No. 14-2734

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MIKAEL SAFARIAN,

Plaintiff-Appellant,

v.

AMERICAN DG ENERGY INC.,

Defendant-Appellee,

v.

MULTISERVICE POWER, INC.,

Third-party Defendant.

Appeal from the United States District Court
for the District of New Jersey

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

DEAN A. ROMHILT
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of plaintiff-appellant Mikael Safarian ("Safarian"). The district court applied the wrong legal analysis in determining that Safarian was an independent contractor as opposed to an employee under the Fair Labor Standards Act ("FLSA" or "Act"), and in determining that Safarian did not engage in protected activity under the anti-retaliation provision of the Sarbanes-Oxley Act ("SOX").

INTEREST OF THE SECRETARY AND AUTHORITY TO FILE

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. He is committed to opposing the misclassification of workers who are employees under the FLSA as independent contractors, thereby depriving them of the Act's protections. The Secretary has successfully pursued numerous enforcement actions against employers who misclassify workers.[1] He also recently participated successfully as amicus in two cases on behalf of misclassified workers.[2] The Secretary is concerned with the scenario by which employers sometimes impose structures on workers who are employees under the FLSA to make it seem that they are independent contractors. These structures include

[1] See, e.g., Perez v. Oak Grove Cinemas, Inc., No. 03:13-CV-00728-HZ, --- F. Supp.3d ----, 2014 WL 7228983 (D. Or. Dec. 17, 2014); Perez v. Super Maid, LLC, No. 11 C 07485, --- F. Supp.2d ----, 2014 WL 3512613 (N.D. Ill. Jul. 14, 2014); Harris v. Universal Contracting, LLC, No. 2:13–CV–00253 DS, 2014 WL 2639363 (D. Utah Jun. 12, 2014); Perez v. Howes, 7 F. Supp.3d 715 (W.D. Mich. 2014) (appeal pending); Solis v. Cascom, Inc., No. 3:09–cv–257, 2013 WL 4537109 (S.D. Ohio Aug. 27, 2013); Harris v. Skokie Maid & Cleaning Serv., Ltd., No. 11 C 8688, 2013 WL 3506149 (N.D. Ill. Jul. 11, 2013); Solis v. A+ Nursetemps, Inc., No. 5:07–cv–182–Oc–10PRL, 2013 WL 1395863 (M.D. Fla. Apr. 5, 2013).

[2] See Chapman v. A.S.U.I. Healthcare & Dev. Ctr., 562 Fed. Appx. 182 (5th Cir. 2014) (affirming judgment that caregivers were employees under FLSA and not independent contractors); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir. 2013) (reversing judgment that cable installers were independent contractors under FLSA).

imposing non-negotiable "independent contractor agreements" on workers as a condition of hire, requiring workers to form a company as a condition of hire, or converting workers to members of a limited liability company organized and controlled by the employer to avoid treating them as employees. Whether a worker is an employee under the FLSA must be determined by the economic realities of the working relationship, and not by labels, characterizations, or how the relationship is structured.

The Dodd-Frank Act ("Dodd-Frank") added to the Securities Exchange Act a new whistleblower provision which incorporates the protections in SOX's whistleblower provision, see 15 U.S.C. 78u-6(h)(1)(A)(iii), and the district court resolved Safarian's Dodd-Frank claim solely by interpreting SOX. The Secretary administers and enforces SOX's anti-retaliation provision through administrative adjudication. See 18 U.S.C. 1514A(b)(2)(A) (incorporating 49 U.S.C. 42121(b)'s rules and procedures); 29 C.F.R. Part 1980. Complaints alleging violations of SOX's anti-retaliation provision must be filed with the Department, and the Department's Administrative Review Board ("ARB") issues final decisions on SOX complaints. See 18 U.S.C. 1514A(b)(1)-(2); 29 C.F.R. 1980.103-.110.[3] The Secretary, through the ARB, has declined to limit SOX's protections as the

[3] If a final decision is not issued within 180 days of the filing of the complaint, and the delay is not due to bad faith by the complainant, a complainant may bring a de novo action in federal district court. See 18 U.S.C. 1514A(b)(1)(B).

district court did, and has instead ruled that employees of public companies and other covered employers are protected from retaliation when they report conduct that they reasonably believe falls into any of the six categories of law listed in SOX. See, e.g., Sylvester v. Parexel Int'l LLC, No. 07-123, 2011 WL 2165854 (ARB May 25, 2011). The Secretary has a substantial interest in ensuring that federal courts interpret the scope of protected activity under SOX in a manner consistent with the ARB's decisions in Sylvester and other cases. See Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013) (according Chevron deference to ARB's Sylvester decision).

Federal Rule of Appellate Procedure 29(a) authorizes the filing of this amicus brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred by concluding that the fact that the employer and Safarian "structured" their working relationship as an independent contractor relationship was solely indicative in determining that Safarian was an independent contractor, thereby failing to ground its decision in the economic realities of the relationship.

2. Whether the district court erred by rejecting the Dodd-Frank whistleblower claim on the basis that a complaint by a person who is not a lawyer or an accountant that his publicly-

traded employer was fraudulently overbilling a customer cannot be protected activity under SOX's anti-retaliation provision.

STATEMENT OF THE CASE

1. Factual Background

Defendant-appellee American DG Energy Inc. ("ADG") is a publicly-traded company that offers its customers more efficient heating and cooling by installing custom-designed systems at their properties. See P00064. ADG maintains the systems and bills its customers by units of energy expended by its systems. See id.

a. Safarian began working for ADG in or about December 2006 as a Senior Engineer. See P00006; P00064; P00881. His duties included performing site engineering and repair, technical site reviews, technical sales assistance, and project management. See P00064; P00485. ADG directed Safarian where to work and what services to perform there. See P00006. It supplied him with materials to install and fix its systems, ADG clothing, a phone, and an ADG email address, and reimbursed him for expenses. See P00006; P00064; P00883-00884; P00896. According to his supervisor, Safarian was the "boots on the ground" and the "face of the company" for ADG at its customers' sites. P00884-00885; P00914. Safarian asserts that he performed the same duties as ADG's employees and was treated by ADG in the same manner as its employees except that he did not

receive benefits. See P00883-00885. According to ADG, Safarian worked independently and used "independent judgment in staffing, designing, constructing and installing ADG systems." P00478.

b. Safarian was paid by the hour and allegedly worked over 40 hours a week. See P00009; P00065. ADG treated him as an independent contractor and did not pay him overtime. See P00065. Safarian had established a home-improvement side business, Multiservice Power Inc. ("Multiservice"), in 2003 to sell and repair air conditioning equipment, which was not ADG's business. See P00289-00291. Multiservice generated little work and was not Safarian's primary source of income while he was working for ADG. See P00294.

Pursuant to an unwritten agreement, Multiservice invoiced ADG for Safarian's services, which ADG paid in full. See P00476. On occasion, Safarian's step-son assisted Safarian, and the step-son's time was billed by Multiservice to ADG. See P00306; P00341-00355. According to ADG, Multiservice employed Safarian and his step-son, retained subcontractors, had customers in addition to ADG, had insurance, filed tax returns, paid payroll taxes, was licensed, owned a truck and equipment, had a bank account, advertised, had a logo, and took advantage of certain tax deductions for small businesses. See P00477-P00478.

Safarian complained to ADG that he was unlawfully classified as an independent contractor and not paid overtime due. See P00066. According to Safarian, ADG responded by offering him additional compensation to continue his employment with ADG, and Safarian eventually accepted the agreement in December 2009. See P00066-00067. Notwithstanding the agreement, ADG did not provide Safarian with the compensation promised and continued to treat him as an independent contractor. See P00067. According to ADG, it twice offered Safarian employment, but he rejected the offers. See P00479. ADG further asserted that Safarian's December 2009 acceptance came after the offer period had expired by its own terms, and that Multiservice continued to invoice ADG after his alleged acceptance. See id. In a March 2010 email discussing reimbursement of expenses from ADG, Safarian stated that he was "not an employee of ADG as of yet." Id.

c. At one customer's site (River Point Towers), Safarian discovered that the ADG system was faulty and inefficient, resulting in overbilling. See P00064-00065. During the summer months, the system would unnecessarily heat water and mix it with water to be cooled, requiring the system to expend more energy to cool the water used to cool the building. See P00065. Because the customer was billed by units of energy expended, the way in which ADG installed the system resulted in overbilling

and, in Safarian's view, wrongfully increased ADG's gross income. See P00065; P00068. In 2007, Safarian reported the overbilling to his supervisor, who did nothing. See P00065; P00329-00332; P00915; P00923-00924. According to Safarian, the customer later discovered the problem and brought it to the attention of ADG, which corrected it. See P00065. Safarian alleged that he also disclosed to his supervisors other instances of overbilling, as well as safety concerns and code violation issues at customers' sites. See P00068; P00894-00895. He alleged that he reasonably believed that this conduct constituted a violation of SOX and that his disclosures were protected by SOX (and thus Dodd-Frank). See id.

Safarian and an ADG employee were scheduled to install a new system at River Point Towers. See P00067. Safarian alleged that on March 31, 2010, prior to the installation, ADG wrongfully terminated him so that it could install a different system at River Point Towers that he believed would allow ADG to overbill the customer. See id. According to ADG, it discontinued using Multiservice because of a lack of work and indifferent performance, and to reduce costs. See P00479.

2. District Court's Decision

Safarian alleged, in addition to state law claims, that ADG did not pay him overtime due under the FLSA and terminated his employment in retaliation for his complaining about the failure

to pay overtime. See P00050-00062. He later amended his complaint to allege that ADG retaliated against him in violation of Dodd-Frank. See P00063-00076. The district court granted summary judgment to ADG. See P00005-00015.

a. In addressing whether Safarian was an employee under the FLSA, the district court stated that it should consider the circumstances of the whole activity as opposed to relying on isolated factors. See P00009 (citing Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991)). It noted that this Court uses a number of factors to assist in making the determination, identifying employer's right to control, worker's opportunity for profit or loss depending on managerial skill, worker's investment, special skill, permanence of relationship, and whether the work is integral to the employer's business. See id. (citing Martin, 949 F.2d at 1293).

The district court stated that "the question of employment status is far from straightforward" in this case. P00009. According to the district court, "[s]ome facts of this relationship, such as the continued and exclusive relationship, the importance of the service to the business, payment on a per-hour basis, and the provision of uniforms, tools, and a phone, are often associated with employee relationships." Id. The district court concluded: "*However*, [Safarian] structured his relationship with [ADG] as an independent contractor and gained

certain benefits that come with this status." Id. (emphasis added). It noted that Safarian billed his work for ADG through Multiservice and used Multiservice "to claim certain tax deductions and receive insurance." Id. In the district court's view, "[a]fter experiencing the benefits available through this arrangement, [Safarian] 'stumbles' in an effort to characterize himself as an employee of ADG." Id. It found that Safarian admitted that he was not an employee of ADG when asked and rejected two written offers from ADG to become an employee. See P00009-00010. "Based on a thorough review of the record and the factors set forth in [Martin]," the district court, without any further discussion of those factors, concluded that Safarian was an independent contractor and thus could not bring an FLSA claim. P00010.

b. Dodd-Frank's anti-retaliation provision, among other protections, prohibits retaliation against an employee who makes a disclosure required or protected by SOX. See 15 U.S.C. 78u-6(h)(1)(A); 17 C.F.R. 240.21F-2(b)(i). Safarian alleged that his complaints regarding customer overbilling were protected under SOX and thus protected under Dodd-Frank. See P00011-00012. The district court noted that to receive protection under SOX, a plaintiff must convey an objectively reasonable belief that the company violated: federal prohibitions against mail fraud, wire, radio, or television fraud, bank fraud, or

securities fraud; any SEC rule or regulation; or any federal law related to fraud against shareholders. See P00012 (citing 18 U.S.C. 1514A; Wiest, 710 F.3d at 125). The district court concluded that Safarian's complaint of customer overbilling was not protected. See id. ("Though overbilling might eventually lead to incorrect accounting records and tax submissions, these kinds of disclosures were not contemplated by [SOX], have not been protected by other courts, and should fall outside the scope of [SOX].").

The district court believed that applying SOX's protections to Safarian's complaints "would be inconsistent" with SOX's purposes. Id. It described SOX as "designed to 'protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes,'" id. (quoting Pub. L. 107–204 (Jul. 30, 2002)), and "'aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies,'" id. (quoting Lawson v. FMR LLC, 134 S. Ct. 1158, 1162 (2014)). Applying SOX's protections to Safarian would be inconsistent with SOX's purposes because Safarian was "an engineer who has no involvement with the company's accounting or taxation practices, and the reported activity did not deal with corporate disclosures." Id.

Distinguishing Wiest, the district court stated that Safarian "does not examine, produce, submit, or approve the accounting reports or tax submissions . . . show that the reported violations are similar to, or are normally associated with, tax fraud or accounting fraud . . . [or] contend that [ADG] misreported his income to the IRS or shareholders." P00013. In the district court's view,

> applying SOX to any fraudulent actions that might lead to misstatements in the accounting records or tax submissions would unduly expand [SOX] to a general anti-retaliation statute. If the actions alleged here sufficiently relate to fraud against shareholders, it is difficult to foresee an illegal act which would not fall under the purview of [SOX].

Id. For these reasons, the district court ruled that Safarian's complaints could not be protected activity under SOX and that his Dodd-Frank claim thus failed. See id.

ARGUMENT

I. THE DISTRICT COURT ERRED BY RELYING SOLELY ON THE "STRUCTURE" OF THE WORKING RELATIONSHIP TO RULE THAT SAFARIAN WAS AN INDEPENDENT CONTRACTOR INSTEAD OF GROUNDING ITS DECISION IN THE ECONOMIC REALITIES OF THE RELATIONSHIP

A. The Economic Realities of the Working Relationship Determine Employment under the FLSA.

The FLSA's text provides the starting point for determining whether a worker is an employee. The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and "employee" as "any individual employed by an

employer," 29 U.S.C. 203(e)(1). It further defines "employ" to "include[ ] to suffer or permit to work." 29 U.S.C. 203(g). These definitions ensure that the scope of employment relationships under the FLSA is as broad as possible. See U.S. v. Rosenwasser, 323 U.S. 360, 362-63 (1945) ("A broader or more comprehensive coverage of employees . . . would be difficult to frame.").

The "suffer or permit" standard derives from state child labor laws in place when the FLSA was enacted and was designed to counter an employer's argument that it was unaware that children were working and to expand liability beyond those who controlled the child laborer. See Antenor v. D & S Farms, 88 F.3d 925, 929 n.5 (11th Cir. 1996) ("The 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children."). Thus, the "suffer or permit" standard does not simply make the scope of employment relationships covered by the FLSA more broad than those covered by the common law control test; the Act's definition of "employee" is "'the broadest definition that has ever been included in any one act.'" Rosenwasser, 323 U.S. at 363 n.3 (quoting 81 Cong. Rec. 7657 (statement of Senator Black)); see Nationwide Mut. Ins. Co.

v. Darden, 503 U.S. 318, 326 (1992) ("employ" is defined with "striking breadth").[4]

Given these definitions' breadth, the test of employment under the FLSA is economic reality. See Tony & Susan Alamo, 471 U.S. at 301. The economic realities of the worker's relationship with the employer rather than any technical concepts used to characterize that relationship control. See Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961). Courts must look beyond any structure or labels placed on the relationship and examine the economic realities of the relationship to determine whether the worker, like most workers, "follows the usual path of an employee." Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

Specifically, the focus is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008); see Scantland, 721 F.3d at 1311 ("[C]ourts look to the 'economic reality' of the relationship . . . and whether that relationship demonstrates dependence."); Baker v. Flint Eng'g & Constr. Co.,

[4] The Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' recognizing that broad coverage is essential to accomplish the [Act's goal]." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)) (internal citation omitted).

137 F.3d 1436, 1440 (10th Cir. 1998) (focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business . . . or are in business for themselves.").

This Court has embraced the economic realities analysis for determining whether workers are employees under the FLSA. See Martin, 949 F.2d at 1293 ("In accordance with [the FLSA's] expansive definitions, the Supreme Court has emphasized that the courts should look to the economic realities of the relationship in determining employee status under the FLSA.") (citing Rutherford Food, 331 U.S. at 730); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382-83 (3d Cir. 1985) (whether the worker as a matter of economic reality is dependent upon the employer to which he/she renders service is the standard for determining employee status under the FLSA). The worker's economic dependence on the employer, considering the entirety of the economic realities of the working relationship, is the touchstone of employment under the FLSA. See Martin, 949 F.2d at 1293; Donovan, 757 F.2d at 1382-83. This Court applies six economic realities factors to assist in determining employee status under the FLSA. See Martin, 949 F.2d at 1293 (right to

control, opportunity for profit or loss depending on managerial skill, investment, special skill, permanence of relationship, and whether work is integral to employer's business) (citing Donovan, 757 F.2d at 1382).[5]

B. The Economic Realities of the Working Relationship Must Be Examined to Determine If the Structure of the Relationship Accurately Reflects Those Realities.

The parties' agreement or a structure adopted by the parties does not necessarily reflect the economic realities of the working relationship under the FLSA. In Rutherford Food, the employer agreed with a group of workers to contract out one discrete part of its meat processing line (which was otherwise worked by its employees). See 331 U.S. at 724-26. The Supreme Court parsed through this structure and noted that because the workers worked "as a part of the integrated unit of production under such circumstances . . . [they] were employees of the establishment." Id. at 729. "Where the work done, in its essence, follows the usual path of an employee, putting on an

[5] In a recent *per curiam* decision, this Court identified four different economic realities factors to consider when determining whether a worker is an employee or independent contractor under the FLSA. See Yu v. McGrath, --- Fed. Appx. ----, 2014 WL 7384328, at *2 (3d Cir. Dec. 30, 2014) (citing In re Enterprise Rent–A–Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 467 (3d Cir. 2012)). This recent decision is unpublished, is not binding precedent, and fails to mention Martin or Donovan. Moreover, the In re Enterprise Rent-A-Car case from which it borrowed the economic realities factors is a joint employment case rather than a misclassification case, and a joint employment analysis entails its own set of economic realities factors. See In re Enterprise Rent-A-Car, 683 F.3d at 467-69.

'independent contractor' label does not take the worker from the protections of the Act." Id.

In Goldberg, the workers became "members" of a cooperative in which they had a voting and ownership interest and for which they sewed products. See 366 U.S. at 29-30. The Supreme Court again parsed through the structure and noted that membership in the cooperative did not prevent the workers from being the cooperative's employees under the FLSA. See id. at 32. Indeed, "[a]part from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products." Id. at 32-33. Because economic reality rather than technical concepts is the test of employment, the workers were employees. See id. at 33 (citing Rutherford Food, 331 U.S. at 729).

In Tony & Susan Alamo, the employer religious foundation argued that its "associates," who operated the foundation's business enterprises, were not employees because their activities were part of the ministry and not in expectation of compensation, and associates testified that they were not employees. See 471 U.S. at 300-01. The Supreme Court stated that the associates' "protestations, however sincere, cannot be dispositive," and that the FLSA's purposes "require that it be applied even to those who would decline its protections." Id. at 301-02. Considering the economic realities, the Supreme

Court ignored the structure placed on the "associates" and determined that they were employees because they were entirely dependent on the foundation for long periods of time and must have expected compensation for their services. See id.

Applying these Supreme Court precedents, courts of appeals reject arguments that the contractual designation or label, as opposed to the economic realities of the working relationship, controls employee status under the FLSA. See, e.g., Scantland, 721 F.3d at 1311 ("This inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether 'the work done, in its essence, follows the usual path of an employee.'") (quoting Rutherford Food, 331 U.S. at 729); Superior Care, 840 F.2d at 1059 ("[E]mployer's self-serving label of workers as independent contractors is not controlling."); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 667 (5th Cir. 1983) (explaining that "[a]n employee is not permitted to waive employee status," and affirming that welders were employees despite having signed independent contractor agreements); Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 755 (9th Cir. 1979) ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA."); Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 1315 (5th Cir. 1976) ("We reject both the declaration in the

lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling FLSA employee status. Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative.") (internal footnotes omitted). Similarly, this Court in Donovan noted that the workers "were asked to sign a document labeled an 'Independent Contractor's Agreement,'" 757 F.2d at 1380, but never mentioned that fact during its application of the economic realities analysis, see id. at 1383-86.

These cases highlight the reasons, based on the FLSA's fundamental purposes, for preventing employers and workers from structuring working relationships or entering into agreements to avoid employee status when the workers would otherwise be employees under the FLSA. The FLSA's purpose is "to correct and as rapidly as practicable to eliminate" working "conditions detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency, and general well-being of workers," 29 U.S.C. 202, primarily by instituting minimum wage and overtime pay protections, see 29 U.S.C. 206, 207. As the Supreme Court stated:

> If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their

> protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.

Tony & Susan Alamo, 471 U.S. at 302 (internal citations omitted). An employee's FLSA rights are "nonwaivable" and "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)).

C. The District Court Erred in Granting Summary Judgment by Analyzing the Case in Such a Way that the Structure of the Working Relationship Appeared to Trump the Underlying Economic Realities Rather than Reflect Those Realities.

In light of this overwhelming caselaw, the district court erred by seeming to subordinate the economic realities of the working relationship and instead relying on the way in which Safarian "structured his relationship" with ADG (P00009) to conclude that he was an independent contractor. Even if Safarian benefitted in some respects from being an independent contractor and stated that he was not an employee (see P00009-00010), the caselaw and the FLSA's underlying purpose make clear that such structures, agreements, and labels do not control his

employee status under the Act.[6] The structure of a working relationship, as well as the worker's or employer's characterization of that relationship, cannot be used by an employer as a pretext for treating a worker who would otherwise qualify as an employee as an independent contractor, and thereby avoiding its FLSA obligations, even if the worker accedes to that structure. If the structure seems to indicate the existence of an independent contractor relationship, the inquiry cannot end there. Rather, while the structure voluntarily adopted by the parties may shed light on the analysis in appropriate circumstances, the economic realities must necessarily be examined to see if they are consistent with that structure. Here, the district court identified several facts of the working relationship as indicating that Safarian was an employee but seemingly based its decision that he was an independent contractor solely on the structure of the relationship. Thus, the district court appears to have erroneously elevated that structure over the underlying economic realities — the crucial part of the analysis.

[6] Multiservice was created three years prior to Safarian's hiring by ADG and was a side business that performed different work than ADG's business. See P00289-00291. Safarian may have taken advantage of this existing business when he was hired by ADG by running his pay from ADG through Multiservice; however, the focus for purposes of his employment status under the FLSA is the economic realities of his working relationship with ADG.

Applying the economic realities analysis as reflected in the six factors used by this Court (see Martin, 949 F.2d at 1293; Donovan, 757 F.2d at 1382), there is considerable evidence to support a determination that Safarian was ADG's employee:

> *Employer's Right to Control*. Safarian's supervisors (Miller and Temple) testified that they controlled his work. See P00913-00914; P00923.
>
> *Opportunity for Profit or Loss Depending on Managerial Skill*. The district court noted that Safarian was paid "on a per-hour basis" and that hourly payment is "often associated with employee relationships." P00009. Indeed, the primary way for Safarian to earn more was to work more; however, deciding to work more is not a managerial skill that demonstrates that the worker is in business for himself. See Martin, 949 F.2d at 1294 (opportunity for profit or loss must depend on managerial skills to indicate independent contractor status); see also Solis v. Cascom, Inc., No. 09-257, 2011 WL 10501391, at *6 (S.D. Ohio Sept. 21, 2011) ("There was no opportunity for increased profit or loss depending upon an alleged employee's managerial skill. While the alleged employees were free to work additional hours to increase their income, they had no decisions to make regarding routes, or acquisition of

materials, or any facet normally associated with the operation of an independent business.").[7]

Worker's Investment. ADG argued that Multiservice had insurance, was licensed, owned a truck and equipment, and had a bank account. See P00477-00478. However, it does not appear that these aspects of Multiservice's business were related to Safarian's work for ADG. Indeed, Safarian alleged that he was issued clothing, business cards, and a phone, was given an ADG email address, and was reimbursed for materials and travel expenses. See P00064; P00883; P00896. ADG opened an account with a supply company so that Safarian could purchase materials that ADG did not stock and be reimbursed for those purchases. See P01283-01284. The district court found that ADG provided uniforms, tools, and a phone to Safarian – a fact that is "often associated with employee relationships." P00009.

Special Skills. Safarian's work seems to have required highly technical skills; however, "the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills

[7] Safarian was well-paid for his work for ADG; however, employees "'are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents.'" Barrentine, 450 U.S. at 741 n.18 (quoting Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945)).

in any independent way." Martin, 949 F.2d at 1295; see Superior Care, 840 F.2d at 1060 ("The nurses . . . possess technical skills but nothing in the record reveals that they used these skills in any independent way."); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987) ("Skills are not the monopoly of independent contractors.").

Permanence of Working Relationship. According to Safarian, he worked for ADG full-time for over three years. See P00896. The district court found that Safarian had a "continued and exclusive relationship" with ADG, thereby suggesting an employment relationship. P00009; see Donovan, 757 F.2d at 1384-85 (district court improperly ignored fact that workers worked continuously for employer, which indicated that workers were employees).

Integral to Employer's Business. Safarian performed the very work that ADG was in business to provide, and the district court noted that "the importance of [Safarian's] service to [ADG's] business" suggested an employment relationship. P00009; see Donovan, 757 F.2d at 1385 ("[W]orkers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.").

Accordingly, this Court should reverse the grant of summary judgment based on the conclusion that Safarian was an independent contractor. It should remand the case so that the district court can determine Safarian's employment status under the FLSA based on the economic realities analysis set forth in Martin and Donovan as opposed to the "structure" of the working relationship.

II. THE DISTRICT COURT APPLIED AN UNDULY NARROW STANDARD WHEN DETERMINING THAT SAFARIAN DID NOT ENGAGE IN PROTECTED ACTIVITY UNDER SOX'S ANTI-RETALIATION PROVISION

SOX prohibits publicly traded companies and other covered persons from retaliating against "an employee" because the employee engaged in protected activity. 18 U.S.C. 1514A(a)(1). Protected activity includes providing information regarding any conduct that the complainant "reasonably believes constitutes a violation" of: laws prohibiting mail fraud, wire, radio, or television fraud, bank fraud, or securities fraud; any SEC rule or regulation; "or any provision of Federal law relating to fraud against shareholders." Id.

To be protected under SOX, a complainant need not provide information that definitively and specifically relates to one of the identified laws; instead, providing information that the complainant reasonably believes is a violation of one of the laws is sufficient. See Sylvester, 2011 WL 2165854, at *13-15 (rejecting "definitively and specifically" standard because it

conflicts with "reasonably believes" language in 18 U.S.C. 1514A(a)(1)); see also Wiest, 710 F.3d at 129-131 (giving Chevron deference to ARB's rejection in Sylvester of "definitively and specifically" standard in SOX whistleblower cases). Reasonable belief means that the complainant has a subjective belief that the complained-of conduct constitutes a violation of the law, and that the belief is objectively reasonable (i.e., the belief must be reasonable for an individual in the complainant's circumstances having his/her training and experience). See Sylvester, 2011 WL 2165854, at *11-12; see also Wiest, 710 F.3d at 131-32 (deferring to ARB's interpretation in Sylvester of "reasonably believes" standard); Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Labor, 717 F.3d 1121, 1132 (10th Cir. 2013) (adopting ARB's definition in Sylvester of "reasonable belief"). The complainant need not cite the specific law that was violated, but must describe the conduct that he/she reasonably believes is a violation of the law. See Wiest, 710 F.3d at 133.

The district court's decision here unduly narrowed the scope of SOX protected activity in two ways. The district court applied a standard such that, to be protected under SOX, a complainant must: (1) be an accountant, lawyer, or auditor or be involved with the company's accounting or taxation practices;

and (2) complain of conduct that relates to fraud against shareholders. SOX imposes no such requirements, however.

A. Protected Activity under SOX Is Not Limited to Lawyers, Accountants, and Auditors Who Complain of Shareholder Fraud.

A complaint need not concern fraud against shareholders to qualify as protected activity. "The plain, unambiguous text of § 1514A(a)(1) establishes six categories of employer conduct against which an employee is protected from retaliation for reporting." Lockheed Martin, 717 F.3d at 1130.

> By listing certain specific fraud statutes to which § 1514A applies, and then separately, as indicated by the disjunctive "or", extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, § 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to "shareholder" fraud.

O'Mahony v. Accenture Ltd., 537 F. Supp.2d 506, 517 (S.D.N.Y. 2008); see Lockheed Martin, 717 F.3d at 1130-31 (ARB's interpretation in Sylvester that complainant need not establish that reported violations relate to shareholder fraud to be protected activity under SOX entitled to Chevron deference); Sylvester, 2011 WL 2165854, at *17 ("[W]e conclude that an allegation of shareholder fraud is not a necessary component of protected activity under [SOX's anti-retaliation provision]."); Funke v. Fed. Express Corp., No. 09-004, 2011 WL 3307574, at *7 (ARB Jul. 8, 2011) ("Section 1514A clearly protects a

whistleblower's disclosures pertaining to any of the six enumerated statutes, including mail, wire, and bank fraud, regardless of whether the misconduct relates to shareholder fraud.").[8]

Indeed, SOX was enacted not only to protect lawyers and accountants who report shareholder fraud, but also to protect reports by others at public companies who reasonably believe that the reported conduct constitutes any of the types of fraud or SEC rule violations enumerated in the anti-retaliation provision.

> The SOX's legislative history indicates that the Accountability Act was implemented to address not only securities fraud (in the aftermath of financial scandals involving Enron, Worldcom, and Arthur Anderson), but also corporate fraud generally. *See* S. Rep. No. 107-146, at 2 (May 2, 2002) ("This legislation aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.").

Sylvester, 2011 WL 2165854, at *16. SOX was intended to "restor[e] trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and

[8] See also Villanueva v. U.S. Dep't of Labor, 743 F.3d 103, 109 (5th Cir. 2014) (SOX "prohibits a covered entity from retaliating against an employee who *reports information* to a supervisor regarding his or her reasonable belief of a violation of, for instance, the U.S. mail- or wire-fraud statute") (emphasis in original; internal quotation marks omitted); Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 221-24 (2d Cir. 2014) (granting Skidmore deference to ARB's Sylvester decision and dismissing complaint because employee had not plausibly pled a reasonable belief of a violation of the mail or wire fraud statutes or of fraud against shareholders).

prosecuted." S. Rep. No. 107-146, at 2. And SOX's anti-retaliation provision was intended to "protect whistleblowers who report fraud." Id. The provision was a response not just to actions against whistleblowers at Enron and Arthur Andersen, but to a "culture, supported by law, that discourage[s] employees from reporting fraudulent behavior," a "corporate code of silence" that "hampers investigations . . . [and] creates a climate where ongoing wrongdoing can occur with virtual impunity." Id. at 5.

Thus, the ARB concluded that a Case Report Forms Department Manager and a Clinical Research Nurse at a company performing clinical tests for pharmaceutical manufacturers who reported falsified clinical research data could engage in protected activity under SOX. See Sylvester, 2011 WL 2165854, at *2-3, *19. In another case, the ARB concluded that a Federal Express delivery driver who reported that a customer was sending suspicious packages (containing fraudulent money orders) engaged in protected activity. See Funke, 2011 WL 3307574, at *1-2, *5-10. Similarly, the Tenth Circuit affirmed the ARB's conclusion that a Communications Director who reported that her supervisor used company funds to further inappropriate relationships with soldiers participating in a program run by the company and then passed on the expenses to the company's customer (the U.S. government) engaged in protected activity. See Lockheed Martin,

717 F.3d at 1126, 1130-33. Not only did the ARB and the Tenth Circuit reject arguments that the employees' complaints had to relate to shareholder fraud to constitute protected activity, but there also was no indication in these cases that the employees were involved with the companies' accounting or taxation practices or their corporate disclosures. Plainly, SOX's whistleblower protections are available to more than just a company's lawyers, accountants, and auditors.

Moreover, the fact that the determination whether the complaint is objectively reasonable takes into account the complainant's expertise shows that no particular status or job (as a lawyer, auditor, or accountant) is required to engage in SOX protected activity. "The second element of the 'reasonable belief' standard, the objective component, 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" Sylvester, 2011 WL 2165854, at *12 (quoting Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009)); see Wiest, 710 F.3d at 132 ("A belief is objectively reasonable when a reasonable person with the same training and experience as the employee would believe that the conduct implicated in the employee's communication could rise to the level of a violation of one of the enumerated [laws in 18 U.S.C. 1514A(a)(1)]."). Thus, the complainant's expertise is

relevant, and a "higher standard" for determining whether the complaint is objectively reasonable may be appropriate when the complainant is a "legal expert;" however, SOX "'does not require . . . that the whistleblower have a specific expertise.'" Sylvester, 2011 WL 2165854, at *12 (quoting Sequeira v. KB Home, 716 F. Supp.2d 539, 551 (S.D. Tex. 2009)) (ellipsis added). SOX's whistleblower protections are not limited to certain types of employees, but are available to any employee whose complaint is "objectively reasonable to employees with the same training and experience" as the complaining employee. Id.

Finally, complaints implicating one of the types of misconduct enumerated in SOX's anti-retaliation provision are protected even if they are not "similar to, or are normally associated with, tax fraud or accounting fraud" (the district court's narrow standard, P00013), and even if the victim of the fraud is the customer of the complainant's employer as opposed to the employer. In Sylvester, the ARB concluded that the complaint of falsified data from clinical drug tests "relate[d] to the financial status of the company" and to one or more of the types of fraud enumerated in SOX, particularly mail and wire fraud. See 2011 WL 2165854, at *19. In Lockheed Martin, the complaint of misusing company funds to further inappropriate relationships and passing on those expenses to the customer constituted protected activity because the reported fraud

related to the mail and wire fraud statutes enumerated in SOX. See 717 F.3d at 1132. Likewise, in Gladitsch v. Neo@Ogilvy, No. 11 Civ. 919 DAB, 2012 WL 1003513, at *1, *7-8 (Mar. 21, 2012 S.D.N.Y.), the court concluded that the complaint of deliberate overbilling of a customer implicated mail and wire fraud and could be protected activity regardless whether the activity amounted to shareholder fraud.

B. The District Court's Analysis of Protected Activity under SOX Was Unduly Narrow.

In light of the ARB's interpretation in Sylvester of the scope of protected activity under SOX's anti-retaliation provision, the controlling deference accorded that interpretation by this Court in Wiest, and the other ARB and court decisions cited above, the district court applied an unduly narrow standard in determining that Safarian did not engage in protected activity. This Court should reject the district court's analysis.

First, the district court wrongly restricted SOX's whistleblower protections to accountants, auditors, lawyers, and others involved in preparing a public company's disclosures. See P00012 (dismissing Safarian as "an engineer who has no involvement with the company's accounting or taxation practices"). There is no basis for such a restriction in the text of SOX's anti-retaliation provision. See 18 U.S.C. 1514A. That provision prohibits discrimination against "an employee,"

not employees with certain job titles or duties. 18 U.S.C. 1514A(a).[9] And such a restriction is not consistent with SOX's purpose of addressing "not only securities fraud . . . but also corporate fraud generally." Sylvester, 2011 WL 2165854, at *16 (citing S. Rep. No. 107-146, at 2). Who made the complaint and his/her job duties are relevant to determining whether the complaint is objectively reasonable, not whether the complaint constitutes protected activity in the first place. See id. at *12. Thus, complaints by "an engineer" who had "no involvement with the company's accounting or taxation practices" can be protected activity under SOX.

Second, the district court wrongly limited SOX's whistleblower protections to complaints of tax fraud, accounting fraud, or shareholder fraud. See P00013 ("Plaintiff does not show that the reported violations are similar to, or are normally associated with, tax fraud or accounting fraud."); id. ("If the actions alleged here sufficiently relate to fraud against shareholders, it is difficult to foresee an illegal act

[9] SOX's unqualified protection of "an employee" stands in contrast to other whistleblower protections that follow the same administrative adjudication scheme as SOX. For example, the Consumer Financial Protection Act, which protects employees who complain of potential violations of consumer financial protections, explicitly limits its protections to individuals performing specific tasks. See 12 U.S.C. 5567. Likewise, the Surface Transportation Assistance Act, which protects whistleblowers in the trucking industry, defines "employee" to limit its protections to specific categories of workers in the industry. See 49 U.S.C. 31105(j).

which would not fall under the purview of [SOX].”). Although SOX’s anti-retaliation provision enumerates a finite list of the types of misconduct that can form the basis of a protected complaint, it is not so narrow as the district court stated and is broader than tax fraud, accounting fraud, or shareholder fraud. See 18 U.S.C. 1514A(a)(1).[10] As discussed above, the provision’s plain text protects complaints that report any one of the types of enumerated misconduct, including mail fraud or wire fraud for example, even if the complaint does not relate to shareholder fraud. See id.; see also Lockheed Martin, 717 F.3d at 1130-31; O’Mahony, 537 F. Supp.2d at 517; Sylvester, 2011 WL 2165854, at *17; Funke, 2011 WL 3307574, at *7. The district court erred by limiting its consideration to whether the misconduct about which Safarian complained related to shareholder fraud and should have considered whether the misconduct related to any of the other types of fraud or violations identified in 18 U.S.C. 1514A(a)(1). For example, fraudulently overbilling a customer may constitute mail or wire fraud when a bill is sent to the customer, and thus complaints

[10] The types of fraud and legal violations protected by SOX’s anti-retaliation provision is indeed finite, and the district court’s concern that SOX would become a “general anti-retaliation statute” (P00013) is misplaced. See, e.g., Villanueva, 743 F.3d at 108-110 (complaint alleging fraud in violation of Colombian tax laws not protected by SOX); Harvey v. Home Depot U.S.A., Inc., Nos. 04-114 & 04-115, 2006 WL 3246905, at *11-12 (ARB Jun. 2, 2006) (complaint alleging “questionable personnel actions, racially discriminatory practices,” and violations of federal employment laws not protected by SOX).

of such fraudulent overbilling can be protected activity under SOX. See Lockheed Martin, 717 F.3d at 1132; Gladitsch, 2012 WL 1003513, at *7-8.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's rulings on Safarian's FLSA and Dodd-Frank whistleblower claims.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Dean A. Romhilt
DEAN A. ROMHILT
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

CERTIFICATIONS OF COMPLIANCE

1. Pursuant to Circuit Rule 28.3(d), I certify that I am an attorney representing an agency of the United States.

2. Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), I certify that the foregoing Brief complies with: the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a monospaced typeface using Microsoft Word utilizing Courier New 12-point font containing no more than 10.5 characters per inch; and the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6,985 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and excluding the Interest and Authority to File section per Circuit Rule 29.1(b).

3. Pursuant to Circuit Rule 31.1(c), I certify that: the text of the Brief transmitted to this Court as a PDF file is identical to the text of the paper copies submitted to this Court; and the PDF file was scanned for viruses using VirusScan Enterprises by McAfee Security (which scan indicated that there were no viruses present).

s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant was served this 12th day of January, 2015, via this Court's ECF system and by pre-paid overnight delivery, on the following:

Maurice McLaughlin
McLaughlin & Nardi, LLC
37 Vreeland Avenue
Totowa, NJ 07512

Rodman Honecker
Windels Marx Lane & Mittendorf, LLP
120 Albany Street Plaza
New Brunswick, NJ 08901

s/ Dean A. Romhilt
DEAN A. ROMHILT