No. 17-16193

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANFORD S. WADLER,

Plaintiff-Appellee,

v.

BIO-RAD LABORATORIES, INC. and NORMAN SCHWARTZ,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
Hon. Joseph C. Spero, Magistrate Judge
Case No. 3:15-cv-02356-JCS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellant Bio-Rad Laboratories, Inc. states that it is a publicly traded company, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This is an appeal from an $11 million final judgment entered by the U.S. District Court for the Northern District of California (Spero, M.J.) after jury trial against Defendants-Appellants Bio-Rad Laboratories, Inc. ("Bio-Rad") and its Chief Executive Officer Norman Schwartz, and in favor of Bio-Rad's former general counsel, Plaintiff-Appellee Sanford S. Wadler. The jury found Wadler was terminated for engaging in protected activity under the Sarbanes-Oxley Act (15 U.S.C. § 1514A), in violation of that statute, the Dodd-Frank Act (15 U.S.C. § 78u-6), and California public policy.

Wadler's claims rest on a memorandum he submitted in February 2013 to Bio-Rad's Audit Committee alleging Bio-Rad had engaged in conduct in China that violated the bribery and books-and-records provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1 *et. seq*. Wadler made these allegations without any investigation, never consulting the experienced FCPA lawyers at his disposal, Bio-Rad's Compliance Officer, nor any of the many people on site at Bio-Rad who could have explained the Chinese-language documents on which he relied for his allegations. Predictably, given Wadler's lack of due diligence, the allegations in his memorandum were discredited by every witness who testified at trial except Wadler himself.

Whatever may have led the jury to find for Wadler, therefore, it was not the result of applying the law to the evidence. As Bio-Rad explained to the jury at trial, Wadler had authored his memorandum just four months after he had received notice that he was being summoned to a "tone at the top" meeting with federal prosecutors—a meeting that threatened his job because its purpose was to discuss Wadler's failure, for over twenty years, to educate Bio-Rad about the FCPA or to implement an FCPA compliance and training program. During that extended period, employees in certain of Bio-Rad's foreign offices appeared to have violated the FCPA, ultimately causing the company to pay a $55 million fine. As Bio-Rad explained to the jury, Wadler thus created his February 2013 memorandum for his own self-protection; as he testified at trial: "*the person who is reporting … isn't usually the person with liability*." ER197 (emphasis added). And even before preparing his memorandum, Wadler searched for and retained a lawyer who represents employee whistleblowers.

Against this showing, the jury verdict in Wadler's favor and the district court's judgment declining to enter judgment for Bio-Rad as a matter of law, can be explained only by several errors that require reversal or at the very least a new trial. *First*, Bio-Rad is entitled to judgment on all claims because no properly-instructed jury could have concluded that Wadler engaged in any "protected activity" under Sarbanes-Oxley. Wadler's memorandum concerned purported

violations of the FCPA's bribery and books-and-records provisions, but Sarbanes-Oxley's retaliation provision, by its terms, does not apply to reports of FCPA violations. The district court thus was wrong to instruct the jury that Bio-Rad could be held liable on that basis. At the very least, this instructional error warrants a new trial because it severely prejudiced Bio-Rad by expanding the grounds on which Wadler could demonstrate protected activity to include reporting bribery under the FCPA.

Second, Bio-Rad is entitled to judgment on all claims because even if reporting alleged FCPA violations were protected activity under Sarbanes-Oxley (it is not), Wadler failed to prove he held an *objectively reasonable* belief that Bio-Rad had violated the FCPA in China, as required for liability. The evidence was overwhelming that a reasonable general counsel of a Fortune 1000 company—*i.e.*, someone with the same training and experience as Wadler—would not have believed Bio-Rad committed an FCPA violation in China based on the documents attached to his memorandum. Wadler presented *no* witness—percipient or expert—supporting his burden of proof on the element of objective reasonableness; nor did he present any evidence showing he had conducted any investigation whatsoever before making his self-serving allegations. And *none* of the evidence upon which the district court relied in upholding the verdict—much of which

related to subjective reasonableness, not objective reasonableness—would have permitted a reasonable jury to find for Wadler.

Third, Bio-Rad alternatively is entitled to a new trial because of two highly prejudicial evidentiary errors. The district court wrongly excluded critical impeachment testimony that Bio-Rad sought to offer to counter Wadler's false testimony that one of his subordinates corroborated his concerns about bribery in China. The district court ruled that the subordinate had not been previously disclosed as a witness but neither the Federal Rules nor the parties' stipulation on witness disclosures required the pre-trial disclosure of impeachment witnesses. This exclusion was highly prejudicial as it prevented Bio-Rad from showing that Wadler had lied when he told the jury that a younger lawyer in the department had expressed concern about possible bribery in China. If allowed to testify, that witness would have told the jury that Wadler's testimony was a fabrication.

The district court also abused its discretion in excluding evidence concerning Wadler's Internet searches for, and retention of, a whistleblower lawyer *after* learning about his impending meeting with government prosecutors and *before* preparing his memorandum. The district court's expressed concern was that the evidence would risk a "mini-trial" over whether Wadler hired the whistleblower lawyer for "offensive" or "defensive" purposes. That concern was mooted during trial when Wadler told the jury that, in the months before he

submitted his memorandum to the Audit Committee, he had no fear he might lose his job. This testimony eliminated any possible "defensive" purpose for hiring a whistleblower lawyer. The exclusion of this evidence too was highly prejudicial because it directly implicated Bio-Rad's theory of the case that Wadler had concocted the FCPA violations to set up a whistleblower defense.

Finally, Bio-Rad preserves its argument that it is entitled to judgment on the Dodd-Frank claim because Dodd-Frank's retaliation provision, 15 U.S.C. § 78u-6, applies only to "whistleblowers" who report to the SEC. This Court has held otherwise, but the Supreme Court has granted certiorari in that case. *See Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir.), *cert granted*, 137 S. Ct. 2300 (2017).

For all these reasons, the judgment should be reversed or at the very least vacated.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because Wadler's claims for retaliation in violation of the Sarbanes-Oxley Act (15 U.S.C. § 1514A) and the Dodd-Frank Act (15 U.S.C. § 78u-6) arise under federal law. The district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Wadler's claim for wrongful discharge in violation of California public policy.

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final judgment (ER70-72), an order denying a post-trial motion under Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59 (ER70-72), and a post-trial stipulated order regarding attorneys' fees (ER68-69). Bio-Rad filed a timely notice of appeal on June 7, 2017. ER66-67.

QUESTIONS PRESENTED

1. Whether judgment should be granted to Bio-Rad on all claims because (a) the jury was wrongly instructed that reporting a violation of the FCPA constitutes "protected activity" under the Sarbanes-Oxley Act and (b) no properly-instructed jury could have found that Wadler reported conduct that constituted "protected activity" under the Act.

2. Whether judgment should be granted to Bio-Rad on all claims because no reasonable jury could have found that Wadler's belief in supposed FCPA violations was objectively reasonable.

3. Whether a new trial is warranted on all claims because the district court improperly (a) excluded impeachment testimony from a key witness and/or (b) excluded evidence related to Wadler's search for and retention of a "whistleblower" attorney before reporting purported FCPA violations.

4. Whether judgment should be granted to Bio-Rad on the Dodd-Frank retaliation claim because Wadler reported his allegations internally, rather than to the SEC.

STATEMENT OF THE CASE

A. The Parties

CEO Norman Schwartz's parents founded Bio-Rad in Berkeley in 1952. ER260. Bio-Rad now conducts business in over 100 countries and has grown to over 8,000 employees. ER251. Bio-Rad has two distinct lines of business. ER261-62. Bio-Rad's Clinical Diagnostics Group makes and sells medical diagnostics instruments and test kits, used to test for HIV, hepatitis, and blood type, among other things, and diabetes monitoring. ER262; *see* ER388. Bio-Rad's Life Science Group makes and sells products that enable laboratories to analyze genes, proteins, and cells, in order to understand the basis of diseases and biological processes. ER262-63. Norman Schwartz became Bio-Rad's CEO in 2003. ER251, ER261.

Bio-Rad, like other publicly-traded companies, has an Audit Committee comprising members of Bio-Rad's Board of Directors, that is responsible for oversight, including hiring of auditors and ensuring that Bio-Rad's financial statements are accurate. ER264, ER354.

Plaintiff-Appellee Sanford Wadler started as patent counsel at Bio-Rad in 1988, became general counsel a few years later, and remained employed at Bio-Rad until June 2013. ER152-53.

B. Wadler's Failure To Implement An FCPA Compliance Program

As general counsel of Bio-Rad, Wadler's responsibilities included advising the company on compliance with the FCPA. ER265. Wadler, however, never implemented an FCPA compliance program (ER265), or provided FCPA training to Bio-Rad employees (ER266).

In 2009, an internal audit team at Bio-Rad discovered a potential FCPA issue involving payments in Vietnam. ER267. At Wadler's recommendation (ER357), Bio-Rad hired FCPA expert Patrick Norton of the law firm Steptoe & Johnson as outside counsel to investigate. ER267-68; *see* ER302. Although initially retained by the company, Steptoe & Johnson subsequently assumed the representation of Bio-Rad's Audit Committee to conduct an independent investigation into "the company's sales worldwide." ER303, ER305. Bio-Rad promptly disclosed Norton's investigation to the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), and pledged full cooperation with the government. ER307.

Norton's investigation lasted approximately two years. ER302-03, ER310. In addition to confirming FCPA issues in Vietnam, the investigation uncovered

FCPA issues in Thailand and Russia. Norton also identified potential "red flags" in China, but no FCPA violations. ER268. Norton reported that the company's records in China for sales from 2005 through 2007 "were in very poor condition," but "[a]fter that point, there was a major management change in the Bio-Rad China operations, the records improved considerably, and on the whole, were very good." ER311. Norton also noted seeming discrepancies in product descriptions in documents concerning the same sales transactions in China, but determined they were not discrepancies, merely differences in how the same products were described on different documents, which did not raise any FCPA concerns. ER313.

After completing his investigation in September 2011, Norton recommended to the Bio-Rad Board of Directors that Wadler's employment be terminated. ER316. He believed the federal prosecutors investigating Bio-Rad's FCPA compliance would not understand how Bio-Rad could continue to employ as their general counsel a lawyer who had failed to become educated about or advise Bio-Rad about its responsibilities under the FCPA. ER317-18. Bio-Rad's Board of Directors agreed with Norton's recommendation, and conveyed to Schwartz a "general sense that they had lost confidence in [Wadler] and felt that he should be replaced." ER269.

Despite the Board's recommendation, Schwartz did not terminate Wadler because Schwartz "wanted to give him a second chance." ER270. In Wadler's employee review for the years 2009 and 2010, however, Schwartz told Wadler that "[t]he FCPA discoveries are a real black eye for the [c]ompany," that "legal could have done a much better job making the organization aware of the risks and guiding us in compliance with the FCPA," and that "legal should have been more assertive or inquisitive, making sure [Bio-Rad was] in compliance." ER486-87.

Starting in 2010, Bio-Rad implemented FCPA training "across the globe." ER271. Wadler, however, did not attend any of the FCPA training sessions. ER271-72. Bio-Rad transferred responsibility for FCPA training and compliance to Roseanne Model, Bio-Rad's newly retained Corporate Compliance Officer. ER272.

C. Wadler's Search For Whistleblower Lawyers After Notice Of A Meeting With Government Officials

In November 2012, attorney Doug Greenburg of the law firm Latham & Watkins—who was representing Bio-Rad in connection with the DOJ and SEC's investigation of the same FCPA issues Norton was investigating (ER275)—informed Wadler that the government wanted to meet with both Wadler and Schwartz to assess Bio-Rad's "tone at the top," that is, its commitment to ethical practices. ER537. The DOJ and SEC lawyers would use the meeting to review

Bio-Rad's past FCPA compliance, as well as the measures Bio-Rad was taking going forward. *See* ER275-76. Greenburg explained to Wadler in an e-mail:

> As you know, the government is looking for dates when you and Norman can meet with them to discuss [FCPA] compliance and "tone at the top."
>
> To prepare for the meeting, you and [Schwartz] should both understand and be ready to discuss FCPA compliance policies and procedures and the improvements that have been, and continue to be made …. [Schwartz's] knowledge of the policies, procedures, and remediation efforts can be more high-level than yours, but he should understand and be able to articulate all of the key elements of them. Your knowledge should be more granular. … We will want to prepare you on tough questions the government might ask, including ***why the company did not have an FCPA program before this investigation began*.**

ER537 (emphasis added).

In December 2012—one month after receiving Greenburg's e-mail—Wadler began searching the Internet for whistleblower lawyers.[1] He found one in January 2013. *See* ER62.

D. Wadler's Memorandum To Bio-Rad's Audit Committee

After this notice about the "tone at the top" meeting now scheduled for late February 2013, Wadler worked with the whistleblower lawyer he had retained (ER62) to prepare a memorandum to Bio-Rad's Audit Committee alleging two

[1] As discussed *infra*, the jury was told that Wadler had searched the Internet for "employment lawyers." ER335. The district court precluded Bio-Rad from eliciting testimony that these lawyers were actually "whistleblower" lawyers. *See, e.g.*, ER30.

types of FCPA violations in China. ER437-48. *First*, in connection with an audit being conducted by Life Technologies, a Bio-Rad licensor (*see* ER176), Wadler asserted that "Bio-Rad was unable to provide the licensing auditors many types of documents that should have been available," and that Bio-Rad's "inability to provide the documents" could give rise to a violation of the FCPA's books-and-records requirements. ER437 (citing 15 U.S.C. § 78m). All of these supposedly missing documents were from third parties, not Bio-Rad. ER328-30. *Second*, Wadler asserted that documents "uncovered during the search for documents in [that same] Life Technologies audit … suggest[ed] several possibilities for bribery." ER437-38. Wadler alleged that a public university in China was being billed for two products, but that Bio-Rad's distributor was sending a purchase order to Bio-Rad for five products for the same price, which Bio-Rad shipped. ER438. Wadler claimed that other documents exhibited "the same pattern." ER438. He also claimed that unnamed "senior management" had to have known about these purported violations. ER237-38, ER438.

Wadler had already discussed these documents with Bio-Rad CFO Christine Tsingos weeks before he submitted his memorandum (ER372, ER374-77), and she explained that the documents reflected "legitimate system order[s]," in which a bundled product (shown on the distributor's bill) was broken down into its components (on the shipping paperwork). ER371-73, ER376-77; *see* ER325-26,

ER331-32. Tsingos used an analogy to a "three-piece suit" to show why there was no discrepancy in the documents: Just as a three-piece-suit can be accurately described either as a "suit" or as a "jacket, … vest, and … pants," the items in the documents Wadler showed her could accurately be described either as a bundled item or as individual components of the bundled item. ER371-73.[2] Wadler used the documents as the basis for his memorandum anyway.

Likewise, at Wadler's insistence, CFO Tsingos had already sent a team to China to retrieve the third-party documents that Wadler was seeking. ER368-69. Specifically, as Tsingos explained, Wadler sought "not just for [documents] that verified what was on [Bio-Rad's] books, but transactions from a third party [an independent entity, known as an "import-export company," required for transactions between Chinese and foreign companies], to verify what was on the [import/export] paperwork." ER367-68. Tsingos's team "confirmed that the pricing on the import/export company documentation as well as [Bio-Rad's] invoicing in [its] own system all matched." ER370. Tsingos explained this to

[2] Tsingos further explained that "on the Bio-Rad invoice, it shows up as perhaps a single item because [Bio-Rad] sell[s] a system or a bundle of products," but the individual products are shipped separately, "each in a different box," and thus, on the invoice, "it looks like it's multiple items." ER372. The head of Bio-Rad's Digital Biology Group (a subdivision of the Life Science Group), Annette Tumolo (ER380), likewise testified that when Bio-Rad sold products in sets, they were referred to as a "system," "bundle," or "set," depending on the selling region and the terms of the transaction. ER382-83.

Wadler. ER370-71. But again Wadler used these documents as a basis for his memorandum.

Prior to submitting his memorandum to the Audit Committee, Wadler did not consult any of the individuals available to him who were experienced in FCPA issues. He did not ask the company's long-time counsel at Latham & Watkins, even though they were representing Bio-Rad on the existing investigation and even though he had multiple discussions, meetings, and other correspondence with lawyers from that firm in the days leading up to his accusations. *See* ER210. He did not ask Steptoe & Johnson's FCPA expert Norton (ER211), who had looked exhaustively for FCPA violations by Bio-Rad and had only recently submitted his final conclusions to the company (ER165). He also did not consult his colleague Roseanne Model, who was in charge of FCPA compliance issues at Bio-Rad. ER291-92, ER299. Wadler likewise admitted that he did not consult Bio-Rad's controller's unit, any Bio-Rad business unit, or "any of the people in the company who were actually knowledgeable about the products that were listed on th[e] shipping documents" that Wadler claimed showed bribery. ER211. And he never indicated that he had consulted with any of Bio-Rad's many native Chinese-speaking employees who worked in his facility and could have confirmed his misunderstanding of the purported "discrepancies" in the Chinese-language documents attached to his memorandum. *See* ER385, ER439-48.

E. Outside Counsel's Investigation Finding No FCPA Violations In China

In February 2013, at Wadler's request, the Audit Committee hired Davis Polk to investigate Wadler's allegations. *See* ER392, ER398-99. The Davis Polk lawyer leading the investigation, Martine Beamon, was a former federal prosecutor from the Southern District of New York and, though Wadler referred to her as an "associate" at trial (ER202, ER391), she had been a partner at Davis Polk for almost nine years. ER391. When Davis Polk was first retained, it determined that, in light of an impending SEC reporting deadline that would require Bio-Rad to disclose Wadler's allegations, Steptoe & Johnson's Norton should return to China for an initial assessment given his familiarity with Bio-Rad's files and employees there. ER399-400. Wadler thereafter contacted Beamon to object to her sending Norton (the lawyer who had recommended he be fired) back to China and suggested Norton had a conflict of interest in "investigating his investigation." ER400-01. Beamon did not agree. ER401.

In March 2013, after traveling to China, Norton sent the Audit Committee a memorandum to explain the findings of his investigation. ER454-64. Norton concluded "there were not any FCPA issues" in China. ER403. He determined, as Tsingos had, that Wadler's concerns over inadequate documentation "appear[ed] to arise primarily out of a misunderstanding of the sales process used for imports ... into China." ER460. Norton separately determined that the supposed

inconsistencies in documents that Wadler claimed demonstrated bribery were explained by (1) regrouping of products to conform to duty exemptions; (2) changes made to the orders; (3) orders partly filled by Bio-Rad's Chinese agent; and (4) non-corrupt inclusion of free products "to close the sale or for commercial relationship purposes." ER463-64.

After Wadler asserted his authority as General Counsel to demand a continued investigation, Davis Polk took a more active role. ER404-06. Beamon stated, however, that, throughout their investigation, the Davis Polk attorneys "had a very difficult time understanding … the basis for Mr. Wadler's conclusion that there was an FCPA issue in China." ER409-10. Wadler kept changing and expanding the basis for his claim, directing Beamon to investigate more and more issues. ER409-11. Wadler's allegations were so unclear that the Davis Polk attorneys warned Bio-Rad that Wadler was "positioning himself as [a] whistleblower." ER466 (notes of Chairman of Audit Committee). Beamon also stated that, at one meeting, Wadler yelled at her "about the conduct of the investigation, and why it was that [Davis Polk] had not yet discovered or concluded that there had been FCPA violations." ER413.

After an extensive investigation, Davis Polk reported its conclusions to Bio-Rad's Board of Directors on June 4, 2013. ER417-18. Davis Polk "found no evidence to date of any violation—or attempted violation—of the FCPA" in China.

ER280, ER418. Beamon told the Board that Wadler's allegations were "without basis," and that he "apparently had done no diligence to substantiate any of the allegations." ER281, ER417-29.

Three days after Davis Polk's report to the Board, on June 7, 2013, Schwartz terminated Wadler's employment, offering him a severance package and a two-year consulting relationship. ER282-83, ER285, ER488-89.

In late June 2013, Davis Polk provided a final report to the DOJ and SEC that included discussion of Wadler's allegations of FCPA violations in China. ER360-61, ER429, ER493-536. Bio-Rad subsequently entered a settlement with the government, paying a total of $55 million to resolve FCPA issues in Vietnam, Thailand, and Russia that arose during Wadler's tenure as general counsel. ER360-62. Bio-Rad was not asked to pay anything based on purported FCPA violations in China. ER361-62.

F. The District Court Proceedings

1. Wadler's Claims

In May 2015, Wadler filed a complaint in the Northern District of California asserting, as relevant here, three claims against Bio-Rad, Schwartz, and the other members of Bio-Rad's Board of Directors. ER144-48.

First, Wadler asserted a claim for retaliation in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which prohibits employers of publicly-traded

companies from retaliating against an employee for "provid[ing] information" to a supervisor "regarding any conduct which the employee *reasonably believes* constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1349 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1) (emphasis added). Wadler maintained that he was terminated for reporting what he reasonably believed to be FCPA violations in China in his memorandum to the Audit Committee. *See* ER139-41, ER145.

Second, Wadler asserted a claim for retaliation in violation of the Dodd-Frank Act, 15 U.S.C. § 78u-6, which provides in relevant part that a "whistleblower" may not be discharged for "making disclosures that are required or protected under the Sarbanes-Oxley Act," *id.* § 78u-6(h)(1)(A)(ii). *See* ER146 (alleging that "Wadler made disclosures that were required or protected under the Sarbanes-Oxley Act of 2002").

Third, Wadler asserted a claim for wrongful discharge in violation of public policy under California law, which must be premised on a public policy that is reflected in "either constitutional or statutory provisions." *Stevenson v. Superior Ct.*, 941 P.2d 1157, 1161 (Cal. 1997). The Sarbanes-Oxley Act was the statutory basis for Wadler's claim. *See* ER147 (alleging that "[a] substantial motivating

reason for Wadler's termination was his reporting … certain bribery and books-and-records violations of the FCPA").

2. The District Court's Key Evidentiary Rulings

Before trial, Wadler filed a motion in limine seeking to exclude evidence of his Internet search for and retention of a whistleblower lawyer prior to submitting his memorandum to the Audit Committee. Dkt. 117-6. In opposition, Bio-Rad's counsel explained that this evidence was critical to a "core element[]" of Bio-Rad's defense—that Wadler had not made his report to the Audit Committee in good faith, but instead to preempt an expected termination after the "tone at the top" meeting. *See, e.g.*, ER56, ER61.

The district court granted Wadler's motion, ruling that "the risk of a mini-trial" on whether he "consult[ed] with an employment lawyer for offensive or defensive purposes" "dramatically outweighs" the probative value of his Internet searches for whistleblower lawyers. ER55, ER58, ER59, ER65.

After Wadler testified at trial that he was not concerned about his employment before his termination (*see, e.g.*, ER158, ER161-62, ER205), thus removing any possible "defensive" purpose for searching for a whistleblower lawyer, Bio-Rad again sought to question Wadler about his Internet searches. The district court permitted Bio-Rad to inquire about Wadler's searches, but limited the questioning to whether Wadler searched for an "employment" lawyer—not a

"whistleblower" lawyer. ER38, ER41-42, ER49-50; *see* ER213-14, ER219, ER221. Wadler denied that he searched the Internet for "employment lawyers." ER244. This false testimony led the court to instruct the jury that Wadler *had* searched the Internet for "employment lawyers" from December 2012 through January 2013 (ER335)—but again without any mention they were lawyers who brought whistleblower complaints.

In a second key evidentiary ruling, the district court granted Wadler's motion to exclude an important impeachment witness. At trial, Wadler testified that, in November 2012, he had asked Bio-Rad's in-house patent attorney, John Cassingham, who was in charge of the Life Technologies audit, about a contract between an import/export company and the end-user in China. ER188-90. Wadler claimed that Cassingham reported back "a couple weeks later" and purportedly told Wadler "what I saw I think shows bribery." ER190-91. Bio-Rad sought to call Cassingham to impeach Wadler's unexpected testimony regarding their purported conversation. Cassingham would have testified he never told Wadler that any documents showed bribery. *See* ER13. Wadler vigorously opposed Cassingham's appearance at trial and moved to exclude him. Dkt. 182.

The district court granted the motion, ruling that Bio-Rad had "given up th[e] right" to call Cassingham as an impeachment witness (ER23), based on a June 2016 stipulation in which the parties had agreed to disclose "any witnesses

they *intend* to call at trial" by September 2016, to give each side adequate time for depositions (ER119 (emphasis added)). Bio-Rad originally disclosed Cassingham as a potential trial witness (*see* Dkt. 182 at 8), but later withdrew him from the witness list (*see* Dkt. 182 at 11), because, as the district court recognized, at that point Bio-Rad no longer intended to call him as a witness at trial (ER14).

3. The Key Jury Instructions

Sarbanes-Oxley's retaliation provision applies only to reporting violations of certain listed statutes, of any "rule or regulation of the [SEC]," or of statutes concerning fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The district court nonetheless, over Bio-Rad's "[v]ery clear" objection (ER351), instructed the jury that the rules or regulations of the SEC include the substantive provisions of the FCPA. ER80 (Final Instruction No. 21); *see* ER106 (Wadler's Proposed Instruction No. 2E) (citing 15 U.S.C. §§ 78dd-1(a), 78m(b)(2)(A), 78m(b)(5)); ER87 (District Court's Proposed Instruction No. 21) (citing same). Bio-Rad objected on the ground that "the FCPA is *not* a rule or regulation of the SEC." ER104; *see* ER98, ER100. At the jury instruction conference, Bio-Rad expressly preserved its "original objections," including to Instruction No. 21, "because it's talking about statutes, not regulations [of the SEC]." ER351.

4. The Jury's Verdict

In February 2017, the jury returned a verdict finding that Wadler's termination violated the retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, and California public policy. ER73-75. The jury awarded Wadler $2.96 million in compensatory damages (ER76), and $5 million in punitive damages (ER77). The district court doubled the compensatory award pursuant to Dodd-Frank's doubling provision (ER71; *see* 15 U.S.C. § 78u-6(h)(1)(c)(2)), for a total award of $11,061,608, including post-judgment interest (ER71-72). The district court entered judgment on February 10, 2017. ER72.

5. The District Court's Denial Of JMOL

Bio-Rad filed a post-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), reiterating (Dkt. 240) its prior arguments at the close of evidence under Fed. R. Civ. P. 50(a) (Dkt. 209) that (1) Wadler's claims failed as a matter of law because "the FCPA is *not* a rule or regulation of the SEC," (2) no reasonable jury could find that Wadler's belief of FCPA violations, as reported in his memorandum, was objectively reasonable, and (3) Wadler's Dodd-Frank claim failed as a matter of law because he reported internally. The district court denied Bio-Rad's motion in May 2017. ER1-11.

As relevant here, the district court ruled the FCPA constituted a "rule or regulation of the Securities and Exchange Commission," because "the FCPA is an

amendment to the Securities and Exchange Act of 1934 and is codified within it," and because there is an SEC rule related to the FCPA's books-and-records provision. ER10,

The district court also ruled that there was substantial evidence of objective reasonableness, but did not distinguish between evidence of Wadler's subjective belief and evidence of the objective reasonableness of that belief. ER7 ("Plaintiff[] presented substantial evidence at trial showing Wadler subjectively believed that Bio-Rad was engaging in conduct in China that violated the FCPA and that his belief was reasonable."). The district court cited Wadler's testimony that Bio-Rad patent attorney Cassingham had purportedly told Wadler that the documents underlying Wadler's memorandum could show bribery; documents purportedly "showing that upper-level management agreed that the lack of documentation reflecting transactions in China was a source of concern;" and documents "reflecting transactions in China that involved free products" that purportedly did not have an innocent explanation. ER7-8. The district court did not explain how this evidence supported objective reasonableness.

SUMMARY OF ARGUMENT

I. Bio-Rad is entitled to judgment as a matter of law on all claims because no properly-instructed jury could have found that Wadler engaged in "protected activity" under the Sarbanes-Oxley Act, which is a predicate to his

claims under the Dodd-Frank Act and California law as well. Sarbanes-Oxley's retaliation provision applies to employees who report violations of enumerated statutory provisions, of statutes concerning fraud against shareholders, or of "any rule or regulation of the Securities and Exchange Commission." 18 U.S.C. § 1514A(a)(1). The district court erroneously instructed the jury that certain substantive provisions of the FCPA, a federal *statute*, constitute "rules or regulations" of the SEC.

The only "rule or regulation" of the SEC concerning books and records relates to *falsification* of records. Wadler's memorandum to Bio-Rad's Audit Committee, however, reported alleged bribery and an alleged failure to maintain books and records—not falsification of records. Accordingly, Bio-Rad is entitled to judgment on all claims because no properly-instructed jury could have concluded that Wadler engaged in "protected activity" under Sarbanes-Oxley.

Alternatively, a new trial is warranted because Bio-Rad was significantly prejudiced by the district court's erroneous instruction that "protected activity" under Sarbanes-Oxley includes reporting a violation of the FCPA's bribery provision. That error expanded the grounds on which the jury could have found Bio-Rad liable and permitted Wadler to argue to the jury he had uncovered evidence concerning purported bribery under the FCPA, which would have been irrelevant had the jury been properly instructed.

II. Bio-Rad is entitled to judgment as a matter of law for the additional reason that Wadler failed to prove he held an objectively reasonable belief that Bio-Rad had committed supposed FCPA violations in China, as required to prove "protected activity" under Sarbanes Oxley. Wadler presented no evidence that a reasonable person with his same training and experience—*i.e.*, a general counsel for a Fortune 1000 company—would have thought that the documents underlying his memorandum showed any FCPA violation. To the contrary, the lawyers who testified at trial uniformly stated that Wadler had not identified any possible FCPA violation. Other undisputed evidence established that Wadler did nothing to investigate his allegations, and that such diligence would have shown his allegations to be plainly incorrect.

The district court identified no evidence from which a reasonable jury could have concluded that Wadler held an objectively reasonable belief. None of the evidence on which the district court relied involved a lawyer of comparable training and experience. Some of the cited evidence reflected concern by Bio-Rad's upper-level management regarding the Life Technologies audit—*not* purported FCPA violations. These individuals, moreover, were not lawyers, let alone general counsel with the experience and training relevant to the objective reasonableness inquiry; rather, they looked to Wadler for legal advice for the

company. And other cited evidence concerned Wadler's subjective belief, not the objectiveness reasonableness of that belief.

III. The district court also made two highly-prejudicial evidentiary errors, each of which independently warrants a new trial. *First*, the district court improperly excluded the impeachment testimony of John Cassingham, in-house patent counsel at Bio-Rad, who would have testified that Wadler had fabricated his testimony that Cassingham had told him certain documents showed bribery. The district court ruled that a stipulation between the parties had required Bio-Rad to disclose Cassingham as a potential witness before trial, but that stipulation concerning pre-trial disclosure of witnesses the parties *intended* to call at trial cannot override Fed. R. Civ. P. 26(a)(3), which expressly exempts impeachment witnesses from pre-trial disclosure. This error was prejudicial because Wadler relied heavily on Cassingham's purported statements in attempting to prove objective reasonableness.

Second, the district court improperly prohibited Bio-Rad under Fed. R. Evid. 403, from presenting evidence that Wadler searched for, and retained, a whistleblower lawyer before submitting his memorandum to the Audit Committee and that the memorandum was prepared on the lawyer's computer. This evidence was relevant to Bio-Rad's argument that Wadler had fabricated the allegations in his memorandum to preempt an expected termination after the "tone at the top"

meeting with government lawyers. And the district court's concern about the risk of a "mini-trial" over whether Wadler retained a whistleblower lawyer for "offensive" or "defensive" purposes was misplaced after Wadler testified at trial that he was never concerned about losing his job until his employment was terminated. This error was prejudicial because the excluded evidence went to the core of Bio-Rad's theory of the case.

IV. Bio-Rad is also entitled to judgment as a matter of law on the Dodd-Frank claim. The Supreme Court has granted certiorari to address whether Dodd-Frank's retaliation provision applies only to purported whistleblowers who report to the SEC, not just internally as Wadler did. Although this Court has held otherwise, in light of the grant of certiorari, Bio-Rad preserves its argument in the event the Supreme Court reverses.

STANDARD OF REVIEW

This Court reviews *de novo* whether a challenged jury instruction correctly states the law. *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014). "An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). "If the evidence presented [at] trial would not suffice, as a matter of law, to support a jury verdict under [a] properly formulated [instruction], judgment [may] properly

be entered … without a new trial." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988).

This Court reviews *de novo* a district court's order denying a renewed motion for judgment as a matter of law. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1005 (9th Cir. 2004). Judgment as a matter of law is properly granted "if the evidence, construed in the light most favorable to the nonmoving party permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Pavao v. Pavao*, 307 F.3d 915, 918 (9th Cir. 2002). A jury's verdict should be upheld only "if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion." *Id.*

"Evidentiary rulings are reviewed for abuse of discretion." *Wilkerson*, 772 F.3d at 838. Evidentiary errors are presumed prejudicial and require reversal unless the verdict is "more probably than not untainted by the error." *Obrey v. Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005).

ARGUMENT

I. BIO-RAD IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL CLAIMS BECAUSE NO PROPERLY-INSTRUCTED JURY COULD HAVE FOUND THAT WADLER ENGAGED IN ACTIVITY PROTECTED BY THE SARBANES-OXLEY ACT

The judgment should be reversed or at the very least vacated because there is no evidence that Wadler engaged in "protected activity" under Sarbanes-Oxley's retaliation provision, 18 U.S.C. § 1514A, which is a predicate for relief on

Wadler's Dodd-Frank and California wrongful discharge claims as well.[3] Wadler's claims are based on his report of purported FCPA violations, (ER437-38), but, contrary to the district court's instruction to the jury, such a report does not constitute protected activity under Sarbanes-Oxley. Bio-Rad is thus entitled to judgment in its favor on all claims, or at the very least a new trial.

A. The Jury Was Wrongly Instructed That Reporting An FCPA Violation Is Protected Activity Under Sarbanes-Oxley

Sarbanes-Oxley's retaliation provision applies to an employee who reports

> information … regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1349 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a)(1). The FCPA, 15 U.S.C. § 78dd-1, et seq., is not one of the statutes listed in Sarbanes-Oxley and does not concern fraud against shareholders. The district court nevertheless treated a report of an FCPA violation as activity

[3] The parties agree, as the district court instructed, that all claims depend on proof of protected activity under the Sarbanes-Oxley Act. *See* ER79 (Instruction No. 18) (instructing jury that "[t]o prevail on his claims … for retaliation in violation of the Sarbanes-Oxley Act, Mr. Wadler has the burden of proving … [he] engaged in activity protected by the Sarbanes-Oxley Act"); ER85 (Instruction No. 24) (instructing jury that "if you find that Mr. Wadler engaged in protected activity under the Sarbanes-Oxley Act, you must also find that he engaged in protected activity under the Dodd-Frank Act"); ER86 (Instruction No. 27) (instructing jury that "[i]t is a violation of public policy to discharge an employee for engaging in protected activity under the Sarbanes-Oxley Act.").

protected under Sarbanes-Oxley, incorrectly instructing the jury, over Bio-Rad's objection (ER351; ER104),[4] that, "under the rules and regulations of the Securities and Exchange Commission … [i]t is unlawful" to violate several substantive provisions of the FCPA. ER80 (Instruction No. 21). The district court's final Instruction No. 21 stated:

> Under the rules and regulations of the Securities and Exchange Commission applicable to Bio-Rad, …
>
> > (1) It is unlawful to 'bribe' an officer or employee of a foreign government.
> >
> > (2) It is unlawful for a company to fail to keep books [and] records … that … accurately … reflect the transactions and dispositions of the assets of the company in reasonable detail. However, a company may not be liable for an independent, third-party company's failure to maintain books and records.
> >
> > (3) It is unlawful to knowingly falsify any book, record, or account … necessary to reflect the transactions … of the company in reasonable detail.
> >
> > (4) It is unlawful to knowingly circumvent a system of "internal accounting controls.

ER80 (Final Instruction No. 21); *see* ER87 (District Court's Proposed Instruction No. 21, citing 15 U.S.C. §§ 78dd-1(a) (bribery), 78m(b)(2)(A) (maintenance of

[4] *See also* Dkt. 209 at 19 (Bio-Rad's Rule 50(a) motion) ("[T]he conduct Plaintiff claims he reported in this case were violations of the FCPA—a Congressional statute … the FCPA is *not* a rule or regulation of the SEC."); Dkt. 240 at 27 (Bio-Rad's Rule 50(b) motion) ("Judgment should be entered on the SOX claim for the additional reason that Mr. Wadler's reporting of purported FCPA violations is not a protected activity under that statute."); ER10 (JMOL order).

accurate books and records), 78m(b)(5) (falsification of books and records and internal accounting controls)).

This instruction is legally erroneous. Where a statute's "text is unambiguous, the statute must be enforced according to its terms," *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016), and the relevant statutory text of Sarbanes-Oxley here unambiguously does not encompass reporting of FCPA violations. Despite listing several statutes, Congress did not include *any* provision of the FCPA in Sarbanes-Oxley's retaliation provision, reinforcing that it does *not* reach reports of FCPA violations. *See, e.g.*, *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992) (applying canon of *expressio unius* in interpreting 33 U.S.C. § 1369(b)(1), which provides appellate jurisdiction to review action taken pursuant to enumerated "particular statute[s]," to exclude appellate jurisdiction to review actions taken pursuant to unlisted statute). Moreover, the FCPA, as a federal statute, is plainly not a "rule or regulation of the Securities and Exchange Commission." Nor is it a "provision of Federal law relating to fraud against shareholders."

Even if the statute were ambiguous (it is not), the Court should defer to the Department of Labor's interpretation that Sarbanes-Oxley's retaliation provision does not apply to FCPA violations. *See In re Gupta*, No. 2010-SOX-54, 2011 WL 121916 (Dep't of Labor Jan. 7, 2011). In *Gupta*, the Department of Labor

dismissed a complaint alleging termination in retaliation for reporting "allege[d] violations … of federal law related to the Foreign Corrupt Practices Act," reasoning that "a violation of the FPCA is not within the scope of SOX" and that the complaint had "fail[ed] to allege any violation of any rule or regulation of the Securities and Exchange Commission." *Id.* at *5. For the reasons set forth above, that interpretation is certainly reasonable and is entitled to deference were there any ambiguity in the statute. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009) (deferring to the Department of Labor's "reasonable interpretation" of activity protected by Sarbanes-Oxley's retaliation provision in *Platone v. FLYi, Inc.*, 25 IER Cases 278, 287 (Dep't of Labor Sept. 29, 2006), *overruled by In re Sylvester*, ARB No. 07-123, 2011 WL 2165854, *12, 15 (Dep't of Labor May 25, 2011)).

The district court offered two reasons why Sarbanes-Oxley applies to reports of alleged FCPA violations, but neither has merit. *First*, the district court stated that "the FCPA is an amendment to the Securities and Exchange Act of 1934 and is codified within it." ER10. But the FCPA's codification within the Exchange Act cannot transform that *statute*—which was passed by Congress and signed by the President—into a "rule or regulation of the Securities and Exchange Commission." 18 U.S.C. § 1514A.

Second, the district court concluded that the FCPA constitutes a "rule or regulation of the Securities and Exchange Commission," because there is an SEC regulation related to the FCPA's books-and-records provision. ER10. But the SEC's books-and-records regulation is narrowly limited to the falsification of books and records. *See* 17 C.F.R. § 240.13b2-1 ("No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account."). The conduct listed in Instruction No. 21 (ER80) ranges much farther, tracking aspects of the FCPA's books-and-records provision that nowhere appear in the SEC's books-and-records regulation—including requirements that an issuer "make and keep [accurate] books, records, and accounts" (15 U.S.C. § 78m(b)(2)(A)) and "maintain a system of internal accounting controls" (*id.* § 78m(b)(2)(B)). There is no SEC rule or regulation concerning the FCPA's requirements that an issuer *maintain* accurate books and records and *maintain* a system of internal accounting controls.

Moreover, even if Section 240.13b2-1 could be construed broadly to include the FCPA's requirement that an issuer maintain accurate books and records and a system of internal accounting controls (it cannot), Instruction No. 21 is legally erroneous for the additional reason that it incorporates FCPA's bribery provision, 15 U.S.C. § 78dd-1(a). *See* ER80 ("Under the rules and regulations of the Securities and Exchange Commission applicable to Bio-Rad, … [i]t is unlawful to

'bribe' an officer or employee of a foreign government. "). There is *no* SEC rule or regulation relating to the FCPA's bribery provision, and thus reporting a purported violation of that provision cannot form the basis for a Sarbanes-Oxley retaliation claim.

Instruction No. 21 is thus legally erroneous because it included in its detailed list of protected activities reports of FCPA violations that are nowhere listed in 18 U.S.C. § 1514A(a)(1) and that do not constitute any "rule or regulation of the Securities and Exchange Commission," as the district court mischaracterized them.

B. Judgment Should Be Entered For Bio-Rad Because Wadler Did Not Report A Violation Of Any Rule Or Regulation Of The SEC

Given this instructional error, Bio-Rad is entitled to judgment as a matter of law because no properly-instructed jury could have concluded that Wadler engaged in "protected activity" under Sarbanes-Oxley. *See, e.g.*, *Boyle*, 487 U.S. at 513 ("If the evidence presented [at] trial would not suffice, as a matter of law, to support a jury verdict under [a] properly formulated [instruction], judgment [may] properly be entered … without a new trial."). As noted, 17 C.F.R. § 240.13b2-1 is the only "rule or regulation of the Securities and Exchange Commission" that tracks *any* of the FCPA provisions set forth in the district court's erroneous Instruction No. 21, and there is no substantial evidence of any violation of that rule. That rule prohibits knowing *falsification* of books or records and does not concern bribery of a foreign official or maintenance of accurate books and records.

Wadler presented no evidence from which a properly-instructed jury could have concluded that he reported a violation of this rule. Wadler's memorandum alleged violations of the FCPA's *bribery* provision (15 U.S.C. § 78dd-1) and the FCPA's requirement that an issuer *maintain* accurate books and records (*id.* § 78m(b)(2)), not that Bio-Rad *falsified* any books, records or accounts. *See* ER437-38; *see also supra*, at 11-12. Nor did any evidence at trial suggest that Wadler reported conduct he reasonably believed constituted *falsification* of books, records or accounts. Because Wadler's evidence was insufficient to show that he reported a violation of Section 240.13b2-1—the only SEC rule or regulation related to any of the FCPA provisions listed in Instruction No. 21—Bio-Rad is entitled to judgment as a matter of law. *Boyle*, 487 U.S. at 513.

C. At A Minimum, A New Trial Is Warranted Because The Erroneous Jury Instruction Was Prejudicial

Even if the Court does not reverse the judgment outright, it should still order a new trial because the portion of Instruction No. 21 wrongly instructing the jury that rules or regulations of the SEC prohibit bribery of a foreign official was not only erroneous but also highly prejudicial. *See* ER81. Had the jury been properly instructed, it is "more probable than not that the jury would have reached" a different verdict. *Wilkerson*, 772 F.3d at 838, 841-42.

Because there is no rule or regulation of the SEC relating to bribery under the FCPA, a properly-instructed jury would have had no basis to conclude that

Wadler's report of alleged bribery in violation of the FCPA constituted "protected activity" under Sarbanes-Oxley. Accordingly, a proper instruction would have significantly narrowed the issues at trial, rendering all of Wadler's bribery-related testimony irrelevant to whether Wadler engaged in "protected activity"—or any other issue at trial. *See, e.g.*, ER168-69, ER171, ER190-91, ER193-94.

Had the jury been properly instructed, much of the evidence underlying the district court's decision to uphold the jury's finding that Wadler held an objectively reasonable belief concerning FCPA violations (*see infra*, at 45-50) would not have been probative at all. For example, in denying Bio-Rad's motion for judgment as a matter of law, the district court relied on both Wadler's testimony that Cassingham had purportedly "discussed his concerns with Wadler that bribery might be occurring in China," and evidence "reflecting transactions in China" that purportedly showed bribery because they did not fit the "three-piece-suit" analogy that Bio-Rad CFO Tsingos had explained to Wadler. ER7-8; *see supra*, at 12-13. None of this evidence would have been relevant had the jury been properly instructed, for in that event, bribery would have been irrelevant.

Moreover, because it was undisputed at trial that Bio-Rad's own records "were complete" (ER365), and that Wadler's case depended on records of independent third parties, it is highly unlikely that the jury would have found that Wadler had an objectively reasonable basis for alleging violations of the FCPA's

books-and-records provisions. Wadler relied exclusively on missing *third-party* documents in asserting that *Bio-Rad* had violated those provisions (*see, e.g.*, ER437-38; ER322, ER329), but, as the district court instructed the jury, "a company may not be liable for an independent third-party company's failure to maintain books and records" (ER435).[5]

A new trial is thus warranted if judgment is not granted to Bio-Rad. *See, e.g.*, *Wilkerson*, 772 F.3d at 838, 841-42.

II. BIO-RAD IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL CLAIMS BECAUSE WADLER FAILED TO PROVE HE HAD AN OBJECTIVELY REASONABLE BELIEF OF FCPA VIOLATIONS

If the Court agrees that Bio-Rad is entitled to judgment due to the district court's legal error in concluding that the FCPA constitutes a "rule or regulation of the SEC," it need not consider Bio-Rad's additional arguments. If the Court does not so hold, however, the judgment still should be reversed because no reasonable jury could have concluded that Wadler held an objectively reasonable belief that

[5] The plain text of the FCPA establishes that the books-and-records requirement applies only to documents that "reflect the transactions and dispositions of the assets *of the issuer*," and thus, a company may not be liable under the FCPA's books-and-records provision based on an independent, third-party company's failure to maintain adequate books and records. *See* 15 U.S.C. § 78m(b)(2)(A) (emphasis added); *see also* U.S. Dep't of Justice & U.S. Secs. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 43 (Nov. 2012) ("An issuer's responsibility … extends to ensuring that subsidiaries or affiliates *under its control*, including foreign subsidiaries and joint ventures, comply with the accounting provisions.").

the documents underlying his memorandum to the Audit Committee demonstrated FCPA violations in China. *See Van Asdale*, 577 F.3d at 1000 (to "trigger the protections of [Sarbanes-Oxley's retaliation provision] an employee must … have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable.").

As the district court instructed the jury, "[w]hether a belief is objectively reasonable is evaluated based on what a reasonable person with *the same training and experience* as the Plaintiff would believe under the circumstances at the time he filed his disclosure." ER80 (Jury Instruction No. 20) (emphasis added); *see In re Sylvester*, ARB No. 07-123, 2011 WL 2165854, *12 (Dep't of Labor May 25, 2011) (objective reasonableness under Sarbanes-Oxley "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee"); *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380 (8th Cir. 2016) (applying *Sylvester*); *Rhineheimer v. U.S. Bancorp. Inv., Inc.*, 787 F.3d 797, 811-12 (6th Cir. 2015) (same); *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220-21 (2d Cir. 2014) (same); *Wiest v. Lynch*, 710 F.3d 121, 131-32 (3d Cir. 2013) (same). Accordingly, it was Wadler's burden to "'show not only that he believed that the conduct constituted a violation, but also that a reasonable person *in his position* would have believed that the conduct

constituted a violation.'" *Nielsen*, 762 F.3d at 221 (quoting *Livingston v. Wyeth*, 520 F.3d 344, 352 (4th Cir. 2008)) (emphasis added).

A. The Undisputed Evidence Showed That A Reasonable Corporate General Counsel Would *Not* Have Believed That The Documents Underlying Wadler's Memorandum Demonstrated An FCPA Violation

1. The Uniform Testimony Discrediting Wadler's Allegations

No reasonable jury could have found that Wadler held an objectively reasonable belief of FCPA violations in China because Wadler presented *no* evidence that a reasonable general counsel in the same factual circumstances would have concluded that Bio-Rad committed such violations in China based on the documents underlying Wadler's memorandum to the Audit Committee. *See, e.g.*, *Livingston*, 520 F.3d at 356 (affirming summary judgment where plaintiff "failed to produce evidence that he provided information or made a complaint … about conduct which a reasonable employee in his position could have believed at the time constituted a violation of the securities laws"). Wadler offered *no* witness of comparable skill—not even another attorney with FCPA experience, let alone another general counsel of a global business—to validate his mistaken belief that the documents showed violations of the FCPA. To the contrary, all of the evidence at trial involving individuals of comparable training and experience to Wadler demonstrated that the documents referenced in his memorandum did *not* show an

FCPA violation, and that Wadler's purported suspicion of FCPA violations was unreasonable.

Every lawyer who analyzed the documents underlying Wadler's memorandum and testified at trial, concluded that the documents did *not* show an FCPA violation. ER341-42, ER344, ER348. After investigating Wadler's claims, Patrick Norton of Steptoe & Johnson reported to the Audit Committee that "there was no violation of the FCPA … shown in the[] documents." ER331-32; *see* ER325-26. Davis Polk conducted an even more in-depth investigation into Wadler's allegations, and likewise concluded that the documents did *not* show any FCPA violation. ER416, ER418. After receiving a detailed report from the attorneys at Davis Polk (ER360-61), lawyers at the DOJ and the SEC also determined that the documents Wadler relied on did *not* demonstrate any FCPA violation in China. *See* ER360-62; *see also Livingston*, 520 F.3d at 355 (no objective reasonableness where "not one link in [the plaintiff's] imaginary chain of horribles was real or … in the process of becoming real").[6]

Far from supporting Wadler's claim that his belief was reasonable, the evidence at trial demonstrated that Wadler himself misunderstood the documents

[6] While Wadler disputed in the district court that there was "evidence of any determination by the government (*see* Dkt. 244 at 13), it is undisputed that Davis Polk provided the government an extensive report regarding all of the issues Wadler raised and that the government did not include any FCPA violations in China as part of its settlement agreement with Bio-Rad (ER360-62).

he referenced in his memorandum, and that his interpretation of those documents was unreasonable, and that he continued to espouse his incorrect view even after being advised he was wrong. *See, e.g.*, *Beacom*, 825 F.3d at 380-81 (employee's belief that $10 million discrepancy between revenue projections and actual revenue constituted shareholder fraud objectively unreasonable where employee did not "understand the predictive nature of revenue projections"). Norton reported to the Audit Committee both that Wadler did not understand the documents he relied on (ER321), and that Wadler could not "explain exactly what he was complaining about" (ER338).

Lawyers at Davis Polk testified that Wadler had provided no basis for his claim that there was an FCPA issue in China. ER409. Beamon testified that Davis Polk "repeatedly asked … Wadler why he believed that the documentation he provided … revealed an FCPA issue," but "could never really get a clear understanding from him." ER409-10. Beamon further testified that Wadler "added [FCPA] issues over time" (ER410), such that Davis Polk had to ask Wadler to put his concerns in writing (ER410-11). When Wadler responded, he identified *eighteen* "potential issues to investigate and/or remediate," the vast majority of which had *no* relationship to the allegations in his memorandum to the Audit Committee. ER411-12, ER450-53. After Davis Polk reviewed the issues on the list, for which Wadler provided no evidence (ER414-15), Wadler told the Davis

Polk lawyers that the FCPA violations probably had begun in 2003—about ten years prior to his memorandum—when Wadler was uninvited from a sales meeting in Hawaii (ER415). Wadler did not explain why or how the Hawaii sales meeting had any connection to the alleged FCPA violations (ER415), and Beamon ultimately reported to the Audit Committee that she "had not found any evidence of FCPA violations," and "found no … witness who had corroborated … Wadler's allegations" (ER416).

Accordingly, the testimony at trial from individuals of similar training and experience to Wadler uniformly demonstrated that Wadler's belief of FCPA violations in China was *not* objectively reasonable.

2. Wadler's Failure To Investigate His Allegations Before Submitting His Memorandum

Wadler also failed to offer evidence that he took appropriate steps to validate his theories that the documents underlying his memorandum showed violations of the FCPA, by either consulting knowledgeable individuals who were available to him or by researching the FCPA. *See, e.g.*, *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008) (affirming ARB's determination that employee "failed to explain how [employer's] alleged conduct could reasonably be regarded as violating any of the laws listed in § 1514A"). Any reasonable lawyer—particularly a general counsel at a Fortune 1000 company—would have, at a minimum, consulted colleagues with FCPA experience and adequately researched the FCPA before submitting a

memorandum to the Audit Committee alleging "endemic" FCPA violations and accusing both his client (the company) and his colleagues of serious violations of federal law. ER438. And that reasonable lawyer especially would have done so when his or her company *was already in settlement discussions* with the SEC and DOJ concerning other FCPA issues. *See supra*, at 8, 10-11, 17.

The undisputed evidence at trial established, however, that Wadler did not take these steps, which would have confirmed that the documents did not raise any FCPA issue. Wadler did not consult with any of the several individuals with FCPA experience who were available to him, to substantiate his theories. Wadler failed to consult Steptoe & Johnson's Norton, who had investigated FCPA issues at Bio-Rad for two years (ER211); Latham's Greenburg, who was representing Bio-Rad in connection with the DOJ and SEC investigation (ER210); Roseanne Model, who was in charge of Bio-Rad's FCPA compliance program (ER291-92, ER299); or anyone in the appropriate Bio-Rad business units who could have explained to Wadler that the Chinese-language documents underlying his memorandum did not show bribery (ER211). And he disregarded CFO Tsingos's explanation that the documents showed a system on one and components on another, not bribery. ER371-73. The documents attached to Wadler's memorandum—which is Wadler's only basis for "protected activity"—fit squarely within this explanation.

ER375-77. A reasonable general counsel would not have made the accusations contained in Wadler's memorandum under these circumstances.

The undisputed evidence at trial also established that Wadler did not conduct any FCPA research, which would have demonstrated that the purportedly missing documents referenced in his memorandum did not give rise to any FCPA books-and-records violation. Even cursory FCPA research would have shown Wadler that the supposed missing books and records upon which he relied in preparing his memorandum were insufficient as a matter of law to support an FCPA violation because they belonged to independent, third-parties. *See supra*, at 37 n.5; ER241, ER322, ER329, ER346-47, ER367; *see also* ER352 (District Court: "Wow. So you are going to argue that there's an FCPA violation if the distributor, who's not owned by these companies … doesn't maintain its records …?"). Nor did Wadler familiarize himself with Bio-Rad's sales process in China. As Norton explained to the Audit Committee, "[a]nyone familiar with the … company sales model [in China] would not … be surprised at the failure of [Bio-Rad China] … to produce substantial documentation" from third parties. ER462.

No reasonable jury could have found that Wadler's allegations were objectively reasonable when even cursory inquiry or research would have shown they were flawed both as a matter of fact and a matter of law.

B. The District Court Identified No Evidence From Which A Reasonable Jury Could Have Concluded That Wadler Held An Objectively Reasonable Belief Concerning FCPA Violations

In ruling there was substantial evidence of objective reasonableness (ER7-9), the district court overlooked Wadler's failure to present testimony from any witness of comparable training and experience or any evidence that he sought to substantiate his allegations before submitting his memorandum. Instead, the district court relied on four types of evidence in denying Bio-Rad's motion for judgment as a matter of law. In doing so, the court did not identify which evidence purportedly supported the "objective" element of the protected activity, versus the "subjective" element. Contrary to the district court's conclusion, no reasonable jury could have found that Wadler held an objectively reasonable belief of FCPA violations in China based on that evidence.

First, the district court stated (ER7) that "Wadler himself testified extensively as to the reasons for his belief that FCPA were likely occurring." *See also* Dkt. 244 at 14 (Wadler arguing in district court that all of the facts supporting subjective belief "support the objective reasonableness of Mr. Wadler's suspicions"). Wadler's subjective belief is not evidence of what a reasonable person with similar training and experience would conclude under the circumstances, and Wadler may not "bootstrap" proof of objective reasonableness from his own erroneous allegations. *See, e.g.*, *Jones-McNamara v. Holzer Health*

Sys., 630 F. App'x 394, 404 (6th Cir. 2015) ("An objectively reasonable belief requires facts that exist independently of the plaintiff's personal, interior mentality."); *cf. Lang v. Nw. Univ.*, 472 F.3d 493, 495 (7th Cir. 2006) (under anti-retaliation provision of False Claims Act, "[t]he right question is whether [the plaintiff's] belief had a reasonable objective basis, and sensible jurors could not find that it did").

Second, contrary to the district court's determination (ER7), Wadler's testimony that Cassingham—a patent lawyer (ER176)—purportedly told Wadler "that bribery might be occurring in China" (*see* ER190-91) was also not evidence of objective reasonableness, let alone substantial evidence thereof. The district court disregarded that the record contains no evidence that Cassingham, as an in-house patent attorney, had similar training and experience to Wadler, a general counsel. *See, e.g.*, *Beacom*, 825 F.3d at 380 (a plaintiff "must establish that a reasonable person in his position, with the same training and experience, would have believed" they were reporting a violation).

The undisputed evidence at trial in fact established that Cassingham neither had Wadler's training and experience, nor even any FCPA experience generally. While Wadler was a general counsel who could be asked "anything" and who purported to have the skill to research any topic that arose (ER155), Cassingham was not a general counsel or a generalist at all—he was a patent lawyer, who

reported to Wadler (ER176, ER187). And while Wadler represented his own duties as general counsel to include "providing legal advice on … Foreign Corrupt Practices Act, and other compliance matters" (ER539), and conceded at trial that he had the skills to "research [and] analyz[e]" FCPA issues (ER208), the record contains no evidence that Cassingham had any FCPA experience. Indeed, although Bio-Rad's head of FCPA compliance, Roseanne Model, collaborated with several in-house Bio-Rad lawyers, including Wadler, she never collaborated with Cassingham. *See* ER295. Because Wadler did not demonstrate that Cassingham had similar training and experience, Cassingham's purported statement is not evidence of objective reasonableness.

Third, the district court also misplaced reliance (ER7) on "documents showing that upper-level management agreed that the lack of documentation reflecting transactions in China was a source of concern." These documents unambiguously show that upper-level management was concerned about obtaining documents for *the Life Technologies Audit*—not to comply with the FCPA. ER467 (e-mail from Brad Crutchfield, Bio-Rad's Executive Vice President of Life Sciences, suggesting a "need to gain the necessary documentation from our China distributors to link end user price with our documentation," as "part of a very complex series of discussions we are having with Life Technologies"); ER491 (e-mail from Schwartz noting "we are trying to collect more data from some of our

distributors to support our position on *royalties paid*") (emphasis added); ER492 (e-mail from Tsingos referencing "the Life audit").

Moreover, while Wadler alleged in his memorandum that Bio-Rad's inability "to provide the licensing auditors many types of documents … could itself be considered a substantive and clear violations of [FCPA] books and records requirements" (ER437), the evidence at trial conclusively showed otherwise. Without exception, the evidence at trial—*including Wadler's own testimony*—established that these documents were from *independent, third parties*, and thus could not support an FCPA books-and-records violation by *Bio-Rad*. ER241 (Wadler); ER322, ER329, ER346-47 (Norton); ER367 (Tsingos); *see* ER352 (district court); *supra*, at 37 n.5.

In any event, Wadler, presented no evidence from which a reasonable jury could conclude that anyone in "upper-level" management had training and experience comparable to a general counsel. There is no evidence in the record that any executive or any member of the Audit Committee had experience and training equivalent to Wadler's, and thus no reasonable jury could find objective reasonableness based on their views.

Finally, the district court wrongly stated that Wadler "offered contrary evidence reflecting transactions in China that … did not" fit the "three-piece suit" analogy that Bio-Rad CFO Tsingos used when Wadler approached her with the

documents he claimed showed bribery. ER7-8. None of this supposed "contrary evidence"—including Wadler's self-serving testimony that he purportedly reviewed documents not discussed in his memorandum (ER199-200), and documents not encompassed by the "three-piece-suit" analogy (ER247-48)—can change the allegations in Wadler's memorandum, which is the only potential basis for protected activity under Sarbanes-Oxley. *See* ER254, ER288, ER432; ER454-64.[7] In his memorandum, Wadler claimed that the documents *he attached* showed bribery because they reflected a bill to the end-user for two products, and a purchase order to Bio-Rad for five products at the same price (ER437-38)—which fits precisely within the three-piece suit analogy (*see supra*, at 12-13). The only documents purportedly demonstrating bribery that Wadler referenced in his memorandum, but did not attach, exhibited, according to Wadler, "*the same pattern repeated on many occasions*." ER437-38 (emphasis added). Thus, regardless of what additional documents Wadler claims to have reviewed, the documents referenced in his memorandum all fit the "three-piece-suit" analogy,

[7] The district court also cited Tr. 277-78 (ER195-96), but there Wadler merely testified that, of the third-party documents he received (ER194), "probably 30 percent or more *showed this same pattern*, where … there would be an order … by the customer for … two products … and [Bio-Rad] would be shipping out six or seven" (ER195). These additional documents fit squarely within the "three-piece-suit analogy." *See supra*, at 12-13.

and thus plainly do not support, let alone demonstrate, an objectively reasonable belief that bribery occurred.

Bio-Rad is entitled to judgment as a matter of law.

III. SERIOUS EVIDENTIARY ERRORS WARRANT A NEW TRIAL

A new trial is separately warranted because the district court abused its discretion in excluding the impeachment testimony of John Cassingham, and in precluding Bio-Rad from questioning Wadler concerning his Internet searches for and retention of "whistleblower" lawyers prior to making his report to the Audit Committee. These errors were highly prejudicial to Bio-Rad; Wadler cannot demonstrate that the verdict is "more probably than not untainted by the[se] error[s]." *Obrey*, 400 F.3d at 699-702.

A. The District Court Abused Its Discretion In Refusing To Permit Bio-Rad To Impeach Wadler's False Testimony

The district court erroneously ruled (ER12-23) that Bio-Rad's failure to disclose in-house patent attorney John Cassingham as a witness before trial precluded Bio-Rad from impeaching Wadler's testimony that Cassingham told Wadler he thought certain documents showed bribery (ER190-91). Under Federal Rule of Civil Procedure 26, parties must disclose before trial witnesses they "may present at trial *other than solely for impeachment*." Fed. R. Civ. P. 26(a)(3) (emphasis added). It is thus well-established that "impeachment evidence does not have to be revealed in pretrial disclosures." *Gribben v. United Parcel Serv., Inc.*,

528 F.3d 1166, 1172 (9th Cir. 2008). This carve-out for impeachment testimony reflects that such testimony is commonly offered in response to unexpected testimony at trial.

The district court nevertheless ruled that Bio-Rad had "given up th[e] right" to call Cassingham as an impeachment witness based on the parties' stipulated agreement to disclose "any witnesses they *intend* to call at trial" by September 2016. ER119 (emphasis added). This ruling was an abuse of discretion—by its terms, the parties' stipulation did not include impeachment witnesses, nor did it reflect any intent to deviate from Rule 26. ER119. If the district court were correct, then all witnesses who testified at trial would have been insulated from impeachment by any person not on a witness list—a result that should not be lightly inferred given its interference with the fact-finding process.

Bio-Rad fully complied with the stipulation because, as the district court recognized (ER14), Bio-Rad had no intention of calling Cassingham as a witness in its case-in-chief. It was only after Wadler falsely testified as to his conversations with Cassingham that Cassingham's impeachment testimony became necessary. Because the parties' stipulation did not require disclosure of impeachment witnesses, the district court abused its discretion in excluding Cassingham's impeachment testimony.

This error significantly prejudiced Bio-Rad. Cassingham would have testified that he did *not* tell Wadler that he thought certain documents showed bribery. *See* ER13. This testimony not only would have impugned Wadler's credibility with the jury, but it would have undermined Wadler's primary evidence of objective reasonableness. As the district court recognized, Wadler testified regarding his purported conversation with Cassingham in an attempt to prove "his substantive claim of reasonableness." ER13. Cassingham's purported statement was the *only* evidence Wadler presented suggesting that another lawyer—although not one of equivalent training or experience—thought that the documents underlying his memorandum could show an FCPA violation (*see supra*, at 39-50), and it was central to the district court's order denying JMOL to Bio-Rad's motion for judgment as a matter of law (*see* ER7).

Given the importance of Cassingham's testimony to objective reasonableness (and the weakness of Wadler's case overall), Wadler cannot demonstrate that the verdict was "more probably than not untainted" by the district court's erroneous exclusion of Cassingham's impeachment testimony. *Obrey*, 400 F.3d at 699-702; *cf. United States v. Bailey*, 696 F.3d 794, 805 (9th Cir. 2012) ("evaluat[ing] the potential impact of improperly admitted evidence keeping in mind that the government's case against [the defendant] was weak" where

"government's case turned entirely on [a single witness's] testimony" with "obvious credibility issues"). A new trial is thus warranted.

B. The District Court Abused Its Discretion In Prohibiting Bio-Rad From Questioning Wadler Concerning His Internet Searches For And Retention Of A Whistleblower Lawyer

The district court also erroneously precluded Bio-Rad from questioning Wadler concerning his Internet searches for "whistleblower" lawyers, the fact that he retained a "whistleblower" lawyer prior to submitting his memorandum to the Audit Committee, and non-privileged metadata showing that Wadler's memorandum was prepared on the whistleblower lawyer's computer. ER24-54, ER55-65. Wadler's Internet searches began the month after he learned he would be facing "tough questions" at the "tone at the top" meeting (ER335, ER537) and thus went to the core of Bio-Rad's defense that Wadler fabricated his FCPA allegations to protect himself. The district court, however, ruled before trial that "the risk of a mini-trial" on whether Wadler consulted an employment lawyer for "offensive purposes or defensives purposes" outweighed the probative value of this evidence. ER24-54, ER55, ER58-59.

The district court's rationale was undermined by Wadler's own testimony at trial, which mooted the possibility of a "mini-trial." Wadler testified that his December 2012 review "was the best review [he] had ever gotten" (ER158); that prior to June 7, 2013, he had no idea his job was in jeopardy (ER161-62); and that,

even up to the day he was fired, termination "was the furthest thing from [his] mind" (ER205-06). Because Wadler was not at all concerned about losing his job, he had no "defensive" reason to search for and retain a whistleblower lawyer. Consequently, there was no basis for the district court to adhere at trial to its pre-trial ruling that there was a high risk of a mini-trial in connection with Wadler's searches for and retention of a "whistleblower" lawyer. *See, e.g.*, *Obrey*, 400 F.3d at 700-01 (overturning district court's exclusion of evidence based on "the prospect of mini-trials").

The error remains even though the district court ultimately permitted, after Wadler opened the door, narrow questioning concerning whether he searched for "employment lawyers" and whether he did so because he was worried about his employment. ER227-28, ER230-31. The district court continued to preclude Bio-Rad from eliciting that Wadler searched for "whistleblower" lawyers specifically, and the fact that Wadler actually retained a whistleblower lawyer. ER49-50; *see* ER24-38, ER30-33 (declining to allow questioning about "the particular lawyer [Wadler] was looking for" due to risk of mini-trial over whether his search "was for offensive or defensive purposes"). And when Wadler was questioned whether he searched for "employment lawyers," he inexplicably *denied doing so*, even though his counsel had represented to the district court earlier the same day after consulting with Wadler—in court while the issue was being discussed outside the

presence of the jury—that he had done so. *See* ER40-41, ER244. After his false testimony, the court instructed the jury that Wadler *had* searched the Internet for employment lawyers from December 2012 through January 2013 (ER335)—but again made no mention of "whistleblower" lawyers.

Even with this instruction, Bio-Rad suffered substantial prejudice from the district court's error. The erroneous exclusion of evidence that is "directly probative of [a] central issue[] in dispute" is not harmless. *Obrey*, 400 F.3d at 700-01, *see, e.g.*, *Barnett v. Norman*, 782 F.3d 417, 424 (9th Cir. 2015) (district court's error in not requiring witness to testify was prejudicial where "everything in … case turned on which version of events was believed") (internal quotation marks omitted). Here, the instruction merely stated that Wadler searched the Internet for "employment lawyers" (ER335), but the excluded evidence that Wadler searched for and retained a "*whistleblower*" lawyer prior to submitting his memorandum to the Audit Committee—and metadata showing that the memorandum was prepared on the whistleblower lawyer's computer—went to the "core" of Bio-Rad's defense. ER56. Bio-Rad's entire theory of the case was that Wadler took deliberate steps to protect himself, preparing to file a whistleblower claim against Bio-Rad in the event he was terminated for his deficient performance as general counsel. *See* ER112-13 (joint case management statement). Under these circumstances, Wadler

cannot demonstrate that the verdict was "more probably than not untainted by the error." *Obrey*, 400 F.3d at 699-702. A new trial is required for this reason too.

IV. BIO-RAD IS ENTITLED TO JUDGMENT ON THE DODD-FRANK CLAIM BECAUSE DODD-FRANK DOES NOT APPLY TO INTERNAL REPORTING

The district court additionally erred in denying Bio-Rad's motion for judgment as a matter of law on the Dodd-Frank retaliation claim. *See* ER10. Contrary to the district court's ruling, Dodd-Frank's retaliation provision does not apply to internal reporting and instead requires reporting to the SEC.

The unambiguous statutory text shows the district court's error. Dodd-Frank's retaliation provision states that a "whistleblower" may not be discharged "because of any lawful act done by the whistleblower … (i) in providing information to the [Securities and Exchange] *Commission*." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). Dodd-Frank, moreover, defines "whistleblower" as "any individual who provides … information relating to a violation of the securities laws *to the Commission*." *Id.* § 78u-6(a)(6) (emphasis added). Because it is undisputed that Wadler did not report to the SEC, but instead reported solely to Bio-Rad's Audit Committee (ER437-38), his claim for retaliation under Dodd-Frank fails as a matter of law. [8]

[8] Because the district court doubled the jury's $2,960,000 compensatory damages award pursuant to Dodd-Frank (ER71; *see* 15 U.S.C. § 78u-6(h)(1)(c)(ii)), that

To be sure, in *Somers*, 850 F.3d 1045, this Court recently held, like the district court below, that Dodd-Frank's retaliation provision applies to internal reporting. The Supreme Court, however, has granted certiorari in that case, *see* 137 S. Ct. 2300, and a decision is expected by June 2018. Bio-Rad thus preserves its argument that Dodd-Frank does not apply to internal reporting in the event the Supreme Court reverses *Somers*.

CONCLUSION

The judgment should be reversed. Alternatively, the judgment should be vacated and the case remanded for a new trial.

Dated: October 16, 2017

Respectfully submitted,

s/ Kathleen M. Sullivan

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portion of the damages award would have to be eliminated if the judgment on the Dodd-Frank claim is reversed.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court hear oral argument in this appeal.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that they are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, the foregoing opening brief is in 14-point, proportionally spaced Times New Roman type and contains 12,646 words.

Dated: October 16, 2017

s/ Kathleen M. Sullivan
Kathleen M. Sullivan

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief for Appellants and the accompanying Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 16, 2017

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