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July 14, 2010

***Via Facsimile and Federal Express***

Administrative Review Board
200 Constitution Avenue NW
Washington, DC 20210

Re: Carri S. Johnson v. Siemens Building Technologies, Inc., and Siemens, AG.
ALJ Case No. 2005-SOX-015

Dear Sir/Madam:

Enclosed is the Brief of Berkshire Hathaway, Inc. and FlightSafety International, Inc. in connection with the above-referenced matter.

All counsel of record are being served by facsimile.

Sincerely,

JACKSON LEWIS LLP

Michael J. DePonte

MJD/cb
Enclosure
cc: Jacqueline Williams — VIA FACSIMILE
Siemens Building Technologies, Inc.
And Siemens AG
c/o Gregg LoCascio, Esq. — VIA FACSIMILE
Gereon Merten — VIA FIRST CLASS MAIL

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|---|---|---|
| **CARRI S. JOHNSON,** | § | **BEFORE THE** |
| | § | **ADMINISTRATIVE REVIEW BOARD** |
| **Complainant,** | § | **U.S. DEPARTMENT OF LABOR** |
| | § | |
| **v.** | § | **ARB CASE NO. 08-032** |
| | § | |
| **SIEMENS BUILDING TECHNOLOGIES, INC. AND SEIMENS, AG,** | § | **ALJ CASE NO. 2005-SOX-015** |
| | § | |
| **Respondents.** | § | |

**BRIEF OF BERKSHIRE HATHAWAY, INC AND FLIGHTSAFETY INTERNATIONAL INC.**

Respectfully submitted,

JACKSON LEWIS LLP

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| | § | |
| **Respondents.** | § | |

NOW COME Berkshire Hathaway, Inc and FlightSafety International Inc., Respondents in the matter of *Gereon Merten v. Berkershire Hathaway, Inc, and FlightSafety International Inc.*, ARB Case No. 09-025, ALJ Case No. 2008-SOX-40 ("Respondents") and pursuant to the Administrative Review Board's request for additional briefing dated April 15, 2010 in the above-captioned matter, submit this Brief.

## I. STANDARD OF REVIEW

The Administrative Review Board's ("ARB") jurisdiction to review an Administrative Law Judge ("ALJ") decision is set forth in the Secretary's Order 1-2002, 67 Fed. Reg. 64,272. The ARB reviews an ALJ's findings of fact in Sarbanes-Oxley Act ("SOX") cases under the substantial evidence standard. 20 C.F.R. § 1980.110(c). In contrast, the ARB exercises de novo review of the ALJ's conclusions of law. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB June 29, 2006).

## II. ARGUMENT

### A. Introduction.

In 2008, the Wall Street Journal quoted Sharon Worthy, a Labor Department spokeswoman, as stating that the agency "'believes that there is no legal basis for the argument that subsidiaries of covered corporations are automatically covered,' under the Sarbanes-Oxley

whistleblower provision. 'The plain language of the statute only applies to publicly traded corporations.'" *Whistleblowers are Left Dangling - Technicality Leads Labor Department to Dismiss Cases,* WALL STREET JOURNAL, September 4, 2008.

The Department of Labor's position is consistent with the proper application of well-established legal principals outlined below. An employee of a subsidiary cannot maintain a Section 806 claim against a parent company absent evidence that the parent and subsidiary are an integrated enterprise. Section 806 applies only to publicly traded companies and their officers, employees, contractors, subcontractors, or agents. Therefore, a subsidiary must have acted as the agent for a publicly traded parent corporation for it to be subject to Section 806. To determine whether a subsidiary is an agent for a publicly traded parent corporation the ARB should use the integrated enterprise test and then determine whether the parent acted through any "centralized control of labor relations" regarding the subsidiary's employee. This is the only theory by which an employee of a subsidiary to a publicly traded company may fall under the provisions of Section 806.

B. **A subsidiary is not categorically covered under Section 806.**

Subsidiaries are not categorically covered under Section 806. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246 (2004) (citations omitted). The statute at issue specifically states:

> 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)), 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—

18 U.S.C. 1514A(a) (also referred to as Section 806). In other words, the plain language of Section 806 states that it applies only to (1) publicly traded companies and (2) "any officer, employee, contractor, subcontractor, ***or agent*** of such company." *Id.* (emphasis added). Nowhere in the statute are subsidiaries considered "publicly traded companies."[1] Thus, absent a finding that a subsidiary has acted in some other specific enumerated capacity for the publicly traded entity, there is no basis for automatically subjecting the subsidiary to SOX's provisions.

### C. A subsidiary must be an agent for its publicly traded parent corporation to be subject to Section 806.

To be subject to the provisions of Section 806, a subsidiary must be an agent of its parent corporation. However, subsidiaries are not agents of their parent corporation simply by virtue of their business relationship. Principles may only be held liable for the acts of their agents ***acting within the scope of their authority***. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Thus, "[J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same." *Royal Indus. Ltd. v. Kraft Foods, Inc.*, 926 F. Supp. 407, 413 (S.D.N.Y. 1996). However, "a parent corporation is not liable for acts of its subsidiaries simply because it owns the subsidiary's stock." RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (citing *United States v. Bestfoods*, 524 U.S. 51, 61-63(1998) (holding that it is a basic tenant of agency law that parent companies are not *ipso facto* liable for the actions of their subsidiaries). Under federal common law,

> the relationship of principal and agent does not obtain unless the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the

[1] In fact, if a publicly traded company's 15(d) reporting obligations have been temporary suspended, the Securities Exchange Commission will exclude the company from SOX's purview. *See* SEC Division of Corporation Finance, Sarbanes-Oxley Act of 2002 – FAQ 1.

> subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.

*In re S. African Apartheid Litig.*, 633 F. Supp. 2d 117, 121 (S.D.N.Y. 2009) (quoting RESTATEMENT (SECOND) OF AGENCY § 1); *see also, Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd.*, 909 F.2d 698, 702-03 (2d Cir. 1990) (establishing similar standards concerning express and implied agency) (citations omitted). For example, in *National Carbide Corp. v. Commissioner* 336 U.S. 422 (1949), the Court addressed whether three wholly owned subsidiaries of a corporation were agents of the parent corporation for tax purposes. The subsidiaries argued that since they were the agents of the parent, the income from their activities was actually the parent company's income. *National Carbide*, 336 U.S. at 424. The Court held that the fact that the subsidiaries were completely owned and controlled by the parent was not enough to support the conclusion that they were the parent's agents. *Id.* at 429. Accordingly, absent a principle/agent relationship wherein the subsidiary acted on behalf of the parent corporation, **for a specific purpose**, a subsidiary cannot be subject to the provisions of Section 806.

### D. The ARB should use the integrated enterprise test and then determine if the parent acted through any centralized control of labor relations with its subsidiary

#### 1. The integrated enterprise test is widely used and accepted

The "doctrine of limited liability" creates a strong presumption that a parent corporation is not liable for the employment actions of its subsidiaries. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir.1993); *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980 (4th Cir.1987); *see also Krivo*

*Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir.1973) (corporate form is not disregarded lightly since the law created corporations primarily to allow limited liability). An exception to this doctrine exists where the parent and subsidiary companies are really a single, integrated enterprise – a single employer. *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 763 (5th Cir. 1997) (citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983)).

To determine whether a parent corporation and its subsidiary may be regarded as a "single employer" in the context of employment matters, the Fifth Circuit adopted the four-part analysis originally created by the Supreme Court for labor disputes in *Radio Union v. Broadcast Service*, 380 U.S. 255, 257 (1965); *see also, Lusk*, 129 F.3d at 777. The four-part test examines: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Trevino*, 701 F.2d at 404.[2] The integrated enterprise test is also utilized by several governmental entities. The Department of Labor utilizes the test to determine whether separate entities are joint employers under the Family Medical Leave Act. Specifically, 29 C.F.R. § 825.104(c)(2) states:

> Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the "integrated employer" test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:
>
> (i) Common management;

---

[2] Other Courts have applied the integrated enterprise test. *See, e.g., Romano v. U-Haul Int'l*, 233 F.3d 655, 662 (1st Cir. 2000). *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (en banc); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240–41 (2d Cir. 1995); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977).

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

29 C.F.R. § 825.104(c)(2). Similarly, the Equal Employment Opportunity Commission provides additional guidance through its Compliance Manual, stating:

> The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:
>
> - **The degree of interrelation between the operations**
>  - Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses
>  - Sharing of payroll and insurance programs
>  - Sharing of services of managers and personnel
>  - Sharing use of office space, equipment, and storage
>  - Operating the entities as a single unit
> - **The degree to which the entities share common management**
>  - Whether the same individuals manage or supervise the different entities
>  - Whether the entities have common officers and boards of directors
> - **Centralized control of labor relations**
>  - Whether there is a centralized source of authority for development of personnel policy
>  - Whether one entity maintains personnel records and screens and tests applicants for employment
>  - Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common
>  - Whether the same persons make the employment decisions for both entities
> - **The degree of common ownership or financial control over the entities**
>  - Whether the same person or persons own or control the different entities

- Whether the same persons serve as officers and/or directors of the different entities
- Whether one company owns the majority or all of the shares of the other company.

EEOC Compliance Manual, Section 2-III(B)(1)(a)(iii)(a). "The purpose of these factors is to establish the degree of control exercised by one entity over the operation of another entity." *Id.*

2. If the ARB finds that a parent and subsidiary are an integrated enterprise it should then determine whether the parent acted through any labor relations regarding the subsidiary's employee

If the ARB finds that a parent and subsidiary are an integrated enterprise, it should then answer the ultimate question of whether the parent acted through the subsidiary regarding the subsidiary's employee. Courts regularly extend their analysis to address the primary question: "what entity made the final decisions regarding employment matters related to the person[s] claiming discrimination?" *Schweitzer*, 104 F.3d at 764 (quoting *Trevino*, 701 F.2d at 404); *see also Lusk*, 129 F.3d at 777 (stating, "This analysis ultimately focuses on the question of whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation."); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2nd Cir. 1995) (same); *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993) (same). In other words, there must be more than common ownership and operations to satisfy the integrated enterprise test for employment matters. "There must be some nexus between the parent company and the subsidiary's daily employment decisions, to support an inference that the subsidiary and the parent were 'functionally integrated.'" *Reilly v. TXU Corp.*, 2009 U.S. Dist. LEXIS 26522 (N.D. Tex. 2009) (citing *Lusk*, 129 F.3d at 778).

The practical application of the integrated enterprise test is exemplified in *Saalim v. Dycom Indus.*, wherein the court refused to hold that the plaintiff was an employee of both the

subsidiary and the parent corporation despite the parent corporation's oversight of its subsidiaries. 2008 U.S. Dist. LEXIS 62208 (D.N.J. July 31, 2008).[3] Despite the intertwined relationship of Dycom and its subsidiaries, the court in *Saalim* refused to hold Dycom liable for the employment actions of the subsidiaries. The court specifically recognized that even though Dycom required its subsidiaries to adopt employment policies, and even controlled the salaries and bonuses paid to employees, "[a] parent's broad general policy statement regarding employment matters [is] not enough" to establish a parent's control over a subsidiary. *Id.* at *16-20, quoting *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993) (finding application of parent's equal opportunity policy, identity statement, and ERISA guidelines to subsidiaries insufficient evidence of labor control); *see also, Lusk,* 129 F.3d. 773, 780-81, (holding that

[3] In *Saalim,* the Court analyzed the relationship between parent corporation, Dycom, and the subsidiaries, Utiliquest and STS, and found:

- The Presidents of Utiliquest and STS report to Dycom's Chief Operating Officer/Executive Vice President;
- Dycom officials meet quarterly with their insurance carrier to review claims against Dycom's subsidiaries;
- Dycom hires or takes part in hiring the presidents, vice presidents and other officers of its subsidiaries; Dycom engaged and paid an outside agency to help in finding the Utiliquest CFO and extended an offer of employment to Dennis Tarosky 'on behalf of Dycom Industries, Inc.';
- Dycom oversees subsidiaries' employee salaries/bonuses and changes in operational structure; subsidiaries provide Dycom with reports concerning payroll, operational activities, and employee disciplinary actions;
- Dycom requires its subsidiaries to adopt harassment and electronic communications policies and even provides form policies for its subsidiaries to use;
- Dycom requires all subsidiary employees to sign and abide by its Business Code of Conduct and Ethics; it also oversees enforcement of this policy; and
- Dycom and its subsidiaries have the same insurance plans.

*Saalim*, 2008 U.S. Dist. LEXIS 62208, *4-5. Moreover, Dycom represented in its corporate publications and filings that all of its subsidiaries' employees were their own and that four individuals were corporate officers for Dycom, Utiliquest, and STS. *Id.* at *5.

National Intergroup, Inc. as the holding corporation for the plaintiffs' employer, could not be held liable for reduction in force and the plaintiffs' subsequent discharge); *Hoffman v. Tyco Int'l, LTD.*, 2006 U.S. Dist. LEXIS 91392 (E.D. Pa. Dec. 18, 2006) (finding no personal jurisdiction over defendant Tyco where company operated 800 number for all its subsidiaries). Thus, unless a parent acted with "a degree of control that exceeds the control normally exercised by a parent corporation," there is no basis for subjecting the parent to liability under Section 806 for the actions of its subsidiary. *Saalim*, 2008 U.S. Dist. LEXIS 62208, *20 (citations omitted).

### E. There is no other theory under which subsidiaries of publicly traded parent should be held liable under Section 806.

Finally, pursuant to the Board's final inquiry, Respondents submit that there is no other basis or theory for subjecting the subsidiary of a publicly traded company to liability under Section 806. The integrated enterprise test provides an accepted methodology to determine the interrelation of parents and their subsidiaries in employment matters and no other theory of liability under Section 806 is required.

## III. CONCLUSION

Absent evidence that a subsidiary acted as an agent of its publicly traded parent with respect to the employment of a "whistleblower" employee under Section 806, there is no basis to subject the parent to liability for the subsidiaries' actions. An employee must demonstrate that the parent and subsidiary are an integrated enterprise that acted as a single employer to retaliate against the employee for engaging in a protected activity under the terms of Section 806. Absent an employee's satisfaction of the integrated employer test, with an emphasis on any alleged centralized control of labor relations, an employee cannot maintain a Section 806 claim against a publicly traded parent corporation.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that for the foregoing was served on the following counsel of record via facsimile the 14th day of July, 2010.

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