UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

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.	

REPLY BRIEF OF SEMPRA ENERGY TRADING LLC AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Pursuant to the July 21, 2010 letter of Chief Administrative Appeals Judge Igasaki, Sempra Energy Trading LLC,[1] through its counsel, submits this reply brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving the question of whether and when an employee of a private subsidiary of a publicly held company may bring an action against his immediate, non-publicly held employer under Section 806, 18 U.S.C. § 1514A, of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act").

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. 111-203, H.R. 4173. Section 929A of the Dodd-Frank Act, which concerns the whistleblower provision of SOX, amends Section 806 by inserting the language, "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company," after "the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))". Thus, Section 806, as amended, reads:

> WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company*, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. . .

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[1] Sempra Energy Trading LLC ("SET") is the respondent in the matter of *Kennon Mara v. Sempra Energy Trading LLC*, ARB Case No. 10-051, ALJ Case No. 2009-SOX-018. On October 5, 2009, finding that SET "is not a covered employer under SOX because SET is not a publicly-traded company and it did not act as an agent on employment matters for either Sempra Energy or RBS," the ALJ granted SET's motion for summary judgment and dismissed Mara's complaint with prejudice. *Mara v. Sempra Energy Trading LLC*, ALJ Case No. 2009-SOX-018, 2009 WL 6470478, at *12, 14 (ALJ Oct. 5, 2009).

§ 806(a), 18 U.S.C. § 1514A, as amended by § 929A of Dodd-Frank Act (amendments in italics). Based on the text of the Dodd-Frank amendments, subsidiaries are now expressly governed by Section 806 of SOX.

For reasons stated in greater detail below, however, Section 929A of the Dodd-Frank Act cannot and should not be applied retroactively to pending cases before the ARB. The Dodd-Frank Act does not expressly provide for retroactive application of Section 929A, nor does the legislative history support a finding of retroactivity. Therefore, with respect to pending cases before the ARB, in which the conduct at issue occurred prior to the passage of Section 929A, the ARB should continue to apply the principles enumerated in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, 2006 WL 3246904 (ARB May 31, 2006). In *Klopfenstein*, the ARB held that private subsidiaries are not categorically covered by Section 806 (prior to the Dodd-Frank Act), and that a determination as to whether a non-public subsidiary may be held liable as an agent for a publicly held company should be made according to the principles of the general common law of agency. Thus, as explained in the July 15, 2010 Brief of Sempra Energy Trading LLC as *Amicus Curiae*, with respect to cases currently pending before the ARB, private subsidiaries of publicly held companies are covered by Section 806 only when they act as agents of the publicly held parent with respect to employment matters.

ARGUMENT

I. The Dodd-Frank Act Does Not Have Retroactive Effect, and Therefore the Section 929A Amendments to Section 806 of SOX Do Not Apply to Pending Cases.

The Dodd-Frank amendments to SOX contained in the Act do not apply retroactively to cases currently pending before the ARB.

As a general rule, statutory amendments are presumed not to apply retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). If the amendment does not unmistakably indicate either a prospective or retroactive application, then:

> [T]he court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, [the] traditional presumption [against retroactive application] teaches that it does not govern absent clear congressional intent favoring such a result.

Id.

A. Neither the Statutory Language Nor the Legislative History Expressly Provides for Retroactive Application.

Nothing in the Dodd-Frank Act expressly states that the amendment to Section 806, contained in Section 929A of the Act, applies retroactively to pending cases or pre-enactment conduct. The text of the amendment states nothing more than that Section 806 has been amended to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such [public] company." § 929A. In similar contexts, federal courts have refused to apply amendments retroactively absent a clear indication of congressional intent to do so in the text of the amendment itself. For instance, the Seventh Circuit refused to apply the Veterans' Benefits Improvement Act ("VBIA") to a pending case alleging violations of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") where Congress did not expressly address retroactivity in the statutory language:

"Congress was aware that for [the amendment] to have retroactive effect, it needed to say so expressly, and the absence of any such express language in the text indicates that Congress chose not to do so." *Middleton v. City of Chicago*, 578 F.3d 655, 663 (7th Cir. 2009). Similarly, Congress's silence with respect to retroactivity in Section 929A indicates that Congress chose not to make the amendment retroactive. Even the legislative history fails to expressly address the subject of retroactivity, further indicating that Congress did not intend for the Section 929A amendment to apply retroactively. *See generally* S. Rep. No. 111-176, § 929A, at 114 (2010) (single paragraph of legislative history regarding Section 929A is silent as to retroactivity).

B. Section 929A Is Not a Clarifying Amendment Entitled to Retroactive Application.

Nor is Section 929A properly includable in the class of legislative amendments deemed clarifying rather than substantive and, therefore, not subject to a presumption against retroactivity. *See, e.g.*, *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("Normally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively.") (addressing 1997 amendments to Copyright Act) (citation omitted); *Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[C]oncerns about retroactive application are not implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law.") (addressing Montreal Protocol No. 4 amendments to Warsaw Convention) (citation omitted). Because the amendment contained in Section 929A is substantive and not merely clarifying, it cannot be given retroactive effect.

1. *Section 929A Alters Existing Law and Therefore Cannot Be Deemed to Be Clarifying.*

First, because Section 929A "eliminat[es] a defense often raised by issuers in actions brought by whistleblowers" (S. Rep. No. 111-176, at 114), the amendment alters existing law,

and thus the presumption against retroactivity must apply.[2] In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997), for example, the Supreme Court held that because the 1986 amendment to the False Claims Act "eliminate[d] a defense to a *qui tam* suit . . . [it] change[d] the substance of the existing cause of action for *qui tam* defendants." Therefore, under the circumstances therein, the Supreme Court refused to apply the amendment retroactively. Like the 1986 amendment to the False Claims Act, Section 929A alters existing law by eliminating a defense raised by private subsidiaries and their public parents when charged with retaliation by an employee of the subsidiary. Thus, the ARB should follow the Supreme Court's holding in *Hughes* and refuse to apply Section 929A retroactively to pending cases.

Second, the Senate Report implicitly acknowledges that Section 806, as originally enacted, does not categorically cover private subsidiaries: "The language of the statute may be read as providing a remedy *only* for retaliation by the issuer, *and not by subsidiaries of an issuer*." S. Rep. No. 111-176, at 114 (emphasis added). Because the statute, as originally enacted, may be read to preclude subsidiaries from its scope, the amendment's inclusion of subsidiaries within the purview of the statute (thus subjecting subsidiaries to liability for violations of the whistleblower provision) alters the existing state of the law. Therefore, the amendment must be deemed to be substantive, rather than merely clarifying.

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[2] The portion of Senate Report No. 111-176 regarding the legislative history reads:

> Amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

S. Rep. No. 111-176, § 929A, at 114 (2010).

2. *The Use of the Phrase "Make Clear" in the Senate Report Does Not Overcome the Presumption Against Retroactive Application of Section 929A.*

The fact that the Senate Report states an intent to "make clear" that subsidiaries are now covered by Section 806 is not sufficient to overcome the general presumption against retroactive application. As stated above, for example, the Seventh Circuit in *Middleton* refused to apply the VBIA to a pending case alleging USERRA violations, despite a statement in the Senate Report that VBIA would "clarify" the original intent of Congress in passing USERRA. 578 F.3d at 664-65. Where, as in *Middleton*, the Congress did not express an intent to make a clarification in the statute itself, the court "proceed[s] with caution when Congress declares its intent to clarify a law in the legislative history rather than the amendment's text." *Id.* at 664.

Similarly, in *Summers v. Department of Justice*, 569 F.3d 500, 504 (D.D.C. 2009), the D.C. Circuit discounted clarification statements made on the floor by Senator Leahy and in a committee report regarding the OPEN Government Act of 2007. Ultimately concluding that the statute did not apply retroactively, the D.C. Circuit reasoned, "Putting aside the general problem that neither a committee nor a single Senator can speak for 'the Congress,' these specific statements simply do not speak to the issue of retroactivity." *Id.*

The ARB should not assume that, just because the Senate Report employs the phrase "make clear," that Congress enacted Section 929A to clarify the original intent of Section 806. "It is hazardous . . . to assume from the enactment of a 'clarifying' amendment that Congress necessarily was merely restating the intent of the original enacting Congress." *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436 (10th Cir. 1997); *see also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010) (*quoting Fowler*). Notably, the legislative history of Section 929A is silent as to the *intent* of the original enacting Congress, and thus the report's "clarification" should be viewed as a prospective change in the law.

3. *The Clarifying Statements Contained in Senate Report 111-176 Have Little Probative Value.*

Even if parties were to make the hazardous assumption that this Congress enacted Section 929A merely to restate the intent of the original enacting Congress, that assumption would be entitled to little weight. *See, e.g., Middleton*, 578 F.3d at 664 ("reliance on a legislature's observations regarding a prior legislature's intent is of marginal utility at best"). Furthermore, "[t]he view of a later Congress cannot control the interpretation of an earlier enacted statute." *Fowler*, 128 F.3d at 1436 (citations omitted). The bottom line is that much has changed since the original passage of SOX in 2002. The economic downturn that began in 2008 has had a devastating effect on the financial services industry, and, in response, Congress passed the Dodd-Frank Act to provide for financial regulatory reform. S. Rep. No. 111-176, at 2. Thus, the amendment to Section 806 is more appropriately seen as part of the current Congress's intent to enact stricter financial regulations, rather than as a clarification of the former Congress's intent in passing SOX.

For each of these reasons, the ARB refuse to apply the amendments contained in Section 929A of the Dodd-Frank Act to cases currently pending before the Board.

II. Because the Dodd-Frank Act Does Not Apply Retroactively to Pending Cases Before the ARB, the Holding in *Klopfenstein* Governs Those Pending Cases.

Although by enacting the Dodd-Frank Act, Congress changed the existing state of the law, it is nonetheless clear that, prior to July 21, 2010, private subsidiaries were not categorically covered by Section 806 of SOX. Before the enactment of Section 929A of the Dodd-Frank Act, Section 806 was silent as to the inclusion of private subsidiaries in its coverage. Because private subsidiaries were not covered by the plain language of Section 806, the ARB has held that private subsidiaries can be held liable for violations of the whistleblower provisions only where they are proven to be agents of their publicly traded parents. *Klopfenstein v. PCC Flow Tech.*

Holdings, Inc., ARB No. 04-149, ALJ No. 2004-SOX-011, 2006 WL 3246904, at *9-10 (ARB May 31, 2006), *reaffirmed in Klopfenstein v. PCC Flow Techs. Holdings*, Nos. 07-21, 22, 2004-SOX-11, 2009 WL 6546648, at *6 (ARB Aug. 31, 2009). Agents are, of course, expressly covered by Section 806. This represents the only circumstance under which a private subsidiary, acting before July 21, 2010, could be held liable for violations of Section 806 of SOX.

Therefore, prior to the enactment of the Dodd-Frank Act, a valid defense to a Section 806 claim was a company's status as a non-publicly held subsidiary that was not acting as an agent of its parent corporation with respect to employment. Indeed, in passing the Dodd-Frank Act, even Congress recognized the existence of this "defense now raised in a substantial number of actions brought by whistleblowers under the statute." S. Rep. No. 111-176, at 114. Even though the passage of the Dodd-Frank Act eliminates this defense going forward, private subsidiaries acting before July 21, 2010 may continue to rely on this defense because at the time of their conduct they were not categorically covered by Section 806.

CONCLUSION

For the reasons set forth above, the Board should conclude that a Section 929A of the Dodd-Frank Act does not have retroactive application, and thus that, with respect to cases filed prior to the enactment of the Dodd-Frank Act, the non-public subsidiary of a publicly held company is covered by Section 806 of SOX only when it acts as an agent of its parent company with respect to employment matters.

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Respectfully submitted,

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