

## **Court Confirms Individual Liability For Directors Under SOX and Dodd-Frank**

October 27, 2015

On October 23, 2015, U.S. Magistrate Judge Joseph Spero of the U.S. District Court of Northern California [ruled](#) that former General Counsel of Bio-Rad Laboratories, Inc. Sanford Wadler can proceed with his whistleblower retaliation case against the company and its board members, holding that Wadler's internal reporting is covered whistleblowing under the Sarbanes-Oxley ("SOX") and the Dodd-Frank Acts.

In 2013, Wadler notified senior management and the Audit Committee of his suspicions that Bio-Rad was bribing Chinese officials to increase sales in the country in violation of the Foreign Corrupt Practices Act. Bio-Rad then conducted internal investigations, concluding that there was no wrongdoing. In a March 2013 meeting, Wadler questioned the accuracy of those findings, after which he alleged he was excluded from participation in further investigation into the matter. On June 7, 2013, Bio-Rad terminated Wadler, a determination made by the Board of Directors and effectuated by the CEO Norman Schwartz.

Wadler asserts that his termination constitutes retaliation in violation of the [whistleblower provisions](#) of both SOX and Dodd-Frank, asserting that both Bio-Rad and certain individual Board members are liable under both Acts. On November 29, 2013, Wadler filed his initial complaint with the Department of Labor ("DOL"), before amending the complaint on January 25, 2015 to clarify that he sought relief from the individual board members as well as Bio-Rad. In May 2015, Wadler availed himself of SOX's "kick-out" provision and filed suit against the company and the board members, alleging that he had been retaliated against for engaging in protected activity under SOX and Dodd-Frank.

Defendants moved to dismiss the claims against the individual board members could not be held liable under either Act and that the 180-day filing limit was not met under SOX. The Judge held that there is "scant case law" regarding the individual liability of directors under SOX and that it was "a close call." Judge Spero ultimately held that directors could be held individually liable under SOX, as "Congress's failure to expressly include directors in the list of those who may be individually liable under Sarbanes-Oxley does not support the conclusion that it intended to shield directors who engage in retaliatory conduct from individual liability." Judge Spero, however, dismissed the SOX claims against the individual directors, holding that the 180-day limitation period had expired when Wadler filed his claim with the DOL against the individual defendants.

The Court denied Defendants' motion with regard to the Dodd-Frank claims against the individual directors. Defendants argued that Dodd-Frank did not provide for individual liability for unlawful retaliation. After identifying that the Act was ambiguous as to the question of individual liability, the Court concluded that "Congress intended that Dodd-Frank provide for individual liability that is *at least as extensive* as that of Sarbanes-Oxley" (emphasis added), thus allowing for holding directors individually liable under Dodd-Frank.

Defendants also contended that Wadler did not qualify for [whistleblower protection under Dodd-Frank](#) since he reported his concerns internally rather than directly to the SEC. Judge Spero denied this

motion, holding that internal whistleblowers are protected from retaliation under Dodd-Frank. This interpretation of the statute adopts the SEC's position as submitted to the Court in an amicus curiae brief filed on August 7<sup>th</sup>, 2015. It also follows the majority of court opinions, although there continues to be a significant number, albeit a minority, of courts that require a whistleblower to report to the SEC to be eligible for Dodd-Frank protections.

This bodes well for potential whistleblowers, as internal reporting is often the first step concerned employees take and a critical component of the SEC Whistleblower Program. As such, it is imperative that individuals brave enough to come forward within their company are protected when they voice their concerns. Amid much controversy over the interpretation of [Dodd-Frank's statutory language](#), Judge Spero joins courts who have interpreted the whistleblower provision broadly, in a manner that most protects whistleblowers from retaliatory action.