inc.; Norman Schwartz; Louis Drapeau; Alice N. Schwartz; Albert J. Hillman; and Deborah J. Neff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Miscellaneous

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

This case raises novel and important privilege and confidentiality issues that Bio-Rad respectfully requests the Court to resolve before trial. Because Plaintiff Sanford Wadler is a former General Counsel suing his former client, Defendant Bio-Rad Laboratories, Inc., this case has presented problems arising from the attorney-client relationship since Day One. Anticipating that this relationship would pose significant issues -- in particular, myriad disputes over what is privileged and/or confidential -- the Court encouraged a sensible approach: a Rule 502 agreement that permitted the parties to produce documents and provide testimony freely, without concern that doing so during discovery would lead to waiver. That approach worked well during the discovery phase. But with trial approaching, the parties and the Court now must confront how this case can be tried given Plaintiff's ethical and statutory duties as a lawyer in California, and Bio-Rad's right to both preserve the privileged and confidential status of its documents and information and fully defend itself in the litigation. The result compelled by applicable law and ethical rules is that Bio-Rad is not required to suffer disclosure of its privileged and confidential information.

California has the strongest requirements in the nation related to an attorney's duty to maintain client confidences. Where most other states have adopted Model Rule of Professional Responsibility 1.6, which allows lawyers to breach privilege for multiple reasons, California has not done so. California's Rule of Professional Conduct 3-100 is far more restrictive, permitting a lawyer to breach privilege in only one instance: where disclosure is necessary to prevent the client from committing a crime "that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." California goes even further, imposing a separate statutory duty of confidentiality, which requires an attorney to preserve the client's secrets "*at every peril to himself . . .*" Cal. Bus. & Prof. Code § 6068(e). Layered on top of the California provisions, Federal Rule of Evidence 501 recognizes the attorney-client privilege as a ground to exclude evidence at trial. It is against this backdrop that this motion must be determined.

Discovery has made clear that Plaintiff's claims and Defendants' defenses are inextricably intertwined with Bio-Rad's privileged and confidential information. Besides the Plaintiff-General Counsel himself, several of Defendants' key witnesses are outside counsel who were involved in the Foreign Corrupt Practices Act ("FCPA") issues at the heart of the case, and company lawyers who worked closely with Plaintiff and advised company executives on the ancillary matters that Mr. Wadler has raised to try to justify the pattern of conduct that led to his termination. The Court will need to rule on privilege and confidentiality with respect to virtually every document in the case, and also will need to make those same calls on a witness-by-witness and question-by-question basis. The case is to be tried to a jury, and, throughout its history, has generated interest by the press. Without a doubt, information Bio-Rad understood—with good reason—would remain private, will become public. Once public, there will be no way to limit its dissemination. It will be available to an audience that includes other parties in litigation against it, competitors, and others who may want to use it adverse to Bio-Rad in one way or another. Defendants are not aware of a single reported case where a defendant has been forced to waive its privilege and forfeit its confidential information because its former General Counsel put the information at issue. California law would seem to preclude that result. As the California Supreme Court stated in *General Dynamics v. Superior Court*, "there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporations that in itself precludes the maintenance of a retaliatory discharge claim, ***provided it can be established without breaching the attorney client privilege or unduly endangering the values lying at the heart of the professional relationship***." 7 Cal. 4th 1164, 1170 (Cal. 1994) (emphasis added).

Based on Bio-Rad's privilege and confidentiality rights, the following categories of evidence, at a minimum, should not be admitted at trial:

- all testimony of Plaintiff 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; and

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

In addition, given the admonition of the California Supreme Court in *General Dynamics*, and the important privilege and confidentiality issues at stake, Bio-Rad respectfully requests the Court to direct Plaintiff to present a specific offer of all proof and evidence he will rely on at trial so that a determination can be made in advance of trial as to whether this case can be tried without invading Bio-Rad's rights and, if so, what constraints and protections must be put in place. This order is necessary to uphold California's decision to foster a legal system anchored by a rock solid protection of the attorney-client relationship. It is also necessary to preclude the prejudice that would flow to Bio-Rad should it be forced continually to assert privilege in front of the jury.

The law firmly supports Bio-Rad's right to protection of its privileged and confidential information. What is not clear under the law is how this trial can proceed to ensure such protection. Although no case has squarely decided the issue, cases that have addressed related issues, or opined on the issue in the context of pleading motions as opposed to trial, have expressed the view that in some cases, any right of a company attorney to sue its former client/employer must yield to the statutory and ethical duties assumed by those who are privileged to practice law. It remains an open question as to whether Plaintiff would have a legally viable case following exclusion of privileged and confidential information, but that prospect cannot diminish Bio-Rad's rights under the attorney-client privilege and Mr. Wadler's corresponding obligations under California Business & Professions Code Section 6068(e) and Rule 3-100.

FACTUAL BACKGROUND

The Underlying Dispute. Mr. Wadler claims he was terminated for reporting FCPA violations in China. The uncontroverted evidence is that the company thoroughly investigated all claims of FCPA issues it received related to China and elsewhere, reported them to the government, and hired highly respected and experienced outside counsel (Steptoe & Johnson and Davis, Polk & Wardwell) to investigate. The government did not find the allegations regarding corruption in China to have merit. The evidence also will show that Mr. Wadler set the company up so he could make a "whistleblower" claim if he were fired for misfeasance. In the months that

passed between the time he allegedly reported violations regarding China and when he finally was terminated, he engaged in conduct so erratic and abusive he alienated every other senior executive, leaving the CEO no choice but to fire him. Those who worked with him breathed a collective sigh of relief when they learned he was gone.

Relevant Procedural History. Plaintiff filed his complaint against Bio-Rad in May 2015. Plaintiff's complaint alleges, among other things, that he was wrongfully discharged from his employment as Bio-Rad's general counsel in violation of the anti-retaliation provisions of the Sarbanes-Oxley and the Dodd-Frank Acts. At the Court's suggestion, the parties entered into a Stipulated Order Pursuant to Federal Rule of Evidence 502(d) Re: Non-Waiver of Attorney-Client Privilege and Work Product Protection in Production of Documents in Discovery ("502 Agreement"), which was entered by the Court on November 19, 2015. Dkt. No. 56. Pursuant to the 502 Agreement, the parties agreed to exchange documents and information that would otherwise be protected from discovery by the attorney-client and work product privileges. *Id.* The parties agreed that the production of such documents and information would not constitute a privilege waiver, and reserved the right to object to the admissibility of any document at trial, including on the grounds that such documents or information were privileged. *Id*. Fulsome discovery proceeded on that basis.

ARGUMENT

I. BIO-RAD'S PROTECTED INFORMATION MAY NOT BE ORDERED DISCLOSED IN THIS LAWSUIT

A. California Law Precludes Disclosure Of Any Client Confidential Information The Attorney Learns

Lawyer-client confidentiality in California is mandated by two substantive provisions: Rule of Professional Conduct 3-100 and Business & Professions Code § 6068. Together, they reinforce California's decision to promote an attorney-client relationship where client confidences are protected in the face of every peril but one: threatened criminal activity that could lead to death or serious bodily harm.

Rule 3-100, which departs significantly from the Model Rule 1.6 adopted by many other states, is the most stringent rule of client confidentiality in the country. *See* American Law Institute Continuing Legal Education, *Attorneys as SEC Whistleblowers: Can an Attorney Blow the Whistle on a Client and Get a Monetary Award?*, TSVJ25 ALI-CLE 11 at 10-15 (relevant pages attached hereto as Exhibit 1). Even though Rule 3-100 permits confidentiality to be breached in the one narrow circumstance mentioned above, even in that instance, it counsels lawyers to try other measures first before violating their duty of confidentiality. In full, Rule 3-100 states:

> **Rule 3-100 Confidential Information of a Client**
>
> (A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
>
> (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that 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.
>
> (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
>
> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
>
> (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
>
> (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
>
> (E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Rule 3-100 references and is reinforced by Business & Professions Code Section 6068(e), which imposes a statutory duty on lawyers "to maintain inviolate the confidence, and at every peril

to himself or herself to preserve the secrets, of his or her client."[1] Bus. & Prof. Code § 6068(e). This duty of confidentiality is **broader** than the attorney client privilege "and protects virtually everything the lawyer knows about the client's matter regardless of the source of the information." *Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 151 (Cal. Ct. App. 2013); *see also Dietz v. Meisenheimer & Herron*, 177 Cal. App. 4th 771, 786 (Cal. Ct. App. 2009). The California State Bar Committee on Professional Responsibility and Conduct explained:

> This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. Any information gained in the professional relationship that the client has requested be held inviolate **or the disclosure of which would be embarrassing or would likely be detrimental to the client is a secret which must be preserved.**

Cal. State Bar Formal Op. 1981-58 (internal quotations and citations omitted)(emphasis added); This principle is expressly recognized under California decisional law. As the Court of Appeal stated in *Chubb & Son v. Superior Court*, 228 Cal. App. 4th 1094, 1104 (Cal. Ct. App. 2014), "these confidences may or may not be subject to the attorney-client privilege, but must nonetheless be kept confidential by the attorney so as not to cause the client or former client embarrassment or harm."

California's rules and statutes regarding attorney conduct apply here. Federal courts look to state ethical rules to evaluate the ethical conduct of attorneys. *See e.g. U.S. v. Quest Diagnostics, Inc.*, 734 F.3d 154, 163 (2d Cir. 2013); *see also U.S. v. Lopez,* 4 F.3d 1455, 1458 (9th Cir. 1993) (applying California rules of professional conduct to federal prosecutors). The United States Supreme Court has mandated this result as well: "In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Nothing in the Sarbanes-Oxley or Dodd-Frank Acts evidences a clear legislative intent to preempt

---

[1] Plaintiff practiced in California for decades but never took the California bar exam or became a member of the bar. Nevertheless, as a registered in-house counsel with the State Bar of California, he is subject to California's ethical rules and statutes. Complaint at ¶ 3; Cal. Rules of Court 9.46(c)(6) (an attorney registered as in-house counsel in California must "[a]bide by all of the laws and rules that govern members of the State Bar of California").

California's ethical and statutory rules regulating an attorney's duty of confidentiality when an attorney brings claims for retaliatory discharge under those Acts. *See* 15 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) (stating "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."); *see also, e.g., Quest*, 734 F.3d at 163 (False Claims Act does not preempt state ethical rules); *see also U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 Fed. Appx. 373, 377-78, n.5 , 7 (5th Cir. 2016) (same).

B. Federal Common Law Mandates Exclusion of Information Protected By The Attorney-Client Privilege

Federal Rule of Evidence 501 applies the common law of privilege to federal proceedings. The attorney-client privilege is, of course, a recognized ground for exclusion of evidence under federal law.

The attorney-client privilege limits "the power of a court to compel disclosure of attorney-client communications or otherwise admit the communications themselves into evidence." *United States v. Stepney*, 246 F. Supp. 2d 1069, 1073 (N.D. Cal. 2003). The privilege "protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney's advice in response to such disclosures." *U.S. v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). It "applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation." *Id.* The fact that protected information may be necessary to a fair trial is irrelevant to the question of whether or not the attorney-client privilege applies. *See Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 12 (1st Cir. 1998) ("The fact that the allegedly privileged information may be necessary to permit Siedle plead his claim with the requisite specificity…is beside any pertinent point."); *see also General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1190 (Cal. 1994) (rejecting "any suggestion that the scope of the privilege should be diluted in the context of in-house counsel and their corporate clients.).

Accordingly, independent of the ethical duties of Plaintiff and the lawyer-witnesses to maintain inviolate Bio-Rad's confidential information, as an evidentiary matter the attorney-client privilege excludes the use of Bio-Rad's protected information at trial by any party, witness or counsel.

C. The Documents And Testimony Relevant To Plaintiff's Claims Are Bound Up With Bio-Rad's Privileged and Confidential Information

Mr. Wadler's effort to prove that he was fired for engaging in protected activity necessarily relies extensively on protected information, that is, information which should be excluded from trial under California ethical and statutory duties, or under the federal common law of attorney-client privilege. To prove retaliatory discharge[2] Plaintiff must establish that (i) he engaged in protected activity or conduct; (ii) Defendants knew or suspected that Plaintiff engaged in the protected activity; (iii) Plaintiff suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. *Van Asdale v. International Game Technology*, 577 F. 3d 989, 996 (9th Cir. 2009). To establish that he engaged in a protected activity, Plaintiff also must prove he had a subjective belief that Bio-Rad's activities violated the FCPA and that this belief was objectively reasonable. *Id*. at 1000.

Although Bio-Rad cannot predict every item of evidence or testimony Mr. Wadler may seek to use, and correspondingly, that Bio-Rad may need to use in defense, certain protected categories are sure to be implicated. These include: (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.

---

[2] Plaintiff has alleged that he was terminated for engaging in protected activity in violation of Sarbanes-Oxley (18 U.S.C. § 1514A), the Dodd-Frank Act (15 U.S.C. § 78u-6) and for wrongful termination in violation of public policy under California law. Because the elements of these three claims significantly overlap, this motion discusses them together. *See, e.g. Ott v. Fred Alger Mgmt., Inc.*, 11-cv-4418, 2012 WL 4767200, *4 (S.D.N.Y. Sept. 27, 2012); Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545 (May 25, 2011), at 18 n.41.

Because of the nature of the allegations made, and the fact that they are leveled by a company lawyer, those categories constitute most of the documents and much of the testimony in the case.

II. PLAINTIFF MUST DEMONSTRATE HOW THIS CASE CAN BE FAIRLY TRIED WITHOUT DISCLOSURE OF BIO-RAD'S PROTECTED INFORMATION

A. Although No Case Is Directly On Point, Courts Acknowledge that a Plaintiff May Not Proceed Where a Case Cannot Be Fairly Tried Without Protected Information

No reported decision has had to confront the issue presented by this case: how to ensure a fair trial for a case mired in documents and testimony entitled to protection from disclosure under California law. Courts that have addressed related issues have offered suggestions, but none has been forced to make the call. In light of the narrow circumstances presented by this case, which includes the strongest confidentiality law in the nation, a witness list thick with lawyers without whom this story cannot be accurately told, and the need for both Plaintiff and Defendants to rely on copious confidential information, Plaintiff should be required to demonstrate how a fair trial can be had without public disclosure of Bio-Rad's protected information.

A key case on the subject is *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th at 1164, in which the California Supreme Court recognized an inherent limitation on in-house counsel's ability to bring a claim for retaliatory discharge against his former employer. There, a former in-house attorney sued for wrongful termination in violation of public policy. *Id.* at 1171. On appeal from defendant's demurrer, the California Supreme Court declined to adopt a *per se* bar on retaliatory discharge claims brought by in-house counsel against their former employers; however, the Court held that such claims could be pursued only where the plaintiff's claim was capable of resolution without breaching client confidences. *Id.* at 1170; *see also Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451 (2001). The Court warned that "the in-house attorney who publicly expose the client's secrets will usually find no sanctuary in the courts." *General Dynamics*, 7 Cal. 4th at 1190. Except in rare instances where disclosure was explicitly permitted, "it is never the business of a lawyer to disclose publicly the secrets of a client." *Id.* For these reasons, "in those instances where the attorney-employee's retaliatory discharge claim is incapable of resolution without breaching the attorney-client privilege, the suit may not proceed."

Id. at 1170. The Court reversed the order granting the demurrer because, it opined, a determination that a case could not be resolved without breaching the privilege would rarely, if ever, be appropriate on demurrer. *Id.*

Some courts applying the principles set forth in *General Dynamic* have found dismissal is the only available remedy where plaintiff's claims triggered the disclosure of privileged information by a defendant. In *O'Melveny*, the court found that requiring a defendant to truncate its defense in order to maintain the privilege would "clearly" prejudice defendant by offering the factfinder only "a limited and distorted view of the facts underlying the lawsuit." 89 Cal. App. 4th at 463; *see also id.* at 461-2 (unlike plaintiff, whose claims can be "easily tested by pre-trial proceedings or by a motion for nonsuit," a defendant "does not have the same opportunity to test whether the charges can be defended without use of the Clients' Secrets"). The *O'Melveny* court reached this conclusion even though plaintiff maintained that the case did not require the disclosure of privileged information. *See also McDermott, Will & Emory v. Superior Court*, 83 Cal. App. 4th 378 (2000).

One court fashioned a balancing test to determine if dismissal was the appropriate result. In *Dietz v. Meissenheimer v. Herron*, the court applied the principles outlined in *General Dynamics* and *O'Melveny* to a dispute brought by a client's former outside counsel against its new counsel over the apportionment of a contingency fee between the two firms. 177 Cal. App. 4th 771 (Cal. Ct. App. 2009). Immediately prior to trial, defendant moved for a protective order on the grounds that it could not fully defend itself without disclosing client confidential information. Following an evidentiary hearing, the trial court dismissed plaintiff's fraud claim but found sufficient waivers of the attorney-client privilege to permit the remaining claims to be fairly prosecuted and defended. *Id*. at 785. In affirming the trial court's order, the appellate court outlined a four-factor test for determining whether a suit could proceed under *General Dynamics* and its progeny: (i) the evidence at issue is client's confidential information that the client maintains must remain confidential; (ii) the confidential information must be "highly material" to the defendants' defenses; (iii) the trial court cannot effectively use 'ad hoc measures from its

equitable arsenal,' so as to permit the action to proceed; and (iv) it would be fundamentally unfair to allow the action to proceed. *Id.* at 792-94.

The California Attorney General also addressed the issue in a case involving employees of state and local public entities. It opined that "whistleblower statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege." California Attorney General Opinion No. 00-1203, 84 Ops. Cal. Att. Gen. 71, 2001 WL 577741, *1 (May 23, 2001).[3]

Several federal courts have grappled with similar issues, but these cases arose either under 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. For example, in *Van Asdale*, the Ninth Circuit declined to apply confidentiality rules to adopt a *per se* bar against retaliatory discharge claims by in-house counsel under Sarbanes-Oxley. *Van Asdale*, 577 F.3d at 995-96; *accord Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 181-82 (3d Cir. 1997). Noting that, as a threshold matter, it was unclear to what extent that case would even require the disclosure of privileged information, the court held that any privileged information adduced at trial could be protected through use of the district court's "many equitable measures." *Van Asdale*, 577 F. 3d 989. at 995-96; *see also Carroll v. California ex rel California Comm'n on Teacher Credentialing*, 2013 WL 4482934 (E.D. Cal. 2013) (dismissal at pleading stage premature where it was "not clear to what extent the lawsuit would actually require disclosure of defendants' confidential information."). Importantly, however, *Van Asdale* arose in Nevada, which has adopted the more permissive Model Rule 1.6, which includes express exceptions to an attorney's duty of confidentiality not present under California law.

[3] The Attorney General's recitation of a particular provision of the California Whistleblower's Act was called into question by the court in *Carroll v. California ex rel. California Comm'n on Teacher Credentialing*, 13-cv-00249, 2013 WL 4482934 (E.D. Cal. 2013). However, that particular statute is inapplicable to the present dispute.

The only case Defendants have found addressing the use of privileged information to prosecute claims for retaliatory discharge at a **hearing** is *Willy v. Administrative Review Board*, 423 F.3d 483, 489 (5th Cir. 2005). In that case, the Fifth Circuit, again applying Model Rule 1.6 (which does not apply here), found the attorney-client privilege would not prevent an attorney's offensive use of privileged information in a claim for retaliatory discharge against a former employer or client *when the action is tried before an administrative law judge*. 423 F.3d at 489 (5th Cir. 2005). *Willy* not only fails to apply to this case because it was decided under Model Rule 1.6 rather than California law, but also it is inapposite on other grounds as well: the Court stated expressly that its holding would *not* apply in "a suit involving a jury and public proceedings." *Id.* at 489.

Even with the limitations imposed by the Court, *Willy's* determination that an attorney may offensively use a client's privileged information in pursuing a retaliatory discharge claim as an evidentiary matter is an outlier. When faced with a similar question arising under Massachusetts' ethical rules in the context of a motion to seal, the First Circuit held that an attorney is not permitted to offensively use privileged information to pursue claims against his or her client. *Siedle*, 147 F.3d at 11 ("We believe that the exception is designed to function only as a shield, not as a sword."). More importantly here, it cannot be squared with an attorney's statutory and ethical obligations to strictly maintain client confidences under California law.

While the questions of both how to fashion appropriate equitable protections and whether in this case effective protections can be designed at all are matters of first impression, the principles, ethical rule, and statute mandating an attorney's fidelity to his or her ethical duty of confidentiality are well-established. As a threshold matter, Bio-Rad respectfully submits that it is now up to Plaintiff to show how this case can proceed to trial without impinging on Bio-Rad's right to maintain the protected status of its information.

B. Bio-Rad Will Suffer True Prejudice If Its Protected Information Is Used In A Trial

Disclosure of private information has always been considered prejudicial, but it is exponentially more so today than it was in the past. Dissemination is swift and irreversible.

Disclosure leads to a permanent record accessible by anyone who types the word "Bio-Rad" into their search box.

Here, some of the prejudice is known and will be immediate. Like other public companies who make highly competitive bio-tech products and have a large portfolio of patents, Bio-Rad is engaged in litigation on a regular basis. At this moment, it has several active litigations, including two that are related to this litigation. In at least one of those cases, counsel has been fishing for information from this case to use in that case. Competitors, too, would be pleased to see Bio-Rad's secrets in the press and on the internet. And so on.

If anyone should be required to keep a company's private information private, certainly that rule should apply to the company's former General Counsel, who enjoyed over 20 years of employment and many millions of dollars in compensation and equity. Given the irrefutable facts that the only violations he claims to have reported related to China and that the government never found any merit to claimed FCPA violations in China, no policy related to preventing corruption is served by precluding Plaintiff from proceeding to trial where Bio-Rad's protected information will be massively spilled.

CONCLUSION

Those who choose to reap the benefits of the privilege of practicing law in California do so knowing that they are bound by the highest duties of confidentiality in the land, that they must hold their client's confidences "inviolate," and that they must honor this duty of confidentiality even at "peril" to themselves. Through the Court's suggested Rule 502 discovery procedure, Mr. Wadler was given every opportunity to construct a case that would not depend on Bio-Rad's confidential information. Before the parties proceed any further towards trial, Mr. Wadler must prove he can do so. If the ethical and statutory duties of confidentiality are to be meaningful, they must be applied here. Fairly categorized, this is one of the "perils" that Bus. & Professions Code Section 6068 contemplated when it elevated a client's need above the attorney's desires. Clients, by contrast, hire lawyers in California expecting their confidences will be maintained, come what may. A client should not be put to the Hobson's choice of a full defense **or** protection of its

confidential information. Respectfully, Mr. Wadler should be required to show how this case can proceed fairly to trial without disclosure of Bio-Rad's attorney-client privileged and confidential information, how the process of protecting that information will be managed during trial, and how all of this can be accomplished without forcing Bio-Rad into the highly prejudicial position of repeatedly making privilege objections in front of the jury.

DATED: October 21, 2016

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ John Potter
John M. Potter

Attorneys for Defendants Bio-Rad Laboratories, Inc.; Norman Schwartz; Louis Drapeau; Alice N. Schwartz; Albert J. Hillman; Deborah J. Neff