UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of:

CARRI JOHNSON,	:	
	:	
Complainant,	:	
	:	ARB Case No. 08-032
v.	:	
	:	ALJ Case No. 2005-SOX-15
SIEMENS BUILDING TECHNOLOGIES, INC.,	:	
and	:	
SIEMENS AG,	:	
	:	
Respondents.	:	

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* pursuant to the Board's Order Requesting Additional Briefing By The Parties And Inviting *Amici Curiae*, *Johnson v. Siemens Building Technologies, Inc.*, Case No. 08-032 (ARB Apr. 15, 2010), at 4-5. The brief responds to the questions posed by the Board, and urges the Board to affirm the Decision and Order of the Administrative Law Judge ("ALJ" or "the Judge").

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Many of EEAC's member companies are public companies subject to the "whistleblower" provisions of the Sarbanes-Oxley Act ("Sarbanes-Oxley," "SOX" or "the Act") of 2002, 18 U.S.C. § 1514A. Many of these companies also have wholly-owned subsidiaries. Accordingly, the issue presented in this case regarding whether the whistleblower provisions of the Act cover a non-publicly traded company that did not act as an "agent" of a publicly traded company with respect to the employment action in question is extremely important to the nationwide constituency that EEAC represents.

EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Board in this case. Indeed, because of its significant experience in these matters, EEAC is

uniquely situated to brief the Board on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Siemens Building Technologies, Inc. ("SBT"), headquartered in Buffalo Grove, Illinois, provides engineering services relating to construction and maintenance of industrial and commercial buildings. *Decision and Order Dismissing the Complaint*, Case No. 2005-SOX-00015 (ALJ Nov. 27, 2007) (Craft, ALJ) (hereinafter "ALJ Decision"), at 6. SBT is a privately-owned company, has no class of securities registered under Section 12 of the Securities and Exchange Act, and is not required to file reports under Section 15(d) of the Securities and Exchange Act. *Id.* at 7. SBT's parent company, Siemens Corporation, the holding company for all Siemens operating companies in the United States, likewise has no securities registered under Section 12, and is not required to file reports under Section 15(d) of the Act. *Id.* Siemens AG, parent of both Siemens Corporation and SBT, is a global company domiciled in Germany, and a publicly traded company subject to regulation by the SEC. *Id.*

SBT hired Johnson in February 2002 to be the Branch Administrator of its Roseville, Minnesota, Fire Safety Division office. *Id.* at 6. She received a poor performance evaluation in November 2003. *Id.* SBT put in place a Performance Improvement Plan for Ms. Johnson in late 2003 or early 2004. *Id.* Her performance did not improve, and SBT's Branch Manager, Human Resources Manager, and Regional Director, all employees of SBT, agreed that Johnson's employment should be terminated. *Id.* SBT terminated Johnson's employment on March 10, 2004. *Id.*

Thereafter, Johnson filed a complaint against SBT with the Occupational Safety and Health Administration (OSHA) contending that SBT had terminated her employment because

she made reports of suspected fraudulent and illegal activity, in violation of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a). *Id.* at 6. The OSHA Area Director found Siemens AG in a corporate directory and served notice on that company as well. *Id.* at 6-7.

The OSHA Regional Administrator found no reasonable cause to believe that SBT had discharged Johnson in retaliation for protected activity. *Id.* at 7. Johnson appealed to the Office of Administrative Law Judges. *Id.* After a full hearing, ALJ Craft, applying the agency principles set out in this Board's decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, No. 04-149 (ARB May 31, 2006), concluded that "[b]ecause the Complainant has failed to establish that Respondent Siemens Building Technologies, Inc. or its employees were acting as agents of Siemens AG in firing her, SBT is not covered by the Sarbanes Oxley Act; [and that] Siemens AG cannot be held liable for the actions of SBT or its employees respecting her employment . . . ." *Id.* at 9.

Johnson appealed to this Board. Both parties briefed the case. The Assistant Secretary of Labor for Occupational Safety and Health filed a brief *amicus curiae* urging this Board to adopt the "integrated enterprise" test for determining subsidiary coverage under Section 806 of SOX, but arguing that even under that test, ALJ Craft correctly dismissed the case for lack of coverage. Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae*, *Johnson v. Siemens Building Technologies, Inc.*, Case No. 08-032, (ARB Apr. 15, 2010). On April 15, 2010, this Board sought additional briefing and invited additional *amicus curiae* briefs addressing these four issues:

(1) Is a subsidiary categorically covered under section 806 *(e.g., Morefield/Walters)?* If so, does the level of ownership of the subsidiary play a factor in that coverage?

(2) Under SOX's whistleblower protection provision, must a non-publicly held subsidiary respondent be an agent of a publicly held company? What are the factors under a section 806 agency test?

(3) Is the integrated enterprise test applicable to section 806? If so, should the Board consider the "centralized control of labor relations" the most appropriate factor?

(4) Is there any other theory under which you contend that subsidiaries would be covered under section 806? If so, explain.

Order Requesting Additional Briefing By The Parties And Inviting *Amici Curiae*, *Johnson v. Siemens Building Technologies, Inc.*, Case No. 08-032 (ARB Apr. 15, 2010), at 4-5.

SUMMARY OF ARGUMENT

(1) A subsidiary is not categorically covered under Section 806. Section 806(a) of Sarbanes-Oxley covers a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d),[1] or any officer, employee, contractor, subcontractor, or agent of such company," 18 U.S.C. § 1514A(a), that takes any of the enumerated adverse employment actions against an employee who engages in any of the listed protected activities. Accordingly, under the plain language of the statute, an individual or entity that is not a public company "or any officer, employee, contractor, subcontractor, or agent of such company" is not subject to Section 806. The legislative history and implementing regulations confirm the statutory limitations on Section 806 coverage. Any alternative interpretation would constitute judicial expansion of Section 806 beyond the limits established by Congress.

(2) A non-publicly held subsidiary must be an agent of a publicly held company, under common law agency principles, to be covered under SOX's whistleblower protection provision. Given the statutory language limiting coverage to public companies and their "agents," a non-

[1] In the interest of brevity, we refer hereinafter to a company "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))" as a "public" company.

public subsidiary of a public parent can be liable under Section 806 only if it acted as an agent of the parent with respect to the challenged employment action. This Board should reaffirm *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, Case No. 04-149 (ARB May 31, 2006), and hold that common law agency principles form the only appropriate test for non-public subsidiary coverage under Section 806. In addition, it would be helpful if this Board would provide additional guidance on the standards under which a non-public subsidiary may be held liable under Section 806 as the agent of a public parent.

(3) The "integrated enterprise" test is not applicable to Section 806 since the statutory language confines coverage to "agents." Because Section 806 mandates an agency analysis, use of the "integrated enterprise" test to find coverage of a non-public subsidiary, absent an agency relationship, would be inappropriate and unsupported by the statute. If this Board were to accept the "integrated enterprise" test in this context, however, then it should recognize that the "centralized control of labor relations" factor is primary, and that it requires, at a minimum, that the public company have actually made or directed the challenged employment decision.

(4). There is no other theory under which a non-public subsidiary could be covered under Section 806.

(5) Sarbanes-Oxley is already too broad, and expanding it to cover non-public subsidiaries would not serve the public interest. By many accounts, SOX already has had significant unintended consequences, imposing unanticipated costs on American companies and driving business overseas. This Board should carefully consider the potential for additional adverse consequences before expanding Section 806 coverage beyond the plain language of the statute.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, A NON-PUBLIC SUBSIDIARY IS NOT CATEGORICALLY COVERED UNDER SECTION 806 OF SARBANES-OXLEY

A. The Plain Statutory Language Of Section 806 Covers Only Public Companies And Any Officer, Employee, Contractor, Subcontractor, Or Agent Of Such Company

Congress enacted the Sarbanes-Oxley Act ("SOX"), Pub. L. 107-204, 116 Stat. 745 (July 30, 2002), in the wake of several highly-publicized scandals involving fraud at publicly traded companies. Among other things, the law imposes on publicly traded companies certain corporate responsibility and financial disclosure requirements.

Section 806(a) of SOX, codified at 18 U.S.C. § 1514A, created a new cause of action against a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d),[2] or any officer, employee, contractor, subcontractor, or agent of such company," that takes any of the enumerated adverse employment actions against an employee who engages in any of the listed protected activities. 18 U.S.C. § 1514A(a).

B. The Statute's Plain Language Precludes Extending Coverage To A Non-Public Company Merely Because It Is A Subsidiary Of A Public Company

Accordingly, under the plain language of the statute, an individual or entity that is not a public company "or any officer, employee, contractor, subcontractor, or agent of such company" is not subject to Section 806. 18 U.S.C. § 1514A(a). The explicit statutory language permits no

[2] In the interest of brevity, we refer hereinafter to a company "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))" as a "public" company.

other reading than that Section 806 imposes liability only on public companies and their officers, employees, contractors, subcontractors, and agents, and only for adverse employment actions against their own employees. Accordingly, any putative whistleblower who is not the employee of a public company, or one of its officers, employees, contractors, subcontractors, or agents, does not have a cause of action under Section 806.

When Congress wanted to include a reference to subsidiaries of public companies in SOX, it did so, three times. The statute provides that in order to be considered "independent," a member of the public company's audit committee must be a member of the board of directors but cannot "be an affiliated person of the issuer or any *subsidiary* thereof." 15 U.S.C. § 78j-1(m)(3)(B)(ii) (emphasis added). With respect to corporate responsibility for financial reports, the parent is made responsible for making sure that the relevant corporate officers have material information about the parent "and its consolidated *subsidiaries* . . . ." 15 U.S.C. § 7241(a)(4)(B) (emphasis added). Finally, in the statutory prohibition on personal loans to executives, SOX makes it unlawful for the company itself or "through any *subsidiary*" to make such loans. 15 U.S.C. § 78m(k)(1) (emphasis added).

These explicit references demonstrate that, had it wanted to do so, Congress could have drafted Section 806 to include public companies and "any officer, employee, contractor, subcontractor, [*subsidiary*] or agent of such company . . . ." 18 U.S.C. § 1514A(a). The fact that Congress did not include the word "subsidiary" in Section 806 makes the word conspicuous by its absence. Indeed, "[t]he inclusion of a reference to subsidiaries in another section of the statute, when combined with the absence of the term in the whistleblower section, is more likely evidence of an intent to not include subsidiaries in the whistleblower section, than an indication that Congress assumed that the uncommonly broad interpretation would be given to the word

'company.'" *Lowe v. Terminix Int'l Co.*, No. 2006-SOX-89 (ALJ Sept. 15, 2006), at 7, *appeal dismissed*, No. 07-4 (ARB Aug. 23, 2007).

Accordingly, the plain language of the statute dictates that coverage is limited to companies that fall within the unambiguous statutory definition.

C. Both The Legislative History And The Implementing Regulations Confirm The Statutory Limitations On Section 806 Coverage

While the legislative history of Sarbanes-Oxley is replete with references to potential fraud by public companies, nowhere does it say that a non-public company is covered by Section 806 merely because it is a subsidiary of a public company. Indeed, even if the legislative history did suggest that Section 806 covers non-publicly traded companies, which it does not, the actual plain language of the statute would be controlling. *See Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir. 1996).

Rather, the legislative history confirms that it was the employees of public companies that the statute was primarily designed to protect:

> Section 806 of the Act would provide whistleblower protection to employees of *publicly traded companies* who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of *publicly traded companies* who blow the whistle on fraud and protect investors. With an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good.

148 Cong. Rec. S7420 (daily ed. July 26, 2002) (emphasis added). In addition, Senator Paul Sarbanes, one of the bill's primary sponsors, said on the Senate floor as he introduced the Conference Report on the bill:

> Before addressing the major provisions of the legislation, let me make very clear that it applies exclusively to public companies—that is, to companies registered

> with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of companies across the country.

148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002). Thus, the legislative history confirms that SOX was targeted at public companies.

Consistent with the statutory language, the implementing regulations of the Occupational Safety and Health Administration ("OSHA") likewise cover only public companies and their officers, employees, contractors, subcontractors, and agents. 29 C.F.R. § 1980.101. The agency defines "company" by merely repeating the relevant portion of the statutory definition verbatim. *Id.* The regulations then add the term "company representative," defined as "any officer, employee, contractor subcontractor, or agent of a company," thus creating the term "company representative" as shorthand for the remaining relevant portion of the statutory definition, and nothing more. *Id.* Accordingly, when the regulations define "employee" as "an individual presently or formerly working for a company or company representative," they properly refer to the same scope of coverage as provided by the statute. *Id.* Nothing in the regulation suggests that a non-public subsidiary that is not an officer, employee, contractor subcontractor, or agent of a public company is covered merely because it happens to be a subsidiary of a public company, or that the regulation added some additional category called "company representative" that expanded coverage to subsidiaries.

D. Any Alternative Interpretation Would Constitute Expansion Of Section 806 Beyond The Limits Established By Congress

The suggestion that Section 806, for whatever reason, should cover non-public subsidiaries of public companies, merely seeks to expand the statute impermissibly beyond its plain language. For this reason, we respectfully submit that the aspirational objective underlying the ALJ decisions in *Morefield v. Exelon Servs., Inc.*, No. 2004-SOX-2 (ALJ Jan. 28, 2004), and

Walters v. Deutsch Bank AG, No. 2008-SOX-70 (ALJ Mar. 23, 2009), is erroneous. The Supreme Court has described "the proposition that the statute at hand should be liberally construed to achieve its purposes" as "that last redoubt of losing causes." *Director, Ofc. of Workers' Comp. Programs v. Newport News Shipbuilding Co.,* 514 U.S. 122, 135 (1995). As the Court there explained, "[t]hat principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." *Id.* at 135-36.

Indeed, "to hold that non-public subsidiaries are subject to the whistleblower protection provisions simply because their parent company is required by other SOX provisions to report the subsidiary's financial information or to adopt an umbrella compliance policy would widen the scope of the whistleblower protection provisions beyond what Congress appears to have intended." *Malin v. Siemens Med. Solutions Health Servs.,* 638 F. Supp.2d 492, 500-01 (D. Md. 2008). Congress exercised its authority to draft Section 806 to cover public companies, and no one's view that Congress *should* also have covered non-public subsidiaries can change that.

Moreover, extending Section 806 coverage to a non-public subsidiary merely because the parent imposes financial controls would be contrary to public policy and the goals of SOX itself, since doing so would pressure public parents to exercise only the minimum amount of control required under the law.

Accordingly, based on the plain language of the statute, Section 806 covers only public companies and their officers, employees, contractors subcontractors, or agents, and does not cover a subsidiary that does not fall within that statutory definition.

II. A NON-PUBLICLY HELD SUBSIDIARY MUST BE AN AGENT OF A PUBLICLY HELD COMPANY, UNDER GENERALLY ACCEPTED AGENCY PRINCIPLES, TO BE COVERED UNDER SOX'S WHISTLEBLOWER PROTECTION PROVISION

A. A Non-Public Subsidiary Can Be Liable Under Section 806 Only If It Acted As The Agent Of A Public Company With Respect To The Challenged Employment Action

As noted above, Section 806 covers only public companies, "or any officer, employee, contractor, subcontractor, or agent of such company," that takes any of the enumerated adverse employment actions against an employee who engages in any of the listed protected activities. 18 U.S.C. § 1514A(a). Accordingly, this Board correctly ruled in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149 (May 31, 2006), that a non-public subsidiary of a public parent could be liable under Section 806 only if it acted as an agent of the parent with respect to the challenged employment action. *Id.* at 16.

Given the statutory language limiting coverage to public companies and their "agents," this Board's ruling in *Klopfenstein* is the correct and only tenable interpretation of Section 806. It is a well-settled "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998). The mere fact of a parent-subsidiary relationship does not make one liable for the torts of the other. *Id.* "[A]gainst this venerable common-law backdrop, the congressional silence is audible." *Id.* at 62.

Accordingly, *Klopfenstein* correctly concluded that a non-publicly held subsidiary can be liable under Section 806 only if it acted as the agent of its public parent with respect to the employment action in question. *See also Rao v. Daimler-Chrysler Corp.*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922, 2007 WL 1424220 (E.D. Mich. 2007) (non-public subsidiary can be

liable under Section 806 only if it acted as the agent of a public company with respect to the challenged employment action); *Brady v. Calyon Sec. (USA)*, 406 F. Supp.2d 307, 318 (S.D.N.Y. 2005) ("Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies"). *See also Klopfenstein* at 14, n.15.

B. This Board Should Reaffirm *Klopfenstein* And Hold That General Common Law Agency Principles Form The Only Appropriate Test For Subsidiary Coverage Under Section 806

As this Board correctly ruled in *Klopfenstein*, "[w]hether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency." *Klopfenstein* at 14 (footnote omitted). Drawing from the Restatement of Agency 2d, it explained that "agency depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control." *Id.* at 14-15 (citing Rest. 2d Agen. § 1(1), comment (b)) (internal quotations omitted). In Section 806 cases, the Board correctly noted, the subsidiary has to act as the agent for the principal specifically with respect to the complainant's employment in order to extend coverage. *Id.* at 15.

Given the clear statutory language of Section 806, which extends coverage only to public companies and agents of such companies, the common law agency principles recited in *Klopfenstein* form the only appropriate analysis for subsidiary coverage.

C. This Board Should Provide Additional Guidance On The Standards Under Which A Subsidiary May Or May Not Be Held To Be An Agent Of A Public Parent Under Section 806

In our view, this Board's opinion in *Klopfenstein* was exceptionally clear in holding that a non-public subsidiary can be liable under Section 806 only if it acted as the agent of a public parent, as analyzed under common law agency principles, in making the challenged employment decision. As this Board observed in the Order Requesting Additional Briefing By The Parties And Inviting *Amici Curiae*, however, "the ALJs have varied in their applications of agency theory under Section 806." *Id.* at 2 (citation omitted). Thus, in the interest of clarity, it would be helpful if this Board would establish, as a follow-up to *Klopfenstein*, even more clear and comprehensive standards for applying common law agency theory to non-public subsidiaries of public parents for the purpose of determining Section 806 coverage.

Quite a few ALJs have applied agency theory appropriately since *Klopfenstein*. In *Savastano v. WPP Group, PLC,* No. 2007-SOX-34 (ALJ July 18, 2007), for example, the ALJ made factual findings that the non-public subsidiary and the public parent (1) acted and were run independently; (2) had no overlap in officers; (3) had separate operations and offices and rarely became involved in each other's daily activities; and most importantly, that (4) no officer or employee of the public parent exerted any control over the terms and conditions of the Complainant's employment or (5) had anything to do with the decision to hire or terminate the Complainant. *Id.* at 7. The fact that statements from the parent's annual report indicated that "non-public subsidiaries may act as [the parent's] agents for purposes of collecting and reporting financial data," the ALJ found, could not serve as a "factual predicate for a finding that there is any agency relationship pertaining to employment matters." *Id.* Accordingly, the ALJ in

Savastano correctly concluded that the non-public subsidiary was not the parent's agent for Section 806 purposes. *Id.* at 8.

Similarly, in *Mara v. Sempra Energy Trading, LLC,* No. 2009-SOX-18 (ALJ Oct. 5, 2009), the ALJ concluded that there was no agency relationship because the non-public subsidiary "maintained its own offices, made all relevant employment-related decisions independent of its parents, and maintained a separate human resources department with its own employment policies, procedures, handbook, and payroll," because "it was very uncommon for [the] parents to get involved with any decisions concerning hiring, firing, discipline, compensation, or bonuses of its employees," and because the non-public subsidiary "was the only entity involved in the decision to hire [the Complainant] and negotiate her rate of compensation . . . ." *Id.* at 12.

Notably, a public parent and a non-public subsidiary need not have entirely separate management in order to avoid a finding of an agency relationship. *See Malin*, 638 F. Supp.2d at 504 (noting that parent and non-public subsidiary had one common board member who had no involvement in the "day-to-day operations, general employment decisions, or the alleged retaliatory conduct of Defendants").

At the same time, it is important for this Board to clarify that mere indicia of some relationship between the public parent and the non-public subsidiary are insufficient to establish an agency relationship for Section 806 purposes. For example, in *Srivastava v. Harris Investment Management, Inc.*, 2007-SOX-24 (ALJ Mar. 28, 2008), the ALJ found that the (1) "use of [the parent's] registered trademark on [the Complainant's] pay stubs and 401(k) statements;" (2) "letters welcoming her to the '[Parent] group of companies;'" (3) "orientation materials referencing the vision and values of the [Parent] group;" (4) "an employment

application reading 'thank you for applying with the [Parent] Group of Companies;'" and (5) "a separation agreement which prohibited Complainant from releasing confidential material without the consent of the General Counsel for the [Parent]" were insufficient to demonstrate an agency relationship under Section 806. *Id.* at 6. Likewise, in *Perez v. H&R Block, Inc.*, No. 2009-SOX-42 (ALJ Dec. 1, 2009), *appeal dismissed*, No. 10-38 (ARB Mar. 18, 2010), the ALJ found that neither a requirement that the Complainant "adhere to the [public parent's] code of business ethics and conduct" nor the fact that the public parent's stock purchase plan was available to the subsidiary's employees as a benefit, were sufficient to establish an agency relationship, particularly where there was no evidence that the parent either knew of or participated in the Complainant's termination. *Id.* at 7-8.

Most importantly of all, however, this Board should state once again that Section 806 coverage will not attach unless the non-public subsidiary that employed the complainant acted as the parent's agent in taking the employment action in question. *See, e.g.*, *Rao*, 2007 U.S. Dist. LEXIS 34922, at *16 (noting the absence of allegations "that anyone at [the public parent] even knew of the decisions regarding Plaintiff's employment, much less took part in those ground-level decisions").

III. THE "INTEGRATED ENTERPRISE" TEST IS NOT APPLICABLE TO SECTION 806 SINCE THE STATUTORY LANGUAGE CONFINES COVERAGE TO AGENTS

A. Because Section 806 Mandates An Agency Analysis, Use Of The "Integrated Enterprise" Test To Establish Coverage Of A Non-Public Subsidiary Would Be Inappropriate

The Assistant Secretary of Labor advocates that this Board should apply the "integrated enterprise" or "integrated employer" test to determine whether employees of subsidiaries are covered under Section 806. Brief of The Assistant Secretary of Labor for Occupational Safety

and Health as *Amicus Curiae*, at 6. With all due respect to the Assistant Secretary, EEAC submits that the statutory language, by limiting coverage to agents of public companies, mandates the agency test adopted in *Klopfenstein* and precludes the use of any other test.[3]

The Assistant Secretary is correct that some courts, and the Department of Labor itself, have applied the "integrated enterprise" test in cases arising under various employment-related laws for the purpose of determining whether a defendant corporation meets a numerical statutory threshold for coverage. Section 806, however, has no such numerical threshold. Rather, it explicitly limits coverage to public companies and their agents.

The fact that other federal whistleblower statutes may have broader coverage, *e.g.*, may cover non-public subsidiaries of public companies under an "integrated enterprise" test, is irrelevant, except insofar as it reaffirms that Congress knows how to provide for such broader coverage when it chooses to do so. It is not unusual for statutes with similar aims to impose different coverage thresholds. Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, for example, covers employers with fifteen or more employees, while the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, covers those with twenty or more, and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2611 *et seq.*, covers those with fifty or more employees. All three statutes have anti-retaliation provisions, yet all set different coverage levels.

As articulated by the Assistant Secretary, the "integrated enterprise" test is significantly different from the agency test mandated by Section 806 and adopted by this Board in *Klopfenstein*. In the Assistant Secretary's view, the key factor in the "integrated enterprise" test,

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[3] Despite our disagreement with the Assistant Secretary's position on the appropriate test, EEAC fully supports the government's conclusion that ALJ Craft correctly dismissed this case for lack of coverage.

that of "centralized control of labor relations," looks to whether the parent controls employment decisions generally or determines general employment policies." Brief of Assistant Secretary as *Amicus Curiae*, at 18. In contrast, the Assistant Secretary continues, "the agency analysis in SOX whistleblower cases has focused on whether the parent corporation had knowledge of or participated in the decision to fire the complainant employee." *Id.* (citing *Klopfenstein*). As the Assistant Secretary acknowledges, then, the "integrated enterprise" test could find coverage even where the subsidiary was not acting as the parent's agent with respect to the complainant's employment. *Id.* at 18-19.

This critical difference between the two tests illustrates why the "integrated enterprise" test is inappropriate for use in Section 806 cases. The statute confines coverage to "agents" of public companies. If the non-public subsidiary was not acting as the agent of a covered public company, Section 806 provides no coverage. The broader reach of the "integrated enterprise" test expands the statutory coverage well beyond the confines of the statutory language. Thus, the "integrated enterprise test" is not appropriate for use in Section 806 cases.

B. If The "Integrated Enterprise" Test Were To Apply To Section 806, Then The Centralized Control Of Labor Relations Should Be The Primary Factor, And Should Be Applied Appropriately

As stated above, the "integrated enterprise" test does not apply to Section 806, and cannot be used to confer coverage where Congress did not. If this Board should decide to apply the "integrated enterprise" test to Section 806, however, it is imperative that the Board do so correctly, and narrowly, with due regard to the fact that it is expanding the statute beyond its words.

1. Centralized control of labor relations is the most important factor of the "integrated enterprise" test

"Centralized control of labor relations" is widely accepted as the most significant, if not determinative, factor of the "integrated enterprise" test. The test consists of four factors: "interrelation of operations, common management, centralized control of labor relations and common ownership." *Radio & Television Broad. Tech. Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam). In the parent/subsidiary context, some degree of interrelation of operations, common management, and certainly common ownership is highly likely, and certainly not unusual, let alone suspect. *See generally, Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993).

For this reason and others, the "centralized control of labor relations" factor "has traditionally been most important." *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997). If it were to adopt the "integrated enterprise" test for Section 806 cases, this Board should view that factor as primary as well.

2. If this Board were to adopt the "integrated enterprise" test, it should state specifically that the "centralized control of labor relations" factor requires, at a minimum, that the public company have made the challenged employment decision

As noted above, the "integrated enterprise" test is inappropriate for use in Section 806 cases. If, however, this Board should decide to use that test, the Board should define unequivocally the minimum requirements for liability under that test, including but not limited to the requirement that the public company have made the employment decision in question.

As the Fifth Circuit observed in *Schweitzer*, courts applying the "integrated enterprise" test "refin[e] their analysis to the single question, '[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?'" *Schweitzer*, 104

F.3d at 764 (5th Cir. 1997). As the Tenth Circuit has said, "[t]o satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993). Broad policy statements, such as an equal opportunity policy, guidelines on fair treatment of employees, and the like, will not suffice. *Id.*[4]

ALJs who have applied the "integrated enterprise" test in Section 806 cases likewise have focused on the question of who made the challenged decision. In *Perez*, where the ALJ found no coverage under common law agency principles and addressed the "integrated enterprise" test only because the Complainant raised it, the ALJ emphasized that "broad general policy statements regarding employment matters are not enough to satisfy" the "centralized control of labor relations" prong of the test, but that only actual day-to-day control, including having made the decision to terminate the Complainant, would suffice. *Perez* at 15-16. Similarly, the ALJ in *Merten v. Berkshire Hathaway, Inc.*, No. 2008-SOX-40 (ALJ Oct. 21, 2008), who used a blended version of common law agency principles and the "integrated enterprise" test, concluded that none of the Complainant's allegations addressed the critical point of "involvement by [the public parent] in employment decisions made at [the non-public subsidiary] generally *or in Complainant's case specifically.*" *Id.* at 8 (emphasis added). In *Carciero v. Sodexho Alliance, S.A.*, No. 2008-SOX-12 (ALJ Feb. 19, 2009), *appeal dismissed*, No. 09-90 (ARB Aug. 14, 2009), in which the ALJ found that no coverage existed under either the "integrated enterprise" test or

[4] Notably, although the Third Circuit said that it was adopting the DOL version of the "integrated enterprise" test for purposes of determining liability under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN Act"), 29 U.S.C. §§ 2101 *et seq.*, focusing on "'unity of personnel policies,'" the court there emphasized that the analysis should include a determination "of whether the parent company directly exercised control over the particular policy at issue." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 490 (3d Cir. 2001). Applying that analysis, the Third Circuit concluded that even "the fact that [the principal] may have controlled the hiring and firing of the company's president and chief executive officer, and monitored the hiring of a few other high-level managers" would not establish the required "unity." *Id.* at 500.

common law agency principles, the ALJ considered, under the "integrated enterprise" test, the fact that the challenged employment decision was made solely by the non-party subsidiary, and that no one at the public parent was involved. *Id.* at 14-15.

Accordingly, if this Board were to rule that the "integrated enterprise" test may be used to establish coverage under Section 806, it should emphasize that coverage may be found if only if the public parent made or directed the challenged employment decision.

IV. THERE IS NO OTHER THEORY UNDER WHICH NON-PUBLIC SUBSIDIARIES COULD BE COVERED UNDER SECTION 806

As stated above, the common law agency theory, as established in *Klopfenstein*, is the only theory under which Section 806 permits coverage of a non-public subsidiary. Therefore, there is no other theory under which non-public subsidiaries may be held liable.

V. BY MANY ACCOUNTS, THE SARBANES-OXLEY ACT ALREADY MAY BE TOO BROAD

It would be a mistake to assume that broadening SOX coverage to include non-public subsidiaries would serve the public interest. Indeed, SOX itself is proving to have significant unintended consequences, including exorbitant costs that may be sending business overseas. In 2006, a House committee examining the impact of SOX on the American economy said that "[a] recent FEI ("Financial Executives International") survey of 274 public companies found that the total cost of compliance associated with SOX is $3.7 million for the average company. While this is a decrease from the average cost of 2005, this is still dramatically more than the original SEC estimates of $91,000 per public company." Press Release, House of Rep. Comm. on Gov't Reform, Subcomm. on Regulatory Affairs, *A Balancing Act: Cost, Compliance, and Competitiveness After Sarbanes-Oxley* (June 19, 2006). More recent data from FEI indicates that

while companies have made great strides in cost containment in the intervening years, the costs are still very high, nearly twenty times that original estimate.[5]

According to a *Wall Street Journal* editorial in late 2008, government regulation, primarily SOX, has "managed to kill the creation of new public companies in the U.S., cripple the venture capital business, and damage entrepreneurship," noting that "[a]ccording to the National Venture Capital Association, in all of 2008 there have been just six companies that have gone public. Compare that with 269 IPOs in 1999, 272 in 1996, and 365 in 1986." Michael S. Malone, *Washington Is Killing Silicon Valley*, Wall St. J., Dec. 22, 2008.[6] SOX has "cost U.S. industry more than $200 billion by some estimates" the article observes. *Id.* That was nearly two years ago.

Back in January 2006, the *Wall Street Journal* reported that in 2000, "Nine out of every ten dollars raised by foreign companies through new stock offerings were done in New York. . . . But by 2005, the reverse was true: Nine of every ten dollars were raised through new company listings in London or Luxembourg . . . ." Craig Karmin, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., Jan. 26, 2006.

Increasing the scope of Section 806 coverage, moreover, would increase substantially the workload of the Occupational Safety and Health Administration, the Office of Administrative Law Judges, and this Board. Such an increase also would multiply exponentially the number of non-meritorious claims against which employers would have to defend. According to OSHA data, the agency dismissed 62% of the complaints the agency closed in Fiscal Year 2009 and

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[5] *Available at* http://fei.mediaroom.com/index.php?s=43&item=204
[6] *Available at* http://online.wsj.com/article/SB122990472028925207.html

found merit in only 2% (the remainder were withdrawn or settled).[7] Occupational Safety & Health Admin., Sarbanes-Oxley Whistleblower Complaints (FY 2003-FY 2009).

Expanding the scope of Section 806 therefore inevitably would increase the number of non-meritorious claims far more than meritorious ones. The employers who would be respondents to those claims would bear the substantial financial and administrative cost of defending against them. No such obligation should be imposed without clear direction from Congress. Indeed, extension of Section 806 to cover non-public companies, even those who are subsidiaries of publicly traded companies, can only, if at all, be legislated by Congress, after due consideration of the broader ramifications.

[7] Notably, this proportion is not unique to SOX Section 806 cases. The federal Equal Employment Opportunity Commission reports, for example, that of the 93,277 discrimination complaints it received in Fiscal Year 2009, 60.9% were closed because the Commission determined there was no reasonable cause to believe discrimination had occurred, and another 18.8% were closed for administrative reasons, *e.g.*, lack of jurisdiction, for a total of 79.7%. Many others were closed due to pre-determination settlements and the like, leaving a mere 4.5% in which the Commission found cause to conclude discrimination had occurred. *See* EEOC Ofc. of Research, Info., and Planning Data Summary Reports, All Statutes (FY 1997-FY 2009), *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm

CONCLUSION

For the reasons set forth above, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the Administrative Law Judge should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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