THOMAS J. KARR (D.C. Bar No. 426340)
KarrT@sec.gov
KAREN J. SHIMP (D.C. Bar No. 456265)
ShimpK@sec.gov
ERIC A. REICHER (D.C. Bar No. 490866)
ReicherE@sec.gov

SECURITIES AND EXCHANGE COMMISSION
Office of the General Counsel
100 F Street NE
Washington, DC 20549-9612
Telephone: (202) 551-5163 (Karr)
Facsimile: (202) 772-9263

Attorneys for *Amicus Curiae SEC*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SANFORD S. WADLER, Plaintiff, vs. BIO-RAD LABORATORIES, INC., a Delaware Corporation; NORMAN SCHWARTZ; LOUIS DRAPEAU; ALICE N. SCHWARTZ; ALBERT J. HILLMAN; DEBORAH J. NEFF, Defendants.	No. 3:15-cv-2356 JCS ***AMICUS CURIAE* BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF PLAINTIFF** --- Hearing Date: December 15, 2016 Time: 10:30 A.M. Place: Courtroom G, 15th Floor Judge: Hon. Joseph C. Spero TRIAL: January 17, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Interest of the Securities and Exchange Commission

The Commission is the agency primarily responsible for administering and enforcing the federal securities laws, including anti-bribery, books and records, and internal controls provisions of the Foreign Corrupt Practices Act ("FCPA").[1] Attorneys employed by public companies play a significant role in assisting those companies in complying with these important obligations, which are designed to protect investors and the capital markets. As the Commission has observed, "[a]ttorneys [] play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws."[2]

Under Commission rules, attorneys employed by public companies are obligated to report evidence of material violations of law by their companies to company management. Thus, the Commission has a strong interest in ensuring that public companies do not retaliate against attorney-whistleblowers who, upon becoming aware of potential material violations, report them to management. If attorney–whistleblowers cannot use their reports to management of potential violations as evidence in anti-retaliation litigation against their employers, then the Congressional scheme of requiring lawyers for public companies to report potential

---

[1] *See* 15 U.S.C. 78dd-1; 78m(b)(2)(A), (B).

[2] *See* Securities and Exchange Commission, Implementation of Standards of Professional Conduct for Attorneys, 68 FR 6295, 6325 (Feb. 6, 2003); *see also* Cong. Rec. S6551 (Jul. 10, 2002) (remarks of Sen. Edwards) ("wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder"); Cong. Rec. S6555 (Jul. 10, 2002) (remarks of Sen. Enzi) ("attorneys are hired to aid the corporation and its accountants in adhering to Federal securities law"); Cong. Rec. S6556 (Jul. 10, 2002) (remarks of Sen. Corzine) ("The bottom line is this. Lawyers can and should play an important role in preventing and addressing corporate fraud."); "The Preliminary Report of the ABA Task Force on Corporate Responsibility," (Jul. 16, 2002) ("our system of corporate governance has long relied upon the active oversight and advice of independent participants in the corporate governance process, such as . . . outside counsel.").

violations, while protecting them from reprisals through the anti-retaliation provisions of the securities laws, would be seriously undermined.[3] Bio-Rad's motion to exclude Wadler's evidence regarding his report to Bio-Rad's management about possible violations of law challenges the supremacy of the Commission's regulations over California state ethics rules that would interfere with the effectiveness of the federal scheme to protect attorney-whistleblowers.[4]

Legal Background and Issue Presented

In 2002, the Sarbanes-Oxley Act ("SOX") mandated a number of reforms to enhance corporate responsibility and combat corporate and accounting fraud. One of those reforms, SOX Section 307, required the Commission to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule **requiring** an **attorney** to **report** evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company * * *" to increasingly higher levels of the company, including if necessary the company's audit committee or the board of directors.[5] An attorney's report of possible violations to company

---

[3] In addition to creating a private right of action for whistleblowers, Congress gave the Commission authority to enforce the anti-retaliation laws. *See* Section 21(d) of the Exchange Act, 15 U.S.C. 78u(d): "Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title [or] the rules or regulations thereunder … it may in its discretion bring an action in the proper district court of the United States * * *."

[4] For example, a decision that California law takes precedence over the Commission's regulations could interfere with California-licensed attorneys' ability to reveal confidential information to the Commission in circumstances where the Commission has determined that the attorneys should be allowed to disclose that information without the client's consent. 17 C.F.R. 205.3(d)(2).

[5] 15 U.S.C. 7245 (emphasis added).

management is commonly referred to as reporting "up the ladder." The Commission rule implementing Section 307 is referred to as "Part 205." 17 C.F.R. 205.1 *et seq*.

In SOX, Congress also enacted protections for employees of public companies[6] against reprisal for reporting potential violations of certain laws, including the federal securities laws and "any rule or regulation of the Securities and Exchange Commission." SOX Section 806, *codified at* 18 U.S.C. 1514A. Section 806 protects attorney-whistleblowers who make an "up the ladder" report against reprisal for that reporting, and provides the right to file a complaint with the Secretary of Labor and, if not decided within 180 days, in federal district court.[7] In 2010, Congress expanded the anti-retaliation remedy by providing the right to file an action directly in district court. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act Section 922, *codified at* Section 21F(h) of the Exchange Act, 15 U.S.C. 78u-6(h).

Wadler alleges that the defendants (collectively, "Bio-Rad") fired him for "engaging in mandatory 'up the ladder' reporting" of potential bribery, books and records, or other violations of the FCPA in the company's Chinese operations." He alleges that he made his Part 205 report to key Bio-Rad officers and directors and ultimately to the audit committee of Bio-Rad's board of directors. *See* Complaint (DE 1) at ¶¶ 1, 22, 29, 72. Bio-Rad has moved the Court to preclude Wadler from introducing any of the following as evidence at trial:

- All testimony by Wadler 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.

---

[6] SOX 806 also protects agents and contractors (such as outside counsel) of public companies. *See Lawson v. FMR LLC*, __ U.S. __, 134 S.Ct. 1158, 1168 (2014).

[7] 18 U.S.C. 1514A(b)(1).

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

DE 94 at ECF p. 2.

The evidentiary limitations Bio-Rad seeks would cover Wadler's Part 205 report as well as any responses thereto. The Commission recognized in promulgating Part 205 that "up the ladder" reports by an attorney-whistleblower would likely include client confidences[8] and that entering those reports into evidence in anti-retaliation litigation would be essential to proving that the attorney was retaliated against for reporting potential wrongdoing. To ensure that attorney-whistleblowers could use those reports as evidence in such litigation,[9] the Commission adopted Section 205.3(d)(1), which provides that "[a]ny report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) **may be used** by an attorney in connection with any investigation, proceeding, or **litigation** in which the attorney's compliance with this part is in issue."[10] The Commission also specified that if "the standards of a state*** where an attorney is admitted or practices conflict with this part, **this part shall govern**."[11]

---

[8] While "client confidences" include attorney-client privileged communications, it also encompasses nearly any nonpublic information the attorney becomes aware of as a result of the attorney-client relationship. *See, e.g.*, Model Rule of Professional Conduct ("Model Rule") 1.6, comment 3 ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

[9] According to Bio-Rad, Wadler's claims and the company's own defenses "are inextricably intertwined with Bio-Rad's privileged and confidential information," to the point that Wadler may not be able to proceed to trial. DE 94 at ECF p. 8. As we discuss later, Bio-Rad's suggestion that its privilege concerns warrant dismissing Wadler's claims is not well-founded.

[10] 17 C.F.R. 205.3(d)(1) (emphasis added).

[11] 17 C.F.R. 205.1 (emphasis added).

Bio-Rad grounds its motion on California Business & Professions Code Section 6068(e) and California Rule of Professional Conduct 3-100, each of which generally prohibits an attorney from revealing a client's privileged or confidential information. Bio-Rad has asserted that these state laws are not preempted by federal law because "[n]othing in the Sarbanes-Oxley or Dodd-Frank Acts evidences a clear legislative intent to preempt California's ethical and statutory rules." DE 94 at ECF pp. 12-13.[12] More recently, Bio-Rad has asserted that SOX and Part 205 are permissive—that is, an attorney "may" file suit and "may" use a Part 205 report—and thus there is no actual conflict between those provisions and California law. DE 105 at ECF pp. 11-12. Both assertions are wrong.

The Commission respectfully submits that the principal issue the Court must resolve in deciding Bio-Rad's motion is whether the Commission's Part 205 regulations preempt the California state laws that generally prohibit attorneys from disclosing client confidences.[13] The Commission's view is that Section 205.3(d)(1)—without which attorneys complying with their legal obligation to report possible violations would have limited anti-retaliation protection—preempts the California laws on which Bio-Rad relies because those laws would interfere with the effectiveness of Part 205. Accordingly, the Court should deny Bio-Rad's motion.

---

[12] Bio-Rad also cites to Federal Rule of Evidence 501 (which provides that federal common law governs privilege claims in certain circumstances), and continues to rely heavily on authority concerning traditional privilege issues in contexts that are significantly different than the one presented here. As shown below, Bio-Rad's reliance on Rule 501 is misplaced.

[13] The Commission does not have any information about the potential evidence beyond what the parties have stated in redacted public filings. In addition, the parties dispute whether and to what extent privilege has been waived by Bio-Rad's disclosures to various government agencies (including the Commission). The Commission does not express any views on those (or any other) factual or legal questions.

ARGUMENT

I. Section 205.3(d)(1) Applies to This Case.

Bio-Rad contends that Section 205.3(d)(1) does not apply here. DE 105 at ECF pp. 11-12. To the contrary, Bio-Rad's reliance on state laws to exclude evidence of Wadler's Part 205 "up the ladder" reporting presents the precise situation Section 205.3(d)(1) was adopted to address.

The Commission's Part 205 rules explicitly permit attorney-whistleblowers at public companies to use as evidence their "up the ladder" reports of potential wrongdoing in circumstances where the attorney's compliance with Part 205 is "in issue":

> **Any report** under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) **may be used by an attorney in connection with any** investigation, proceeding, or **litigation in which the attorney's compliance with [Part 205] is in issue**.

17 CFR 205.3(d)(1) (emphasis added). In construing Section 205.3(d)(1), courts "must begin with the words in the regulation and their plain language."[14] This regulation plainly authorizes an attorney-whistleblower to use his or her Part 205 report[15] as evidence in litigation so long as the attorney-whistleblower's compliance with Part 205 is "in issue"—*i.e.*, is probative and material to the attorney-whistleblower's claims, allegations, or response to defenses.

The Commission confirmed that it intended this result in its comments adopting the regulation:

---

[14] *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984); *see also United States v. Bucher,* 375 F.3d 929, 932 (9th Cir. 2004) ("To interpret a regulation, we look first to its plain language."); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 117 (2nd Cir. 2005) (a rule's plain meaning controls unless it leads to absurd result).

[15] A Part 205 report need not be a formal document or take any particular form. "*Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing." 17 C.F.R. 205.2(n).

> Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the ABA's [Model Rule 1.6(b)(5)][16] and corresponding "self-defense" exceptions to client-confidentiality rules in every state. **The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves**.

68 Fed. Reg. 6295, 6310 (emphasis added).

Wadler's complaint alleges that his compliance with his Part 205 obligations was the reason for his termination. His Part 205 report(s)—the information about potential material violations he conveyed to Bio-Rad management and its audit committee—are plainly probative and material to his claims and possibly to his refutation of Bio-Rad's defenses. This action is thus "litigation in which the attorney's compliance with [Part 205] is in issue."[17]

To the extent Bio-Rad suggests that Section 205.3(d)(1) only authorizes an attorney to use his or her Part 205 report in defending allegations against the attorney (*e.g.*, to an allegation that the attorney did not make a required report), the argument lacks any support in the text of the rule. Nothing in the rule (or the Commission's comments in promulgating the rule) limits use of a Part 205 report to defensive purposes. Rather, the clear language of Section 205.3(d)(1) explicitly contemplates an attorney's use of such communications whenever his or her

---

[16] The Commission's comments originally cited to then-Model Rule 1.6(b)(3). In August 2003, the ABA reformatted its rules and re-numbered various provisions, including then-Model Rule 1.6(b)(3), which was renumbered as Model Rule 1.6(b)(5). The text and substance of the rule is identical to its prior version. Thus, for purposes of this brief, we refer to both versions of the rule as "Model Rule 1.6(b)(5)."

[17] Section 205.3(d)(1) applies where the client is an "issuer" as defined in 17 C.F.R. 205.2(h). Bio-Rad is an issuer because it maintains a class of publicly-traded securities registered pursuant to Section 12(b) of the Exchange Act. *See, e.g.*, Complaint (DE 1) at ¶ 50.

compliance is "in issue," regardless of whether it pertains to a claim or a defense. Interpreting the rule to only authorize defensive uses of a Part 205 report would be an unduly narrow construction that would require the Court to read non-existent limitations into the clear language of Section 205.3(d)(1) without any textual basis for doing so. *See, e.g., United Cigar Whelan Stores Corp. v. United States*, 113 F.2d 340, 345 (9th Cir. 1940) ("we are not at liberty" to "read into the regulation words not therein contained").

Moreover, such a limitation would incorrectly imply that a whistleblower retaliation action is purely an "offensive" use of a Part 205 report. An attorney-whistleblower retaliation complaint is quintessentially a *defensive* reaction to an employer's allegedly illegal adverse action—discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against the attorney "in the terms and conditions of employment"—in retaliation for whistleblowing. 18 U.S.C. 1514A(a) [SOX]; Exchange Act Section 21F(h)(1)(A) [Dodd-Frank]. Because in such litigation the issuer is alleged to have taken adverse employment action against the employee, and the employee is attempting to restore (rather than preserve) the status quo, it is reasonable to view the employee as acting in self-defense. Put differently, if an issuer had to file suit to fire an employee, and the employee countered by responding that the issuer was illegally retaliating against him for reporting potential violations, no one would doubt that the employee was employing a "whistleblower defense" to protect himself.[18] Indeed, in both situations, the attorney and client have become adversaries, and "[o]nce an adversarial

[18] *See, e.g., Coons v. Secretary of U.S. Dep't of Treasury*, 383 F.3d 879, 891 (9th Cir. 2004) (noting the "whisteblower defense").

relationship has developed, simple fairness demands that the lawyer be able to present her claim or defense without handicap."[19]

In short, nothing in the plain language of Section 205.3(d)(1) can be reasonably construed as barring an attorney's use of his or her Part 205 report offensively, as a "sword," or as limiting an attorney's use of such communications to defensive measures, as a "shield." Bio-Rad's argument that this is not a case in which Section 205.3 applies runs contrary to the broad remedial purpose of the Part 205 regulations[20] and to the well-established proposition that whistleblower protection provisions, such as SOX Section 806, Exchange Act Section 21F(h), and Part 205, should be construed broadly to effectuate their remedial purposes.[21]

---

[19] 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* §9.23 at 9-100.

[20] The Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-97 (1983) (*quoting SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180, 195 (1963)); *see also Lowe v. SEC*, 472 U.S. 181, 225 (1985) (White, J., concurring) (noting "our longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly in order to effectuate their remedial purposes"); *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("Congress has broad remedial goals in enacting securities laws.") (internal quotation marks omitted); *SEC v. Ralston-Purina Co.*, 346 U.S. 119, 126 (1953).

[21] *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998); *see also Bechtel Constr. Co. v. Sec. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws"); *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996) ("The overall purpose of the statute– the protection of whistleblowers– militates against an interpretation that would make anti-retaliation actions more difficult."); *Haley v. Fiechter*, 953 F.Supp. 1085, 1092 (E.D. Mo. 1997) ("Courts which have been called upon to interpret different federal whistleblower statutes have uniformly held that such statutes should be broadly construed."); *U.S. ex rel Kent v. Aiello*, 836 F.Supp. 720, 725 (E.D.Cal. 1993) ("Whistleblower protection statutes are remedial in nature and thus should be liberally construed."); *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (noting the "simple [approach], often used in construing statutes designed to protect individual rights", that remedial statutes must be interpreted broadly).

II. Under Well-Settled Principles of Conflict Preemption, the Commission's Part 205 Rules Preempt California Laws that Interfere with the Federal Objectives the Part 205 Rules Address.

"There are three types of preemption: express, field, and conflict preemption."[22] The Commission agrees with Bio-Rad that the issue here is whether conflict preemption applies.[23]

"Conflict preemption consists of impossibility and obstacle preemption. * * * Obstacle preemption arises when a challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[24] Bio-Rad asserts that there is no conflict between Part 205 and California law because Section 205.3(d)(1) and the anti-retaliation provisions at issue are merely "permissive," *i.e.*, an attorney "may" file suit and "may" use a Part 205 report as evidence in such an action but isn't required to do either. DE 105 at ECF pp. 11-12. The practical effect of adopting Bio-Rad's reasoning would be to allow California law to take away the rights given by Congress and the Commission to California attorney-whistleblowers in all but the rare cases where he or she can prevail on a retaliation claim without using any material deemed "confidential" under California laws. The outcome advocated by Bio-Rad is a classic example where obstacle preemption overrides the interfering state law.

---

[22] *Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015), *citing Kurns v. R.R. Friction Products Corp.*, --- U.S. ---, 132 S.Ct. 1261, 1265-66 (2012).

[23] Bio-Rad also argues that Congress neither expressly preempted state laws governing attorneys' obligations to their clients nor indicated an intention to occupy that field of law. The Commission does not assert (nor, it appears, does Wadler) that either of those bases apply.

[24] *Nation*, 804 F.3d at 1297, *citing Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

The case on which Bio-Rad principally relies (*Barrientos v. 1801-1825 Morton LLC*[25]) specifically addresses obstacle preemption and supports the Commission's position. In *Barrientos*, a defendant-landlord wanted to evict tenants in order to raise the rent on the apartment units. A Los Angeles law prohibited evictions for that purpose, but a federal regulation by HUD permitted evictions for "good cause * * * which may include [the] desire to lease the unit at a higher rental." *Id.* at 1202. Bio-Rad reads *Barrientos* as suggesting that it is always the case that where state law prohibits what federal law allows, but does not require, there is no conflict. DE 105 at ECF p. 10. But *Barrientos* cannot be read nearly that broadly. It is noteworthy that the Supreme Court decided nearly three decades before *Barrientos* that a conflict between an agency's regulations and state law "does not evaporate because the [agency's] regulation simply permits, but does not compel,' what state law prohibits." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). If the state law's prohibition removes "flexibility" provided by the agency's regulation, then it will be preempted. *Id.* This principle applies here as the relevant California laws would limit the legal right to use probative evidence (the Part 205 report),and the flexibility to bring anti-retaliations claims, that federal laws provide attorney-whistleblowers.

The *Barrientos* court was interpreting *de la Cuesta* as it applied to the conflicting HUD and Los Angeles provisions.[26] While the court found that under the circumstances of that case, the federal law did not preempt the Los Angeles provision, its analysis supports the Commission's argument that Part 205 **does**

[25] 583 F.3d 1197 (9th Cir. 2009).

[26] "Applying *de la Cuesta*, we consider whether the agency intended to preempt the local law and whether [the Los Angeles law] stands as an obstacle to the accomplishment of Congressional purposes." *Barrientos*, 583 F.3d at 1209.

preempt the California laws relied on by Bio-Rad. The reasons the Court held that HUD's "good cause" regulation did not preempt the Los Angeles ordinance were: (1) HUD did not intend to preempt local eviction controls, (2) the Los Angeles ordinance did not present an obstacle to the accomplishment of federal objectives, and (3) HUD's *amicus* brief and public guidance disavowed an intent to preempt state provisions like the LA ordinance. *Barrientos*, 583 F.3d at 1209-14. Application of these factors leads to the conclusion that Part 205 preempts the California laws at issue here.

First, unlike the situation in *Barrientos*, the Commission expressly intends its regulation to preempt inconsistent state laws. In fact, the first section of Part 205 specifically states:

> Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern**.**

17 C.F.R. 205.1 (emphasis added). In its comments adopting the regulations, the Commission explained:

> A number of commenters questioned the Commission's authority to preempt state ethics rules, at least without being explicitly authorized and directed to do so by Congress. * * * The language 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. At the same time, **the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices**.

68 Fed. Reg. at 6297 (emphasis added). Then, in a public statement in response to a Washington State Bar Association Proposed Interim Formal Opinion Regarding the Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorneys' Obligations Under the Rules of Professional Conduct, the Commission (through its then-General Counsel) stated unequivocally that its regulations under Part 205

"will take precedence over any conflicting provision" of state law.[27] Additionally, in two *amicus* briefs (this one, and *Jordan v. Sprint Nextel Corporation*[28]), the Commission reiterated its position that Section 205.3(d)(1) preempts any state law that would present an obstacle to whistleblower-attorneys using as evidence their Part 205 reports in litigating anti-retaliation claims. *Barrientos* recognizes that an agency "'is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.' Further, an agency's position in an amicus brief is entitled to deference if there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.' * * * Agencies 'have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[29]

The California laws involved here clearly present an obstacle to the accomplishment of federal objectives. Congress, in Section 307 of SOX, directed the

---

[27] Although the specific provision at issue was Section 205.3(d)(2), which permits attorneys to make disclosures to the Commission in certain circumstances, the preemption analysis and conclusion in the Commission's response applies equally to Section 205.3(d)(1). Statement available at https://www.sec.gov/news/speech/spch072303gpp.htm.

[28] *See* Redacted Brief of the Securities and Exchange Commission, *Amicus Curiae*, Dep't of Labor Admin. Review Bd. Case No. 06-105, filed August 3, 2009, *available at* https://www.sec.gov/litigation/briefs/2009/jordan0809.pdf.

[29] *Barrientos*, 583 F.3d at 1214, internal citations omitted. *See also Roth v. Perseus, LLC*, 522 F.3d 242, 247 (2nd Cir. 2008) ("we defer to the SEC's interpretation of the Rule, including one articulated in its amicus brief, so long as the interpretation is not plainly erroneous or inconsistent with the law"); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulation is controlling even if presented in amicus brief); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2nd Cir. 2000) ("We are bound by the SEC's interpretations of its regulations in its amicus brief, unless they are plainly erroneous or inconsistent with the regulation[s]").

Commission to promulgate "minimum standards of professional conduct for attorneys appearing and practicing before the agency" in representing issuers, specifically "including a rule" requiring them to report material violations up the ladder within the issuer.[30] In response to this Congressional mandate, the Commission promulgated Part 205,[31] which requires an attorney representing an issuer to report material violations "up the ladder" within that issuer. Section 205.3(b) requires an attorney to report evidence of a material violation first to the issuer's chief legal officer. If the attorney does not receive an "appropriate response"[32] from the chief legal officer (or if, as here, the attorney *is* the chief legal officer), the attorney must continue reporting up the management chain, including to the audit committee or the board of directors, until an appropriate response is received.

When an attorney-whistleblower who has made a Part 205 report believes he or she has been retaliated against for making that report, both SOX and Dodd-Frank grant the attorney the right to file an action for unlawful retaliation. A central issue in any such action (including this one) is whether the attorney can use his or her Part 205 report—which will nearly always contain attorney-client communications, client confidences, or both—as evidence. In Section 205.3(d)(1), the

---

[30] 15 U.S.C. 7245.

[31] 17 C.F.R. 205.1 *et seq*. *See also* 68 Fed. Reg. 6295 *et seq*.

[32] An "appropriate response" is "a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) ... no material violation ... has occurred, is ongoing, or is about to occur;

(2) ... the issuer ... has adopted appropriate remedial measures ...; or

(3) ... the issuer ... has retained or directed an attorney to review the reported evidence of a material violation."

17 C.F.R. 205.2(b).

Commission specifically addressed this issue and answered it with a clear "yes": any Part 205 report, or the response thereto, "may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue."

Section 205.3(d)(1) is entirely consistent with the rule—established by 47 state bars, the ABA's Model Rules of Professional Conduct ("Model Rules"), as well as the federal common law—that an attorney may use client confidences in support of "claims or defenses" in litigation against a client. Notably, Congress enacted the whistleblower retaliation protections of Dodd-Frank eight years **after** instructing the Commission to issue the regulations that became Part 205, and seven years after those regulations—including Section 205.3(d)(1)—were promulgated. Yet Congress did not single out attorneys as a group without recourse; instead, it extended the broader Dodd-Frank protections to "**any** lawful act done by the whistleblower … in making disclosures that are **required or protected under the Sarbanes-Oxley Act of 2002 * * ***[33]—which would include attorney-whistleblowers. If interfering state laws are not preempted, then Congress's interest in protecting attorney-whistleblowers, reinforced by its extension of those protections in the Dodd-Frank Act, and the Commission's interest in encouraging attorneys to comply with its Part 205 rules, would be seriously undermined.

The Supreme Court has consistently upheld the authority of federal agencies to implement rules of conduct that conflict with state laws that address the same conduct. *See, e.g., Sperry v. State of Florida*, 373 U.S. 379 (1963) (Florida could not enjoin non-lawyer registered to practice before the Patent and Trademark Office from prosecuting patent applications in Florida, even though non-lawyer's actions

[33] Exchange Act Section 21F(h)(1)(A) (emphasis added).

constituted unauthorized practice of law under Florida bar rules). Importantly, the Ninth Circuit has specifically held that ethics rules approved by the Commission in accordance with the Exchange Act preempt conflicting California ethics standards. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005). In *Credit Suisse*, California adopted heightened disclosure and disqualification standards for neutral arbitrators that conflicted with Commission-approved rules of a private self-regulatory organization (the NASD, now known as FINRA).[34] The *Grunwald* court's analysis and conclusion is even more persuasive where, as here, the rules at issue are the Commission's own regulations that were promulgated in response to a Congressional mandate and after robust notice and public comment.[35]

In sum, the Court should reach the same conclusion the Department of Labor's Administrative Review Board (which was entrusted by Congress with the responsibility of deciding SOX whistleblower cases in the first instance) reached in an analogous case: "SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' or 'person' who reports such violations. Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806, even if it necessitates that attorney-client privileged communications be held admissible in a [] whistleblower proceeding.

---

[34] The Supreme Court of California reached the same conclusion on nearly identical facts. *Jevne v. Superior Court*, 35 Cal.4th 935, 111 P.3d 954 (Sup.Ct.Cal. 2005).

[35] *See also McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668 (9th Cir. 2013) (state law prohibiting employers from "forced patronage" was preempted by the Exchange Act because the state law restricted what federal law permitted); *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159 (9th Cir. 2008) (plaintiff's state law claims were challenges to Commission-approved rules of self-regulatory organizations and thus preempted).

"Consequently, we conclude that **under [Section] 205.3(d)(1),** if an attorney reports a 'material violation' in-house in accordance with the SEC's Part 205 regulations, **the report, though privileged, is nevertheless admissible** in a SOX Section 806 proceeding **as an exception to the attorney-client privilege** in order for the attorney to establish whether he or she engaged in SOX-protected activity. Furthermore, in accord with the ALJ's rationale that SOX Section 307 should impliedly be read consistent with SOX Section 806, **we similarly conclude** that Congress also intended that **any other relevant attorney-client privileged communication that is not a Part 205 report is also admissible** in a [] whistleblower proceeding in order for the attorney to establish whether he or she engaged in SOX protected activity."[36]

III. Both a Part 205 Report and Other Privileged or Confidential Evidence are Admissible Under the Federal Rules of Evidence and the Federal Common Law.

Bio-Rad argues that Federal Rule of Evidence 501, which incorporates the federal common law on attorney-client privilege, also bars Wadler's use of his Part 205 report as evidence at the upcoming trial. DE 94 at ECF pp. 13-14. But common-law evidentiary principles are trumped where an agency has properly promulgated regulations pursuant to statutory authority, because those regulations "have the force and effect of law" as to the matter covered by the regulations.[37] Section

---

[36] *Jordan v. Sprint Nextel Corp.*, Case No. 06-105, 2009 WL 3165850 (Dep't of Labor, Admin. Review Bd. Sept. 30, 2009) (emphasis added). *Jordan* was decided before the Dodd-Frank Act added another set of whistleblower protections for SOX Section 307 reports, but the ARB's rationale and analysis apply equally to SOX and Dodd-Frank claims.

[37] *See, e.g., Milwaukee v. Ill.*, 451 U.S. 304, 314 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("[P]roperly promulgated, substantive agency regulations have the force and effect of law.") (internal quotation marks omitted); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (recognizing that regulations "issued by an agency pursuant to statutory authority and which implement the statute, as, for

205.3(d)(1) is an express provision of federal law that takes priority over the federal common law (even though, as we discuss below, federal common law is consistent with the Commission's Part 205 rule) and permits use of the evidence notwithstanding Rule 501.

Importantly, the Court does not have to parse through the evidence to sort Part 205 evidence from relevant but non-Part 205 evidence, because if there is any of the latter evidence, the federal common law permits its use at trial.[38] Supreme Court Standard 503(d)(3)—often cited as a restatement of the federal common law on attorney-client privilege[39]—states that there is no protection "[a]s to a communication relevant to an issue of **breach of duty** by the lawyer to his client or **by the client to his lawyer**[.]" (Emphasis added.) The natural reading of the anti-retaliation provisions of both SOX and Dodd-Frank is that Congress imposed a legal duty on Bio-Rad not to take an adverse action against Wadler for reporting potential material violations of federal law as required by Part 205. Thus, under federal common law, any communications relevant to Wadler's claim that Bio-Rad breached its legal duty not to retaliate against him are not privileged.

---

example, the proxy rules issued by the Securities and Exchange Commission . . . have the force and effect of law.") (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedures Act* 30 n. 3 (1947)).

[38] *See also* the ARB's decision in *Jordan*, quoted above, which reached the same conclusion on the grounds that there is "strong evidence of congressional intent" to allow attorney-whistleblowers to use otherwise privileged materials in a retaliation action even where Part 205 does not apply. *Jordan*, 2009 WL 3165850 at *9-10.

[39] Supreme Court Standard 503 is the proposed, but never adopted, Federal Rule of Evidence 503. *See* Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 235-36 (1972). It is often cited as a restatement of the common law of attorney-client privilege applied in the federal courts at that time. *See, e.g., United States v. Mosony*, 927 F.2d 742, 751 (3rd Cir. 1991).

That conclusion is bolstered by developments in the law since Standard 503 was first proposed in 1972. The federal common law on privilege is meant to reflect "well-established [state law] exceptions" to the attorney-client privilege.[40] Over the past 40-plus years, the Code of Professional Responsibility (from which Standard 503 drew) has been replaced by ABA Model Rule 1.6(b)(5), which has been adopted either in whole or in relevant substance by 47 states (so far).[41] The modern rule clearly permits an attorney to use otherwise privileged or confidential information "to the extent the lawyer reasonably believes necessary: *** to establish a **claim or defense** on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]"[42] (Emphasis added.)

---

[40] *See* Advisory Committee Notes to Standard 503, 56 F.R.D. at 239-40 (noting that Standard 503 was drafted with reference to established state rules).

[41] *See* Ala. Rule 1.6(b)(2); Alaska Rule 1.6(b)(2); Ariz. ER 1.6(d)(4); Ark. Rule 1.6(b)(5); Colo. Rule 1.6(c); Conn. Rule 1.6(d); Del. Rule 1.6(b)(5); Fla. Rule 4-1.6(c)(2); Ga. Rule 1.6(b)(1)(iii); Haw. Rule 1.6(c)(3); Idaho Rule 1.6(b)(5); Ill. Rule 1.6(b)(5); Ind. Rule 1.6(b)(5); Ia. Rule 32:1.6(b)(5); Kan. Rule 1.6(b)(3); Ky. Rule 1.6(b)(2); La. Rule 1.6(b)(2); Me. Rule 1.6(b)(5); Md. Rule 1.6(b)(5); Mass. Rule 1.6(b)(2); Minn. Rule 1.6(b)(8); Miss. Rule 1.6(b)(2); Mo. S. Ct. Rule 4-1.6(b)(2); Mont. Rule 1.6(b)(3); Neb. Rule 1.6(b)(3); Nev. Rule 156(3)(b); N.H. Rule 1.6(b)(2); N.J. Rule 1.6(d)(2); N.M. Rule 16-106(D); N. Car. Rule 1.6(b)(6); N. Dak. Rule 1.6(e); Ohio Rule 1.6(b)(5); Okla. Rule 1.6(b)(3); Ore. Rule 1.6(b)(4); Pa. Rule 1.6(b)(4); R.I. Rule 1.6(b)(2); S. Car. Rule 1.6(b)(2); S. Dak. Rule 1.6(b)(3); Tenn. Rule 1.6(b)(3); Tex. Rule 1.6(c)(5); Utah Rule 1.6(b)(3); Vt. Rule 1.6(c)(2); Va. Rule 1.6(b)(2); Wash. Rule 1.6(b)(5); W. Va. Rule 1.6(b)(2); Wisc. Rule 1.6(c)(2); Wy. Rule 1.6(b)(2).

[42] Indeed, the Commission's comments when it adopted Part 205 specifically noted that its rule permitting use of otherwise privileged information at trial "is effectively equivalent to the ABA's [Model Rule 1.6(b)(5)] and corresponding 'self-defense' exceptions to client-confidentiality rules in every state." 68 Fed. Reg. at 6310.

This exception to the general rule of confidentiality is notably broad. Numerous courts, both before and after the Commission adopted Section 205.3(d)(1), have held that the claim-or-defense rule (in some states referred to as the self-defense rule) allows attorneys to use client confidences to prove wrongful discharge or whistleblower claims.[43] Indeed, the ABA has specifically noted that a wrongful-discharge action is a "claim" under ABA Model Rule 1.6(b)(5).[44]

---

[43] *See, e.g., Schaefer v. GE Co.*, 2008 WL 649189 at *6 (D. Conn. 2008) ("The plain language of Model Rule 1.6 is quite broad, allowing a lawyer to use the claim . . . exception in a controversy between the lawyer and the client" in an action for sex discrimination); *Van Asdale v. Int'l Game, Tech.*, 498 F.Supp.2d 1321, 1329 (D. Nev. 2007), *overturned on other grounds* (allowing plaintiff to use confidential client information in SOX whistleblower action, explaining that the "Model Rules permit a lawyer to reveal confidential information relating to the representation in order to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client"); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1042 (Mont. 2000) (discharged in-house counsel could use client confidences as reasonably necessary to prove wrongful-discharge claim); *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So.2d 607, 610-12 (Fla. App. 2004) (allowing employer's former general counsel to use client confidences to support claim under Florida's Whistleblower Act); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 608 (Utah 2003) (former in-house counsel could use client confidences to prosecute wrongful-discharge claim); *Crews v. Buckman Labs Int'l, Inc.*, 78 SW.3d 852, 863-64 (Tenn. 2002) (adopting a new provision to its conduct rules that follows Model Rule 1.6 and "permit[s] in-house counsel to reveal the confidences and secrets of a client when the lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer or the client"); Oregon Formal Ethics Op. 136 (1994) (permitting the use of client confidences by attorney in wrongful-termination case after analyzing Oregon's rule that, like Model Rule 1.6(b)(5), expressly applies to either a "claim or defense"). *See also* Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* at 9-99 (Rule 1.6(b)(5) "permits a lawyer to reveal client confidences when needed to 'establish a claim,' which is a matter of offense rather than defense").

[44] The ABA's Standing Committee on Ethics and Professional Responsibility explained that "[r]etaliatory discharge actions provide relief to employees fired for reasons contradicting public policy," and that in-house attorneys who are improperly discharged may rely on the exceptions contemplated in the Model Rule to utilize confidential client information to pursue "a retaliatory discharge claim or similar claim" against their former employers. ABA Formal Op. 01-424 at 3-4 (Sept. 22, 2001) (noting that an attorney cannot divulge client confidences "except . . . as permitted by Rule 1.6" and identifying now-Rule 1.6(b)(5) as such an exception).

IV. The Court Can Use its Equitable Tools to Limit Public Disclosure of Bio-Rad's Sensitive Information at the Upcoming Trial if it Deems Such Protections Advisable.

Bio-Rad argues that even when an attorney-whistleblower case is sufficiently meritorious to warrant trial, the Court should exclude the evidence of the Part 205 report (and other possibly privileged information) to keep it out of the public domain rather than use its inherent equitable powers such as sealing the record or entering a protective order to restrict public access. DE 94 at ECF pp. 18-19 and DE 105 at ECF pp. 17-18. Of course, the attorney-whistleblower will likely rely on the *same* evidence it intends to use at trial to fend off a motion to dismiss and/or for summary judgment. It would be a perverse (and unwarranted) result to allow the attorney-whistleblower to use key evidence to demonstrate to the court that his case has merit, but then be precluded from using the same evidence to prove his claim at trial.

In addition, Bio-Rad's argument is grounded in the mistaken conclusion that the communications reflected in the Part 205 report are still privileged. But as discussed above, Part 205 and the federal common law "claim or defense" provisions are *exceptions* to the general rule of privilege.[45] The evidence supporting Mr. Wadler's claims is thus admissible even if it was once privileged or confidential.

The Ninth Circuit's controlling decision in *Van Asdale v. Int'l Game Tech.* confirms that the attorney-whistleblower's need to use once-privileged information

[45] For the same reason, Bio-Rad's argument that allowing Wadler to use the evidence is an affront to the purposes of Federal Rule of Evidence 502 (DE 105 at ECF pp. 6-7, 17) is misplaced. Rule 502 addresses litigants' concerns that producing privileged information, even inadvertently, in the discovery process could constitute a waiver. Certainly there are many cases where a party obtains information in discovery that it cannot actually use at trial—because the documents have not lost their privileged status, and no other exception applies. Here, of course, the point is that the evidence **has** lost its protections as a result of Part 205 and/or the federal common law, and accordingly the no-waiver protections of Rule 502 are not implicated.

from his or her Part 205 report is **not** a basis for preventing an otherwise valid SOX retaliation claim from proceeding to trial:

> There are few federal circuit court cases addressing the right of in-house counsel to use attorney-client privileged information in a retaliation suit. In *Willy v. Administrative Review Board,* 423 F.3d 483 (5th Cir. 2005), an in-house attorney brought suit against his former employer, alleging retaliation as a result of a report he had written; it was undisputed that the contents of the report were covered by the attorney-client privilege. *Id.* at 494 n. 48. The Fifth Circuit allowed the suit to go forward, rejecting the notion "that the attorney-client privilege is a *per se* bar to retaliation claims under the federal whistleblower statutes, i.e., that the attorney-client privilege mandates exclusion of all documents subject to the privilege." *Id.* at 500. However, *Willy* involved a claim before an administrative law judge and the Fifth Circuit expressly reserved the question of whether its holding would apply to "a suit involving a jury and public proceedings." *Id.* at 500–01.
>
> Similarly, in *Kachmar v. SunGard Data Systems, Inc.,* 109 F.3d 173 (3rd Cir.1997), the Third Circuit held that a former in-house attorney could maintain a Title VII suit for retaliatory discharge; the Third Circuit reasoned that "concerns about the disclosure of client confidences in suits by in-house counsel" did not alone warrant dismissal of the plaintiff's action. *Id.* at 181. Rather, the Third Circuit suggested that a district court should "balanc[e] the needed protection of sensitive information with the in-house counsel's right to maintain the suit," while considering any protective measures that might be taken **at trial** to safeguard confidential information. *Id.* at 182.
>
> Although neither case is precisely on point, **we agree with the careful analysis of the Third and Fifth Circuits and hold that confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims**. … [W]e agree with the Third Circuit that **the appropriate remedy is for the district court to use the many "equitable measures at its disposal" to minimize the possibility of harmful disclosures**, not to dismiss the suit altogether. *Id.* at 182.
>
> We also note that the text and structure of the Sarbanes–Oxley Act further counsel against IGT's argument. Section 1514A(b) expressly authorizes any "person" alleging discrimination based on protected conduct to file a complaint with the Secretary of Labor and, thereafter, to bring suit in an appropriate district court. **Nothing in this section indicates that in-house attorneys are not also protected from retaliation under this section**, even though Congress plainly considered the role attorneys might play in reporting possible securities fraud. *See, e.g.,* 15 U.S.C. § 7245. We thus agree with the district court that dismissal of the Van Asdales' claims on grounds of attorney-client privilege is unwarranted.

577 F.3d 989, 995-96 (9th Cir. 2009) (emphasis added).[46]

In short, the Ninth Circuit has already taken a position consistent with the Commission's: the issuer's confidentiality concerns do not warrant dismissing a retaliation lawsuit. The Court may (but does not have to) use its equitable tools to limit public access to sensitive information.[47]

Conclusion

The Commission has a strong interest in ensuring that public companies do not retaliate against the attorneys who often play a key role in protecting investors and the integrity of the securities markets by ensuring their clients' compliance with the federal securities and related laws. The Commission's interest extends to ensuring that attorney-whistleblowers who honor their responsibilities have a meaningful ability to exercise the rights granted by Congress in SOX and Dodd-Frank to bring an action for illegal retaliation. Congress' intent, the Commission's regulations, the Model Rules of Professional Responsibility, the rules governing lawyers in 47 states, and the federal common law are all in accord: An attorney-whistleblower can use otherwise privileged or confidential information to support a

---

[46] Bio-Rad cites *Van Asdale* for the proposition that "these issues will rarely, if ever, be appropriately resolved at the motion to dismiss stage." DE 105 at ECF pp. 7, 9. But *Van Asdale* did not involve a motion to dismiss—it involved a motion for summary judgment. After the Ninth Circuit's decision that summary judgment was not appropriate, the case did in fact proceed to trial (where the Van Asdales prevailed).

Bio-Rad also dismisses *Van Asdale* as inapposite because it interpreted Nevada law. DE 105 at ECF p. 9. But the court did not rely on Nevada (or Illinois, or any other state) law. The Ninth Circuit did not even reference Nevada's state ethics rules; rather, both the district and appellate courts indicated that federal law governed. *See* 577 F.3d at 995 *and* 498 F.Supp.2d at 1326-27.

[47] Of all the equitable tools available to the Court—sealing, protective orders, etc.—Bio-Rad focuses on arguing that the Court could limit the admissibility of evidence. DE 105 at ECF p. 17. But as the entire preceding discussion establishes, it would not be appropriate to limit evidence on the grounds of privilege or confidentiality (or state law) alone.

claim of illegal retaliation. We respectfully ask the Court to hold that Part 205 preempts California Business & Professions Code Section 6068(e) and California Rules of Professional Conduct 3-100 to the extent either of those would *preclude* an attorney-whistleblower from using evidence that Part 205 *permits* the attorney to use.

December 13, 2016

Respectfully submitted,

/s/ Thomas J. Karr

THOMAS J. KARR* (D.C. Bar No. 426340)
Assistant General Counsel

Attorneys for *Amicus Curiae*
SECURITIES AND EXCHANGE COMMISSION

Of counsel:

KAREN J. SHIMP*
Special Trial Counsel
DC Bar # 456265

ERIC A. REICHER*
Senior Counsel
DC Bar# 490866

Office of the General Counsel
SECURITIES AND EXCHANGE COMMISSION
100 F Street NE
Washington, DC 20549-9612
Tel: (202) 551-5007 (Shimp)

* Appearing pursuant to Civil L.R. 11-2.

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
100 F Street NE, Washington, DC 20549-9612
Telephone No. (202) 551-5163; Facsimile No. (202) 772-9263.

On December 13, 2016, I caused to be served the document entitled ***Amicus Curiae* Brief of the Securities and Exchange Commission in Support of Plaintiff** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: December 13, 2016 *<u>/s/ Thomas J. Karr</u>*
Thomas J. Karr

Wadler v. Bio-Rad Laboratories, et al.
United States District Court—Northern District of California
Case No. 3:15-cv-2356-JCS

SERVICE LIST

Michael John von Loewenfeldt
Mvl@kerrwagstaffe.com
Kenneth Paul Nabity
Nabity@kerrwagstaffe.com
Kevin Brooke Clune
Clune@kerrwagstaffe.com

KERR & WAGSTAFFE LLP
101 Missions Street, 18th Floor
San Francisco, CA 94105-1528
(415) 371-8500
Counsel for Plaintiff

James Robert Asperger
Jimasperger@quinnemanuel.com

QUINN EMANUEL URQUHART & SULLIVAN LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
(213) 443-3223

John Mark Potter
Johnpotter@quinnemanuel.com
Karin A. Kramer
Karinkramer@quinnemanuel.com

QUINN EMANUEL URQUHART & SULLIVAN LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
(415) 875-6600
Counsel for Defendants