ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

DOUGLAS DENNENY, *Petitioner*, v. MBDA, INC., MBDA UK, & MBDA GROUP, *Respondents*.	ARB Case No. 2018-027 ALJ Case No. 2016-SOX-00032

BRIEF OF THE SOLICITOR OF LABOR AS AMICUS CURIAE

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STATEMENT OF INTEREST

Pursuant to the Administrative Review Board's ("ARB" or "Board") order of August 3, 2020, the Solicitor of Labor submits this brief as *amicus curiae*.

STATEMENT OF THE ISSUES

1. Whether MBDA is a contractor within the meaning of the Sarbanes-Oxley Act ("SOX") whistleblower provision, 18 U.S.C. § 1514A; and

2. Whether Denneny established a genuine issue of material fact as to whether he engaged in protected activity under SOX.

STATEMENT OF THE CASE

A. Statement of Facts

Respondent MBDA, Inc. ("MBDA") is a privately-held Delaware corporation headquartered in Arlington, Virginia. *Denneny v. MBDA, Inc.*, et al.,

ALJ No. 2016-SOX-00032, slip op. at 4 (ALJ Feb. 9, 2018) ("ALJ Op."). MBDA is a wholly-owned subsidiary of MBDA UK, Limited, which is also privately held. *Id.* Denneny began working for MBDA in 2009 as its Vice President for Government Relations. *Id.* He initially reported to the then-CEO, Jerry Agee, but in 2011, John Pranzatelli become Chief Operating Officer, and thereafter, Denneny reported to Pranzatelli. *Id.* Denneny's title expanded to Vice President of Business Development, Government Relations and Communications in February 2012. *Id.* Denneny and Pranzatelli both became members of Respondent's Board of Directors in 2013. *Id.* at 5. When Agee retired in 2013, Scott Webster became interim CEO and Chairman of MBDA's board, while Denneny and Pranzatelli both sought the permanent CEO position. *Id.* at 7, 8. Denneny claimed that he and Pranzatelli did not get along due to personality conflicts, and asserted that Pranzatelli made unfounded accusations against him while they were competing to become CEO. *Id.* at 8. Pranzatelli was selected as the new CEO, and assumed the position on November 1, 2014, after which Webster continued to serve as Chairman of the Board. *Id.* at 7.

SABER

MBDA developed the SABER munitions program to market to the United States Army. ALJ Op. at 4. Denneny claims that he repeatedly advised Pranzatelli and Agee that SABER was not commercially viable, and he stated that he attended

a board meeting in July 2012 where Pranzatelli made misstatements concerning SABER's performance to the CEO of MBDA's parent company. *Id.* at 5. MBDA never contracted to sell SABER to a publicly-traded company, although Denneny asserts that he believed Respondent was having discussions with public companies to sell SABER. *Id.* at 4, 5.

Redstone Arsenal Lease

MBDA entered into a contract to sell three Brimstone II missiles to Boeing,[1] a publicly-traded company. ALJ Op. at 5. Denneny asserts that MBDA represented to Boeing that it intended to produce the Brimstone II missiles at the Redstone Arsenal in Huntsville, Alabama. *Id.* However, the U.S. Army informed MBDA in September 2014 that it planned to terminate MBDA's lease on the Redstone Arsenal facilities, and MBDA vacated the facility in April 2015. *Id.* Denneny claims that MBDA did not have another facility it could use to manufacture explosive devices, and thus would not be able to fulfill the terms of the contract. *Id.* Denneny further alleged that Pranzatelli and Webster concealed the information about the termination of the Redstone Arsenal lease from MBDA's board until Denneny informed the board in October 2014. *Id.* at 6. However, Respondent

[1] MBDA also had a contract with Boeing to produce Diamond Back Wing Assembly Kits, which attach to missiles to extend their range. Pet'r's Br. at 5. Because Denneny did not allege that he engaged in any protected activity related to this contract, for the reasons discussed *infra*, this contract is not relevant to determining whether MBDA is a SOX-covered contractor here.

asserted that it did not enter into the contract with Boeing until February 2015, several months after the Army provided notice of the lease termination. *Id.* Respondent also claimed that the facility was not capable of manufacturing Brimstone II missiles without significant modification. *Id.*

Orbital ATK Conflict of Interest

MBDA's original Brimstone missile used a motor manufactured by ATK, while Brimstone II used a Roxell motor. ALJ Op. at 6. Denneny thought the Roxell motor was superior for use with Brimstone II. *Id.* In April 2014, Webster disclosed to MBDA's board that he would be on the board of a newly-merged company, Orbital ATK, that would sell the ATK motor. *Id.* at 7. On April 20, 2015, the U.S. Navy issued a request for information ("RFI") for a "Brimstone-like" missile. *Id.* Brimstone II broadly fit the requirements of the RFI. *Id.* The next day, an Orbital ATK vice president forwarded a link to the RFI to Pranzatelli, copying Webster, with a message offering assistance and stating he was "hopeful we can find a way to collaborate together." *Id.* Pranzatelli forwarded the message to Denneny, who replied that he was concerned Webster might have a conflict of interest, which Pranzatelli acknowledged. *Id.*

Thereafter, Denneny alleges that MBDA began having strategy meetings to consider replacing the Roxell motor with an Orbital ATK motor. ALJ Op. at 8. Denneny alleged that he warned Pranzatelli that he planned to raise Webster's

conflict of interest at MBDA's May 7, 2015 board meeting, but he was fired before he could do so. *Id.* MBDA claims that the parameters of the RFI made it technologically impossible to use the Orbital ATK motor on the Brimstone II missile. *Id.*

Denneny's Termination

Denneny claims that when Pranzatelli became CEO in 2014, he expected Denneny to resign. ALJ Op. at 8. In March 2015, Pranzatelli informed Denneny that he was outsourcing MBDA's government relations function and removing it from Denneny's job responsibilities. *Id.* MBDA terminated Denneny's employment on May 7, 2015. *Id.* MBDA claims that it fired Denneny because he had become "difficult to manage, "disgruntled," was "resistant to other people's opinions," made "negative comments about Pranzatelli," and reacted poorly to being divested of the government relations function. *Id.* at 9. Denneny claims that he was terminated in retaliation for protected activity, particularly his warning that he planned to raise Webster's conflicts of interest with MBDA's board. *Id.* at 8. Denneny asserts that he never received a negative performance evaluation, reprimand, or discipline. *Id.*

B. Procedural History

Denneny filed a SOX whistleblower complaint with OSHA on October 29, 2015 alleging that he had been fired in retaliation for the various incidents

described *supra*. ALJ Op. at 2. On April 7, 2016, OSHA dismissed the complaint. *Id.* at 2–3. Denneny timely objected to OSHA's findings and requested a hearing before an ALJ. *Id.* at 3.

Following discovery, MBDA moved for summary decision, and the ALJ granted the motion on February 9, 2018.[2] ALJ Op. at 1, 3. The ALJ began his analysis by explaining that the Supreme Court had determined in *Lawson v. FMR LLC*, 571 U.S. 429 (2014), that the SOX whistleblower provision protects employees of contractors to publicly-traded companies from retaliation, but it did not define the outer limits of SOX contractor coverage. ALJ Op. at 12. The ALJ also discussed several post-*Lawson* decisions that identified possible limitations on SOX contractor coverage. *See, e.g., Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 651–52 (N.D.N.Y. 2015); *Gibney v. Evolution Mktg. Research, LLC*, 25 F. Supp. 3d 741, 747–48 (E.D. Pa. 2014). ALJ Op. at 12–13.

Applying these standards, the ALJ determined that the three incidents where Denneny allegedly reported shareholder fraud did not fall within the ambit of SOX whistleblower protection. ALJ Op. at 14–17. First, as to Denneny's claim that Pranzatelli was not honest with potential purchasers or subcontractors about the poor prospects of SABER, the ALJ held that any misrepresentation was not

[2] The ALJ issued his decision on February 1, 2018, however, that opinion erroneously omitted appeal rights. The ALJ issued a revised decision correcting the error on February 9, 2018.

covered by SOX because it did not involve a contract with a public company. *Id.* at 14. Second, as to the Redstone Arsenal lease, the ALJ determined that, taking the facts in the light most favorable to Denneny, MBDA officers hid information about the lease termination from MBDA's Board, and the lease termination could negatively impact MBDA's ability to fulfill its contract with Boeing. *Id.* at 15. However, this was not conduct that Denneny could reasonably believe violated one of the six categories of law listed in SOX section 806; at most, it would lead to MBDA violating its contract with Boeing. *Id.* Finally, in regard to Webster's potential conflict of interest concerning the Orbital ATK motor, the ALJ determined that because MBDA did not have a contract with any public company related to a potential bid on the RFI, the only potentially relevant contract was MBDA's contract with Boeing to produce the three Brimstone II missiles. *Id.* The ALJ held that no reasonable factfinder could conclude that MBDA was contemplating using the Orbital ATK motor to fulfill its contract with Boeing, and thus Denneny did not sufficiently allege that he engaged in SOX-protected activity. *Id.* at 15–16.

Denneny filed a petition for review of the ALJ's order, and both parties have filed their respective opening briefs. Denneny contends that the ALJ erred in holding that the whistleblower protection provisions of SOX are not applicable to him, while MBDA argues that the ALJ's decision was correct.

ARGUMENT

I. DENNENY FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER MBDA IS A SOX-COVERED CONTRACTOR ON THE FACTS OF THIS CASE.

Lawson established that the SOX whistleblower provision protects employees of contractors to publicly-traded companies, but the facts of that case did not require the imposition of any limitations on that coverage, although the court noted that some limitations may be warranted. *Lawson v. FMR LLC*, 571 U.S. 429, 453–54 (2014). Here, the ARB should determine that the SOX whistleblower provision only protects employees of a contractor where the contractor is acting in its capacity as contractor to a publicly-traded company. Applying this principle, Denneny has not established that there is a genuine issue of material fact as to whether MBDA is a SOX-covered contractor.

A. SOX Prohibits a Contractor From Retaliating Against its Own Employee When the Case Concerns the Contractor Fulfilling its Role as a Contractor to a Public Company.[3]

1. Statutory Background and the Lawson Decision

SOX was enacted "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation."

[3] As in *Lawson*, the term "public company" is used here as a shorthand to refer both to companies that are publicly-traded (i.e. companies that have a class of securities registered under section 12 of the Securities Exchange Act) and companies that are required to file reports under section 15(d) of the Securities Exchange Act.

Lawson, 571 U.S. at 432 (citing S. Rep. No. 107–146, pp. 2-11, 2002 WL 863249 (2002) (Conf. Rep.). As the Department has summarized before, "[t]he Act generally was designed to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing." U.S. Dep't of Labor, Occupational Safety & Health Admin., Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11865-02, 2015 WL 913626 (Mar. 5, 2015) (Final Rule). "The whistleblower provision is intended to protect employees who report fraudulent activity and violations of Securities Exchange Commission ("SEC") rules and regulations that can harm innocent investors in publicly traded companies." *Id*.

SOX prohibits a covered person from retaliating against an employee for engaging in activity protected under the statute, providing in pertinent part that:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*(d)) . . . , or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee for [engaging in protected whistleblowing].

18 U.S.C. § 1514A.

In *Lawson*, the Supreme Court held that SOX unequivocally protects from retaliation an employee of a private contractor to a public company, not just the

employees of the public company served by the contractor. 571 U.S. at 433. As the *Lawson* Court explained, not only is this the most logical reading of the statute as a textual matter, but it is also consistent with the purpose of SOX. *Id.* at 447–48. Thus, the court could "safely conclude that Congress enacted § 1514A aiming to encourage whistleblowing by contractor employees who suspect fraud involving the public companies with whom they work." *Id.* at 449.

The *Lawson* Court did not endorse any rules concerning "the bounds of § 1514A," because the plaintiffs sought "only a 'mainstream application' of the provision's protections." *Lawson*, 571 U.S. at 454. Thus, left unanswered in *Lawson* was the question of under what circumstances a privately-held company should be regarded as a contractor to a public company under SOX.

Nonetheless, the *Lawson* Court acknowledged the limitations suggested by the plaintiffs and the Solicitor General that might allay any concerns regarding an overbroad reading of SOX. In particular, the Court noted the Solicitor General's explanation that § 1514A protects contractor employees only to the extent that their whistleblowing relates to "the contractor . . . fulfilling its role as a contractor for the public company, not the contractor in some other capacity." *Lawson*, 571 U.S. at 453 (quoting Tr. of Oral Arg. at 18–19 (Gov't counsel)); *see also id.* ("[I]t has to be a person who is in a position to detect and report the types of fraud and securities violations that are included in the statute. . . . [W]e think that 'the

contractor of such company' refers to the contractor in that role, working for the public company." (quoting Tr. of Oral Arg. at 23 (Gov't counsel))).

2. SOX is Best Read as Covering Contractors Acting in Their Capacity as Contractors to Public Companies

The interpretation of SOX's contractor coverage advanced by the Solicitor General in *Lawson*—that contractor coverage is limited to instances where the private company is fulfilling its role as a contractor to a public company—remains the best reading of SOX's statutory language. The reasoning of *Lawson* and subsequent caselaw support this interpretation, and the ARB should apply that rule here.

SOX prohibits retaliation by a public "company . . . or any officer, employee, contractor, subcontractor, or agent *of such company*." 18 U.S.C. § 1514A. By referring to a "contractor . . . of such company," the statute specifically indicates the status of the company as an entity performing a particular contract for a particular public company. The reference back to "such company" reinforces the relationship that must exist between a covered contractor and the public companies that are the focus of SOX's prohibitions. By choosing to define a covered contractor according to its relationship with a public company, in contrast to, for example, its connection to the prohibited activity, Congress demonstrated that a key question for determining SOX contractor coverage is the nature of the relationship between the contractor and the public company. Accordingly, the

language of the statute limits contractor coverage to instances where the contractor is acting within the scope of its relationship to the public company.

This reading is consistent with the purpose of SOX and the history of its enactment. As the *Lawson* Court explained, "Congress plainly recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up" perpetrated by Enron's officers. *Lawson*, 571 U.S. at 447 (quoting *Spinner v. David Landau & Assoc., LLC*, ARB Case Nos. 10-111, 10-115, 2012 WL 1999677, at *9 (ARB May 31, 2012)). Indeed, as the Court noted, Arthur Andersen was heavily involved in the Enron scandal as a consultant and independent auditor, and Congress had observed that "outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract," but "fear of retaliation was the primary deterrent to such reporting by the employees of Enron's contractors." *Id.* at 447–48. Moreover, the facts of *Lawson* were particularly compelling: in that case, the Fidelity mutual funds, consistent with industry practice, had no employees, so the plaintiffs, employees of contractors providing management and advisory services to the funds, were in the best position to report shareholder fraud. *Lawson*'s holding thus "avoid[ed] insulating the entire mutual fund industry from § 1514A." *Lawson*, 571 U.S. at 450. Prohibiting retaliation by contractors to public companies in their role as such

provides anti-retaliation protection to contractors' employees, consistent with the circumstances noted in SOX's legislative history and in *Lawson*, without stretching SOX coverage to circumstances far removed from the shareholder-protection purposes of SOX.

Following *Lawson*, the courts to consider this question have agreed with this interpretation of the SOX whistleblower provision. *See Tellez v. OTG Interactive, LLC*, No. 15 CV 8984-LTS-KNF, 2019 WL 2343202, at *3 (S.D.N.Y. June 3, 2019) (recognizing that, since *Lawson*, courts have applied the "limiting principle" that the contractor must be "'fulfilling its role as a contractor for the public company' in engaging in the conduct complained of by the putative whistleblower" to be covered by SOX (quoting *Lawson*, 571 U.S. at 453–54)); *Baskett v. Autonomous Research LLP*, No. 17-CV-9237, 2018 WL 4757962, at *8 (S.D.N.Y. Sept. 28, 2018) (no SOX coverage where allegation did not relate to contract with public company); *Limbu v. UST Glob., Inc.*, No. CV-16-8499, 2017 WL 8186674, at *4 (C.D. Cal. Apr. 20, 2017) (applying limitation identified in *Lawson* that "contractor employees are protected 'only to the extent that their whistleblowing relates to the contractor . . . fulfilling its role as a contractor for the public company, not the contractor in some other capacity'" (quoting *Lawson*, 571 U.S. at 453)); *Anthony*, 130 F. Supp. 3d at 652 ("[T]he whistleblowing must relate to the contractor's provision of services to the public company.").

Furthermore, a casual business relationship is generally insufficient to make a private company a contractor for SOX purposes. For example, the Seventh Circuit noted that, "in context, 'contractor, subcontractor, or agent' sounds like a reference to entities that participate in the issuer's activities," and explained that "[n]othing in § 1514A implies" that if a private company purchases a box of rubber bands from a store like Wal-Mart, it thereby becomes covered by SOX. *Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010). Additionally, the ARB determined last year that "an employee cannot invoke SOX protection simply because his employer is a party to a contract with a publicly traded company;" rather, "at a minimum, a 'contractor' under § 1514A must actually perform a service for a publicly traded company." *Griffo v. Book Dog Books, LLC*, ARB Case No. 2018-0029, 2019 WL 3293950, at *3 (ARB May 2, 2019). In *Griffo*, the complainant worked for a private company that sold textbooks through Amazon.com, Inc., a public company, and that had bank accounts with PNC Bank, a subsidiary of a public company. *Id.* at *1. The complainant argued that because his employer had contracts with Amazon to sell books and with PNC to obtain a line of credit, his employer was a covered "contractor" under the SOX whistleblower provision. *Id.* at *2. The ARB rejected that contention, because the private company did not "perform[] any service for either Amazon or PNC." *Id.* at *3. Holding otherwise, the Board noted, would have expanded SOX coverage to

almost any private company, assuming most private companies do business with a public company at some point. *Id.*

Applying the rule that SOX only covers a contractor acting in its capacity as a contractor to a public company produces a result in keeping with the text and purpose of SOX and avoids converting SOX into a general whistleblower protection provision. Thus, to determine SOX coverage in a case involving an allegation of retaliation by a contractor, the Board should consider the conduct that forms the basis of the complainant's alleged protected activity and ask whether that conduct relates to the employer's work in its capacity as a contractor for a public company. If it does not, there is no SOX coverage, and the complainant cannot state a claim under SOX.

B. Applying the Rule Suggested Above, Denneny has Failed to Adequately Establish SOX Coverage and Summary Decision was Appropriate in this Case.

In the present case, Denneny has not established a genuine issue of material fact regarding whether MBDA was acting in its capacity as a contractor to a public company, as he must for his SOX claim to survive MBDA's motion for summary decision. Denneny asserted that he engaged in SOX-protected activity in three instances: (1) when he complained to MBDA's board about alleged misstatements about SABER; (2) when he informed MBDA's board about purported misstatements concerning the Redstone Arsenal Lease; and (3) when he

complained to Pranzatelli about Webster's alleged conflict of interest. However, as explained below, none of these concerns involve a sufficiently strong relationship to MBDA's work in its capacity as a contractor to Boeing or any other public company. Thus, they do not implicate SOX's prohibition on retaliation by a contractor or subcontractor to a public company.[4]

1. SABER

Denneny's claim that MBDA was a SOX-covered contractor with respect to his allegation concerning SABER fails because it does not involve a contract with a publicly-traded company. Denneny alleged that SABER "had limited customer interest and was not a good investment," and that Pranzatelli misstated SABER's performance and customer interest" to MBDA's board. Pet'r's Br. at 5–6. Denneny claims that he "believed that [MBDA] had publicly traded subcontractors for SABER development" and he "believed he was reporting fraud that could impact a publicly traded company because MBDA was having discussions with publicly traded entities, like Boeing, about selling SABER." *Id.* at 22. This argument

[4] Denneny also asserts that MBDA's parent company, MBDA UK Limited, and other affiliated companies had contracts with several publicly-traded companies, and that MBDA and its parent acted as a single entity in his termination. Even if true, these allegations would not change the coverage analysis. Denneny points to no contract between a publicly-traded company and MBDA UK Limited or an affiliate that would have been implicated by any of the concerns that he raised. The fact that a respondent has a contract with a public company is not enough to make it a SOX-covered contractor. As discussed herein, the allegations in the complaint must relate to the contractor's work in its capacity as a contractor.

conflates coverage and protected activity. The complainant's beliefs are *not* relevant to the question of whether a private company is covered by the SOX whistleblower provision. Rather, SOX requires consideration of a complainant's beliefs when evaluating whether he or she engaged in SOX-protected activity by reporting conduct that she "reasonably believes constitutes a violation of" the laws listed in the SOX whistleblower protection provision. 18 U.S.C. § 1514A(a)(1); *see also Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2517148, at *11 (ARB May 25, 2011). The employee's beliefs are not relevant aside from making this specific determination. Here, the Board does not need to inquire into whether Denneny reasonably believed that he was reporting fraud, because he cannot establish that MBDA qualifies as a contractor under SOX.

To establish that MBDA is a SOX-covered contractor with respect to his allegation concerning SABER, as discussed *supra*, Denneny must show that his allegation relates to MBDA's activity in its capacity as a contractor to a public company. Denneny has not shown that MBDA had a contract with a public company related to SABER at the time that he raised his concerns about SABER to MBDA's board. Therefore, because there was no contract with a public company, Denneny cannot establish contractor coverage under SOX.

2. Redstone Arsenal Lease

Denneny asserts that he reported to MBDA's board and senior executives that the termination of MBDA's Redstone Arsenal lease meant that MBDA lacked a suitable facility to develop the Brimstone II missile under its contract with Boeing, despite the fact that MBDA represented to Boeing during contract negotiations that it would produce the missiles at the Redstone facility. *See* Pet'r's Br. at 6–7. However, Denneny cannot show that MBDA was a SOX-covered contractor with respect to this allegation because his claim relates to conduct that occurred before MBDA contracted with Boeing. Additionally, it concerns MBDA's internal affairs, that is, whether information was hidden from MBDA's own board, and not an allegation that MBDA made misrepresentations to Boeing.

Denneny's claim is focused on the contention that Pranzatelli and Webster failed to inform MBDA's board about the loss of the Redstone Arsenal lease until Denneny notified the board in October 2014. Pet'r's Br. at 22.[5] Denneny does not dispute that the loss of the lease occurred several months before MBDA entered into the contract with Boeing to produce the Brimstone II missiles. *See* ALJ Op. at 6; Record Appendix ("RA") at 135 (Denneny's deposition testimony stating that

[5] Denneny asserts that the lease termination was concealed from MBDA's board for "about six months," but the parties' joint stipulation of facts stated that the Army notified MBDA of the termination on September 10, 2014, and Denneny claims that he informed MBDA's board about the loss of the lease in October 2014. *See* RA at 391; Pet'r's Br. at 22.

the contract was signed in February 2015). Additionally, the assertion that MBDA employees concealed information from MBDA's board pertains entirely to MBDA's internal affairs, and does not implicate MBDA's contract with Boeing. As several courts have correctly determined, SOX ordinarily does not cover a private company's misconduct in its own affairs, because such actions generally do not relate to the private company's work fulfilling its role as a contractor to a public company. *See Tellez*, 2019 WL 2343202, at *4 (SOX does not reach contractor misconduct "that is not related to or engaged in by a public company"); *Baskett*, 2018 WL 4757962, at *8 (dismissing for lack of contractor coverage SOX complaint regarding private contractor's own failure to comply with FINRA and SEC rules applicable to its personnel). Therefore, because the allegation does not concern a private company's misconduct in its capacity as a contractor to a public company, it does not bring MBDA within the scope of SOX contractor coverage.

3. Conflict of Interest Related to Orbital ATK Motor

Denneny also has not established a genuine issue of material fact as to whether MBDA was acting as a SOX-covered contractor with regard to his allegations concerning the Orbital ATK motor. As explained above, the gravamen of Denneny's allegation is that Webster, who served on the Boards of both MBDA and Orbital ATK, had a conflict of interest and should have been excluded from MBDA's discussions about potential partnerships for the Brimstone II. Pet'r's Br.

at 21–22. Despite Denneny's passing allegations that Boeing shareholders would be harmed by this change, Denneny appears to be focused on the conflict of interest as it relates to a response to the RFI. *Id.* at 8–9 (discussing allegations related to Orbital ATK). MBDA had no contract with any publicly-traded company related to a bid on the RFI, and thus is not a SOX-covered contractor with regard to allegations concerning the RFI.[6]

[6] In an additional rationale supporting his decision, the ALJ rejected Denneny's claim concerning the conflict of interest to the extent it was based on a theory of "pass-through" liability where Boeing was the victim, rather than the perpetrator of fraud. ALJ Op. at 16 (citing *Gibney*, 25 F. Supp. 3d at 747–48). Several district courts have repeated this distinction between the public company as the perpetrator rather than the victim of fraud, albeit often in dicta. *See Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 WL 1080937, at *3 (N.D. Tex. Mar. 21, 2017); *Anthony*, 130 F. Supp. 3d at 651–52; *see also Baskett*, 2018 WL 4757962, at *8; *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017). At least one district court declined to draw this distinction, offering the critique that "[t]here is no support in the plain text of the statute, in *Lawson*, or in Seventh Circuit case law for such a narrowing of the reach of the Act." *Gryga v. Henkels & McCoy Grp., Inc.*, No. 19-C-1276, 2019 WL 3573565, at *4 (N.D. Ill. Aug. 6, 2019). No federal appellate court has yet considered this issue. Here, it is not necessary for the ARB to take a position on this distinction. Rather, it can determine that MBDA is not covered by SOX because Denneny's allegation does not concern actions taken by MBDA in its capacity as a contractor, and further, Denneny did not establish a genuine issue of material fact regarding whether he engaged in SOX-protected activity because, as discussed *infra*, he did not show that he reasonably believed that the replacement of the motor would be material to Boeing shareholders.

II. DENNENY'S COMPLAINTS REGARDING THE REDSTONE ARSENAL LEASE AND THE ORBITAL ATK MOTOR CONFLICT OF INTEREST DO NOT AMOUNT TO PROTECTED ACTIVITY UNDER SOX.

The ARB can determine that all of Denneny's claims should be dismissed because he failed to establish a genuine issue of material fact concerning whether MBDA was a SOX-covered contractor, for the reasons discussed *supra*. In addition, Denneny failed to show that he engaged in activity protected under SOX when he voiced concerns as to the loss of the Redstone Arsenal lease and Webster's conflict of interest.[7] Thus, the absence of protected activity presents an alternative basis for dismissing these claims.

SOX prohibits covered respondents, including contractors to public companies, from discharging or otherwise retaliating against an employee because the employee, among other protected activities, provided information regarding "conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C.

[7] The ALJ did not analyze whether Denneny engaged in protected activity in regard to SABER because, given the lack of a contract with a public company related to SABER. there is not even a viable argument that MBDA was a SOX-covered contractor with respect to this allegation. As discussed *supra*, that reasoning is correct.

§ 1514A(a)(1). To demonstrate that he or she engaged in protected activity, the complainant must show that "he or she 'reasonably believe[d]' that the conduct complained of constitutes a violation of the laws listed at Section 1514." *Sylvester*, 2011 WL 2517148, at *11. In order to satisfy the reasonable belief standard, the complainant must show that: (1) he or she had a subjective belief that the complained-of conduct constituted a violation of the relevant law or rule, and (2) the belief was objectively reasonable. *Sylvester*, 2011 WL 2165854, at *11. "[T]he reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." *Rhineheimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015) (citing *Sylvester*, 2011 WL 2165854, at *12).

With regard to the termination of the Redstone Arsenal lease, Denneny has alleged that this information should have been disclosed to MBDA's board, and further, that the loss of the lease jeopardized MBDA's ability to fulfill its contract with Boeing. *See* Pet'r's Br. at 6–7 (asserting that the lease termination "could negatively impact MBDA's ability to fulfill its contract with Boeing," and claiming that use of the Redstone Arsenal facility was the "key lynchpin" to producing the contracted-for missiles). Denneny has not asserted that he believed that any potential inability by MBDA to satisfy the Boeing contract would

constitute mail fraud, wire fraud, bank fraud, securities fraud, fraud against shareholders, or a violation of an SEC rule. *See* 18 U.S.C. § 1514A(a)(1). By his own telling, Denneny was simply concerned that MBDA might breach its contract.[8] But his expressing a concern about a potential breach of contract is not protected activity under SOX, so he cannot rely on it to establish a genuine issue of material fact regarding whether he engaged in protected activity. *See* ALJ Op. at 15 (discussing Denneny's allegations related to the Redstone Arsenal lease).

Denneny also has not established a genuine issue of material fact concerning whether he engaged in protected activity by voicing concerns to Pranzatelli about Webster's potential conflict of interest with regard to Orbital ATK and the Brimstone II motor. Denneny asserts that he believed Webster had a conflict of interest because he was on the boards of both MBDA and Orbital ATK, and Denneny thought that Orbital ATK was attempting to persuade MBDA to replace the Brimstone II's Roxell motor with the Orbital ATK motor. Denneny says that he reported these concerns to Pranzatelli and informed him that he planned to raise the

[8] In his brief, Denneny does not assert that he had an objectively reasonable belief that the alleged misstatements concerning the termination of the lease constituted a violation of one of the six categories of law listed in SOX, let alone explain the basis for such a belief. Pet'r's Br. at 23–25. Instead, he only argues that he had an objectively reasonable belief that Webster had a conflict of interest. *Id.* at 24 ("Denneny's complaint that Webster had a conflict of interest was objectively reasonable."). Thus, he essentially concedes that he did not have an objectively reasonable belief that he was reporting a violation of one of the categories identified in SOX with regard to the loss of the Redstone Arsenal lease.

issue at MBDA's next board meeting, but was fired before he had the chance to do so. Here, Denneny has not shown that he engaged in protected activity because he did not have a reasonable belief that MBDA was acting on Webster's conflict of interest or that the effect, if any, was large enough to be material to Boeing's shareholders.

First, Denneny devotes the bulk of his argument to discussing the potential conflict of interest as it relates to the Navy RFI, but any conflict concerning the RFI is outside the scope of SOX whistleblower protection because MBDA did not have a contract with a publicly-traded company related to the RFI at the time that the events in question occurred. *See supra* at 19–20.

As to the allegedly protected activity, Denneny seems to assert that reporting concerns about Webster's conflict of interest amounted to reporting potential fraud against Boeing's shareholders. In support of his allegation concerning the potential conflict of interest, Denneny points to a few emails from Orbital ATK's vice president and the fact that Webster did not recuse himself from discussions concerning Brimstone II. Pet'r's Br. at 21–22. Denneny also asserted that MBDA was having strategy meetings around the same time as the Orbital ATK communications to discuss replacing the Roxell motor with the Orbital ATK motor, but he did not claim that these meetings were prompted by, or connected to, Webster's position with Orbital ATK. *See* AR at 143–44 (Denneny deposition

testimony stating that meetings discussing potential replacement of motor were occurring "at the same time" that Orbital ATK was contacting MBDA). Taken together, these facts are not sufficient for a reasonable person in Denneny's position to have believed that MBDA was conspiring with Orbital ATK to replace the Brimstone II motor. In fact, the ALJ determined that Denneny failed to present any evidence that MBDA was seeking to change the Brimstone II's motor, that the correspondence Denneny relied on between MBDA and Orbital related to the Navy RFI, and that Denneny presented nothing but his unsupported assertions that MBDA held meetings regarding replacing the Roxell motor with the Orbital ATK motor. ALJ Op. at 16.

Further, a reasonable person in Denneny's position would not have believed that Webster's conflict of interest was of sufficient magnitude to rise to the level of fraud against Boeing's shareholders. "To be objectively reasonable, a whistleblower is not required to strictly plead all the elements of a shareholder fraud cause of action," however, "the reasonableness of an employee's belief must be considered in the context of what is required to establish shareholder fraud." *Northrop Grumman Sys. Corp. v. U.S. Dep't of Labor, ARB*, 927 F.3d 226, 234 (4th Cir. 2019); *accord Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) ("[T]he statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific

provisions."); *see also Dietz v. Cypress Semiconductor Corp.*, 711 F. App'x 478, 484 n.5 (10th Cir. 2017) ("If the facts known to the claimant could not even reasonably be squared with the elements of a crime referenced in Sarbanes-Oxley, then the whistleblower cannot be said to have formed a reasonable belief necessary to trigger protection under the statute."). Thus, where an employee claims to reasonably believe that certain conduct amounted to fraud against shareholders, whether the conduct would be material to those shareholders is relevant to the Board's consideration of whether the employee's concerns were objectively reasonable. *See Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 381 (8th Cir. 2016) (holding employee did not have objectively reasonable belief of shareholder fraud where he "would understand that $10 million is a minor discrepancy to a company that annually generates billions of dollars"). Here, Denneny has not explained how, even assuming MBDA was seeking to replace the motor in the three Brimstone II missiles in the Boeing contract, he could reasonably believe that the replacement would be material to Boeing shareholders. *See* ALJ Op. at 15–16. Accordingly, Denneny has not established a genuine issue of material fact as to whether he engaged in protected activity by reporting concerns about Webster's possible conflict of interest to Pranzatelli.

CONCLUSION

For the reasons explained above, Denneny has not established a genuine issue of material fact regarding whether MBDA is a SOX-covered contractor or whether he engaged in SOX-protected activity, and therefore his petition for review should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of the Solicitor of Labor as Amicus Curiae complies with the requirements of Fed. R. App. P. 29(a)(4) and 32(a)(5)(A) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,367 words according to the count of Microsoft Word.

/s/ Sarah M. Roberts
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2020, I served a copy of the foregoing Brief of the Solicitor of Labor as Amicus Curiae through the ARB's Electronic Filing portal and via email, by consent, on the following parties:

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