

# California Federal Court Upholds \$8 Million Jury Verdict In Former General Counsel's Whistleblower Lawsuit

Article By:

Lloyd B Chinn

Harris M Mufson

Andrew M Schnitzel

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Recently, a **California** federal court denied the defendant–employer's motion for a new trial, upholding the jury's \$7.96 million verdict finding that the Company terminated its former general counsel for reporting alleged Foreign Corrupt Practices Act violations. See ***Sanford S. Wadler v. Bio-Rad Labs., Inc. et al.***, 2017 WL 1910057 (N.D. Cal. May 10, 2017).

## Background and Jury Verdict

Plaintiff Sanford Wadler, the former general counsel of Defendant Bio-Rad Laboratories, Inc. (the "Company"), filed suit against the Company and its individual board members after his employment was terminated in June 2013. Wadler asserted several claims against the Company, including whistleblower retaliation claims under SOX and Dodd-Frank, and wrongful termination in violation of California public policy. His claims were based on his belief that the Company's Chinese sales department had violated the FCPA and his purported protected activity of drafting a memorandum to the Company's Audit Committee concerning such allegations.

On the eve of trial, the Company filed a motion to prevent Wadler from introducing virtually all of the evidence and testimony he intended to rely on to prove his case, including all the information he learned in the course of his service as the Company's general counsel, claiming it was protected from disclosure by attorney-client privilege. The motion was denied and the trial was held over several weeks in January and February 2017. On February 6, 2017, the jury awarded Wadler \$2.96 million in back wages and \$5 million in punitive damages, finding that the Company violated SOX, Dodd-Frank, and California public policy regarding wrongful termination.

## The Court's Denies the Company's Post-Trial Motions

Following the jury verdict, the Company filed a motion for renewed judgment as a matter of law and a motion for a new trial. The Company argued that it was entitled to judgment as a matter of law as to all claims that a new trial was warranted because the verdict was against the weight of the evidence.

First, the Company argued that no reasonable jury could conclude that “Wadler engaged in protected activity, that is, that he held a subjectively and objectively reasonable belief that the conduct he was disclosing constituted a violation of the FCPA.” The Company argued that Wadler’s memo requested an investigation into the potential FCPA violations and that he was trying to protect himself rather than expose wrongdoing. The Court rejected this argument, relying on testimony from Wadler concerning his conversations with others about potential wrongdoing and that he found it difficult to obtain correct documentation of corporate transactions in China. In the alternative, the Company argued that Wadler’s subjective belief was unreasonable and pointed to evidence that Wadler’s concerns were based on a fundamental misunderstanding of how the Company conducted its invoicing and business practices in China. The Court also rejected this argument, citing evidence concerning Wadler’s conversations with others and a presentation in which someone learned of unauthorized contracts in China.

Second, the Company asserted that no reasonable jury could find that Wadler’s protected activity – writing his memorandum to the audit committee – was a substantial or contributing factor in his termination. The Company pointed to evidence that Wadler was terminated for “a pattern of behavior involving a series of incidents with coworkers” that demonstrated the incompetence for which he was allegedly terminated. The Court disagreed, finding support for the jury verdict in evidence of an earlier positive performance evaluation, close temporal proximity between the protected activity and comments concerning his termination, and a negative performance evaluation that was purportedly created after the termination and back-dated. The Company also argued that it had legitimate, non-discriminatory reasons for terminating Wadler, which was rejected by the Court on similar grounds.

Finally, the Court disposed of the Company’s claim that there could be no Dodd-Frank violation because Wadler did not report the purported violations to the SEC. The Court followed the Ninth Circuit’s recent decision in *Somers v. Digital Realty, Inc.*, 850 F.3d 1045 (9th Cir. 2017), which held that Dodd-Frank protects those who report internally, and joining other circuits on this issue, including the [Second Circuit in \*Berman v. Neo@Ogilvy LLC\*](#), 801 F.3d 145 (2d Cir. 2015).

## Implications for Employers

This is a troubling case for employers for many reasons. Chief among those is the fact that it calls into question whether companies can have frank discussions with in-house counsel that will remain privileged if the in-house counsel later asserts a whistleblower claim. Employers can take comfort in the fact that other courts have reached contrary conclusions about this issue. For example, in New York, courts have specifically prohibited counsel from relying on privileged information to pursue whistleblower claims.

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