

**Administrative Review Board
United States Department of Labor
Washington, D.C.**

In the Matter of: §
§
CARRI S. JOHNSON, §
§
COMPLAINANT § ARB CASE NO. 08-032
§
v. § ALJ CASE NO. 2005-SOX-015
§
SIEMENS BUILDING TECHNOLOGIES, §
INC. and SIEMENS AG, §
§
RESPONDENTS. §

**BRIEF OF GEREON MERTEN
AS AMICUS CURIAE SUPPORTING COMPLAINANT**

32 FRIEND STREET
CONGERS, NY 10920

Issues

- (1) Whether a subsidiary is categorically covered under section 806 of SOX?
- (2) Whether a non-publicly held subsidiary of a publicly held company must be an agent of the public company to be considered a covered employer under the whistleblower protection provision of SOX?
- (3) Whether the integrated- enterprise test is applicable to section 806 of SOX?
- (4) What are the factors under a section 806 agency test? & Is section 806 of the SOX a labor law?
- (5) Whether a public company's SOX required internal controls, which are pervasive throughout their non-publicly traded subsidiaries could tie the parent and the subsidiary to section 806 coverage for SOX purposes?

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Interest of Gereon Merten

Gereon Merten is a party to a SOX case pending before this Board, for which he is the Complainant and the petitioner (ARB Case No.09-025). The issues raised in Carri Johnson's complaint , subsidiary coverage under section 806 of the SOX, agency, and the integrated enterprise test have also been raised in the case to which Mr. Merten is a party. At the Board's invitation, Gereon Merten files this brief as Amicus Curiae.

Statement

Congress, the SEC, SRO's, CEO's, voluntary expert organizations, etc. have worked diligently to address the problem of companies with a corporate culture that punish whistleblowers and to encourage and protect employees for the purpose of protecting innocent investors and restoring full confidence in the capital markets.

Employees of subsidiaries of publicly traded companies should be categorically covered under section 806, of the Corporate and Criminal Fraud Accountability Act of 2002, when they file a complaint alleging unlawful discrimination for lawful acts described in section 1514A (1) & 1514A (2) as protected. Because:

"[...] the term "employee of publicly traded company," within the meaning of Sarbanes-Oxley, includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports.[...]"

(See Morefield v. Exelon Servs., Inc., ALJ No. 2004-SOX-002)

Statement of the Case

On June 8, 2004, Carri S. Johnson mailed a whistleblower complaint to the Occupational and Safety Health Administration (OSHA), alleging that her employment had been terminated by her employer, Siemens Building Technologies, Inc. (SBT) in retaliation for her having engaged in protected activity, and that her employer had violated Section 806 of the Sarbanes-Oxley Act of 2002. OSHA named SBT, a non-publicly held subsidiary, and their publicly traded parent, Siemens AG as proper respondents. On November 15, 2004, the Regional Administrator issued his findings, which Ms. Johnson appealed on Dec. 10, 2004. After numerous delays a hearing was scheduled for May 15, 2006 before a Department of Labor Administrative Law Judge (ALJ). Respondents filed two motions for summary decision, one on the merits and one on employer coverage. Ms. Johnson filed a motion to add respondents, one of which was permitted, Siemens AG was added as a respondent in this case. The ALJ denied the Respondent's motions because a genuine issue of material fact had been raised and because the coverage issue was still not settled as a matter of law. A hearing was held and shortly after it had commenced, this Board (ARB) issued its decision in Klopfenstein v PCC Flow Technologies Holdings, Inc. ARB No. 04-149, ALJ No. 04-SOX-11. Ultimately, after more briefing, because of the Klopfenstein decision, the ALJ issued a decision and orders dismissing Carri Johnson's complaint on the coverage issue alone, because Ms. Johnson did not establish that SBT was acting as Siemens AG's agent in her firing.

Argument

Subsidiary employees of publicly traded parents are covered under section 806 of the SOX, when they are discriminated against for engaging in conduct protected by the Act, by virtue of the legislative history behind the Act, the language in the Act itself, and the publicly traded parents required accountability and compliance with the laws and rules that further the Acts purposes.

I. Categorical Coverage

A. Congress Intended to Cover Subsidiary Employee's of Public Companies

Congress intended to extend Section 806¹ coverage to employees of subsidiaries of publicly traded parents. There is nothing in the Act that suggests they were intended to be excluded. The legislative history of the SOX together with the authors of the provisions statements on this issue affirm subsidiary coverage to be Congresses intent. An employee covered under the Act's implementing regulations is defined as " an individual presently or formerly working for a company or company representative...or a individual whose employment could be affected by a company or company representative"² (emphasis added). There is little doubt that a publicly traded company has the authority to affect the employment of an individual working within one of their wholly owned subsidiaries. A defense claiming that the parent company did not partake in the alleged retaliation has no bearing on the subsidiary employee's coverage under section 806. According to the definition of employee

¹ Sarbanes-Oxley Act 2002 , Section 806

² 29 CFR 1980.101 - Definitions

above, all that is required to bring the subsidiary employee under section 806 protection is that the parent company had the authority to affect the employment of the subsidiary employee, for example by terminating or not terminating the alleged misconduct . A company representative is defined as " any officer, employee, contractor, subcontractor, or agent of a company." ³Under this definition, employees of wholly owned subsidiaries of publicly traded companies would fall under "employee", "agent", or both, and satisfy the company representative requirement needed for the subsidiary employee alleging retaliation to bring their claim under the Act's coverage. A company's employees are also their agents.

The legislative history of the Sarbanes-Oxley Act makes evident that numerous scenarios describing criminal and unethical conduct took place within wholly owned subsidiaries of publicly traded companies and led to misstatements in financial reports, severe harm to shareholders, and a lack of investor confidence in our capital markets. These companies utilized corporate law protections intended to protect shareholders, as a device that harmed shareholders. See *Walters v. Deutsch Bank AG*, ALJ No. 2008-SOX-070 (ALJ Mar. 23,2009).

Congress intended to prevent this sort of misconduct from hurting our capital markets in the future and created the Sarbanes-Oxley Act of 2002 , setting in motion reforms that would be supplemented in its furtherance by rules and regulations of the Security and Exchange Commission (SEC), the Public Accounting and Oversight Board (PCAOB), Self Regulatory Organizations (SRO's) and the Department of Labor (DOL).

³ 29 CFR 1980.101- Definitions

With the understanding that corporate veils were employed to conceal wrongdoing through wholly owned subsidiaries of public companies, Congress sought accountability and transparency from public companies regarding their entire corporate structure, to include their subsidiaries. For this reason corporate veils should not be honored as a defense when considering section 806 retaliation claims. Section 806 protections were put in place to encourage insiders within the publicly held corporate structure to come forward with information that would protect shareholders and their interests.

The legislative history makes clear that Congress intended to provide section 806 coverage to employees within wholly owned subsidiaries of publicly traded companies. See Walters *supra*. In addition, the Senate Judiciary Committee addressed this very issue in a letter to the Secretary of Labor, the Honorable Elaine Chao (now the former Secretary of Labor), dated Sept. 9, 2008,⁴ stating that:

“[...] We want to point out as clearly and emphatically as we can. that there is simply no basis to assert, give this broad language, that employees of subsidiaries of the companies identified in the statute were intended to be excluded from its protections.

Moreover, as the authors of this provision, we can clearly state that it was by no means our intention to restrict these important whistleblower protections to a small minority of corporate employees or to give corporations a loophole to

⁴ <<http://judiciary.senate.gov/resources/documents/110thCongress.cfm>> Sept. 09, 2008, Letter from Chairman Patrick Leahy and Senator Charles Grassley to Secretary of Labor Elaine Chao, re: Department of Labor interpretation of the Corporate and Criminal Fraud Accountability Act, section 806 of the Sarbanes-Oxley Act (last checked 07/05/2010)

retaliate against those who would report corporate fraud by operating through subsidiaries. These protections against abuses were intended as a safety valve, protecting the public, shareholders, and Americans' confidence in the marketplace. Congress enacted SOX as a direct response to the fraud perpetrated by Enron Corporation (now known as Enron Creditors Recovery Corporation)- through the misuse and abuse of its shell corporations and subsidiaries. Consequently, it is unreasonable to argue that subsidiary corporations would not be covered by the whistleblower protection provisions of SOX.[...]"

Subsidiary employee's of publicly traded companies are categorically covered under section 806 of the Sarbanes-Oxley Act because:

" [...] the term "employee of a publicly traded company," within the meaning of Sarbanes-Oxley, includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports.[...] ",

See Morefield v. ExxonMobil Servs., Inc., ALJ No. 2004-SOX-002

B. Labor Specific Tests Applied to Section 806 do not Further the Act's Purposes

Numerous whistleblowers employed by subsidiaries of publicly traded companies have been denied coverage not because they did not come forward and provide

valuable information as Congress had encouraged (emphases added), but because Congresses intent was not fully understood and because labor-specific tests designed to address labor laws have been applied, rather than tests designed to address securities laws to determine coverage. See Walters, *supra*.

In *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB Case No. 04-149 (May 31, 2006), this Board (ARB) had before it the issue of whether or not a subsidiary of a publicly held company could, standing alone, as the public parent had not been named and was not before them, be considered a covered employer for the Act's purposes. The Board declined to address categorical coverage of subsidiaries because the record in the case before them did not require such a finding. The Board held that a subsidiary of a publicly traded company, standing alone, could come under the Act's coverage if it could be determined that the subsidiary was the publicly traded parents agent for purposes of SOX employee protection. The ARB identified the general common law of agency principles as the appropriate measure for determining whether such an agency relationship was present.

In the case before them, the ARB identified possible relationships in the record that could determine agency, and remanded the case to the presiding ALJ to make those determinations. At no time did the ARB suggest that the isolated relationships that appeared to be potentially present in the Klopfenstein record, e. g. participation in the adverse action by the parent company, were meant to be general requirements in order to find in favor of agency as it applies to general common law principles.

Unfortunately numerous decisions that followed sought similar circumstances apparent in the Klopfenstein case in order to determine the general common law principles of agency for SOX employer coverage. This perceived requirement ultimately led to a labor specific analysis of agency principles in Section 806 cases. See Walters *supra*.

Some ALJ's took this labor specific analysis further by applying a labor-specific test, the integrated enterprise test, to determine coverage. See Walters, *Supra*. The integrated enterprise test is designed to establish whether or not a parent company and its subsidiary can be viewed as a single employer. Agency can exist even when a parent company and its subsidiary are not viewed as one enterprise. See Pearson v. Component tech. Corp., 247 F3d 471 (3rd Cir. 2001). The integrated enterprise test is a much more restrictive test than an agency test and it's accepted application to determine agency would serve to render the "[...]" or agent [...] prohibition from the SOX anti-retaliation provision obsolete. The integrated enterprise test is the wrong legal standard to apply when determining section 806 employer coverage.

The appropriate legal standard to apply when determining agency for SOX purposes is set forth by the ARB in Klopfenstein, *supra*.

Because the Sarbanes-Oxley Act is defined as a securities law, a labor specific analysis would not be appropriate when determining whether or not an agency relationship exists. The underlying intentions of the SOX, and more specifically, of

Section 806 of the SOX, are not solely the protection of employees and therefore not labor specific. The protection of employees' in Section 806 of the SOX is intended to protect the interests of shareholders and the investing public by assuring that the well intentioned "insiders" within publicly traded corporate structures have a means by which to come forward and protect shareholder interests, without fear of retaliation. See Walters, *supra*. In Pearson, *supra*, the court stated that:

" [...] We decide whether to apply agency principles to establish liability under a federal statute in accordance with the degree to which such principles effectuate the policies of the statute." citing AT&T v. Winback & Conserve Program, Inc., 42 F. 3d 1421, 1429-33 (3d Cir. 1994), " [...] Thus if we are to import agency principles...we must do so selectively, with an eye to effectuating the WARN Act purposes [...]" .

An agency test under Section 806 of the SOX, therefore, should apply the general common law of agency principles set forth in Klopfenstein, *supra*, "with an eye" to effectuating the Sarbanes-Oxley Act's purposes.

C. Section 806 is a Witness Protection Provision within an Obstruction of Justice Statute within a Securities Law. It is not a Labor Law.

The Sarbanes-Oxley Act of 2002 is a securities law. The SOX states:

" [...] The term "securities laws" means the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder. [...]"

The Securities and Exchange Act of 1934 states that:

"[...] The term "securities laws" means... the Sarbanes-Oxley Act of 2002,[...]"

Section 806 of the Sarbanes-Oxley Act has been codified as 18 United States Code , Section 1514A. The Office of the Law Revision Counsel of the U.S. House of Representatives explains on their website that they prepare and publish the United States Code pursuant to section 285b of title 2 of the Code. They state that " The Code is a consolidation and codification by subject matter of the general and permanent laws of the United States." and that "[...] Certain titles of the Code have been enacted into positive law, and pursuant to section 204 of title 1 of the Code, the text of those titles is legal evidence of the law contained in those titles. [...]" . Title 18 has been enacted into positive law.⁵ "A positive law title of the United States is - itself- a Federal statute." ⁶ The legislative procedure involved in the positive law codification process is described as follows:

"[...] The Office of the Law Revision Counsel prepares an initial draft of a bill to restate existing law as a positive law title of the United States Code. The bill is introduced in the House of Representatives by the Chairman of the Committee on the Judiciary. The Committee on the Judiciary has jurisdiction of codification legislation. After introduction of the bill, an extensive review and comment period ensues. The Office of the Law Revision Counsel actively seeks input from Federal agencies, congressional committees, and others with expertise in the area of law

⁵ <<http://uscode.house.gov/about/info.shtml>> (last checked 07/05/2010)

⁶ <<http://uscode.house.gov/codification/legislation.shtml>> (last checked 07/05/2010)
Brochure ,Positive Law Codification in the United States, can be downloaded here.

being codified. At the conclusion of the comment period, an amendment in the nature of a substitute – reflecting corrections and comments – is prepared by the Office of the Law Revision Counsel and transmitted to the Committee on the Judiciary for Committee action. Typically, the bill is passed by the House under suspension of the rules and in the Senate by unanimous consent.[...]"⁷

These positive law enactments conform to the understood policy, intent and purpose of the Congress in the original enactments.

In light of the legislative procedure involved in positive law codification, and considering that Section 806 of the SOX is now codified into positive law in the U.S. Code as:

Title 18 - Crimes and Criminal Procedure

Chapter 73 - Obstruction of Justice (§§ 1501-1521)

Section 1514A - Civil action to protect against retaliation in fraud cases

there can be no doubt that Section 806 of the SOX is not a labor law. Furthermore, when observing the placement of 1514A , having been specifically grouped with three witness protection provisions, it is apparent that Section 806 is a witness protection provision, which the legislative history affirms. See Walters, *supra*.

Section 806 of the SOX is a witness protection provision, meant to encourage a specific type of witness to come forward, one who would further the purposes of the Sarbanes-Oxley Act of 2002, a securities law, and in so doing protect the interests of shareholders and our capital markets.

⁷ <<http://uscode.house.gov/codification/legislation.shtml>> (last checked 07/05/2010)
Brochure ,Positive Law Codification in the United States, Legislative Procedure.

II. Protection of Investors & Confidence in the Capital Market's

A. The Policies & Purposes of the Sarbanes-Oxley Act

The Sarbanes-Oxley Act states it is "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes". It tasked the Securities and Exchange Commission (SEC) with promulgating rules and regulations in its furtherance.⁸ It established a Public Company Accounting Oversight Board (PCAOB) tasked with adopting standards relating to the preparation of audit reports.⁹ It requires the audit committee of each issuer to establish procedures for the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.¹⁰ It requires the signing officers of each annual report to certify that they "are responsible for establishing and maintaining internal controls...",¹¹ that they "have designed such internal controls to insure that material information relating to the issuer and its consolidated subsidiaries is made known to them by others within those entities [...]"¹² that they "have evaluated the

⁸ Sarbanes-Oxley Act 2002 , Section .3(a)

⁹ Sarbanes-Oxley Act 2002 , Section 103 (a)(1)

¹⁰ Sarbanes-Oxley Act 2002 , Section 301 (4)(A) and (4)(b)

¹¹ Sarbanes-Oxley Act 2002 , Section 302 (a)(4)(A)

¹² Sarbanes-Oxley Act 2002 , Section 302 (a)(4)(B)

effectiveness of the issuers internal controls as of a date within 90 days prior to the report"¹³ and that they " have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation [...]"¹⁴ The Sarbanes-Oxley Act (the SOX, the Act) further requires that " [...] each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by management of the issuer." and that " an attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement".¹⁵ In compliance with the SOX, the publicly traded company's signing officers must also certify that they " have disclosed to the issuer's auditors and the audit committee...all significant deficiencies in the design or operation of internal controls which could adversely affect the issuers ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls"¹⁶ and " any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls [...]"¹⁷

The requirements of the Sarbane-Oxely Act led to detailed SEC rules (and guidance), PCAOB auditing standards, and amendments to Self Regulatory

¹³ Sarbanes-Oxley Act 2002 , Section 302 (a)(4)(C)

¹⁴ Sarbanes-Oxley Act 2002 , Section 302 (a)(4)(D)

¹⁵ Sarbanes-Oxley Act 2002 , Section 404 (a)(b)

¹⁶ Sarbanes-Oxely Act 2002 , Section 302 (a)(5)(A)

¹⁷ Sarbanes-Oxely Act 2002 , Section 302 (a)(5)(B)

Organization's (SRO's) listing standards, all of these efforts were taken with the focus and intent of furthering the Act's purposes. Publicly traded companies are required to comply with the laws and rules referenced above. Their implemented Internal Controls over Financial Reporting (ICFR) are the result of their required compliance, and are pervasive throughout the publicly traded companies to include their consolidated subsidiaries. Employees of their subsidiaries effect their internal control process.

B. The SEC, the PCAOB & the SROs' Rules in Furtherance of the Act's Purposes

Among the SEC's final rules regarding a public company's assessment of their ICFR is a requirement that they name an acceptable framework definition of effective internal controls, from which their ICFR should be designed and annually evaluated.¹⁸ The SEC also released definitions of ICFR, significant deficiencies in ICFR, and material weaknesses in ICFR.¹⁹ Public Companies are required to include in their annual report, a report containing management's conclusions about the operational effectiveness of their ICFR. Management is not permitted to conclude that their ICFR is effective if there is one or more material weaknesses present.²⁰

The PCAOB adopted Auditing Standard NO. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit Of Financial Statements. In

¹⁸ SEC [RELEASE NOS. 33-8238; 34-47986; IC-26068; File Nos. S7-40-02; S7-06-03], Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports

¹⁹ 17 CFR 210.1-02 (4) - Definitions of terms related to internal control over financial reporting

²⁰ 17 CFR 229.308 (a)(3) - (Item 308) Internal control over financial reporting

their release the PCAOB referenced the SEC's proposed guidance to help management in the assessment of their internal controls, explaining that they sought to improve the coordination between the SEC's management guidance and their standard. In doing so they decided to use the same definition of material weakness and adopted the SEC's definition of significant deficiencies. The PCAOB further stated that "[...] the final standard and final management guidance also describe the same indicators of a material weakness [...]"²¹

Section 301 of the SOX relating to audit committee's states that the SEC shall "[...] by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer not in compliance with the requirements of any portion of paragraphs (2) through (6)." ²² The SEC established rule 10A-3 under the Exchange Act in regards to audit committee requirements pursuant to the SOX. Rule 10A-3(b)(3) under the Exchange Act, requires each audit committee to establish procedures for the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting, or auditing matters. And the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters.

Self-Regulatory Organization's (SRO's) such as the New York Stock Exchange

²¹ PCAOB Release No. 2007-005A June 12, 2007 - Auditing Standard No. 5 —

²² Sarbanes-Oxley Act 2002 , Section 301(A)

(NYSE) and the NASD amended their rules in furtherance of the Act's purposes.²³

The NYSE's Corporate Governance Listing Standards are of particular significance because Siemens AG, as well as the three companies with pending cases before this Board, whose parties have been invited to file amicus curiae briefs in this case, are listed (or were listed at the relevant time) on the NYSE and required to comply with their listing standards.

Among the NYSE's amended listing standards are rules regarding audit committee's aligned with the SEC's rules, and the requirement that listed companies adopt and disclose a code of business conduct and ethics for directors, officers and employees. "Each code of business conduct and ethics must contain compliance standards and procedures that will facilitate the effective operation of the code. These standards should ensure the prompt and consistent action against violations of the code. Each listed company's website must include its code of business conduct and ethics. And each company's annual report on Form 10-K filed with the SEC must state that the foregoing information is available on its website and that the information is available in print to any shareholder who requests it."²⁴

These codes of business conduct and ethics state that they cover employees of the publicly traded company including its subsidiaries.

Section 303A. 02 of the NYSE's Listed Company Manual states that "[...]

²³ SEC Release No. 34-48745; November 4, 2003 - NASD and NYSE Rulemaking: Relating to Corporate Governance

²⁴ <<http://nysemanual.nyse.com/lcm/>> Section 303A.00 - Corporate Governance Standards, 303A.10 Code of Business Conduct and Ethics (last checked 07/05/2010)

references to " company " would include any parent or subsidiary in a consolidated group with the company [...]"²⁵

The NYSE stated in a commentary note on the code requirement that: "No code of business conduct and ethics can replace the thoughtful behavior of an ethical director, officer or employee. However, such a code can focus the board and management on areas of ethical risk, provide guidance to personnel to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, and help to foster a culture of honesty and accountability."

All of the rules and adopted definitions mentioned in this section serve to enforce the Sarbanes-Oxley Act, particularly through the strengthening of internal controls.

The complaint procedures requirement of audit committees and the NYSE's required code of business conduct and ethics, which also contains complaint procedures, are intended to serve the same objectives as Section 806 of the SOX. To foster ethical and lawful behavior and to encourage well intentioned employees to report illegal or unethical behavior without fear of retaliation. They are an important part of an issuers internal controls. The requirement that they are disclosed to the public serves to assure investors that controls are in place to deter unethical and illegal behavior within these companies, thereby restoring investor confidence in the capital markets.

The SEC adopted as a final rule The Committee of Sponsoring Organization's of the Treadway Commission's (COSO) definition of Internal Control over Financial

²⁵ <<http://nysemanual.nyse.com/lcm/>> Section 303A.00 - Corporate Governance Standards, 303A.02

Reporting (ICFR).²⁶ They clarified that their adoption "[...] encompasses the subset of internal controls addressed in the COSO report that pertains to financial reporting objectives [...]" . This subset encompasses the following five components: control environment, risk assessment, control activities, monitoring, and information and communication. COSO explains that determining whether a system of internal control is effective is a subjective judgement resulting from an assessment of whether the five components are present and functioning effectively.

C. Internal Control Framework & its Importance in Furthering the Acts Purposes

The Committee of Sponsoring Organization's of the Treadway Commission (COSO) is also the author of one of the widely accepted framework definitions of effective internal controls.²⁷ Although a voluntary choice, COSO's Internal Control - Integrated Framework has relevance because it is the chosen framework of Siemans AG, as well as the chosen framework of three companies with pending cases before this Board whose parties have been invited to file amicus curiae briefs in this case. Publicly traded companies are required, by SEC rule, to design and evaluate their ICFR according to their chosen framework definition.

²⁶ SEC [RELEASE NOS. 33-8238; 34-47986; IC-26068; File Nos. S7-40-02; S7-06-03], Managements Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports - (pages 9 & 10)

²⁷ Committee of Sponsoring Organizations for the Treadway Commission (COSO), Internal Control - Integrated Framework

COSO's Internal Control - Integrated framework thoroughly explains that :

"[... Internal Control is a process effected by an entity's board of directors, management and other personnel designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- Effectiveness and efficiency of operations.
- Reliability of financial reporting.
- Compliance with applicable laws and regulations."

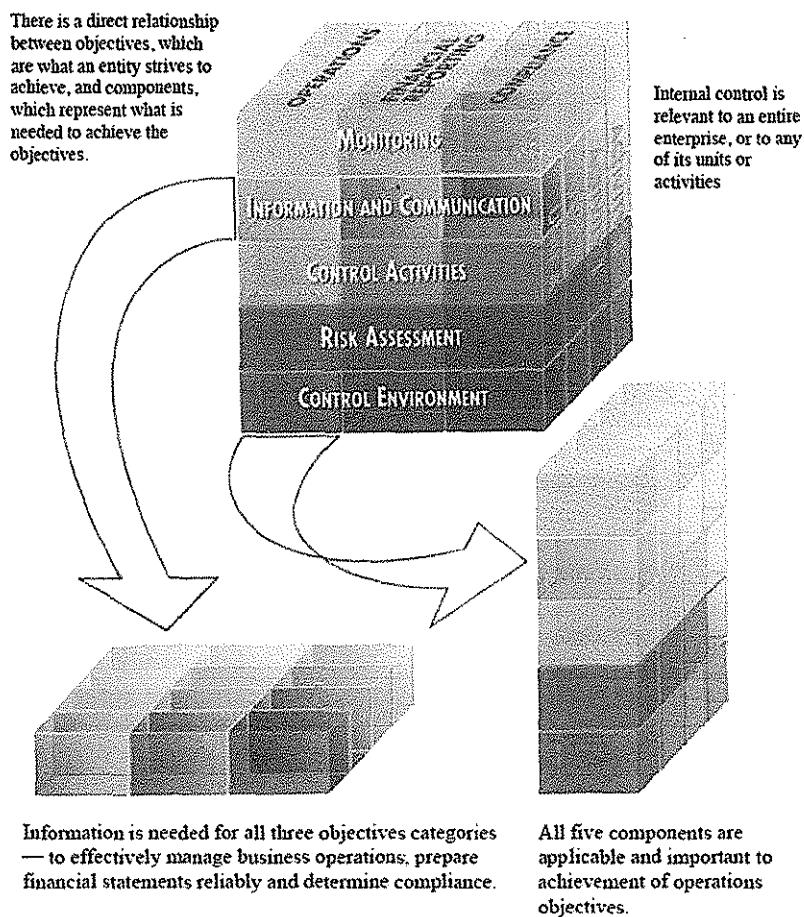
The SEC explains that their adoption of COSO's definition encompasses solely the subset of internal controls that pertain to financial reporting objectives and compliance with laws and regulations directly related to the preparation of financial statements. The SEC also referred, earlier in the same release, to COSO's subset of components: control environment, risk assessment, control activities, information and communication , and monitoring, and stated that "[...] The scope of internal control therefore extends to policies, plans, procedures, processes, systems, activities, functions, projects, initiatives, and endeavors of all types at all levels of a company[...].

For SOX purposes this described scope would be specifically relevant in matters relating to financial reporting objectives.

The following graphic is from COSO's Internal Control - Integrated Framework (page 19) and serves to illustrate the application of the components to one of the three categories mentioned above (e.g. Reliability of Financial Reporting)

Exhibit 2

Relationship of Objectives and Components



The following excerpt is taken from COSO's Internal Control - Integrated Framework (Executive Summary page 4), it serves to briefly describe the subset of the five components:

- **Control Environment** — *The control environment sets the tone of an organization, influencing the control consciousness of its people. It is the foundation for all other components of internal control, providing discipline and structure. Control environment factors include the integrity, ethical values and competence of the entity's people; management's philosophy and operating style; the way management assigns authority and responsibility, and organizes and develops its people; and the attention and direction provided by the board of directors.*
- **Risk Assessment** — *Every entity faces a variety of risks from external and internal sources that must be assessed. A precondition to risk assessment is establishment of objectives, linked at different levels and internally consistent. Risk assessment is the identification and analysis of relevant risks to achievement of the objectives, forming a basis for determining how the risks should be managed. Because economic, industry, regulatory and operating conditions will continue to change, mechanisms are needed to identify and deal with the special risks associated with change.*
- **Control Activities** — *Control activities are the policies and procedures that help ensure management directives are carried out. They help ensure that necessary actions are taken to address risks to achievement of the entity's objectives. Control activities occur throughout the organization, at all levels and in all functions. They include a range of activities as diverse as approvals, authorizations, verifications, reconciliations, reviews of operating performance, security of assets and segregation of duties.*
- **Information and Communication** — *Pertinent information must be identified, captured and communicated in a form and timeframe that enable people to carry out their responsibilities. Information systems produce reports, containing operational, financial and compliance-related information, that make it possible to run and control the business. They deal not only with internally generated data, but also information about external events, activities and conditions necessary to informed business decision-making and external reporting. Effective communication also must occur in a broader sense, flowing down, across and up the organization. All personnel must receive a clear message from top management that control responsibilities must be taken seriously. They must understand their own role in the internal control system, as well as how individual activities relate to the work of others. They must have a means of communicating significant information upstream. There also needs to be*

effective communication with external parties, such as customers, suppliers, regulators and shareholders.

- *Monitoring — Internal control systems need to be monitored—a process that assesses the quality of the system's performance over time. This is accomplished through ongoing monitoring activities, separate evaluations or a combination of the two. Ongoing monitoring occurs in the course of operations. It includes regular management and supervisory activities, and other actions personnel take in performing their duties. The scope and frequency of separate evaluations will depend primarily on an assessment of risks and the effectiveness of ongoing monitoring procedures. Internal control deficiencies should be reported upstream, with serious matters reported to top management and the board.*

COSO's Internal Control-Integrated framework states that :

"[...] When looking at any one category — the effectiveness and efficiency of operations, for instance — all five components must be present and functioning effectively to conclude that internal control over operations is effective.[...]" .

For SOX purposes, of course, the categories of relevance would be - reliability of financial reporting and compliance with applicable laws and regulations (in so much as they relate to financial reporting objectives).

The NYSE's code of business conduct and ethics would ,according to COSO, fall under the control environment component. The control environment is considered to be the foundation for all other components of internal control. Complaint policies and procedures, according to COSO, would fall under the control activities component. These would include the audit committee's established complaint procedures as well as the complaint procedures within the NYSE's required code of business conduct and ethics. The capture of information sent upstream, by employee's following complaint procedures, would fall, according to COSO, under the information and communication component.

Considering that the SEC states that management is not permitted to conclude that their ICFR is effective if there is one or more material weaknesses present, and that management is required to evaluate their ICFR according to the definition of their named framework, and that COSO's framework states that all five components must be present and functioning effectively to conclude that internal control over financial reporting is effective, it must be assumed that when a component is not present or not functioning effectively a material weakness is present, and that management cannot conclude that their ICFR is effective.

In light of this understanding, when a publicly traded company (that named COSO's framework) denies responsibility for complaints from employees with in their subsidiaries sent up stream in compliance with their policies, and further denies accountability for alleged retaliation brought on by individuals within those subsidiaries because of those complaints, their internal controls are not effectively operating and they are not in compliance with the rules furthering the Acts purposes.

D. Known Internal Control Limitations, the Design of Safeguards to Reduce Risk & the Participation of the Witnesses Congress Intended to Protect

The SEC explained in their interpretive guidance release, Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,²⁸ that:

"[...] ICFR cannot provide absolute assurance due to its inherent limitations; it is a

²⁸ SEC [Release Nos. 33-8810; 34-55929; FR-77; File No. S7-24-06]
Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting
Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934

process that involves human diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human failures. ICFR also can be circumvented by collusion or improper management override. Because of such limitations, ICFR cannot prevent or detect all misstatements, whether unintentional errors or fraud. However, these inherent limitations are known features of the financial reporting process, therefore, it is possible to design into the process safeguards to reduce, though not eliminate, this risk.[...]"

The complaint channels designed into a company's ICFR are among the safeguards meant to reduce the known risks referenced above. The complaint procedures established by a company's audit committee are a part of a company's ICFR. The code of business conduct and ethics, and its complaint procedures, are also a part of a company's ICFR. The publicly traded company is responsible for the design and maintenance of their ICFR, to include their consolidated subsidiaries. Employee's within these subsidiaries are directed to the parent's established complaint channels.

When a public company disowns their responsibility for ICFR, and permits management within their subsidiaries to override and or circumvent ICFR, for example by identifying and targeting whistleblowers who utilize the public company's complaint channels , the public company is ultimately responsible for the violation of the Act, and cannot hide behind the corporate veil to avoid liability.

Congress understood the valuable contribution that employees within subsidiaries of publicly traded companies could make by coming forward and serving as

witnesses to matters, that left undetected, could harm shareholders. The legislative history makes clear that Section 301 and Section 806 were intended to cover the same individuals. See Walters,*supra*. Affording employee's of subsidiaries of publicly traded companies categorical coverage under Section 806 of the Sarbanes-Oxley Act was Congresses intent. Whether covered as an employee of the public company, an employee of the public company's agent or both these individuals should be covered. Agency principles should be applied "with an eye" to effectuating the Acts purposes. It is through consideration of the laws, rules, and resulting internal controls elaborated on in this section, their pervasive effect on employees' throughout the subsidiaries of publicly traded companies, and their direct relation to the Sarbanes-Oxley Act, and to Section 301 and 806 specifically through their complaint procedures, that agency between a publicly traded parent and their subsidiary should be assessed and determined to be present.

III. SBT Inc. and Siemens AG Should Be Considered Covered Employers Under Section 806 of the Act in Regards to Carri Johnson's Complaint

Carri S. Johnson is a covered employee under Section 806 of the Sarbanes- Oxley Act for the Act's purposes, and should be afforded 806 protections as Congress had intended. SBT Inc. and Siemens AG are covered employers for SOX purposes and should not be permitted to succeed in employing corporate veil principles as a means to avoid liability and thereby avoid their required compliance with the SOX.

Ms. Johnson named SBT Inc, a non-publicly held subsidiary, and their publicly traded parent, Siemens AG, as Respondents in her complaint. Ms. Johnson alleges

that the Respondents retaliated against her for coming forward and providing information regarding fraudulent and illegal activity in the areas of booking sales and billing customers, and that she suffered an adverse action as a direct result of engaging in lawful behavior described in Section 806 of the SOX as protected.

The Administrative Law Judge (ALJ) presiding over this case initially denied the Respondents' motion for summary decision, claiming that they were not covered employers under the SOX, holding that there were numerous differing opinions on the question of coverage and that, at that point in time, the question of coverage was still unsettled as a matter of law. The ALJ was correct, the matter had not been settled. Unfortunately the ALJ later misinterpreted the decision issued by the Administrative Review Board (ARB), in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.* ARB No. 04-149, ALJ No. 04-SOX-11 (ARB May 31, 2006), as having settled the matter of employer coverage.

The ALJ erred in application of the Klopfenstein decision to the Johnson case. The ARB's decision in Klopfenstein, requiring that common law agency principles be applied to determine subsidiary coverage in the case before them, was because the only respondent before them was a non publicly traded subsidiary, the publicly traded parent had not been named. In the Johnson case the publicly traded parent was named as a respondent, and therefore, the agency requirement described in the Klopfenstein decision did not apply to the Johnson case. The second error in this case, was in the application of common law agency principles. The ALJ applied agency principles commonly utilized in employment law cases, and for that reason

did not find in favor of an agency relationship between SBT Inc. and Siemens AG relevant to Ms. Johnson complaint. Had the ALJ applied general common law agency principles "with an eye" to effectuating the purposes of the Sarbanes-Oxley Act, a securities law, she would likely have found SBT Inc. and Siemens AG to be covered employers.

When determining whether SBT Inc. and Siemens AG are covered employers under Section 806 of the Act, it is necessary to consider the intent and purposes of the Sarbanes-Oxley Act, the rules and regulations implemented in its furtherance , Siemens AG's required compliance and its relevance to Carri Johnson's complaint. At the time of Ms. Johnson's employment termination, Siemens AG was required to be in compliance with the SOX and the NYSE's Corporate Governance Rules.

- The CEO of Siemens AG certified, in their 2004 SEC annual filing, that Siemens AG was in compliance with Section 302 of the SOX,²⁹ which requires a public company's signing officers to attest to their known responsibility for designing and maintaining their internal controls for the company to include its consolidated subsidiaries.
- In order to be listed on our national securities exchanges, Siemens AG was required to be in compliance with Section 301 of the SOX , which requires audit committees to establish employee complaint procedures regarding accounting and auditing matters.
- By January 22, 2004, the date of their annual shareholders meeting, Siemens

²⁹ <<http://www.sec.gov/Archives/edgar/data/1135644/000115697304001382/f00866exv12w1.htm>>
Exhibit 12.1 ,Siemens 2004 SEC annual filing (last checked 07/06/2010)

AG was required to be in compliance with the NYSE's Corporate Governance Rules, which include a Code of Business Conduct and Ethics for directors, officers and employees. These codes must contain compliance standards and ensure prompt and consistent action against violations. These codes must be posted on their company websites.³⁰

Employee complaint procedures are an important part of a public company's internal controls over financial reporting (ICFR) and are relevant to auditing matters. These complaint procedures are directly related to the SOX and more specifically to Section 806.

"References to "Company" or "Siemens" are to Siemens AG and its Subsidiaries"

Siemens AG's Code provides the following guidance regarding complaints :

"All employees may lodge a complaint with their supervisor, their compliance officer, their personnel manager or some other person / unit designated for this purpose or with an existing internal works council.

Circumstances which point to a violation of the Business Conduct Guidelines are to be reported to the chief compliance officer, the compliance officer responsible for the Sector, Division, Regional, or Corporate Units, the Tell Us Help Desk or the Siemens Ombudsman.

There is a special process for handling complaints related to accounting practices.

All complaints can be submitted both confidentially and anonymously, and all complaints will be investigated. Corrective measures will be implemented if necessary.

All documentation will be kept confidential to the extent permitted by law. No reprisal of any kind against complaints will be tolerated"

(Source, Siemens AG Business Conduct Guidelines, Edition 2009-01, pg.6 & 24)

³⁰ <http://www.siemens.com/investor/en/corporate_governance/business_conduct.htm>
Siemens AG's Code of Business Conduct can be downloaded here (last checked 07/06/2010)

When Carri Johnson lodged a complaint within SBT reporting suspected fraudulent and illegal activity within SBT, she was utilizing the public parent's complaint channels and was a part of their internal control process. Had Siemens AG's complaint controls been operating effectively, the information would have been captured and sent upstream. What Ms. Johnson alleges in her whistleblower complaint, in essence, suggests that controls were overridden and that she suffered an adverse action because of it.

A known risk in the financial reporting process is management override.

"Management Override of Internal Controls: The Achilles' Heel of Fraud Prevention"

(the American Institute of Certified Public Accountants' (AICPA))

- In 2005 Siemens AG named The Committee of Sponsoring Organization's of the Treadway Commission's (COSO),Internal Control - Integrated Framework to be the framework definition that they use in designing and evaluating the operational effectiveness of their internal controls.³¹

"Management may be in a position to override controls and ignore or stifle communications from subordinates, enabling a dishonest management which intentionally misrepresents results to cover its tracks."

(Source, COSO Internal Control - Integrated Framework)

³¹ <<http://www.sec.gov/Archives/edgar/data/1135644/000132693205000152/f01125e20vf.htm>>
COSO Internal Control framework named in Siemens AG's 20F annual (pg. 108) (last checked 07/06/2010)

- On March 26, 2006, SBT submitted an Affidavit of the Corporate Secretary for SBT in support of their motion for summary decision to the ALJ presiding over the Johnson case.
- On September 18, 2006, SBT filed a Motion for Judgement as a matter of Law, this time representing themselves and Siemens AG who by now had been named, officially, as a respondent. In support of their motion that Siemens AG was not a proper party to the action and that its non publicly traded subsidiary SBT could not be held liable for a violation of the SOX, the Affidavit of the Corporate Secretary of SBT was re-submitted.

This Affidavit explains the Respondents' position on Section 806 coverage:³²

- SBT is not publicly traded.
- SBT's parent, Siemens Corporation is not publicly traded.
- Siemens Corporation is the holding company for all Siemens operating companies in the United States.
- Siemens AG is domiciled in Germany and is the ultimate parent.
- SBT makes its own management and personnel decisions and Siemens AG is not involved in SBT's personnel decisions.

When Siemens AG takes the position that they do not get involved in their subsidiary's personnel decisions, even when those decisions could be the result of management override of their implemented internal controls, which they are responsible for maintaining, their ICFR is not effective and they are likely to be in violation of the Sarbanes-Oxley Act, SEC rules, and the NYSE Corporate Governance rules.

"No reprisal of any kind against complaints will be tolerated".

(Source, Siemens AG Business Conduct Guidelines, Edition 2009-01, pg 24)

³² Johnson v. Siemens Building Technologies Inc. and Siemens AG, ALJ Case No. 2005-SOX-15

Summary

Because the SOX requires accountability from the publicly traded company's entire organization to include its consolidated subsidiaries and because the SOX requires publicly traded companies to comply with securities laws and rules which further the Act's purposes, employee's of these subsidiaries are among the group of "insiders" Congress intended to protect. For the Act's purposes, subsidiary employee's are employee's of the publicly traded parent and employee's of the parent's agent and they should be afforded Section 806 coverage. Employees of subsidiaries are subject to the parent's required internal controls and are an important part of their internal control process. Complaint procedure controls in a public company's ICFR , e.g. those required by Section 301 of the SOX and those within their Codes of Business Conduct and Ethics (required by SRO's), are directly related to Section 806 and serve the same underlying purposes. Subsidiary employee coverage under Section 806 should be assessed "with an eye" to effectuating the Act's Purposes.

The Corporate and Criminal Fraud Accountability Act is intended to hold publicly held companies accountable (emphasis added) for unethical and illegal behavior that takes place within their corporate structures. These companies post their Codes of Business Conduct and Ethics on their websites, assuring the public that they have established ethical standards and have complaint procedures in place which encourage employees to come forward without fear of retaliation. These codes of conduct state that their subsidiaries are inclusive with the company. These

companies also post on their websites their audit committee charters, as required by SRO's, which include their responsibility for establishing complaint procedures regarding accounting and auditing matters.

Internal Controls Over Financial Reporting (ICFR) is an auditing matter.

Publicly traded companies that tell their auditors and shareholders one thing, such as... we have controls in place..., yet tell Federal Investigators (OSHA) and Department of Labor Administrative Law Judges another, such as ...we are not responsible ..., are exactly the sort of companies that Congress intended to shine a light on by requiring accountability and transparency throughout the publicly traded company's entire corporate structures.

For these reasons stated above subsidiary employees' of publicly traded companies should be afforded categorical coverage under Section 806 of the Sarbanes-Oxley Act.

Conclusion

The decision and orders of the Administrative Law Judge, denying Carri S. Johnson Section 806 coverage under the SOX should be reversed.

Respectfully submitted.


Gereon Merten

ARB Case Name : Carri S. Johnson v. Siemens Building Technologies,
Incorporated and Siemens AG

ARB Case No: 08-032

ALJ Case No: 2005-SOX-015

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