CLE SEMINAR

Does size matter? Brainstorming potential tactical advantages in large multi-defendant cases.

Presented by:
Federal Public Defender's Office

Speaker:
CJA Attorney Daniel Feiner

Portland, Oregon
March 24, 2016
12:00pm to 1:00pm

Joint defense agreements: the benefits and the risks

Joint defense agreements have been around for a long time, and with them come both advantages and disadvantages. In a Sound Advice podcast from the American Bar Association Section of Litigation, Lee Ziffer of Kuchler Polk Schell Weiner & Richeson LLC explains the purpose of a joint defense agreement and offers guidelines for using the agreements wisely.

At its core, a joint defense agreement is an agreement among attorneys for different defendants in a case who agree to share confidential information that would otherwise be protected by the attorney-client privilege to further a common defense goal, Ziffer said. These agreements have many benefits.

"They allow defendants to share information with other defense counsel without relative fear of waiving work product or attorney-client privileges," he said. "They allow development of a unified defense strategy to defend a claim and to avoid duplicative work. It allows defendants to divide the issues and conquer. One defendant can handle expert issues; another defendant can handle discovery issues, motions in limine and so forth."

While the benefits of working with co-defense counsel on a common defense goal are fairly clear, often many attorneys overlook some of the dangers associated with sharing confidential information with attorneys representing other parties, Ziffer said.

Any time you're thinking about entering into a joint defense agreement, there should be two questions that should frame your thinking about whether to enter into such an agreement, he said. "First, how does this affect me as the attorney, and second, how does this affect my client?" Ziffer asked. "In order to answer these questions, the attorney needs to have a proper understanding of why we enter into joint defense agreements in the first place."

A joint defense agreement is really just a written recognition of the joint defense privilege, which is recognized as common law in most jurisdictions, Ziffer said. "The privilege itself doesn't require a written agreement to apply, but, as with most implied agreements among attorneys or their clients, there are many reasons to make sure the parties define the scope of their agreement to share information in writing before proceeding," he said.

Black's Law Dictionary defines the joint defense privilege as the rule that a defendant can assert the attorney-client privilege to protect confidential communication made to a co-defendant lawyer if the communication was related to the defense of both defendants, Ziffer said. There are a couple levels to this definition, he said.

"First, the privilege keeps confidential information confidential when shared with co-defense counsel. That's good, but here's the caveat: The information is only kept confidential if the communication is related to the defense of both defendants," Ziffer said. "Without a clearly defined scope, whether a particular communication is related to the defense of both defendants can be ambiguous. So with this framing in mind, the benefits of a written agreement to define this scope is clear. The joint defense agreement is a useful tool to make sure that everybody is on the same page as to the goal of the joint defense and the information that can be exchanged in furtherance of that joint defense before proceeding. In essence, it's best to look at the agreement as simply a definition of the parameters of the joint defense privilege."

As attorneys, there are a couple of pitfalls you should be aware of, Ziffer said. First, a joint defense agreement may create an implicit attorney-client relationship among your co-defendants. This implied relationship isn't fully defined in most jurisdictions and differs among the jurisdictions. However, the relationship at least includes a duty of confidentiality owed to these co-defendants and a duty to avoid and disclose conflicts or potential conflicts to the defense group either before entering into the agreement or during the pendency of the agreement, he said.

"It's important to frame the agreement carefully to define the scope of the joint defense to be only as broad as necessary," Ziffer said. "Basically, you don't want other defendants disclosing information that you treated as confidential, and you don't want other defendants accusing you of using confidential information when you thought this information was not related to the defense or this information was not disclosed in confidence. So if properly framed, the joint defense agreement can make sure everyone is on the same page about the nature of the relationship among defense counsel upfront."

In addition to the implied attorney-client relationship, the joint defense privilege creates some fiduciary relationship as to the co-defendants, Ziffer said. "This fiduciary relationship generally requires that an attorney not use the information obtained in the joint defense meetings against the other defendants," he said. "If conflicts arise, an attorney can be disqualified for the conflicts. So, disclosing all pertinent potential conflicts

and approved uses of the information upfront in the written agreement can discharge this fiduciary duty and make sure everyone is on the same page."

For attorneys, signing a joint defense agreement, just like any contract, binds the signing attorney to the terms of the contract, Ziffer said. "So when you sign the joint defense agreement, you are bound by its terms, personally, to the extent the agreement is lawful," he said. "If you violate the terms of this agreement, you can be held liable for breach of contract. It's possible that if inartfully drafted, joint defense agreements and the contractual requirements that are placed upon the attorneys as parties to the agreement can conflict with the duty of loyalty that is owed to your individual client."

Your client's main concern should be making sure that the confidential information disclosed to defendants in the joint defense group stays confidential, Ziffer said. "This is important to understand when disclosing information subject to the joint defense privilege because the joint defense privilege is not nearly as broad as the attorney-client privilege in the way that we normally think of it," he said. "It's much more easily waived, and as your client's attorney, you don't have nearly as much control over the flow of information once it's disclosed to the defense group. So before entering into an agreement, you should carefully analyze the case and understand all the theories of liability against your co-defendants as well as their available defenses.

"If there is a reasonable probability that one of the party's interests may diverge from your own, you should seriously consider not entering into the agreement or at the very least limiting the scope of the agreement to a specific issue or goal where you know your interests will be aligned."

Because you've entered into a joint defense agreement, this doesn't mean that all confidential information you share is protected, Ziffer said. The protection only extends as far as is necessary to further the joint defense goal. "Now this problem underscores the basic purpose of the written agreement, which is to clearly define the scope and goal of the joint defense efforts," he said. "Once you clearly define the goal, only disclose the information that is necessary to further that goal and nothing more. Before sharing any information, make sure that that written agreement is in place and signed by all defense counsel and parties to the agreement. Finally, as with any decision that affects your client, you should fully disclose to your clients the benefits and risks of entering into this agreement and obtain their informed consent before proceeding."

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LUIS ALBERTO GONZALEZ, *Defendant-Appellant.*	No. 11-15025 D.C. No. 3:06-cr-00710-WHA-2 OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted
November 15, 2011—San Francisco, California

Filed January 25, 2012

Before: Michael Daly Hawkins and Milan D. Smith, Jr., Circuit Judges, and Kevin Thomas Duffy, District Judge.*

Opinion by Judge Hawkins

*The Honorable Kevin Thomas Duffy, United States District Court Judge for the Southern District of New York, sitting by designation.

COUNSEL

Daniel P. Blank, Assistant Federal Public Defender, San Francisco, California, for the defendant-appellant.

Robert David Rees, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

In this interlocutory appeal, Luis Alberto Gonzalez ("Gonzalez") challenges an order denying his motion to quash a subpoena in a section 2255[1] habeas proceeding brought by his wife, Katherine Elizabeth Paiz ("Paiz"). Gonzalez and Paiz were convicted in separate trials of fraud arising from an insurance scam involving Paiz's car. The car was found burned in a field with a gas can in the backseat shortly after the pair discovered the car needed several thousand dollars of repairs not covered by warranty, and ten days after Paiz took out an insurance policy on the vehicle. Although both separately confessed to the fraud, Paiz claimed she had no knowledge that fire would be used to destroy the car. Gonzalez initially told FBI agents that he had burned the car but that his wife knew nothing about it. The trial court severed the trials when Gonzalez announced he intended to testify at his wife's trial regarding the use of fire count (which carried a mandatory minimum ten-year sentence). *See* 18 U.S.C. § 844(h).

However, shortly before his own trial, Gonzalez indicated his defense would be that he had nothing at all to do with the crime and that he had lied to the FBI about his involvement to protect his wife. He was convicted of three fraud counts,

[1]28 U.S.C. § 2255.

but acquitted of the use of fire count, and sentenced to ninety-six months in prison.

Paiz's attorney, Nina Wilder ("Wilder") ultimately decided not to call Gonzalez as a witness at Paiz's trial. Paiz was convicted on all counts, and sentenced to 121 months in prison. In her section 2255 petition, Paiz now alleges that Wilder provided ineffective assistance of counsel by failing to call Gonzalez as a witness. Gonzalez intervened to seek quashal of the subpoenas directed at Wilder on the basis of a joint defense privilege.

FACTS AND PROCEDURAL HISTORY

In September 2010, Paiz filed a motion in district court to set aside her conviction for ineffective assistance of counsel. One of her claims was that Wilder was ineffective for failing to call Gonzalez as an exculpatory witness.

The government sought a deposition subpoena and subpoena duces tecum for Wilder. It specifically sought discovery regarding Wilder's statements to the district court during an *ex parte* hearing, including communications Wilder had received from Gonzalez's counsel around that time, relating to Gonzalez's potential testimony at Paiz's trial. The court granted the motion and directed that the deposition proceed.

Gonzalez filed an emergency motion to quash or modify the subpoenas on the basis of a joint defense privilege. His counsel submitted a declaration claiming that he and Wilder had "met and discussed confidential information related to trial preparation" and that although there was no written joint defense agreement ("JDA"), these communications were "for the purpose of preparing a joint defense strategy" and the "clear understanding was that such communications were privileged."

The district court ordered that the deposition of Wilder go forward, but provided that counsel for Gonzalez and Paiz

could attend and object to questions that they believed were privileged. The court also imposed a protective order limiting the use of any disclosed material to litigating Paiz's section 2255 motion.

During the deposition, Gonzalez's counsel objected to several questions on the basis of the joint defense privilege, and Wilder also frequently claimed that questions called for protected information. Like Gonzalez's counsel, Wilder indicated there was no written JDA, but an "implied agreement." At the deposition, Wilder reasoned: "We understood between ourselves that everything we said would be confidential," and "[w]e agreed there would be a joint defense and that we would share information."

After additional briefing, the district court issued an order denying the motions to quash, holding that "when a claim of ineffective assistance of counsel is asserted in a collateral challenge to a conviction, all information to and from trial counsel plausibly relevant to the alleged acts or omissions is discoverable." *United States v. Paiz*, No. CR 06-710 WHA, 2010 WL 5399216, at *1 (N.D. Cal. Dec. 23, 2010). The court concluded that even assuming a JDA existed, Gonzalez's joint defense privilege must yield to the discovery needs created by Paiz's ineffective assistance claim. The court ordered Wilder's deposition to continue and that she answer all relevant questions posed to her, but stayed the order pending this interlocutory appeal. *Id.* at *12. We now reverse and remand to the district court.[2]

[2]We have jurisdiction over this appeal pursuant to *Perlman v. United States*, 247 U.S. 7 (1918): "We have interpreted *Perlman* to mean that a discovery order directed at a 'disinterested third-party custodian of privileged documents' is immediately appealable because the 'third party . . . would most likely produce the documents rather than submit to a contempt citation.' " *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006) (citation omitted).

STANDARD OF REVIEW

A district court's conclusions whether information is protected by attorney-client privilege is a mixed question of law and fact which this court reviews de novo. *United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011).

DISCUSSION

I. The Joint Defense Privilege

The joint defense privilege was first recognized by our court in *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964). Employees of two different oil companies had been summonsed to testify before the Grand Jury; each was interviewed by their respective counsel. Counsel then prepared memoranda about the information received and "exchanged such memoranda in confidence in order to apprise each other as to the nature and scope of the inquiry proceeding before the Grand Jury" and "to make their representation of their clients in connection with the Grand Jury investigation and any resulting litigation, more effective." *Id.* at 348-49. When the government later sought to discover these memoranda, asserting that the attorney-client privilege had been waived by disclosing the information to third parties, we rejected the claim and ordered the subpoena quashed. *Id.* at 350.

We reasoned that the communication was made for the "limited and restricted purpose to assist in asserting their common claims" and that thus "the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents." *Id.* (quotation omitted); *see also Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) ("[W]here two or more persons who are subject to possible indictment in connection with the same transactions

make confidential statements to their attorneys, these statements, even though they are exchanged between the attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.").

[1] The Ninth Circuit has long recognized that the joint defense privilege is "an extension of the attorney-client privilege." *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (explaining that a JDA had established an implied attorney-client relationship between the codefendants and their counsel)*; see also United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (recognizing joint defense privilege as extension of attorney client privilege that "protects not only the confidentiality of communications passing from a party to his or her attorney but also 'from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel' ") (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The privilege is also referred to as the "common interest" privilege or doctrine, because it has not been limited to criminal defense situations or even situations in which litigation has commenced:

> Whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990).

Here, the district court assumed for the sake of argument that an implied JDA existed, but nonetheless held that no such

agreement "should or can be allowed to bar discovery or use of pertinent communications to and from trial counsel in a later Section 2255 proceeding." 2010 WL 5399216, at *11. The court reasoned that the "joint defense agreement does not create a duty of loyalty to an individual who is not one's own client, and it is not the same as joint representation." *Id.* at *8. The court thus concluded that communications between counsel are more appropriately characterized as "work product communications, intended to aid in preparation for litigation," and that such privilege is not absolute; the court went on to hold that there existed the required "necessity and unavailability by other means" for discovery of the work product. *Id.* at *8-9; *see* Fed. R. Civ. P. 26(b)(3).

On appeal, the government does not advance the rationale proffered by the district court.[3] Rather, it argues that (1) Gonzalez did not sufficiently establish on the record that a JDA actually existed, (2) that such an agreement could not exist in the circumstances here, where Gonzalez's defense was adverse to Paiz's, and (3) even if one existed, the court correctly held that Paiz's section 2255 claim acted as a unilateral waiver of the privilege in these circumstances.

II. Existence of a Joint Defense Agreement

Noting that we may affirm on any ground supported by the record, the government suggests that we need not reach the broader question of whether Paiz's section 2255 motion waived the joint defense privilege as to Gonzalez's communications. It contends Gonzalez has not even established the existence of a JDA. *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (party asserting the attorney-client privilege has the burden of establishing the existence of the relationship and the privileged nature of the communication).

[3]We address the district court's reasoning in Section III, below.

The government first characterizes the district court's decision as concluding that "the actual record is too thin" to support the contention that a JDA existed. 2010 WL 5399216, at *11. But the court went on to state that there was possibly an "implied joint defense agreement, one arising from a course of conduct," and ultimately concluded that the JDA's existence was irrelevant because "the main holding of this order is that no joint defendant agreement, no matter how plain and clear, should or can be allowed to bar discovery or use of pertinent communications to and from trial counsel in a later Section 2255 proceeding." *Id.*

[2] The district court thus made no express finding regarding the existence of an agreement and it is clear that the court instead "assumed for the sake of argument that there was a joint defense agreement." *Id.* More importantly, it is clear that no written agreement is required, and that a JDA may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation. *Cont'l Oil*, 330 F.2d at 350 (privilege applies even "without an express understanding that the recipient shall not communicate the contents thereof to others") (quotation omitted); *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (it may reasonably be inferred from consultation among clients and counsel allied in common legal cause that disclosures are confidential); *HSH Nordbank AG v. Swerdlow*, 259 F.R.D. 64, 72 n.12 (S.D.N.Y. 2009) (noting joint agreement need not be in writing to protect a communication); *Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F. Supp. 2d 1199, 1203 (W.D. Wash. 2007) ("a written agreement is not required" to invoke the joint defense privilege).

[3] Here, there was sufficient evidence in the record to support the existence of a JDA, at least to a point. Gonzalez's counsel filed a declaration asserting:

> [A]s the case progressed, [Ms. Wilder and I] met and discussed confidential information related to trial preparation, sometimes in the presence of the clients and sometimes not. Although there was no written joint defense agreement, this communication among Mr. Gonzalez and Ms. Paiz and their counsel was for the purpose of preparing a joint defense strategy and involved the sharing of confidential information. The clear understanding was that such communications were privileged.

At her deposition, Wilder testified similarly that the JDA started "from the beginning of the case," and that it was an "implied agreement." "We understood between ourselves that everything we said would be confidential." She further stated: "I think that the joint defense agreement was formed when we sat down and agreed to jointly strategize in the case and to share information. That's the basis we agreed to" and "[i]n our initial conversation we agreed to proceed jointly and share confidential information." Wilder acknowledged there was no written JDA or any emails about one to her knowledge, but that "at some point we certainly discussed, and repeatedly, I think, at various points, talked about the fact that it was a joint defense agreement, that there was a joint defense, that we share confidential information, which is the whole point of the joint defense."

[4] The government argues that notwithstanding these assertions of a joint defense and strategy, the legal interests of Gonzalez and Paiz lacked sufficient commonality, especially at the point the trials were severed or, if not then, when Gonzalez announced a defense that was demonstrably adverse to the interests of Paiz by blaming her for the crime. The government acknowledges that parties to an asserted JDA need not have identical interests and may even have some adverse motives, *see Hunydee*, 355 F.2d at 185, but correctly points out that the attorneys do, at a minimum, need to be "engaged in maintaining substantially the same cause on behalf of other

parties in the same litigation." *Cont'l Oil*, 330 F.2d at 350; *see also Hunydee*, 355 F.2d at 185 (communications are privileged "*to the extent* that they concern common issues and are intended to facilitate representation") (emphasis added).

[5] Here, even if Gonzalez and Paiz began as codefendants with aligned interests, they later moved simultaneously to sever their trials from one another; the government argues "it is inherently contradictory simultaneously to claim to be in a joint defense agreement and also that a joint trial is legally prohibited." This is not necessarily true, however, as parties in separate actions might nonetheless have reasons to work together toward a common objective, and there is no requirement that actual litigation even be in progress. *Cont'l Oil*, 330 F.2d at 350; *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (unnecessary that there be actual litigation in progress for privilege to apply). For example, here the trials were initially severed so that Gonzalez could aid Paiz by testifying at her trial. In addition, attorney Wilder testified that she and Gonzalez's counsel continued to meet and discuss the cases after the severance was granted.

However, Wilder also testified that the first time she learned of Gonzalez's plan to blame his wife for the insurance scam occurred "shortly before trial" and around the same time Gonzalez publicly disclosed the defense. She also testified she did not know at the time she filed the severance motion that Gonzalez would claim he had lied to federal agents to protect Paiz as the truly guilty party. The government contends that one party being kept in the dark about such crucial information is strong evidence that no true JDA existed. In addition, Gonzalez's defense was completely antagonistic to Paiz's—blaming her entirely for the crime while asserting his own innocence. It is debatable whether Gonzalez could have reasonably believed by this point that he and his wife were continuing to pursue a joint defense arrangement. *See Schwimmer*, 892 F.2d at 244 (common interest rule requires

communication to be given in confidence and that the client reasonably understood it to be so given).

Gonzalez maintains that notwithstanding his shift in defense theories, he remained consistently committed to Paiz's defense on the use-of-fire count—that she was guilty of fraud but had no knowledge that the car would be burned. If their mutual interest is defined more narrowly in this way, then it is possible that their other adverse positions did not undermine their joint defense privilege on this specific issue.

[6] As the foregoing discussion illustrates, the existence of a JDA is not necessarily an all-or-nothing proposition, and may be created (and ended) by conduct as well as express agreement. The timeline of events and the facts of this case could suggest that a JDA existed at the outset between the parties and their counsel, but that it had ended at least by the time Gonzalez decided to pursue his own defense and blame Paiz for the crime (thus ending their common legal interests). *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) (affirming district court factual finding that common interest agreement did not exist prior to December 2001, so disclosures made prior to that time were not privileged); *see also Gilson v. Sirmons*, No. CIV-01-1311-C, 2006 WL 2320682, at *30 (W.D. Okla. 2006) (noting trial court had conducted an *in camera* hearing and determined that a JDA existed at least prior to the severance of the cases, and that any information gained in confidence during the existence of those joint defense efforts remained protected by attorney-client privilege). Alternatively, it may also be that Paiz's and Gonzalez's "joint defense" strategy always related only to the use-of-fire charge and that they remained committed on this point notwithstanding other defense changes.

[7] The record at least establishes the existence of a JDA (either an express verbal agreement or one implied from conduct), but the court made no specific findings regarding the extent or duration of that JDA. We therefore remand to the

trial court for an (*in camera*) evidentiary hearing to expressly determine: (1) if the JDA implicitly ended at some point, (2) if so, when, and (3) when the relevant communication here (the ultimate representation regarding what Gonzalez would testify to at Paiz's trial) was made. If the communication occurred during the existence of the JDA, then it remains protected, as discussed further below. On the other hand, if it was made after the joint defense efforts ended, and when Gonzalez was merely a potential trial witness for Paiz, then that specific communication to Paiz's counsel may not be privileged (though any prior statements made or communicated to her during the JDA would remain protected). *See Schwimmer*, 892 F.2d at 243 (only communications made in course of ongoing common enterprise and intended to further that enterprise are protected).

III. Unilateral Waiver by Section 2255 Motion

[8] In ruling that Gonzalez's communications to Wilder were nonetheless discoverable, the district court first concluded that they should be treated more as "work product communications" rather than "true privilege[d]" statements. 2010 WL 5399216, at *8-9. It then held that they were discoverable because of the necessity and unavailability of other means of discovering such work product. *Id.* This ruling conflicts with a number of this circuit's precedents establishing that the joint defense privilege *is* an extension of the attorney-client privilege, and *does* establish a duty of confidentiality on the part of the additional attorney and party to the agreement. *Hunydee*, 355 F.2d at 185; *Cont'l Oil*, 332 F.2d at 350*; see also Austin*, 416 F.3d at 1021; *United States v. Stepney*, 246 F. Supp. 2d 1069, 1077 (N.D. Cal. 2003). This distinction is important because "[p]rivilege cannot be overcome by a showing of need, whereas a showing of need may justify discovery of an attorney's work product." *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494-95 (9th Cir. 1989) (quotation omitted).

[9] Moreover, the case law is clear that one party to a JDA cannot unilaterally waive the privilege for other holders. *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) (The "privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties."); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990) (joint defense privilege cannot be waived without the consent of all parties to the defense); *In re Grand Jury Subpoenas*, 902 F.2d at 250 (holding that all documents related to common claim "are subject to a joint defense privilege that [one party] may not waive unilaterally"). The Restatement similarly indicates that one party to a common-interest arrangement lacks the ability to waive the privilege as to other members:

> Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member. . . . Any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication.

Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000).

Nonetheless, the government argues that Paiz's filing of the section 2255 motion can act as a unilateral waiver of the privilege as to both her communications and those made by Gonzalez. To support its argument, the government cites to a number of cases in which co-clients (represented by the same attorney) later become involved in disputes with one another. *See, e.g.*, *In re Teleglobe Commc'ns Co.*, 493 F.3d 345, 366 (3d Cir. 2007) ("When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."); *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (joint defense privi-

lege "inapplicable to disputes between joint clients"). These cases are inapposite, however, as Paiz and Gonzalez were not co-clients with the same counsel, and, moreover, are not adverse parties in this habeas litigation.

The district court relied on this court's decision in *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), in which we noted the longstanding rule that "where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer." *Id.* at 716. We explained that there is an implied choice to the holder of the privilege: "If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it." *Id.* at 720. In *Bittaker*, we relied on notions of fairness, and balanced the need for discovery against the petitioner's claim of privilege. *Id.* at 720-22. Here, although noting that *Bittaker* involved the waiver of the petitioner's *own* claim of privilege and not that of a third party, the district court relied on these underlying considerations to conclude that Gonzalez's interest in confidentiality should also yield because he faced no consequences from disclosure and yet the petition could not be fully and fairly resolved without it.

[10] While the district court identified valid concerns, they represent only half of the equation presented in *Bittaker* and the long line of cases decided before it: the holder of the privilege has a choice. "[T]he holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition." *Id.* at 721. Gonzalez, of course, is presented with no such choice and is an unwilling third-party participant in this habeas proceeding. Thus, a *Bittaker*-type balancing test does not work here, where Gonzalez has not filed a petition and thus has not *chosen* to put his communications at issue. In addition, allowing unilateral waiver of confidential communications by a single codefendant without the consent of

the others would likely severely undermine the rationale for the joint defense privilege in the first place. *See Schwimmer*, 892 F.2d at 243 (a lawyer's "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure," and joint defense privilege is an extension of that attorney-client privilege) (internal quotation omitted).

[11] For the foregoing reasons, we conclude the district court's analyses regarding privilege versus work product and unilateral waiver by filing the section 2255 petition were in error, and reverse and remand for further proceedings consistent with this Opinion.

CONCLUSION

It appears that for at least part of the proceedings, Gonzalez and Paiz were part of a JDA, either express or implied. However, it also appears possible that at some point that arrangement ended, such as when Gonzalez decided to pursue his own self-serving defense and blame Paiz for the crime rather than pursuing a jointly beneficial defense strategy. Therefore, we remand to the district court for an *in camera* evidentiary hearing to determine if and when the JDA ended, and when the communication at issue here (what Gonzalez would ultimately testify to at Paiz's trial) was made.

REVERSED AND REMANDED.

222 F.3d 633 (2000)

UNITED STATES of America, Plaintiff-Appellee/Cross-Appellant,

v.

Steven J. HENKE, Defendant-Appellant/Cross-Appellee.

United States of America, Plaintiff-Appellee/Cross-Appellant,

v.

Chan M. Desaigoudar, Defendant-Appellant/Cross-Appellee.

Nos. 99-10015, 99-10023.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 2000
Filed August 25, 2000

635 *634 *635 Nina Wilder, Weinberg & Wilder, San Francisco, CA, and Sanford Svetcov, Landels Ripley & Diamond, LLP, San Francisco, CA, for the defendants-appellants.

Laurie Kloster Gray, Assistant U.S. Attorney, San Francisco, CA, for plaintiff-appellee.

Before: SCHROEDER, BEEZER, and TROTT, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge BEEZER.

PER CURIAM.

Chan Desaigoudar and Steven **Henke**, former executives of California Micro Devices, Inc. ("Cal Micro"), appeal their convictions for conspiracy to make false statements to the Securities Exchange Commission (18 U.S.C. § 371), making false statements (18 U.S.C. § 1001), securities fraud (15 U.S.C. §§ 78m(a), 78ff(a)), and insider trading (15 U.S.C. §§ 78j(b), 78ff(a)). The government cross-appeals the defendants' sentences.

The defendants claim that their convictions must be set aside because a conflict of interest prevented their counsel from cross-examining a key government witness and because there was insufficient evidence to support their insider trading convictions. They also argue that the district court erred in admitting lay opinion testimony and an out-of-court statement into evidence, and in failing to conduct an *in camera* review of government notes from an interview with a key government witness to ensure that the notes did not contain information that the government was required to disclose to the defense. Finally, they claim that the prosecutor committed misconduct in forcing Desaigoudar to testify that various government witnesses were lying. We agree with the defendants that a new trial is necessary because their lawyers' ability to conduct their defense was impaired by a conflict of interest. We also agree that the district court erred in admitting lay opinion testimony on the key issue of knowledge. We disagree, however, that the evidence was insufficient to support their insider trading convictions. We therefore remand the case to the district court for a new trial. While we address the defendants' remaining claims because they present issues that
636 may recur on re-trial, because we vacate the convictions *636 and sentences, we do not address the government's sentencing appeal.

BACKGROUND

This case arises from a false revenue reporting conspiracy carried out by Cal Micro executives in order to preserve the

appearance that the company was a good investment option when in fact it was struggling financially. Cal Micro designs, manufactures, and markets electronic components and semiconductor products for the defense and electronics industries. The company was purchased in 1980 by Desaigoudar, who turned it into a multi-million dollar company during the 1980s. In addition to being Cal Micro's largest shareholder, Desaigoudar served as its Chief Executive Officer and Chairman of the Board until he was removed in 1994.

In 1993, Cal Micro had two objectives. It hoped both to attract a strategic outside partner to invest in the company and to raise about $40 million in outside capital through a second public offering. Making the company an attractive investment option for outside companies and private investors was crucial to achieving these objectives and Desaigoudar instituted an incentive-based stock option plan to motivate officers and managers to meet revenue goals. These goals became increasingly difficult to meet, however, because Apple Computers, one of the company's largest customers, substantially reduced its orders.

Unable to close the widening gap between revenue targets and actual sales, some Cal Micro executives devised a plan to make it appear on paper that the company was meeting its financial goals. Under Cal Micro's stated revenue recognition policy, revenue was recognized when an order was shipped. These Cal Micro executives began to deviate from this practice in several ways. They started: (1) recognizing revenue when some orders were received, rather than when shipped; (2) shipping orders earlier than requested in order to recognize the revenue during a certain fiscal period; (3) sending unwanted shipments; (4) creating false orders; and (5) executing "title transfers" falsely reflecting that products stored at Cal Micro had been purchased by a client.

While this was occurring, Cal Micro successfully negotiated an agreement with Hitachi under which Hitachi would purchase two million shares of Cal Micro stock at $23 a share. Cal Micro and its investment bankers also put in motion plans for a second public offering.

Things then took a turn for the worse. Those involved began to worry about the implications of the revenue scheme. Moreover, the company's plan to write off several million dollars in "bad debts" caused Cal Micro's investment bankers to balk at a second public offering. The Board eventually instituted an investigation and ultimately ousted Desaigoudar.

Desaigoudar and **Henke**, a former Chief Financial Officer, Vice President, and Treasurer of Cal Micro, were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. Surendra Gupta, Cal Micro's President during the revenue reporting scheme, was also indicted, but reached a plea agreement with the government shortly before trial was to begin. The central issue at trial was whether the defendants had early knowledge of the false revenue reporting scheme and whether they traded their stock because of this inside information. Several of Cal Micro's executive officers, including former co-defendant Gupta, testified that the defendants did have such early knowledge. The jury believed the government's witnesses and convicted the defendants.

CONFLICT OF INTEREST

The defendants' principal claim is that they are entitled to a new trial because their attorneys worked under an actual conflict of interest that prohibited them from cross-examining one of the government's key witnesses, Gupta.

637 *637 Before trial, Desaigoudar, **Henke**, and Gupta participated in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement. Before trial was to begin, Gupta accepted a plea agreement and promised to testify for the government.

Desaigoudar's attorney then moved for a mistrial and to withdraw because his duty of confidentiality to Gupta under the joint defense agreement prevented him from cross-examining Gupta on matters involving information he learned as a result of the privileged pre-trial meetings. **Henke's** lawyer was also present at the joint defense meetings and felt that his duty to Gupta

impaired his ability to adequately represent **Henke**.

The district court denied the motion to withdraw. It reasoned that any privileged impeaching information counsel learned about Gupta would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. The court granted the motion for a mistrial to allow defense counsel to regroup after Gupta's plea.

Once the new trial began, Gupta testified for the government. Defense counsel conducted no cross-examination for fear that the examination would lead to inquiries into material covered by the joint defense privilege.

The issue for our decision is whether the government's use of a former defendant, with whom both **Henke's** and Desaigoudar's attorneys had an attorney-client relationship arising from a joint defense agreement, as a key witness at trial created a conflict of interest that impaired defense counsel's ability to defend their clients.

The joint defense privilege is an extension of the attorney-client privilege. It has been recognized by this Circuit since at least 1964. *Waller v. Financial Corp. of America,* 828 F.2d 579, 583 n. 7 (9th Cir.1987). A joint defense agreement establishes an implied attorney-client relationship with the co-defendant, here between **Henke's** and Desaigoudar's attorneys and Gupta. *See* ***United States*** *v. McPartlin,* 595 F.2d 1321, 1337 (7th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.,* 559 F.2d 250, 253 (5th Cir.1977). The government concedes in its brief the existence of this privilege in this case.

This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case. As the court said in *Abraham Construction,*

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

559 F.2d at 253; *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311, 1319 (7th Cir.1978) (defense attorney breaches fiduciary duty if he uses information obtained in a joint defense meeting). Here, what Gupta allegedly said in confidence during pre-trial joint defense meetings about the defendants' presence at a critical meeting of Cal Micro executives was claimed to be at odds with his trial testimony for the government. This evidence put the two defense attorneys in a difficult position. Had they pursued the material discrepancy in some other way, a discrepancy they learned about in confidence, they
638 could have been charged with using it against their one-time client Gupta. In fact, Gupta's lawyers had threatened *638 **Henke's** and Desaigoudar's attorneys with legal action if they failed to protect Gupta's confidences. Here is the text of the letter received by defense counsel:

> June 26, 1998
>
> Re: *U.S. v. Desaigoudar and* ***Henke***
>
> Dear [attorneys for defendants Desaigoudar and **Henke**]:
>
> It has come to our attention you may be contemplating filing an ex parte in camera submission to Judge Walker outlining what you contend are the contradictory statements made by Mr. Gupta in what you have conceded was a joint defense privileged meeting.
>
> Please be advised that we do not, waive, and at no point ever have waived the joint defense privilege. Please be further advised that we are aware of no legal basis upon which you have any right to breach the privilege and that we reserve Mr. Gupta's right to pursue any and all appropriate legal remedies for any unauthorized breach of the privilege.

> Please consider this letter as a formal objection to any ex parte in camera submissions to Judge Walker of any joint defense privileged information.
>
> Yours very truly,
>
> [Signed]
>
> Attorneys for Suren Gupta

Under these circumstances, the district court erred in not fully acknowledging the conflict and then acting on its implications.

Nothing in our holding today is intended to suggest, however, that joint defense meetings are in and of themselves disqualifying. We stress that it was defense counsel in this case that timely moved for disqualification. As the Supreme Court said in *Holloway v. Arkansas,* the attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 435 U.S. 475, 485, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a situation where they could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients. There is nothing in this record to suggest that the attorneys were doing anything other than attempting to adhere to their ethical duties as lawyers.

Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest. Here, because of that conflict, the appellants' lawyers were constrained to impair yet another primary right of their clients: the right to cross-examine a witness who testified against them. By choosing to convert Gupta into a prospective witness shortly before the trial was scheduled to start, the government—which may not have anticipated this complication when it made a deal with Gupta—caused this problem, and should not now be heard to complain.

SUFFICIENCY OF THE EVIDENCE

The defendants also challenge the sufficiency of the evidence supporting their convictions for insider trading under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (West 2000). Each contends that the evidence established that he sold his Cal Micro stock for innocent reasons and not because of information about the company's false revenue reporting.

We may reverse a jury conviction for insufficient evidence only if, viewing the evidence in the light most favorable to the
639 government, no rational jury could have found the essential elements of the crime beyond a reasonable doubt. *See* *639 *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In this case, we look to whether the evidence supports a finding that the defendants traded stock on the basis of material nonpublic information with an intent to deceive, manipulate, or defraud. *See* ***United States*** *v. Smith,* 155 F.3d 1051, 1068-69 (9th Cir. 1998), *cert. denied* 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 664 (1999).

With respect to Desaigoudar, the jury heard evidence that he sold a portion of his stock after learning of Cal Micro's false revenue reporting scheme and that his sudden decision to "diversify" his portfolio came after receiving this information. Moreover, Desaigoudar's financial adviser had been advising Desaigoudar to diversify since 1986, but Desaigoudar only sold his stock in 1994 after the revenue reporting scheme surfaced. This evidence permits the inference that Desaigoudar traded on the basis of inside information and acted with the requisite scienter. Although Desaigoudar sold only a small portion of his Cal Micro stock, *cf. In re Worlds of Wonder Sec. Litig.,* 35 F.3d 1407, 1427 (9th Cir.1994), his overall pattern of trading Cal Micro stock, when viewed in the light most favorable to the government, supports the jury's verdict.

Henke relies on our law that when there is evidence that an investor had a preexisting pattern or plan of trading and continued

to execute that plan even after coming into possession of material nonpublic information, such evidence negates an inference that the investor acted with the scienter required for an insider trading conviction. *See Smith,* 155 F.3d at 1068; *In re Worlds of Wonder,* 35 F.3d at 1427-28. In **Henke's** case, however, the "preexisting pattern" of trading consisted of only two stock sales. Moreover, these sales netted him a relatively small return. The sale made after knowledge of the revenue scheme enabled him to avoid hundreds of thousands of dollars of loss in the stock's value. In addition, Desaigoudar's executive assistant testified that **Henke** told her that she would be stupid not to sell her own stock. When viewed in the light most favorable to the government, these circumstances permitted the jury to infer that the sales were the result of **Henke's** insider knowledge and not an earlier plan. We therefore conclude that sufficient evidence supports both **Henke's** and Desaigoudar's insider trading convictions.

Desaigoudar also contends that some of the evidence the government presented as to when he obtained inside information varied from one of the dates alleged in the indictment. There is no material variance or even inconsistency. *See **United States** v. Tsinhnahijinnie,* 112 F.3d 988, 991 (9th Cir.1997) (noting that a variance is immaterial where it is not of a character which could have misled the defendant at trial and there is no danger of double jeopardy). The government proved that Desaigoudar had inside information on the date alleged in the indictment.

LAY OPINION TESTIMONY

The defendants argue that the district court erred in admitting lay opinion testimony on the issue of the defendants' knowledge. Proving that Desaigoudar and **Henke** had knowledge of the false revenue reporting scheme was critical to the government's case. Without establishing this knowledge, it could not carry its burden of proving beyond a reasonable doubt that the defendants knew that financial statements they made were false, or that they possessed material nonpublic information before trading their stock.

One of the witnesses the government used to prove knowledge was Wade Meyercord, Desaigoudar's replacement as Chairman of Cal Micro's Board of Directors. Over the defendants' objections, the prosecutor systematically and repeatedly asked Meyercord about the reasons for terminating the defendants and other officers of Cal Micro. This questioning was done
640 in order to elicit Meyercord's conclusion that the defendants "must have *640 known" about the revenue reporting scheme.[1]
641 The defendants claim that it was *641 error to admit this testimony. We agree.

Under Federal Rule of Evidence 701, a lay witness's testimony in the form of an opinion is permissible only when it is helpful to understanding the witness's testimony or to the determination of a fact in issue. If the jury already has all the information upon
642 which the witness's opinion is based, the opinion is not admissible. *See **United States** v. Skeet,* 665 F.2d 983, *642 985 (9th Cir.1982) ("If the jury can be put into a position of equal vantage with the witness for drawing the opinion, then the witness may not give an opinion."); Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 701.05 (2d ed. 2000) ("[L]ay testimony generally is not helpful on matters that are essentially a jury question, such as credibility issues."); *see also **United States** v. Anderskow,* 88 F.3d 245, 251 (3d Cir.1996) (holding that a witness's testimony that a defendant "must have known" fails to meet the helpfulness requirement); ***United States** v. Rea,* 958 F.2d 1206, 1219 (2d Cir.1992) (same).

Here the jury was in the best position to determine whether the defendants knew about the revenue scheme. Unlike Meyercord and the Board of Directors, the jury had the benefit of several years of discovery, investigation, and litigation to flesh out the facts. Moreover, it heard testimony from all of the key actors in the scheme. While Meyercord testified that the Board formed a special committee of independent directors to investigate the false revenue reporting scheme, he was not questioned about the facts that the investigation turned up or how those facts were discovered. Meyercord was simply asked about the Board's conclusion that the defendants "must have known" about the scheme-a conclusion that went to the primary question for the jury. Because the jury was in a superior vantage point to decide this issue, Meyercord's testimony that the defendants must have known about the revenue scheme was not helpful. Its admission was therefore error.

OTHER ISSUES THAT MAY RECUR ON RETRIAL

In the event of retrial, there are three remaining issues that may recur. The defendants claim that the district court erred in admitting an out-of-court statement and refusing to review interview notes with a key government witness *in camera* to ensure that the notes did not contain information the government would be constitutionally or statutorily obligated to disclose. They also contend that prosecutorial misconduct occurred when the prosecutor required Desaigoudar to testify that government witnesses were lying. We address each in turn.

1. Out-of-court statement

The first issue is whether the court properly admitted Desaigoudar's out-of-court response—"next question please"— to an accusation in a press conference that the defendants were "cooking the books." The district court found that the response was not unduly prejudicial and that, under the circumstances, the natural response to such an accusation would be to address or deny it. It therefore admitted the statement as an adoptive admission. *See* Fed. R.Evid. 801(d)(2)(B). It was within its discretion to do so. *See* ***United States*** *v. Schaff,* 948 F.2d 501, 505 (9th Cir.1991).

2. *In camera* review of interview notes

The defendants also contend that the district court erred in failing to conduct an *in camera* review of the government's notes from interviews with Ron Romito, a key witness, to ensure that the notes did not contain information that should be produced as exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as impeachment material under *Giglio v.* ***United States****,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), or as witness statements under the Jencks Act, 18 U.S.C. § 3500 (West 2000). The government provided the defendants with a substantial amount of information about Romito, including FBI reports, declarations, and a copy of his plea agreement, but invoked the work-product privilege as to its pre-trial interview notes. The defendants made no showing that they might discover something exculpatory or impeaching. Nor
643 did they show that the notes were used or adopted by the witness. Accordingly, the defendants did not trigger the *643 district court's obligation to review the privileged notes *in camera. See* ***United States*** *v. Boshell,* 952 F.2d 1101, 1104-05 (9th Cir.1991) (finding that the defendants failed to make a showing that notes were read or adopted by the witness and that the notes were therefore not subject to the Jencks Act production requirements).

3. Alleged prosecutorial misconduct

Finally, the defendants claim that the government acted improperly in forcing Desaigoudar to testify on cross-examination that the government's witnesses were lying. During Desaigoudar's cross-examination, the prosecutor repeatedly forced him to say that several of the government's witnesses lied on the stand. After the judgments were entered in this case, we made clear that forcing a defendant to comment on the veracity of another witness's testimony is inappropriate. *See* ***United States*** *v. Sanchez,* 176 F.3d 1214, 1219-20 (9th Cir.1999). In light of *Sanchez,* this line of questioning by the prosecutor was improper and must be avoided on retrial.

CONCLUSION

The judgments of conviction are reversed, the sentences vacated, and the matters remanded for new trial or other proceedings consistent with this opinion.

REVERSED and REMANDED.

BEEZER, Circuit Judge (Concurring):

I join the court's opinion only with respect to the sections entitled BACKGROUND and LAY OPINION TESTIMONY. Because the district court's error prejudiced both defendants and was not harmless, I would reverse the defendants' convictions and remand for a new trial. Because this ground is sufficient to order such relief, I would not address the other issues raised on appeal.

[1] In relevant part, the testimony was as follows:

Q. [by the prosecution]: What happened next ... ?

A. [Meyercord]: There was another Board meeting in October of '94, so that the—later that month. I don't recall the exact date. At which time, if I recall correctly, we removed Mr. Desaigoudar as Chairman of the company, and I was elected Chairman.

Q. Why did you remove—yeah, why did you remove Mr. Desaigoudar?

[Defense counsel]: Objection, your Honor.

The court: You can rephrase that counsel.

Q. [Prosecution]: If you know, what—how did the Board reach that decision?

[Defense counsel]: Your honor, that's simply an opinion that they reached—conclusion that they reached.

The court: Well, no. I think the witness can testify as to the understanding that he has of the reason that the Board took that action. That's, I think, the appropriate question. All right? With that in mind, Mr. Meyercord, what is your understanding of the reason that the Board took the action which you did in removing Mr. Desaigoudar as Chairman of the Board?

A. Because we felt there was—*we removed Mr. Desaigoudar as Chairman because we felt there was a high probability that he knew that the revenues had been misstated* and that we could not in good conscience leave him in that position.

. . . . .

Later, the prosecutor was permitted to elicit the following testimony from Meyercord concerning the Board's decision to fire Desaigoudar and to reject **Henke's** severance agreement.

Q. [Prosecution]: ... December 1st . . . was a decision made to terminate certain employees of the company?

A. Yes.

Q. And was that made at a Board meeting?

A. Yes....

Q. Do you remember who was terminated?

A. We terminated Mr. Desaigoudar. Mr. **Henke** had already resigned at that point. We terminated Mr. Gupta. I believe Mr. Chalaka, Mr.—who—am I missing somebody else?

Q. Was it Mr. Romito?

A. Yes, Mr. Romito.

Q. And why were these people all terminated?

[Defense counsel]: Objection, your honor.

The court: I think the witness can testify as to what is his understanding of the reason that the Board took this action.

[Meyercord]: It was our belief at that time—

[Defense counsel]: Can I just state the grounds for the objection? Relevance and opinion.

The court: Very well. Overruled.

Q. [Prosecution]: You can answer.

A. *It was our belief at that time based on the evidence that we had that all of those individuals had—must have known about the misstatement of revenue.*

. . . . .

Q. And directing your attention to the last paragraph on the first page [of minutes from the Board meeting]—

A. Yes.

Q. Is the second sentence there—is that the reason these people were terminated?

A. (Reviewing document.) Yes.

Q. And is it because of reported financial irregularities? Do you see that?

A. As stated in the minutes *because of his apparently active participation in the previously reported financial irregularities, because [he] apparently intentionally withheld information from the Board and provided the Board with false and misleading information,* the company would not advance Mr. Desaigoudar's costs and expenses in connection with any litigation or investigation in which he was or is named a defendant.

Q. What does that mean?

A. That meant that we were reasonably sure that—

[Defense counsel]: Same objection, your honor. It's not relevant, particularly not relevant what this witness's opinion was. [Co-defense counsel]: And it's very prejudicial, opinion of a Board—your honor.

The court: Well, the objection's overruled. It is relevant. It, obviously, is reflective of the conclusions drawn by the—by the Board of Directors at the time and—

[Defense counsel]: That's right.

The court: And, Ladies and Gentlemen [of the jury], you understand that that's what this evidence is, that you're going to have to make up your own mind with respect to the evidence that is submitted to you. All right.

Q. [Prosecution]: Could you explain that last sentence, what that was about?

A. That sentence says that the company would not provide money to Mr. Desaigoudar to defend himself in any action that might ensue here in any—any legal proceedings.

Q. And did you also—was—*was a finding made that he had intentionally withheld information from the Board?*

[Defense counsel]: Oh, this is leading, your honor.

The court: This is leading, Ms. Merchant.

Q. [Prosecution]: Does this document refer to a finding that was made—you know why—

[Defense counsel]: It's the same—

Q. [Prosecution]:—why the Board made this decision, Mr. Meyercord?

[Defense counsel]: That's exactly the same thing, and it's opinion—calling for opinion and conclusion.

The court: You've got the minutes in. You've got the witness's testimony. I think that's sufficient.

Q. [Prosecution]: There's a reference— you made a reference earlier to the fact that Mr. **Henke** had resigned sometime earlier. Do you remember that?

A. Yes.

Q. And do you remember the circumstances of his resignation from your perspective as a Board member?

[Defense counsel]: Irrelevant, your honor, his perspective as a Board member.

The court: Well, why don't you rephrase the question.

Q. [Prosecution]: Did Mr. **Henke** resign around this time period?

[Defense counsel]: Did Mr. **Henke** do what?

[Prosecution]: Resign around this time period.

[Defense counsel]: That's been asked and answered.

The court: She's setting the stage for the question. All right.

A. [Meyercord]: Yes, he did.

Q. And was—were you aware of the fact that he had negotiated a severance package?

A. I became aware later, yes.

Q. And do you know who he negotiated it with? Did you learn that?

A. Yes. With Mr. Desaigoudar.

. . . . .

Q. . . . [C]ould you describe the nature of the compensation package that had been negotiated?

A. (reviewing document). Yes. It says here that he would have had a consulting agreement for one year at 5,400-and-some-odd dollars per month.

Q. Well, Mr. Meyercord, did the Board accept this severance packet?

A. No, we did not.

Q. Why not?

[Defense counsel]: Well, I object to it, your honor, on the same grounds that we've objected to the other documents, that it's prejudicial, and it's—actually this is testimony.

The court: Well, now, no speaking objections, Mr. Hallinan. What's the basis of the objection?

[Defense counsel]: Well, first of all, under the circumstances, it's so prejudicial. That's one. Second of all, there's no basis for it, doesn't show any special knowledge. And third of all, it calls for an opinion of this witness.

The court: Overruled. The witness may testify as to his understanding of the reason that the Board took the action which it did.

A. [Meyercord]: The Board—the Board did not feel that a severance package for Mr. **Henke** was appropriate given the evidence we had in front of us.

Q. What evidence was that?

[Defense counsel]: Well, there, your honor. Object to that.

The court: Objection overruled.

A. The evidence that the revenue had been misstated.

Q. Did you have an understanding as a Board—did you learn as a Board member what Mr. **Henke's** role was in that?

A. I'm sorry?

[Defense counsel]: Your honor, what relevance—

[Meyercord]: I don't understand the question.

[Defense counsel]: is that?

The court: Objection overruled.

[Meyercord]: Could you—I don't understand the question.

Q. Did you learn in the investigation—

The court: What was the witness's understanding of the facts?

[Prosecution]: Right.

Q. What was your understanding of the facts as they concerned Mr. **Henke**?

A. *My understanding of the facts were [sic] that Mr. **Henke** must have known about this—about the revenue misstatements.*

[Defense counsel]: Well, I'll move to strike that. That is just an opinion, he "must have known." That shouldn't even be before the jury, your honor.

The court: Objection overruled.

[Prosecution]: No further questions, your honor.

JOINT DEFENSE INVESTIGATION AGREEMENT

1. ***Parties to this Agreement*:** This Agreement is made by and among the defendant-clients, attorneys, and agents of attorneys (the "Parties") in United States District Court Case XXX ("the Case").

By signing this Agreement, the attorneys represent they discussed this Agreement with their respective clients, and are authorized to sign this agreement on their client's behalf. The undersigned attorneys agree that this Agreement shall apply to the conduct and activities of their respective investigators, experts, and any others retained or appointed to work on the case and have explained the terms of this agreement to such agents for the attorney.

2. ***Statement of Common Need and Interest*:** The parties each are charged in the indictment with XXX. The parties anticipate each may have access to information as to which they have a protected, confidential relationship that is not available to other parties. The government's allegations in the case are broad and complex, the discovery is voluminous, and the amount of investigation that must be undertaken will be similarly broad, complex, and voluminous.

   The parties wish to take every lawful, ethical, and proper step to permit their respective counsel to share and exchange intelligence, strategies, legal theories, confidences, and other secrets to advance their common interests. The Parties would not cooperate, coordinate or exchange such information but for their mutual and common interests. The Parties further agree their interests will be best served if they can exchange information regarding witnesses, witness contacts and witness interviews so as to preserve and maintain confidentiality, in accordance with the attorney-client privilege, the attorney work-product privilege, and all other applicable privileges vis-à-vis the government and non-parties to this Agreement.

3. ***Intent of this Agreement:*** The parties believe communication among and between the parties on matters of common interest and concern is essential to the effective representation of each individual party. It is presumed that disclosures under this Agreement will be made in the course of this cooperative effort and such disclosures will be to facilitate representation. The parties intend that each disclosure shall be protected to the maximum extent possible consistent with rights recognized under the Federal and State Constitutions, and statute, rule and common law, including but not limited to the attorney-client privilege, attorney work product immunity, and joint defense doctrine. This Agreement shall be controlled by, and interpreted by federal law.

4. ***Applicability of the "Common Interests" or "Pooled Information" Privileges*** It is the intent of the Parties that their joint cooperation and sharing of witness information and materials pursuant to this Agreement shall occur pursuant to the doctrine known variously as the "common interests," "pooled information" or "joint defense" privilege. *See*, *e.g., Visual Scene, Inc., et al., v. Pilkington Bros., PLC*, 508 So. 2d. 437, 440-441 (Fla. 1987) and cases cited therein. *See also, United States v. McPartlin*, 595 F.2d 1321, 1336-37

(7th Cir.), *cert. den.*, 444 U.S. 83, 100 S. Ct. 65 (1979); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964).

5. ***Common defense and sharing of information***: The parties are not bound to present a common defense at trial, or to support one another's claims in any phase of the case. The sharing of confidential information under this agreement may be done solely at the election of each individual party, and is not required except as stated below regarding witness contacts and interviews.

6. ***Withdrawal from the agreement***: If a party reaches a settlement with the government, notification of that settlement must be communicated to the defense counsel group at the time that a formal settlement proposal is accepted. If a party agrees to a proffer with the government in the case, the fact of the proffer must also be communicated. Either a settlement or a proffer shall obligate the party to withdraw from the Joint Defense Agreement. In the event a client withdraws from joint activity, all work product undertaken by the client's representatives in satisfying a defense group task assignment must be turned over to the group at the time of such withdrawal and must remain confidential under the terms of this agreement, except as required by counsel's ethical responsibilities to their client.

7. ***Information Protected by this Agreement:*** The parties agree that all or any part of the following information is protected by this agreement:

    a. ***Communications:*** This agreement protects oral and written communications of any nature between any combination of attorney, clients, and/or agents of the attorneys.

    b. ***Documents:*** This agreement protects the sharing and exchange among the parties of all documents, both in traditional and in electronic forms. The parties agree to mark all materials generated pursuant to this agreement with the annotation "Confidential and Privileged Information, Produced Pursuant to Joint Defense Agreement." No such document shall be turned over to the government.

    c. ***Investigation and Work Product:*** The attorneys agree to share and exchange with one another the undertaking of investigation, interviews of witnesses, summaries of interviews, and other investigation efforts.

    If an attorney undertakes a joint-defense project and decides not to pursue such project, or otherwise does not affirmatively work on such project the attorney shall immediately notify the remaining parties and make accessible all work product generated to date.

8. ***Investigation*** The Attorneys recognize they are obligated to effectively and zealously represent their respective clients, and such representation requires them to attempt to contact witnesses prior to the trial, in order to prepare their respective defenses and to otherwise prepare for trial. The Parties recognize that multiple, uncoordinated contacts

of witnesses by different defense teams risks alienation of those witnesses and increases the likelihood that witnesses will not cooperate with the defense. Accordingly, the Parties agree that they share a common interest in cooperating and coordinating their efforts, and in sharing information, in respect to witnesses.

If a party interviews a witness, they are obligated under this agreement to notify the other parties, who may then submit proposed questions to the contacting party, and any subsequent reports, memorandum, or summaries of the witness shall be shared amongst the parties. Advance notice of an interview may be given via email. Memorandum and witness summaries should be distributed to all parties.

Any investigator who authors a witness summary, report, or memorandum, covered by the instant agreement shall remain available as a witness to any party to this agreement, notwithstanding the withdrawal of the investigator's principal/client from this agreement.

9. ***Signatures in Parts:*** This agreement shall be valid when signed by each attorney, in parts, and the various collected signature pages will be assembled. The page with each respective counsel's signature may be faxed or emailed to counsel forXXX at XXX once signed.

Attorney for XXX
Dated _____ day of _____, 2009

_____
Attorney A

JOINT DEFENSE, COOPERATION AND CONFIDENTIALITY AGREEMENT

This JOINT DEFENSE, COOPERATION AND CONFIDENTIALITY AGREEMENT ("Agreement") is entered into by and among _____ _____ and _____and _____ and _____ _____ ("the Parties"), who are executing this Agreement personally and through their respective counsel.

The parties are aware that an investigation/proceeding/inquiry is currently being conducted by the _____, out of which have arisen or could arise civil, administrative, and/or criminal proceedings to which the parties may be and/or may become subjects or targets ("the Action"). After private and independent consultation with their respective counsel, each of the Parties has concluded that he/she/it shares a common interest with the others in determining the nature and scope of this matter, accurately determining all facts necessary for the securing of meaningful legal advice, and identifying and efficiently presenting all challenges and defenses, both legal and factual. Accordingly, each of the Parties has determined that it is in his/her/its best interest to cooperate in a joint defense effort and that such joint defense effort must be continued to permit effective and adequate representation.

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NOW THEREFORE, the Parties agree as follows:

1. Each Party affirms that the joint defense effort memorialized and effectuated by this Agreement will require the Parties and their respective counsel to engage in communications and the exchange of information, documents and materials, including confidential business and financial information, which by virtue of the purpose for which such communications are made or information exchanged and the use to which such is to be put by counsel constitute "confidences and secrets of clients" as those terms are defined by Disciplinary Rule 4 of the Oregon State Bar Code of Professional Responsibility [as approved by the Oregon Supreme Court through September 24, 1993]. In addition, each Party acknowledges and affirms that in his/its communications and exchanges with counsel for another Party, he/it is a "representative of the client" of that Party and each counsel acknowledges and affirms that in his/her/its communications and exchanges with a Party represented by other counsel, he/she/it is a "representative of the lawyer" for that Party, as those terms are defined by Oregon Evidence Code Rule 503. Hence, all Parties and their counsel acknowledge and affirm that none is a "third Party" as that term is used in this Agreement.

2. Each Party agrees that all information, documents or materials exchanged between two or more Parties in connection with the joint defense efforts in the action, and all information, documents, and materials derived from or related to information,

documents, and materials so exchanged (collectively "Confidential Information"), shall be communicated in confidence for the purpose of securing legal advice and representation and for the common interest shared by the Parties and therefore shall be subject to (a) all Privileges belonging to the Parties producing and receiving them, which Privileges may not be waived by any other Party without the prior written consent of such Parties, and (b) the terms of this Agreement.

3. To ensure the protection of thoughts, mental impressions, conclusions, opinions, legal theories, and other work product of counsel, as well as privileged or confidential business or financial information, and to preserve all Privileges belonging to each of the Parties, each of the Parties agrees that any Confidential Information received from another Party shall not be given, shown, made available, or communicated in any way to anyone other than (a) the undersigned attorneys of the Parties and other attorneys and legal support staff working on the Action in the law practice of those attorneys, (b) the Parties to the Agreement, and (c) agents, including consultants and/or experts, retained by any Party to assist counsel in performing his/her professional duties. Disclosure of any Confidential Information to any person in the group of persons identified in clause (c) above may be made only with the prior written consent of the Party who provided that information.

4. No Confidential Information shall be given, shown, made available or communicated in any way to the persons to whom such disclosure is authorized by this

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Agreement until each such person shall have read this Agreement and agreed in writing to abide by its terms.

5. Any Confidential Information received by a Party to this Agreement from any other Party(ies) shall be used only in connection with the preparation and defense of the Action. No such information shall be supplied, directly or indirectly, to any third party (i.e. any person not a party to this Agreement), and shall not be used for any other purpose, including but not limited to negotiations for or court proceedings to obtain approval of any proposed plea bargain, without the prior written consent of the Party who provided the information.

6. If any Confidential Information is disclosed by a Party in violation of the terms set forth in this Agreement, including disclosure of the terms set forth in this Agreement, including disclosure to an unauthorized person, such disclosure shall not constitute a waiver of any other Party's attorney-client or work-product privilege, or right of privacy, or other applicable privilege, or of any of its rights under this Agreement. No negligent or unintentional disclosure to an unauthorized person shall waive any Party's attorney-client or work product-privilege, or any of its right of privacy, or other applicable privilege, or any of its rights under this Agreement.

7. This Agreement and the covenants contained herein are made solely for the benefit of, and shall be binding upon, the Parties their respective successors and assigns,

and the undersigned attorneys of the Parties.

8. This Agreement may be executed by the Parties in counterparts, each of which shall be deemed an original.

9. In the event any provision of this Agreement shall be held by a court of competent jurisdiction to be illegal, void, or unenforceable, then such provision shall have no force or effect, but the illegality or unenforceability of such provision shall neither affect nor impair the legality and enforceability of any other provision of this Agreement.

10. It is not intended by any Party to this Agreement that any attorney-client relationship be established by this Agreement between any Party and any counsel for any other Party, and this Agreement and its performance shall not be the basis of any claim of disqualification or conflict of interest. Specifically, neither the existence of this Agreement, nor the exchange of confidential materials pursuant to it, shall be used by any Party as a basis of any claim that any counsel should be disqualified form representing individuals, corporations or other entities in other and different litigation.

11. This Agreement shall be construed in accordance with the laws of the State of Oregon.

12. Nothing contained herein is intended to be, or shall be deemed to be, an admission of any liability on the part of any Party or of the existence of facts upon which liability could be based.

13 Any modification of this Agreement must be agreed upon in writing by

every other then-participating Party to this Agreement.

14. This Agreement shall continue to be in force and effect notwithstanding the withdrawal from or discontinuance of participation in the joint defense efforts by any Party to this Agreement. Any Party that should decide to withdraw from this Agreement shall give every other Party written notice of that decision to withdraw and shall return all written Confidential Information to the Party from whom it was received. Such withdrawal shall not be effective until written notice of the withdrawal has been given to every other Party. Any Party who withdraws or discontinues participation in the joint defense efforts shall remain bound by this Agreement for any joint defense activities undertaken up to the date of withdrawal.

15. Parties, in addition to the original signatures to this Agreement may join in it upon the prior written consent of all those who are then party to it.

Dated: _____

_____
[client # 1]

_____
[attorney for client # 1]

Dated: _____

_____
[client # 2]

_____
[attorney for client # 2]

Dated: _____

_____
[client # 3]

_____
[attorney for client # 3]

Dated: _____

_____
[client # 4]

_____
[attorney for client # 4]

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA **3:15-CR-00430-HZ**

v. **PROTECTIVE ORDER**

ALFREDO PENA-LOPEZ aka "Gerionda,"
ADEMIR CHAVEZ aka CARMELO GUTIERREZ BARAJAS aka "Carmelo,"
ISRAEL BENJAMIN RIOS aka "Guero,"
LUIS ALONSO ORTIZ GUTIERREZ,
LUIS REY TORRES-ORTIZ aka "LICHO,"
JUAN PAULO FERNANDEZ,
FERNANDO DIAZ CASTELLENA, and
JESUS IVAN RIVERA HERNANDEZ,

Defendants.

Upon motion of the United States, the Court being advised as to the nature of this case, and there being no objection by the parties, it is hereby:

ORDERED that pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, counsel of record, their investigators, assistants, and employees may show defendants copies of all discovery material produced by the government, but shall not give defendants physical or electronic copies of, or unsupervised access to, any discovery material produced by the government which contains:

a) personal identifying information of any individual (other than that of any defendant), including without limitation, any individual's date of birth, social security number,

home address, home or cellular telephone number, personal email address, or driver's license number ("Personal Information"); however, telephone numbers that appear in court pleadings (including wiretap applications and their contents), and telephone numbers of any phone that was either intercepted in this investigation or was in contact with a phone intercepted in this investigation, are not "Personal Information."

b) financial information of any individual or business, including without limitation, bank account numbers, credit or debit card numbers, account passwords, or taxpayer identification numbers ("Financial Information");

c) information regarding the government's confidential sources or sources of information, including criminal histories, arrest records and summaries of information provided to the government ("Confidential Source Information");

d) the contents of any sealed documents, including wiretap applications and their contents (affidavits, orders) and other court-ordered authorizations (e.g., pen registers, GPS orders, tracking orders) ("Sealed Information"), unless the Personal Information, Financial Information, and Confidential Source Information mentioned in each of these subparagraphs, has first been redacted from the discovery materials.

IT IS FURTHER ORDERED that government will redact Core Documents in this case. "Core Documents" are narrative reports prepared by law enforcement at the federal, state or local levels; and all court pleadings filed so far in connection with this investigation. Those redacted Core Documents will be produced to defense counsel, who may give physical or electronic copies of the redacted Core Documents to the defendants. The government will produce each set of redacted Core Documents to defense counsel within 30 calendar days of the government's production of each set of corresponding unredacted documents.

IT IS FURTHER ORDERED that neither defense counsel nor defendants shall physically or electronically provide any discovery material produced by the government, including redacted Core Documents, to any person not a party to this case, or provide publicly any physical or electronic copies of the same, without the government's express written permission, except that defense counsel may provide discovery material to those persons employed, retained, or otherwise consulted by defense counsel who are necessary to assist counsel of record in preparation for trial or other proceedings. The Court retains jurisdiction to modify this Order, upon motion, even after the conclusion of district court proceedings in this case. Defense counsel may file redacted Core Documents as attachments to pleadings in this case.

DATED this 13 day of January, 2016.

Marco Hernández

HONORABLE MARCO A. HERNÁNDEZ
United States District Judge

Presented by:

BILLY J. WILLIAMS
United States Attorney

s/Thomas S. Ratcliffe
THOMAS H. EDMONDS, OSB #90255
THOMAS S. RATCLIFFE, ILSB #6243708
Assistant United States Attorneys
(503) 727-1000