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RYAN UEHLING

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

In Re RYAN UEHLING KELLY NELSON, Plaintiff, vs. MILLENNIUM LABORATORIES, INC., a California corporation; JASON BRISTOL, an individual; and DOES 1-10, inclusive, Defendants.	Case No. 1:13-mc-00022-BAM **REQUEST FOR RECONSIDERATION BY THE DISTRICT COURT OF MAGISTRATE JUDGE'S RULING; HEARING REQUESTED** **Fed. R. Civ. P. 72** **Local Rule 303(c)**

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I.

INTRODUCTION

Non-party Ryan Uehling respectfully requests reconsideration of United States Magistrate Judge Barbara A. McAuliffe's June 27, 2013, Order granting Defendant Millennium Laboratories, Inc.'s (ML) Motion to Compel his deposition testimony in the above referenced matter. The Magistrate Judge ordered Mr. Uehling to answer a series of questions to which he has asserted various privileges, which enables Defendants to continue to fish for information regarding Millennium's possible status as a defendant in an unrelated False Claims Act case that Millennium believes has been filed against it by Mr. Uehling.

The Magistrate Judge's Order is clearly erroneous and contrary to law, and allows the continued harassment and deposition of Mr. Uehling, who is a witness in the above-captioned employment discrimination lawsuit. Mr. Uehling has already given 2 full days and 400 pages of testimony, the majority of which was taken by Millennium's *False Claims Act attorney*, Michael Loucks of Skadden Arps, (not their Littler employment law attorney), and who only sporadically asked questions regarding the pending employment law case.[1]

The Magistrate Judge, who stated that she did not read ***the documents provided to her under seal that explained Mr. Uehling's claimed privileges***, found that the crime fraud exception applied to some questions, that questions regarding Mr. Uehling's communications with the government were not attorney-client privileged because Mr. Uehling "did not meet his burden to demonstrate the existence of an attorney-client relationship with the United States government" and that, even if a qui tam action is under seal in another jurisdiction (again, without ever reading what had been filed, under seal, with the Court), and even if Mr. Uehling is the realtor in that action, that the Court could simply seal the deposition testimony, which allows Millennium's counsel to continue asking questions critically helpful to Millennium's

[1] Tellingly, in an interview with the New York Times Mr. Loucks is reported to advise his clients to push for the unsealing of complaints, so they can "learn the scope of complaints sooner, identify witnesses and fight back harder." See *Drug Makers' Feared Enemy Switches Sides, As Their Lawyer* , New York Times, Printed June 5, 2011, Available Online at http://www.nytimes.com/2011/06/05/business/05switch.html?_r=1&

future defense in any possible False Claims Act case. The Magistrate Judge's Order is contrary to law, clearly erroneous and eviscerates established public policy regarding whistleblowers and False Claims Act litigation.

II.

BRIEF FACTUAL BACKGROUND

On March 18, 2013, non-party witness Ryan Uehling was subpoenaed by Plaintiff Nelson and Defendant Millennium to testify as a witness in Plaintiff's employment-related lawsuit against Defendant Millennium and others. (Notice, No. 2:12-cv-01301-SLG (D. Ariz. Filed March 18, 2013.) At the time, Millennium was represented by the employment law firm Littler.

Immediately thereafter, on March 28, 2013, Millennium's False Claims Act lawyer Michael Loucks signed a pro hac vice application for the district court in Arizona, which was granted on April 2, 2013. (Request, No. 2:12-cv-01301-SLG (D. Ariz. Filed April 1, 2013.)

That same day, April 2, 2013, Mr. Uehling's deposition proceeded in Fresno, California, at the Fresno Littler office. Millennium's employment attorney from Littler did not attend;[2] rather, its False Claims Act lawyer, Michael Loucks, attended on behalf of Millennium. (Doc. No. 4. Exhibit 1; Deposition Transcript to Be Emailed Upon Assignment of a District Court Judge.)

Mr. Uehling's deposition proceeded for two full days, resulting in more than 400 pages of deposition testimony, with the bulk of the questioning done by False Claims Act attorney Loucks. (Doc. No. 4. Exhibit 1; Deposition Transcript to Be Emailed Upon Assignment of a District Court Judge.) Mr. Uehling asserted an unspecified "statutory" privilege to some questions, and the attorney-client privilege to others. Mr. Uehling ultimately refused to answer 135 questions and, after the meet and confer process, defendant Millennium filed its motion to compel with respect to 61 of those questions. (See Doc. No. 3; Questions

[2] A Littler lawyer did attend to represent an individual defendant in the suit.

listed at Doc. No. 19; Doc. 7, Joint Statement Re Discovery Disagreement.)

A sampling of t Mr. Loucks' questions demonstrate Mr. Loucks' purpose in attending the deposition had virtually nothing to do with the pending employment case:

> Q: You had no clue, right, on whether the tests were medically necessary?
>
> (Deposition, page 264:23-24)

> Q: And what's your compliance issue with respect to troubled account lists?
>
> (Deposition, page 259:20-21.)

> Q: Are you familiar with something called the False Claims Act?
>
> (Deposition, page 273:24-25.)

> Q: Do you know what the anti-kickback statutes prohibits?
>
> (Deposition, page 275:14-15.)

> Q: Do you know whether there is an exception in the anti-kickback statute with respect to electronic medical records?
>
> (Deposition, page 176-177.)

> Q: Well, you weren't in a position to evaluate whether they were in compliance with the law or not, correct?
>
> (Deposition, page 182:12-14.)

The Magistrate Judge's ruling made it possible for Millennium to continue its fishing expedition. After briefing and a June 21, 2013, hearing, on June 27, 2013, Judge McAuliffe granted Millennium's motion to compel and ordered Mr. Uehling to "submit to a continued deposition." (Doc. 22.) The Court determined that it had "resolved Uehling's statutory concerns" by placing the deposition under seal, and admonished Mr. Uehling that

"otherwise refusing to answer Millennium's questions" will result in the imposition of sanctions. The Magistrate Judge stated that she "did not review the documents that were filed under seal, which were documents 11 and 12. I thought it best at this point in the proceedings not to review those, and I will reserve that for another date, if necessary." Doc. 22, page 2:3-6.

This Request for Reconsideration timely follows. Fed. R. Civ. P. 72; Local Rule 303(b). The filing of a Request for Reconsideration prevents the Magistrate Judge's Order from becoming final. Fed. R. Civ. Proc. 72(a); Local Rule 303(b). A district judge must consider the objections raised in a request for reconsideration, and opposition to this Request for Reconsideration must be served and filed within seven (7) days. Pursuant to Local Rule 303(e), Mr. Uehling requests that this matter be set for oral argument in front of the district court judge, once assigned.

III.

ARGUMENT

A. The Magistrate Judge's Refusal to Read the Sealed Documents Was Clearly Erroneous

A district court may reconsider a magistrate judge's nondispositive pretrial order, such as a discovery order, when the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a). The "clearly erroneous" standard applies only to a magistrate judge's findings of fact. *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993). The "contrary to law" standard, on the other hand, allows independent, plenary review of purely legal determinations by the magistrate judge. *FDIC v. Fidelity & Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D. Cal. 2000); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91 (3d Cir. 1992).

For unknown reasons, the Magistrate Judge refused to read the documents delivered under seal. The refusal to review the documents that support Mr. Uehling's objections was, in and of itself, clearly erroneous, as the Magistrate could not rule on the legitimate factual basis for Mr. Uehling's objections without reviewing the facts on which they were based. A judge has an obligation to review and consider the arguments and factual

allegations of the parties. In this case, Mr. Uehling contends that he is under a legal obligation not to reveal either the nature of, or the factual basis for, the privilege he is asserting and therefore provided sealed documents to the Court to support his claimed privileges. Thus, without reviewing the sealed documents, the Magistrate Judge could not reasonably make *any* factual or legal determination of the validity of Mr. Uehling's objections, nor have an understanding of the context in which the line of questioning Mr. Uehling was being subjected to would give rise to the types of objections being made. Nor does the magistrate's assumption that Mr. Uehling is a relator obviate the fact that she has not read the very documents that may well justify factually and legally his claims of confidentiality and precludes her from considering whether district courts have issued sealed orders that may affect the application of statutory objections. The failure to even review the facts and arguments presented by a party – disclosed in the unexamined documents – is clear error and contrary to law and the Magistrate Judge's Order must be reconsidered on that ground alone.

B. The Magistrate Judge's Ruling On the "Statutory Privilege" Ignores That The False Claims Act Sealing Requirement is Designed to Protect Government Investigations and Allowing Millennium's False Claims Act Lawyer Unfettered Questioning Of Mr. Uehling, If He Is a Relator, Destroys the Purpose of the Seal, Whether Uehling's Deposition is Sealed or Not

Mr. Uehling contends that the Magistrate Judge's ruling on the "Statutory Privilege," pages 3-5, is clearly erroneous and contrary to law.

Mr. Uehling objected to 38 questions on the grounds of a statutory privilege, the foundation of which he revealed under seal. (Document 20, page 3, fn. 2.) The Magistrate Court concluded, without review of the documents filed under seal (Documents 11, 12), that "Uehling represents he cannot publically discuss whether he is or is not a relator in a qui tam action." (Doc. 22, 3:9-10.) The Magistrate Judge further ruled that "[a]ssuming Uehling is a relator in a qui tam action, the primary inquiry at issue is whether his answers to the subject deposition questions would constitute a "public disclosure" of the "allegations or transactions giving rise to the relator's claim, as opposed to mere information." (Doc. 22, p. 5.) The Magistrate Judge then went onto conclude, in a footnote, that "Uehling's credibility as a key witness is highly relevant to Millennium's defense" but that "Uehling may well have a valid

statutory obligation that, if undermined, could harm important investigative and enforcement efforts of the United States government. Requiring Uehling submit to a continued deposition under seal harmonizes these competing considerations."[3] (Doc. 22, p. 5.)

However, a review of the applicable cases makes clear that the Magistrate Judge's ruling – that so long as the deposition testimony is not "public" then any concern that Mr. Uehling might violate a possible qui tam seal are assuaged – is facially contrary to law and fact.

The False Claims Act did not require a relator's complaints to be filed under seal until 1986. At that time, the seal provisions were enacted to "prevent alleged wrongdoers from being tipped off that they were under investigation" and allow the Government to proceed with its investigation without a defendant having knowledge of the details of the complaint or the existence of the complaint. *U.S. ex rel Summers v. LHS Group, Inc.* 623 F.3d 287 (6th Cir. 2010). By focusing on the "public disclosure" aspect of Mr. Uehling's deposition,[4] the Magistrate Judge missed the primary purpose of the seal: to keep a possible qui tam defendant from the details of the complaint while the government investigates. (*Id.*) So while it is true that "public disclosure" can be a seal breach, it is even more true that a "sealed" disclosure, ***made to the potential defendant***, would violate the seal and the purposes behind the sealing requirements.

Mr. Uehling is being deposed by Millennium's qui tam counsel, and asked questions regarding his understanding of the kickback statutes, his understanding of internal procedures of Millennium that he may have believed to be illegal, the timing and existence of

[3] The Magistrate Judge's ruling implies that counsel for Mr. Uehling conceded that sealing the deposition transcript would resolve the statutory privilege concerns. Counsel did not concede to sealing the deposition as a solution. Without reviewing the sealed documents, it is difficult to see how the Magistrate Judge would be able to determine whether a seal would resolve the problem, and counsel's answer that it "very well may" certainly did not concede that it would. For numerous reasons discussed herein, sealing the deposition transcript resolves none of Mr. Uehling's problems in being subjected to continued questioning by Mr. Loucks.

[4] Which, as noted by the Magistrate Judge, the parties did not address. The parties did not raise the "public disclosure" aspect of the issues before the court because it was not relevant to the concerns raised by Mr. Uehling's objections.

his conversations with qui tam counsel, the Government and his grand jury testimony, all under the guise of exploring his credibility and bias as a witness in another person's employment discrimination lawsuit. And the party asking the questions – Millennium – is, if Millennium is correct, the very party the seal provisions are designed to keep from obtaining exactly this type of information during the sealed period of the case. As stated by the Ninth Circuit, "[b]y providing for the seal provision, Congress intended to strike a balance between "the purposes of qui tam actions [and] . . . law enforcement needs[.] . . . . The other side of the balance recognizes the need to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." *U.S. ex rel. Lujan v. Hughes Aircraft Co.* 67 F.3d 242, 245 (9th Cir. 1995).

If, however, a relator can be subjected to deposition questions, by qui tam counsel for the very defendant the Government is presumably trying to investigate, the ability of the relator (who is still subject to the stay and certainly not entitled to any discovery himself) to prosecute the alleged fraud is hamstrung by the seal, yet the suspected defendant gets to pursue discovery. More importantly, the seal's purpose of allowing the Government to investigate the details of the alleged fraud before the possible defendant is aware of the allegations against it is eliminated, as the defendant has been given free reign to ask detailed questions about the allegations of fraud. In other words, the defendant is not only "tipped off" about the qui tam, it knows the details of what it may need to defend against. *U.S. ex rel. Summers v. LHV Group, Inc., supra,* 623 F.3d at 293.

Additionally, a stated goal of the Senate Committee that recommended the sealing amendments in 1986 was "to encourage more private enforcement suits." *U.S. ex rel Summers, supra,* 623 F.3d at 292. While under seal, a relator and the Government are able to evaluate their claims without the chilling effect of harassment, discovery and lawsuits by the alleged wrongdoer in the qui tam action. Allowing Millennium to ask detailed questions regarding their belief that a qui tam exists, in this unrelated lawsuit, in order to build a defense in a possible qui tam action pending in a different jurisdiction, creates a chilling effect on

potential whistleblowers who could become subject to discovery in any number of unrelated venues. This is not a fear born of paranoia: the bigger the fraud, the more likely the prospect of litigation in many jurisdictions, by many different persons, on a variety of claims. Allowing questions about a real or imagined False Claims Act case in this unrelated matter creates a discovery tool that will be most useful to the perpetrators of the most fraudulent activity.[5]

Assuming, as the Magistrate Judge did, that Mr. Uehling is a relator, a seal violation can be fatal to False Claims Act litigation. See, e.g. *U.S. ex rel. Summers v. LHV Group, Inc*, *supra*, 623 F.3d at 290 [applying a rigid rule that any violation of the seal is procedural fatal and dismissing qui tam plaintiff's action]; *Erickson ex rel U.S. v. Am. Inst. Of Biological Sciences*, 716 F.Supp.908 (E.D. Va. 1989) [dismissing qui tam due to failure to file complaint under seal]. Moreover, any decision regarding a seal violation and its possible effect on qui tam litigation should be heard in the jurisdiction where the qui tam action, if any, is pending, by the judge presiding over the qui tam action itself. By unilaterally determining that deposition under seal would not affect a qui tam, the Magistrate Judge has directly affected (and potentially fatally so) litigation that may be pending in another jurisdiction. This Court is in essence being asked to hope that, if a qui tam action is pending in another jurisdiction, that court will not disagree that allowing a confidential deposition about that very pending case will protect its seal. Given the applicable False Claims Act provisions prohibiting disclosure of qui tam cases and the case law affirming the dismissal of qui tam actions where there has been a disclosure, no matter how innocent, it is seems highly unlikely that the qui tam court would ever agree with the Magistrate Judge's decision. By failing to read the sealed documents and

[5] Nor is the chilling effect of this Order illusory, as not only is the Order available to attorneys on WestLaw and Lexis, but a simple Google search for False Claims Act litigation reveals a recent blog entry about the Magistrate Judge's Order here. Entitled, "The Seal is a Big Deal: A Warning About Breaching Requirements in FCA Cases," the blog entry notes that "allowing [Millennium's counsel to depose the potential relator results in the target defendant finding out all about the sealed qui tam case. The purpose for the seal is destroyed. And the relator is still barred from beginning his own discovery against [Millennium] by the seal." http://www.fmbusinessattorneys.com/622/ Potential whistleblowers turn to the internet when they suspect fraud; the Magistrate Judge's ruling has a chilling effect by telling potential whistleblowers the seal of a qui tam will not be respected.

failing to appreciate the seriousness of the objections raised by Mr. Uehling, the Magistrate Judge acted contrary to law and the Order must be reversed.

C. The Magistrate Judge's Application of the Crime-Fraud Exception with Respect to Communications Between Uehling and His Counsel is Contrary to Law

Mr. Uehling contends that the Magistrate Judge's ruling with respect to the attorney-client privilege, pages 6 – 12, is clearly erroneous and contrary to law.

The Magistrate Judge concluded that, as to the 26 questions asked with respect to "actions Uehling took with respect to Millennium property," that Millennium was entitled to ask whether attorneys (presumably qui tam or Government attorneys) had instructed Uehling regarding what to do with Millennium property. (Doc. 22., page 9.) The Magistrate Judge concluded none of the questions were protected because Uehling admitted he had taken his Millennium laptop to Houston after he was fired. The Magistrate Judge concluded, "The crime-fraud exception applies to communications by Uehling's attorneys directing Uehling to take certain actions with Millennium property. A reasonable inference can be drawn from Uehling's retention and use of Millennium property after his termination that some unlawful act was committed." (Doc. 22, page 10:8-11.)

The application of the crime-fraud exception to the attorney-client privilege allowing questions about documents possibly provided to the government—which is both protected and encouraged by statute and case law in qui tam cases—is patently contrary to the law. That is always true, but especially so in when counsel has asked questions designed to create a disclosure that would force the dismissal of the qui tam claim he believes Mr. Uehling has filed and, failing that, questions directed at obtaining information about this suspected qui tam claim. In addition to the fact that mere allegations of a crime or fraud, as here, do not suffice (Doc. 7, page 6; *United States ex rel. Rabushka v. Crane Co.* (8th Cir. 1997) 122 F.3d 559, 566), an employee's use of documents in order to expose an alleged fraud under the False Claims Act is protected activity; in fact, relators are required under the False Claims Act to disclose to the Government all of the inside information used to file qui tam lawsuits. See, e.g., 31 U.S.C. §§ 3730(b)(2), (e)(4)(B). The case law makes clear that not only the False Claims

Act statute but also the courts consistently protect a relator's use of employer documents.

The Magistrate Judge correctly concluded that the crime-fraud exception withholds the protection afforded by the attorney-client privilege for any communication "in furtherance of intended, or present, continuing illegality."[6] *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *Geilim v. Sup. Ct.*, 234 Cal.App.3d 166 (1991); Cal. Evid. Code § 956. Federal and California state courts have consistently observed that the crime-fraud exception is a narrow exception that requires a heavy burden and is used in rare circumstances. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422, opinion modified on reh'g, 30 F.3d 1347 (11th Cir. 1994) (observing that the "crime-fraud exception presents one of the rare and extraordinary circumstances" justifying an exception to the attorney-client and work product privileges); *In re John Doe, Inc.*, 13 F.3d 633, 635 (2d Cir. 1994) (observing that a "high standard of proof" is required for establishing the exception); *United States v. Honken*, 378 F.Supp.2d 970, 1008 (N.D. Iowa 2004) (ruling that the crime-fraud exception a "rare instance" in which the attorney-client privilege can be disregarded); *D & D Assocs., Inc. v. Bd. of Educ. of N. Plainfield*, 2011 WL 1871110, at 10 n.9 (D.N.J. May 13, 2011) (observing that the crime-fraud exception to the attorney-client privilege was "the rare case"); *In re Application of Chevron Corp*., 762 F.Supp.2d 242, 254 (D. Mass. 2010) (observing that party invoking crime-fraud exception must meet a "heavy burden in establishing that narrow exception").

California courts also recognize that only exceedingly rare and extraordinary circumstances call for use of the crime-fraud exception. *Geilim, supra*, 234 Cal.App.3d at 174. "Cases decided since the adoption of the Evidence Code recognize the limited nature of the exception to the attorney-client privilege created by Evidence Code section 956: 'This exception is invoked only when a client seeks or obtains legal assistance "to enable or aid" one to commit a crime or fraud. The quoted language clearly requires ***an intention on the part of the client to abuse the attorney-client relationship, . . .***' [Citations] *Geilim v. Superior Court,*

[6] Under either federal or California law the use of the crime-fraud exception in this matter is contrary to law, so Mr. Uehling provides authority for both to the Court.

supra, 234 Cal. App. 3d at 174.

The Magistrate Judge failed to acknowledge that in order for the exception to apply at all, there must be evidence of a knowing intent to engage the services of the lawyer *in order to perpetuate the alleged crime*. Millennium would have to show that the attorney's services were sought or obtained to aid in the crime itself, i.e. that "the attorney-client communications were sought or obtained to aid in such a scheme or that the communications were factually related to the fraud." *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1262 (Cal. App. 5th Dist. 1988) Thus, even assuming a crime was committed (which Mr. Uehling denies), the crime-fraud exception would still not apply under California or federal law unless there was evidence that Mr. Uehling purported to engage an attorney *specifically to commit the alleged crime.*

The "crime" the Court purported occurred was the transportation of the laptop across state lines and the alleged "theft" of Millennium documents. There was no evidence whatsoever that Mr. Uehling sought the assistance from an attorney about how to take his laptop across state lines or how and whether to "steal" documents from Millennium. If anything, Mr. Loucks' own line of questioning appeared to reveal that the purpose for obtaining the services of an attorney were related to filing a False Claims Act complaint, not for the purpose of the alleged crime – that is, obtaining Millennium documents. The Magistrate Judge's Order simply found a "reasonable relationship between the crime or fraud and the attorney-client communication" and on that ground found they would not be protected, which is contrary to law. Much, much more than a "reasonable relationship" is required to violate the sanctity of attorney client communications. As stated by the court in *BP Alaska Exploration, Inc. v. Superior Court*, the exception only applies "where an attorney's services **are sought to enable a party to plan to commit a fraud**." 199 Cal.App.3d at 1263. There is no evidence or reasonable inference that Mr. Uehling sought an attorney's services to enable him to obtain Millennium documents. The exception simply has no bearing on these facts whatsoever.

Second, and most importantly, the Ninth Circuit, as well as many others, recognizes the need to allow the access and removal of documents in support of False Claims

Act allegations. In *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009), the Ninth Circuit expressly rejected an employer's argument that an employee accessed electronic documents without "authorization" when the employee emailed those documents to himself with the intention of uncovering the employer's fraud. The Ninth Circuit reasoned that where the employee's actions were consistent with the access previously granted to him as an employee, the employee acts with proper "authorization" within the meaning of the Act, regardless of whether the employee breached his or her duty of loyalty to the employer.[7]

Indeed, it has long been understood that "the purpose of the qui tam provisions of the act is to encourage those with knowledge of fraud to come forward." *Neal v. Honeywell, Inc.* 826 F.Supp. 266 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994) citing H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)). Gathering evidence in support of False Claims Acts cases is recognized as crucial to False Claims Act litigation. "Fraudulent activity by its very nature is concealed. . . . Without the help of insiders who brought the Government documents and other hard evidence of the fraud, it would have been extremely difficult for the Government to develop sufficient evidence to establish liability in many successful FCA cases." Representative Berman (CA), "Fraud Enforcement and Recovery Act of 2009," *Congressional Record* 155: 82 (June 3, 2009) p. E1295, E1297.

The Magistrate Judge's Order adopts the crime-fraud exception as a basis for requiring Mr. Uehling to disclose discussions between himself and his counsel regarding documents that Millennium apparently believes were used in the creation of a qui tam complaint, that Millennium believes exists, goes to the heart of protected False Claims Act activity. In fact, in order to proceed with an False Claims Act action, the False Claims Act requires that a relator disclose to the United States "substantially all material evidence and

[7] Thus, Mr. Loucks' deposition question "Have you told the government that you did that, that you took Millennium's property from California to Houston across state lines and gave somebody else access to it?" is not only irrelevant with respect to the Nelson litigation, but also has nothing to do with Mr. Uehling's credibility or bias, given that his having done so would be fully protected activity which he would be, if a seal exists, *unable to currently present any defense for.* This is patently unfair and goes back, again, to the purposes behind sealing requirements.

information the person possesses," 31 U.S.C. § 3730(b)(2), and ties the relators' share of any award to the importance of her/his participation in the action and relevance of the information provided. *See, e.g., United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996).

So important are the documents gathered in support of False Claims Act litigation that courts consistently refuse to enforce confidentiality agreements in qui tam cases that would otherwise require employees to turn over those very documents in non-qui tam ligitation. In *United States ex rel. Head v. Kane Co.*, 668 F.Supp.2d 146, 152(D.D.C 2009), the Court stated that "[e]nforcing a private agreement that requires a qui tam Plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the Defendant who is under investigation would unduly frustrate the purpose [of § 3730(d)(2)]." See also, *X Corp. v. John Doe*, 805 F.Supp. 1298, n.24 (E.D. Va. 1992) [noting that a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government".]

Similarly, in *United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004), the Court dismissed the company's claim against a relator for breach of a confidentiality agreement. As noted by the court in that case, "Relator and the government argue that the confidentiality agreement cannot trump the [False Claim's Act's] strong policy of protecting whistleblowers who report fraud against the government. **Their position is correct and the defendant concedes as much.** . . . Relator could have disclosed the documents to the government under any circumstances, without breaching the confidentiality agreement." (Emphasis added.) The Court specifically noted that **production of documents necessary for an investigation of health care offenses, such as "medical records and billing records related to suspected billing discrepancies, including excessive charges and improper billing" are protected activity**. *Id*. at 768. *See also X Corp. v. John Doe, supra*, 805 F.Supp. 1298, 1310 n. 24 , *aff'd sub nom., Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994) (attorney allowed to retain confidential documents evidencing fraud in spite of a confidentially agreement where the Court found that the documents were "plainly relevant" to

the allegations of fraud).

Simply stated, where a former employee discloses an employer's confidential business documents to the Government for the purpose of exposing fraud, that insider cannot be subject to liability for doing so. The Court in *Maddox v. Williams*, 855 F.Supp. 406, 415 (D.D.C. 1994) provided the following insight:

> If the [Plaintiff company's] strategy were accepted, those seeking to bury their unlawful and potentially unlawful acts from consumers, from other members of the public, and from law enforcement or regulatory authorities could achieve that objective by a simple yet ingenious strategy: all that would need to be done would be to delay or confuse any charges of health hazard, fraud, corruption, overcharge, nuclear chemical contamination, bribery, or other misdeeds, by focusing instead on inconvenient documentary evidence and **labeling it as the product of theft,** violation of proprietary information, interference with contracts, and the like. The result would be that even the most severe public health and safety dangers would be subordinated in litigation and in the public mind to the malefactors' tort or contract claims, real or fictitious. [¶] The law does not support such a strategy or inversion of values. There is a constitutional right to inform the government of violation of federal laws . . ."
>
> (Emphasis added.)

It is important to recognize Millennium's Motion to Compel for what it is, which is a not-so-veiled attempt to set up a future motion to suppress in possible impending criminal cases, and for future counterclaims in the qui tam action Millennium believes exists. But Millennium will have that ability in the event of qui tam litigation, where the use of counterclaims as a defense is commonplace. In *United States ex rel. Battiata v. Puchalski*, 906 F.Supp.2d 451 (D.C. So. C. 2012), the district court gives a thorough summary of the appropriate (and inappropriate) use of counterclaims in qui tam litigation. Citing the Ninth Circuit in *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 213-14 (9th Cir. 1991) and *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993), the *Battiata* court noted that allowing counterclaims of, for example, breach of fiduciary duty against the employee was not in the public's interest, and affirmed the dismissal of counterclaims brought by qui tam defendants based on the alleged improper gathering and use of documents by the relator. The *Battiata* court quoted another district court's summary of

court of appeals cases on the issue of allowing counterclaims against relators regarding the use of employer documents as follows:

> "These cases come together to form a sensible rule. If a defendant's counterclaim is predicated on its own liability, then its claims against a relator typically will allege that the relator participated in the fraud, or caused the defendant some damage by the act of being a relator, that is, by disclosing the defendant's fraud. The first kind of action seeks contribution or indemnity, rights that are not provided by the FCA because they would deter relators, allow wrongdoers to shift their costs, and would disrupt the intended framework of incentives and punishments established by the FCA. The second kind of action has the same effect of providing contribution or indemnity, with the perverse twist that the relator is not even accused of contributing to the defendant's fraud. If such suits were allowed, they would punish innocent relators, which would be a significant deterrent to whistleblowing and would imperil the government's ability to detect, punish, and deter fraud. The FCA contains several provisions seeking to protect relators from retaliation, and it would run counter to this policy if the Court were to allow retaliatory suits against truthful relators."
>
> *Id*. at 459-460.

Obviously, Millennium will have the right to vigorously defend itself if and when the criminal indictment they apparently expect comes, and when, if ever, a qui tam complaint is revealed. In both of those instances, the proper forum for obtaining evidence and full evidentiary hearing on a motion to suppress due to the (meritless) alleged improper actions of Mr. Uehling related to his laptop and/or counterclaims for alleged breaches of a confidentiality agreement would be properly subject to discovery *by all parties* to the relevant litigation, cross-examination, and full evidentiary hearing by the district court in which the case is pending. Millennium's attempt to explore and exploit any possible defenses in the suspected qui tam and criminal cases that Millennium guesses are down the road is improper and highly prejudicial to Mr. Uehling, if he is a relator, who is not even a party to the current lawsuit.

In sum, the Magistrate Judge's Order not only plainly fails to follow California or federal law with respect to the manner in which the crime-fraud exception can apply, it fails to recognize the nature of the questions being asked and the fact that the questions themselves show that Millennium believes the documents, if obtained from Millennium, were so obtained with the intent to pursue False Claims Act claims. In this context, the crime-fraud exception is

inapplicable, even if it had been properly applied. The Magistrate Judge's Order was thus contrary to law.

D. The Magistrate Judge's Ruling on the Attorney-Client Privilege With Respect to Communications with Ameritox Ignores the Common Interest Privilege and is Clearly Erroneous and Contrary to Law

The Magistrate Judge further held, with respect to "Uehling's Interactions with Ameritox," (questions 61-68) that Millennium was entitled to discuss the time, number and production of documents to Ameritox because it was not requesting attorney client privileged information. Doc. 22, page 11. This was clearly erroneous and contrary to law.

The district court in Arizona has already determined that the common interest privilege applies to protect conversations between Ms. Nelson, the plaintiff, and Ameritox. See *Nelson v. Millennium Laboratories, Inc. et al.*, Case No. 2:12-cv-01301-SLG, D. Ariz., Doc. 185, Filed 06/26/13. Despite Mr. Uehling's assertion of the common interest privilege (Doc. 7, page 74-84), the Magistrate Judge determined that the questions were not protected because Mr. Uehling is not represented by Ameritox lawyers and because the questions were not designed to elicit the substance of the conversation. (*Id.*) Millennium's attempt, in this court, to circumvent the ruling of the judge in the underlying case in Arizona in order to figure out the extent, if any, of Ameritox's involvement with Ms. Nelson and Mr. Uehling evidences blatant forum shopping.

Additionally, as to the manner of questions being asked and whether they would elicit privileged information, the facts surrounding any meeting by Mr. Uehling with Ameritox lawyers – including who called whom, where they met, who was there, for how long and how many times they met and whether he provided documents to them – necessarily reveals the type and scope of litigation given the nature of the relationships, known to Mr. Loucks, between Millennium, Uehling, Berg & Androphy, and the Ameritox lawyers. Any information which would reveal the motive of a client in speaking with the attorneys, litigation strategy, or the specific nature of the services provided is protected. "As a general proposition, the client's ultimate motive for litigation or for retention of an attorney is privileged. *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674-75 (5th Cir. 1975); see 8 J. Wigmore, Evidence § 2313

(McNaughton Ed. 1961)." *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. Cal. 1982).

In this case, given the nature of Mr. Loucks' line of work, the nature of the questions being asked of Mr. Uehling, and the nature of the relationship between Ameritox, Uehling and Millennium,[8] answering any of the questions posed by Mr. Loucks with respect to possible contact by Mr. Uehling with Ameritox lawyers is privileged.

E. <u>The Questions At Issue All Involve Mr. Uehling's Access to Documents, Possible Conversations with Qui Tam Counsel, Possible Conversations with the Government, and Possible Defenses by Millennium in a Qui Tam Action</u>

Millennium's attorney asserted in its motion that, as experienced qui tam counsel,[9] his questions were carefully crafted to not reveal the existence of a qui tam action. That position is misleading given that Mr. Loucks's attendance at the deposition makes clear Millennium has already assumed the existence of a qui tam action, with Mr. Uehling as the relator. In fact, every question objected to by Mr. Uehling related to his conversations with Berg & Androphy (a well known qui tam law firm), possible conversations with government attorneys, grand jury testimony and possible production of Millennium documents did not have to reveal the existence of a qui tam, **because all of the questions were already designed to extract information in order to defend against a qui tam**. Moreover, Mr. Uehling's alleged financial bias can only exist if there is a False Claims Act complaint, thus the only way for Mr. Uehling to admit or deny financial motivation is through acknowledging or denying the existence, if any, of a qui tam complaint. See, e.g., Doc. 19, page 17, questions 55, 56, 57.

F. <u>Millennium Has 400 Pages of Deposition Testimony That Includes Extensive Discovery Related to Mr. Uehling's Credibility and Possible Bias, Making Millennium's Alleged Interest Attacking Mr. Uehling's Credibility Substantially Outweighed by the Possible Governmental Interest in a Fraud Investigation</u>

Finally, the Magistrate Court expressed a desire to "harmonize" the interests of

[8] Remember, no less than 5 lawsuits are pending with Millennium as a party at present. (Doc. 7, page 5, fn. 5.)

[9] In fact, Mr. Loucks was an Assistant United States Attorney for nearly 25 years, and arguably the most successful qui tam health care fraud prosecutor the Department of Justice has ever had.

Millennium and the Government by sealing the deposition. In addition to all the reasons set forth herein that sealing the deposition does not resolve the privilege problems Mr. Uehling faces, the reality is that any further deposition of Mr. Uehling to answer these or any other questions is entirely redundant and harassing. For example, while Mr. Uehling refused to answer questions 41-55, which were all questions regarding documents Mr. Uehling may have had and whether Mr. Uehling has an "expectation of financial reward" regarding Millennium's compliance issues, Mr. Uehling did provide testimony that he is represented by Berg & Androphy, did provide testimony regarding his use of his laptop, and apparently gave Mr. Loucks sufficient "credibility" evidence to warrant the following commentary by Mr. Loucks:

> "One of the things about Word documents in particular on a computer, Mr. Uehling, Power Point, Word, Excel spreadsheets, is every time you open the document it creates what's called a metadata in the document, I'll let you know that, and you can tell when documents were last accessed, when they were opened and modified." (Doc. 20, 119:7-13.)

In 400 pages of deposition testimony, Mr. Uehling's credibility was exhaustively covered; badgeringly so. To the extent Millennium's right to be able to pursue the credibility or bias of Mr. Uehling is a factor that could be weighed against the need to protect sealed matters, they have already been allowed to do so, exhaustively.

IV.

CONCLUSION

The Magistrate Judge's Order was clearly erroneous and contrary to law as set forth herein. Accordingly, Mr. Uehling respectfully requests it be reversed in its entirety, that his deposition be ordered concluded, and that Millennium be ordered to refrain from any further harassing discovery requests that are fishing for information Millennium believes Mr. Uehling may have related to potential False Claims Act litigation that may be pending in other jurisdictions.

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Any further False Claims Act discovery, if any, must be conducted in front of the court with jurisdiction over such litigation after the complaint, if any, is unsealed. Until then, Millennium's harassing fishing expedition must stop.

Dated: July 11, 2013

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