

UNITED STATES DEPARTMENT OF LABOR
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In the Matter of

ARB Case No.: 09-108

2009-108-1 P 2:29

WILLIAM VILLANUEVA,

ALJ Case No.: 2009-SOX-006

Complainant,

v.

CORE LABORATORIES NV
SAYBOLT DE COLOMBIA LIMITADA,
Respondents.

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COMPLAINANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of the Complainant, William Villanueva, in support of his appeal from the decision, dated June 10, 2009, of Administrative Law Judge Jonathan C. Calianos (the "ALJ").

By Order to Show Cause dated November 5, 2008, the ALJ ordered that the parties show cause in writing on why this case should not be dismissed because the Department of Labor lacks subject matter jurisdiction. In response, Complainant submitted a declaration with extensive exhibits, together with a brief setting forth the reasons why subject matter jurisdiction exists in this proceeding.

By decision dated June 10, 2009, the ALJ rejected Complainant's arguments and ruled that:

Because Villanueva is a foreign national working at a foreign subsidiary of Core Labs – which is itself a Netherlands company whose shares are registered under Section 12 of the Securities Exchange Act of 1934 – and because the alleged fraud as well as the termination occurred in Columbia ... the case is **DISMISSED** for lack of subject matter jurisdiction.

As set forth more fully in this brief, the ALJ's decision should be reversed because both the fraudulent scheme to evade taxes and the retaliation against Complainant were directly undertaken and controlled by Core Lab's executives located and employed in Houston, Texas, and this case therefore does not seek to apply the whistleblower protection provisions of the Sarbanes Oxley Act extraterritorially.

STATEMENT OF FACTS

The following facts are set forth in the Declaration of William Villanueva, dated December 5, 2008, submitted in opposition to the Order to Show Cause (and in Core Lab's SEC filings where noted).

A. Background

Core Laboratories NV ("Core Lab"), which provides services to the petroleum industry, has shares that are traded on the New York Stock Exchange and registered under section 12 of the Securities Exchange Act of 1934. Core Lab's corporate headquarters is in Houston, Texas.

For more than 16 years Villanuava was the CEO of Saybolt Colombia ("Saybolt Colombia"), a subsidiary of Core Lab.¹ On April 29, 2008, he was abruptly fired from the company as a result of his complaints about, and investigation of, income tax and value added tax fraud that was being perpetrated by Saybolt Colombia at the direction, and under the direct control of, Core Lab's accounting and legal executives in Houston, Texas. The decision to terminate his employment was made directly by these same U.S. executives of Core Lab in Houston Texas.

B. Description of the Income Tax and VAT Fraud

(1) Income Tax Fraud

The income tax fraud uncovered by Villanuava results from a classic "transfer pricing" scheme, pursuant to which Core Lab unlawfully "transferred" to an offshore entity, Core

¹ According to Core Lab's 2007 Form 10-k, Core Lab directly owns 95% of the stock of Saybolt. (See Form 10-K Exhibit 21.1, #153)

Laboratories Sales NV (“CLSNV”), taxable revenue resulting from inspection services performed in Colombia. CLSNV is domiciled in Curacao, one of the Dutch Antilles, which is an internationally recognized as a tax haven. Written Core Lab accounting policies, issued directly by its corporate accounting department in Houston, mandated that Saybolt (together with all other Core Lab subsidiaries worldwide) use CLSNV as the contracting party whenever services are performed for a non-Colombian client and that 10% of the revenues for the assignment be allocated to CLSNV.²

However, CLSNV performed no marketing, coordination, R&D, IT or other work in connection with the transaction, and played no part in obtaining the client for whom the services were performed. Nor were any of these services performed by personnel who were physically located in Curacao, whether employed by CLSNV or otherwise. Moreover, CLSNV did not assume the risk of collection of fees from the client. Rather, if the client failed to pay for the services, CLSNV did not pay Saybolt Colombia and Saybolt Colombia was required (by directives from Houston) to write off the receivable for the work it has performed. In short, while CLSNV played no role in the services provided, or in obtaining the business, Core Lab Houston executives ensured that Saybolt and its other worldwide subsidiaries transfer a portion of the taxable revenue to CLSNV and correspondingly under-report a portion of the taxable revenue to the local tax authorities (in this case the Colombian tax authorities).

² The percentage diverted to CLSNV varied depending on the country and business segment.

(2) **VAT Fraud**

The services provided by Saybolt Colombia with respect to CLSNV transactions did not qualify for any exemption to the VAT tax imposed on services by the Colombian government because the services were not used exclusively abroad and were not used by customers having business activities exclusively abroad. However, at the express direction of Core Lab's corporate accounting department in Colombia, a VAT exemption was falsely being claimed from the Colombian government.

C. **Villanueva's Repeated Complaints and Objections to the Tax and VAT Fraud**

On January 2, 2008, Villanueva wrote an email in which he raised concerns that the CLSNV transactions "represent[] an underestimation of revenue in our [Saybolt Colombia's] financial statements and it is also transferring taxable income out of Colombia." He warned Core Lab that he believed this to be a "fraud to the Colombia financial statements" which are filed with the Colombian tax authorities in conjunction with the income tax returns. Based on these concerns, Villanueva requested that the CLSNV portion of the revenue be recorded as Saybolt revenue in the company's accounting system (which is directly handled by Core Lab's accounting department in Houston).

Later that same day, Brigg Miller, Core Lab's Chief Accounting Officer in Houston, responded to Villanueva's email, confirming that Core Lab Accounting Policy 1201, issued by Core Lab's accounting department in Houston, required a portion of revenue be transferred to CLSNV for all transactions between Saybolt Colombia and a client with billing addresses outside Colombia, notwithstanding that all of the services were performed within Colombia.

Also on January 2, 2008, John Denson, Core Lab's then General Counsel in Houston, sent an email to Villanueva berating him for "wasting the company resources in attempting to address what [he] thought was a fraud." Denson made clear that any other issues involving this or any other suspected fraud should be dealt with by "call[ing]" Denson rather than leaving a paper trail of emails documenting the fraud.

On January 11, 2008, Core Lab emailed Villanueva a copy of a legal opinion it had obtained from the Colombian tax law firm of Gonzalez Villalba & Rincon ("Gonzalez Firm"). The Gonzalez Firm's opinion ("Gonzalez Opinion") alarmed Villanueva for two principal reasons. First, the Gonzalez Opinion was clearly based on erroneous facts that had been provided by Core Lab regarding CLSNV's role in the transactions. The opinion implicitly concluded that, if properly documented, the CLSNV transactions could justify excluding the CLSNV portion of the income from taxable income under Colombian tax law. However, this conclusion was expressly premised on incorrect factual assumptions regarding the role played by CLSNV in the transaction and the economic rationale of allocating 10% of the revenue to CLSNV. Specifically, the opinion was based on the false premise that CLSNV was a "business consultancy for the developing of marketing strategies, R & D, customer penetration, through which it makes available to Saybolt Colombia its know-how and expertise." Elsewhere in the opinion it refers to CLSNV "identifying business opportunities" for Saybolt Colombia and acting as a "business brokerage." Hence, the opinion was premised on an entirely fabricated set of facts provided by Core Lab regarding the actual role played by CLSNV and the economic rationale for the revenues allocated to CLSNV.

Second, even if the fictitious role of CLSNV which formed the premise of the Gonzalez Opinion had, in fact, accurately reflected CLSNV's role in the transactions, the Gonzalez Opinion raised an entirely separate tax concern that the value added tax ("VAT") exemption being claimed by Saybolt Colombia may not be applicable and that Colombian VAT should therefore have been paid on the CLSNV transaction.

Based on these concerns, Villanuava immediately emailed Denson (in Houston), requesting that a further opinion be obtained from the Gonzalez Firm which reflected the true nature of CLSNV's role in the transactions. However, the Core Lab accounting department in Houston promptly overrode Villanueva's request and the Gonzalez Firm was instructed by Core Lab not to provide any further advice on this matter. It is readily apparent that Core Lab issued this instruction precisely to avoid the issuance by the Gonzalez Firm of the opinion that would inevitably be issued once the true facts were disclosed, namely that the corporate directive from Houston regarding the transfer of revenue to CLSNV violated Colombian tax and VAT laws.

On February 28, 2008, Villanueva sent an email to Ivan Piedrahita, Core Lab's Regional Manager for Saybolt Latin America who is based in Houston and is employed by Core Lab's U.S. subsidiary, Saybolt LP.³ Villanueva reiterated his concerns that the CLSNV transaction violated Colombia's tax laws. In an email response the same day, Piedrahita assured Villanueva that Core Lab would obtain another legal opinion to address his concerns.

On March 11, 2008, after waiting more than six weeks for the tax opinion to be provided

³ See email contained in Villanueva Decl. Ex. M; Core Lab's 2007 Form 10-k, Exhibit 21.1, #130.

by Core Lab, Villanueva provided Piedrahita with his own detailed review of Colombian law relating to tax and VAT exemptions (Villanueva has a law degree in Colombia). In that email he provided a detailed discussion as to why the concerns raised by the Gonzalez Firm in its January opinion were valid and why Saybolt was not entitled to the tax and VAT exemptions it had been claiming with respect to the CLSNV transaction. He also expressly requested that Core Lab's Accounting Department in Houston eliminate the improper tax exemptions and recognize the appropriate revenue before March 31, 2008.

On April 7, 2008, not having received any response to his March 11 request and not having received from Core Lab any further legal opinion regarding the tax fraud issue, Villanueva sent Mark Elvig, Core Lab's new general counsel [in Houston] and Piedrahita [in Houston] an English translation of his March 11 email. In his April 7 email he also confirmed that "[s]o far, I have not received any response either from the Corporate [head office in Houston] or from the External consultant hired [by Core Lab]."

By separate email also dated April 7, 2008, Villanueva sent Elvig (in Houston) an English translation of an email he had previously sent to Denson (in Houston) and other company executives (in Houston) on February 21, 2008. In that email Villanueva again expressly raised the issue of billing through CLSNV and the retaliation to which he was subjected as a result of his complaints and reminded Elvig that Core Lab's legal department in Houston had failed to take any action to address this issue.

On April 14, 2008, certain accounting statements were due to be filed with the Colombian tax authorities. However, as Villanueva still had not received the outside legal opinion on the tax

issues that Core Lab had promised to provide, he emailed Padilla informing him that he could not approve and file Saybolt financial statements relating to VAT, revenues, accounts receivable and profits until he “receiv[ed] and assess[ed] the [legal opinion]” Core Lab had agreed to provide.

At 6:52 p.m. on April 16, 2008, the evening before the day Saybolt’s income tax returns were due to be filed in Colombia, Brig Miller (Core Lab’s Chief Accounting Officer in Houston) emailed Villanueva a legal opinion dated two days earlier that Core Lab had obtained from the Colombian law firm of Godoy & Hoyos (“Godoy Firm”). The timing of providing the Godoy Opinion to Villanueva hours before the due date of the tax returns, notwithstanding that it was issued two days earlier and had been requested by Villanueva beginning more than three months earlier, plainly demonstrates that Core Lab’s senior executives in Houston were trying to intimidate him into filing false tax returns merely in order to meet the filing deadline.

More importantly, however, the Godoy Opinion did not support Core Lab’s position in several fundamental respects. First, the Godoy Opinion simply failed to address one of the two tax issues about which Villanueva had been complaining for months, namely the issue of whether or not taxable income could legally be transferred from Saybolt to CLSNV. Indeed, the Godoy Opinion expressly stated that “[w]e have not evaluated if [Saybolt and CLSNV] are related parties within the scope of transfer pricing regulations in Colombia [because] this is not the object of the” legal opinion. Instead the Godoy Opinion by its own terms related solely to the VAT issue.

Second, the Godoy Opinion regarding the VAT issue was entirely undermined by its failure to set forth the facts upon which it was premised. Indeed, it was apparent that, as with the Gonzalez Opinion, Core Lab had deliberately provided a false version of CLSNV’s involvement in

order to obtain the legal opinion it desired.

Based on these deficiencies with the Godoy Opinion Villanueva was unable to certify and file the Saybolt tax returns. By email dated April 18, 2008, Villanueva so advised Miller [in Houston] and informed Miller of his intent to immediately hire a tax expert to properly review and provide advice on the transactions. However, Elvig (Core Lab's General Counsel in Houston) expressly prohibited Villanueva from obtaining an independent legal opinion, even though Villanueva went so far as to offer to pay for it personally.

In summary, Villanueva's efforts over the course of more than three months to raise and address with Core Lab's senior executives in Houston two issues of tax fraud that were being orchestrated and implemented directly from Core Lab's executive offices in Houston were met with stonewalling, delays and disingenuous legal opinions that avoided the legal issues and were deliberately premised on a false set of facts.

D. The Unlawful Retaliation Against Villanueva

Less than two weeks after Villanueva refused to sign and file the Colombian tax returns and supporting accounting documentation absent an independent legal opinion that was based on accurate facts, Core Lab's Houston executives summarily terminated his employment after more than 24 years with Saybolt (16 years of which I served as its CEO). The termination letter, dated April 29, 2008, was written and signed by Piedrahita (in Houston).⁴ Piedrahita's letter expressly

⁴ Core Lab has claimed: (1) that the termination decision was actually made by Jan Heinsbroek; and (2) that Heinsbroek is based in the Netherlands. However, the termination letter was signed by Piedrahita in Houston and all of the decisions relating to the tax issues were made by Piedrahita and the other Houston executives. Moreover, Core Lab's 2008 annual report

confirms that Villanueva's complaints about, and opposition to, the tax and VAT fraud were the primary reason for his termination. Specifically, Piedrahita included the following grounds for the termination:

- (A) Failure to file the Saybolt income tax returns (which fraudulently understated taxable Colombian income and falsely claimed a VAT exemption)
- (B) Failure to file the supporting Saybolt financial statements (which fraudulently understated taxable Colombian income and falsely claimed a VAT exemption)
- (C) Various complaints by Villanueva regarding the tax fraud he reasonably believed resulted from Core Lab Houston's directives. The complaints that are expressly referenced in the termination letter include his January 2, 2008 complaint about the fraud discussed above, an April 6, 2008 complaint to Elvig (in Houston) and various other communications with executives and directors of the company (in Houston) regarding his legitimate – and correct – belief that he was being directed by Houston to commit tax fraud for Saybolt.

Hence, it is indisputable that Core Lab's termination of Villanueva's employment was undertaken because of my complaints about, and investigation of, what he reasonably believed to be income tax and VAT fraud being perpetrated in Columbia at the express direction of Core Lab's executives in Houston using mail, email and telephones to accomplish the fraud.

(<http://www.corelab.com/corporate/investorrel>) demonstrate that Heinsbroek is a Vice President of Core Lab. Accordingly, a genuine factual issue exists regarding who made the decision and where it was made and that issue cannot be resolved prior to discovery and in a summary manner.

E. Core Lab Directly Controlled the Operations, Accounting and Personnel Actions of Saybolt From Houston, Texas

As discussed at length above, both the fraudulent scheme to evade taxes and the retaliation against Villanueva were directly undertaken and controlled by Core Lab's executives in Houston, Texas.

Core Lab's Houston executives and staff also directly controlled all aspects of Saybolt's business, employment, finances and operations:

(a) Core Lab Houston had to approve all hiring and firing of employees at Saybolt. For example, Villanueva was required to seek permission from Piedrahita (Core Lab Houston) to hire an additional employee to cover vacation periods.

(b) All sales contracts entered into between Saybolt and its international customers had to be signed by Core Lab Houston. Moreover, those contracts specifically identify Saybolt as "a Division of" Core Lab.

(c) Core Lab Houston had to approve any sale of assets by Saybolt. For example, Villanueva was required to seek permission from Piedrahita (Core Lab Houston) to sell a company vehicle.

(d) Core lab controlled the check books for all Saybolt bank accounts (some in Colombia and some in Houston). Moreover, for certain Saybolt bank accounts the only two authorized signatories on the accounts were R. L. Bergmark, Core Lab's Treasurer, and C. Brigg Miller, Core Lab's Chief Accounting Officer, both of whom were in Houston.

(e) All of Saybolt's accounting was performed by, and controlled by, Core Lab's

employees and officers in Houston. Core Lab Houston also issued detailed accounting policies mandating the manner in which its subsidiaries accounted for transactions and conducted routine internal audits to ensure Saybolt's compliance with these policies.

(f) Core Lab Houston also mandated that all Saybolt employees receive training in, and abide by, Core Lab's corporate ethics code and took affirmative steps to provide mandatory training regarding same.

ARGUMENT

POINT I

BECAUSE THE FRAUDULENT SCHEME AND THE RETALIATION WERE PERPETRATED BY U.S. EXECUTIVES OF CORE LAB WITHIN THE U.S. THIS CASE DOES NOT INVOLVE THE EXTRATERRITORIAL APPLICATION OF THE SARBANES-OXLEY ACT

The anti-retaliation provisions of the Sarbanes-Oxley Act are set forth in 18 U.S.C. §

1514A:

(a) 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)), 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—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the

employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

* * *

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

The language of the statute therefore does not restrict its application to employees who are located in the United States. Rather, the statute's jurisdictional nexus is contained in the requirement that the respondent be subject to the provisions of the Securities Exchange Act of 1934, namely by offering securities within the United States. It is undisputed that Core Lab is such a company and, as set forth below, Saybolt Colombia meets this Board's test for being the "agent" of Core Lab.

A. **Carnero is Inapposite Because Both the Underlying Fraud and the Retaliation in That Case Occurred Overseas**

In his decision dismissing this case, the ALJ relied upon the First Circuit's decision in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). However, the *Carnero* case is distinguishable from the instant case in a fundamental respect. In *Carnero* both the misconduct complained of and the retaliation occurred overseas. Here, however, both the fraudulent scheme and the retaliation were undertaken by U.S. executives and managers of Core Lab employed and located within the territory of the United States. Hence, this case does not present an issue of extraterritorial application of the Sarbanes-Oxley Act and the holding of *Carnero* is therefore

inapplicable.

The plaintiff in *Carnero* was an Argentinian citizen who was hired in Brazil to work for the Brazilian and Argentinian subsidiaries of the defendant, a United States company. The plaintiff alleged that he was fired by the subsidiaries in retaliation for complaining to officials employed overseas by the foreign subsidiaries about accounting misconduct carried out overseas by the foreign subsidiaries. In other words, the decision-making alleged by the plaintiff in that case – both for the underlying misconduct and the retaliation – occurred overseas by the foreign entity and not by U.S. officials located here in the U.S. The issue before the First Circuit, therefore, was “whether the whistleblower provision of the [Sarbanes Oxley] Act has extraterritorial effect, so that a foreign employee . . . who complains of misconduct abroad by overseas subsidiaries may bring suit under the whistleblower provision of Sarbanes-Oxley against the listed United States parent company.” 433 F.3d at 5 (emphasis added)

The First Circuit began its analysis with the well-established principle that “[w]here, as here, a statute is silent on its extraterritorial reach, and no contrary congressional intent clearly appears, there is generally a presumption against its extraterritorial application.” *Id.* The court noted that in *E.E.O.C. v. Arabian Am. Oil Co.*, 449 U.S. 244, 248 (1991) the Supreme Court had reiterated “[the] longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” The *Carnero* court then examined both the text and the legislative history of the Sarbanes-Oxley Act and concluded that the presumption against extraterritoriality was not rebutted with respect to the civil whistleblower protection provision at issue.

The *Carnero* court emphasized, however, that “[w]e decide this case necessarily on its own facts [and] [o]ne can imagine many other fact patterns that may or may not be covered by our reasoning in today's decision.” 433 F3d at 18. In other words, not all cases in which an employee is physically located abroad involve the prohibited extraterritorial application of the statute.

In *Carnero* both the plaintiff and the company officials who allegedly retaliated were located overseas, *i.e.* outside the territorial jurisdiction of the United States, and the retaliating officials were employed abroad by a foreign subsidiary. Here, in direct contrast, the retaliation against Villanueva was undertaken within the territorial jurisdiction of the United States by executives located in the United States and employed directly by the publicly-traded parent, Core Lab, in its headquarters in Houston, Texas. Hence, Villanueva simply seeks to enforce the anti-retaliation prohibition of Sarbanes Oxley with respect to conduct engaged in by U.S. employees and officers of Core Lab who work within the territory of the United States. It is therefore entirely irrelevant that Villanueva himself was working in Colombia because the conduct sought to be regulated by the U.S. statute, namely the fraudulent scheme and the retaliation against Villanueva, occurred within the United States. In other words, the adjudication of this case simply does not involve the exercise of extraterritorial jurisdiction.

B This case is Directly Analogous to the O’Mahony v. Accenture Case

The recent decision of the United States District Court for the Southern District of New York in *O’Mahony v. Accenture*, 537 F.Supp.2d 506 (S.D.N.Y. 2008), confirms that where, as here, a foreign employee located overseas is retaliated against by U.S. executives of a publicly-

traded parent company because of his complaints about foreign tax fraud that is perpetrated at the direction of the U.S. executives, the foreign employee is entitled to Sarbanes-Oxley whistleblower protection.

O'Mahony, an Irish citizen, was originally a partner and employee of Accenture LLP, the U.S. subsidiary of the Bermuda-based Accenture Ltd. which is listed on the New York Stock Exchange. However, at the time of the alleged retaliation by Accenture O'Mahony had become an employee of Accenture's French subsidiary, Accenture SAS.

In September 1992 Accenture sent O'Mahony on an expatriate assignment to France. She remained in France as an employee of Accenture LLP for the next 12 years. Under the terms of a 1987 treaty between the United States and France, a U.S. employer that obtains a "certificate of coverage" for an employee transferred to France may continue paying social security contributions for that employee in the United States instead of France for up to five years. However, after the first five years the employer must begin paying French social security contributions which can amount to an additional one-third or more of an employee's total compensation.

Accenture obtained a certificate of coverage for the first five years of O'Mahony's employment in France but thereafter failed to begin paying French social security contributions. O'Mahony alleged in her lawsuit that she complained internally to Accenture's global financial controller in New York but was told that Accenture's global tax partner in California had decided that Accenture's 'interests' would be better served by not making any of the French social security contributions and continuing to affirmatively conceal from the French authorities the fact that

O'Mahony had been working in France since 1992. O'Mahony alleged that, after informing Accenture executives in the U.S. that she would not be a party to "tax fraud", Accenture's Global Business Operations Director in New York retaliated against her in December 2004 by demoting her and substantially reducing her compensation. At the time of the demotion she was employed by Accenture's French subsidiary, not the U.S. subsidiary.

Relying primarily on *Carnero*, Accenture moved to dismiss O'Mahony's claims on the basis that she was employed overseas and that the court therefore lacked subject matter jurisdiction. In denying the motion, the court distinguished *Carnero* on three factual grounds and therefore determined that its holding was not applicable to O'Mahony's case. The first ground was that, while the plaintiff in *Carnero* was employed and compensated by foreign subsidiaries of a United States corporation, O'Mahony was until 2004 employed and compensated by a United States subsidiary of a foreign corporation. 537 F.Supp.2d at 511. However, this factor was obviously not the court's principle ground for distinguishing *Carnero*, because the court noted that her employment was transferred to the French subsidiary on September 1, 2004, prior to the time that she complained to Accenture's global CFO that she believed Accenture was committing "tax fraud" and prior to the decision of U.S. executives to demote her which was the retaliation at issue in that case. 537 F.Supp.2d at 507-508.

Moreover, while Villanueva was not directly employed by Core Lab, the parent company that is headquartered in the United States, Saybolt – the Colombian subsidiary of Core Lab – functioned as a single entity with Core Lab and, indeed, was described in legal documents as being a "division" of Core Lab. As set forth in detail in Villanueva's declaration submitted to the

ALJ in this case,, Core Lab's Houston executives and staff directly controlled all aspects of Saybolt's business, finances and operations. For example: (a) Core Lab Houston had to approve all hiring and firing of employees at Saybolt and all compensation and pay raises]; (b) all sales contracts entered into between Saybolt and its international customers had to be signed by Core Lab Houston; (c) Core Lab Houston had to approve the sale of all Saybolt assets; (d) all Saybolt bank accounts were controlled from Houston and the only two permitted signatories on the accounts were Core Lab's Treasurer and Core Lab's Chief Accounting Officer, both of whom were in Houston; (e) all of Saybolt's accounting was performed and controlled by Core Lab's employees and officers in Houston and Core Lab issued detailed accounting policies mandating the manner in which Sayboly accounted for transactions; and (f) Core Lab Houston also mandated that all Saybolt employees receive training in, and abide by, Core Lab's corporate ethics code and took affirmative steps to provide mandatory training regarding same.

As this Board has previously held, "[w]hether a particular subsidiary ... is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to the general common law of agency." *Klopfenstein v. PCC Flow Technologies*, ARB 04-149, 2004 SOX-11 (ARB May 31, 2006) *10. In *Klopfenstein*, this Board relied on the fact that the parent company's officers and employees were involved in both the underlying fraud and the challenged decision to terminate the Complainant's employment. Here, the underlying fraud was orchestrated and perpetrated by the parent, Core Lab, which also had complete control over Saybolt's operations, accounting, hiring and firing. Moreover, it is undisputed that the decision to terminate Villanueva was made and implemented by Core Lab and not by Saybolt. Accordingly,

this distinction from *carnero* relied upon by the O'Mahony court applies equally in the instant case.

The second ground used by the *O'Mahony* court in distinguishing *Carnero* was that both the underlying fraud and the retaliation was undertaken by U.S. executives of the company that were located in the United States:

[I]n *Carnero*, the alleged wrongful conduct that gave rise to the claim occurred in Latin America [whereas] O'Mahony alleges that the conduct related to the alleged fraud involved employees of Defendants located in the United States and occurred in the United States. Specifically, Accenture LLP, perpetrated the alleged fraud by deciding in the United States not to pay French social security contributions owed on O'Mahony's behalf pursuant to the Social Security Agreement and then acting upon that decision in the United States by not making the payments in question. In addition, O'Mahony alleges the retaliation against her was undertaken by executives located in the United States, who were employed by Accenture LLP.

537 F.Supp.2d at 511 (emphasis added). This factual distinction from *Carnero* formed the core of the *O'Mahony* court's holding that it was not applying SOX extraterritorially.

Here, as in *O'Mahony*, Villanueva alleges that the decision to evade Colombian taxes was made by Core Lab's senior U.S. executives in Houston who also implemented the decision by controlling all aspects of Saybolt Colombia's accounting. In fact, Villanueva was prohibited by Brigg Miller, Core lab's Chief Accounting Officer in Houston, from making any changes to this practice, notwithstanding that Villanueva was Saybolt's CEO. In addition, the evidence demonstrates that the termination decision was made by these same executives and carried out by Core Lab's Houston executive, Ivan Piedrahita, who was the author of the termination letter.

The third ground used by the *O'Mahony* court in distinguishing *Carnero* was that, whereas in *Carnero* “the plaintiff brought an action against the United States parent for the alleged misconduct abroad by its Latin American subsidiary ... O'Mahony brings an action against the foreign parent and its United States subsidiary for the alleged misconduct of the United States subsidiary in the United States.” *Id.* (emphasis added) Here, as in *O'Mahony*, this proceeding is brought against the United States entity for the misconduct of that entity in the United States, not for the misconduct abroad of the foreign affiliate.

Having distinguished the *Carnero* decision, Judge Marrero proceeded to address the question of whether or not application of SOX in O'Mahony's case would nevertheless be precluded by the presumption against extraterritorial application of U.S. laws. Applying the “conduct test” developed by federal courts to determine whether application of a law to transactions beyond United States borders is permissible, Judge Marrero evaluated a number of factors in determining that SOX whistleblower protection could be afforded to O'Mahony. These factors, which must be considered “in conjunction” with each other, included the following.

- The “essential core” or “center of gravity” of the wrongdoing. Judge Marrero found that O'Mahony alleged that both the conduct giving rise to the fraud (the fraudulent scheme to evade French taxes) and the decision to retaliate against her for reporting the fraud occurred in the United States. Here, as in *O'Mahony*, Villanueva alleges that the fraudulent scheme to evade Colombian taxes was devised and controlled from the United States by United States executives of Core Lab, including its General Counsel and Chief Accounting Officer, and that the decision to terminate him was made in the United States and implemented by U.S. executives.
- The timeline of when and where the relevant domestic and foreign acts occurred. Judge Marrero found that the decision to reduce O'Mahony's level of responsibility occurred in very close proximity to her allegations of fraud against by the U.S.

Accenture entity, indicating that the U.S. Accenture entity may have been the “driving force” behind the alleged retaliation against O’Mahony. Here, the evidence that U.S. Core Lab executives were the driving force behind the retaliation is even stronger than in *O’Mahony*. Not only was the decision to fire Villanueva made within a matter of days of his refusal to implement the fraudulent scheme, the termination letter itself was authored in Houston by Core Lab’s Regional Manager for Latin America who is based in Houston.

- The materiality and substantiality of the domestic conduct relative to the fraudulent transaction and the causal connection. Judge Marrero found that O’Mahony alleged that the conduct giving rise to the fraud and the retaliation against her for reporting the fraud occurred in the United States by executives of Accenture LLP. Here, as in *O’Mahony*, Villanueva alleges (and his declaration demonstrates) that the conduct giving rise to the fraud and the retaliation against him for opposing the fraud occurred in the United States by U.S. executives of Core Lab.
- Whether extending jurisdiction in the particular case is reasonable and in accordance with Congressional policy. Here, again, Judge Marrero emphasized that the locale of the “misconduct” was in the U.S., notwithstanding that the taxes were not paid in France, and that the plain text of the statute indicates that it is meant to protect employees from retaliation for reporting misconduct. And again, the same rationale is applicable to this case..

Accordingly, Judge Marrero concluded that “the Court has subject matter jurisdiction over Accenture LLP because the alleged wrongful conduct and other material acts occurred in the United States by persons located in the United States, and hence the exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law.” Precisely the same situation exists here in Villanueva’s case and, accordingly, the Department of Labor has subject matter jurisdiction over the case.

At least one ALJ has also held that, even where the complainant is employed abroad, the Department of Labor had jurisdiction to enforce the anti-retaliation provision of Sarbanes-Oxley where the complaints about fraud are directed to United States officials and the retaliatory

decision is made from within the United States. *Penesso v. LCC International, Inc.*, 2005 SOX 00016 (ALJ March 4, 2005). In *Penesso*, the complainant, who was employed in Italy by the Italian subsidiary of an American corporation, was retaliated against after he complained to corporate officers in the United States about improper financial dealings which had taken place in Italy. In holding that the Department of Labor had jurisdiction under § 1514A, the ALJ distinguished the *Carnero* case because, *inter alia*, Penesso had directly communicated his concerns to corporate officials in the United States and “at least one of the alleged retaliatory actions – the decision not to issue bonuses in 2003 – took place in the United States.” *Id.* at p. 3.

Notably, in the *Penesso* case the United States Department of Labor – which is charged under the Sarbanes-Oxley Act with investigating civil whistleblower complaints – initially dismissed the complaint on the grounds that the statute could not be applied extraterritorially but then argued to the ALJ that its own initial decision had been wrong. Specifically, in a letter to the ALJ dated December 20, 2004, the Department of Labor argued that “[b]ecause Mr. Penesso alleges that the adverse [action] taken against him by Respondent LCC International, Inc. occurred in the United States, it is OSHA’s position that the presumption against extraterritoriality is not implicated in this case.” (A copy of the letter is attached hereto as Exhibit

A)

C. **Courts Have Also Repeatedly Held That Enforcement of Other United States Statutes with Respect to Actions Carried out Within the Territory of the United States Does Not Implicate the Presumption Against Extraterritorial Jurisdiction**

Notably, courts have also repeatedly held that enforcement of other United States statutes with respect to actions carried out within the territory of the United States does not implicate the

presumption against extraterritorial jurisdiction relied upon in *Carnero*. For example, in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) the Eleventh Circuit reversed a decision of the district court which had refused to extend the provisions of the Americans with Disabilities Act to a passenger on a foreign-flag cruise ship in United States waters. As the Eleventh Circuit noted in its opinion, “[t]he district court based its determination about foreign-flag cruise ships on the presumption against extraterritoriality set out in *EEOC v. Arabian Am. Oil Co.*” *Id.* at 1242. However, the Eleventh Circuit held that the case did not involve the extraterritorial application of the statute because the conduct occurred within U.S. borders:

By definition, an extraterritorial application of a statute involves the regulation of conduct *beyond U.S. borders*. Accordingly, a foreign-flag ship sailing in United States waters is not extraterritorial. The presumption against extraterritoriality, therefore, is inapposite to this case.

Id. (emphasis in original)

Similarly, in *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), the D.C. Circuit held that the National Environmental Policy Act, which requires all United States federal agencies to prepare an environmental impact statement before making a decision that could significantly affect the quality of the human environment, applied to a decision by the National Science Foundation (“NSF”) to incinerate waste in Antarctica. While the decision to incinerate was made by the NSF within the United States, the effects of the decision on the environment occurred entirely outside the United States, *i.e.*, in Antarctica. The D.C. Circuit began its analysis as did the *Carnero* court by noting that “the Supreme Court recently reaffirmed the general presumption against the extraterritorial application of statutes in *Equal’ Employment*

Opportunity Commission v. Arabian American Oil Co.” However, the D.C. Circuit held that “the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States.” *Id.* The court explained that:

By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.

986 F.2d at 531 (emphasis added); *See also In re Florsheim Group Inc.*, 336 B.R. 126, 130 (N.D. Ill. 2005) (“The first question a court must address when considering whether a U.S. law applies to a transaction with international components is whether application of the statute presents an extraterritoriality problem at all. That is, a court must determine whether the statute seeks to regulate conduct in the United States or in another sovereign country.”)

Likewise, it is well established that, although the U.S. Copyright Act does not apply extraterritorially, where there is a predicate act of infringement within the United States the plaintiff can nevertheless recover damages for distribution of the infringing materials abroad. *Los Angeles News Service v. Reuters Television International Limited*, 149 F.3d 987 (9th Cir. 1998).

Accordingly, because enforcement of the Sarbanes-Oxley anti-retaliation provision in this case does not require extraterritorial application of the statute, it is irrelevant that Villanueva was employed overseas. Rather, the determinative factor for this Court to exercise jurisdiction is that the conduct at issue occurred within the territory of the United States. Indeed, in view of the Sarbanes-Oxley Act’s application to multinational companies that have securities listed on U.S.

exchanges, there exists no reason to presume that Congress intended the statute's whistle blower protections to apply only to employees working within the United States provided that the retaliation itself was orchestrated from within the United States. In the context of the global economy in which many publicly-traded U.S. companies now operate, an employee of a multi-national company anywhere in the world may possess information concerning fraud within a company whose securities are traded on a United States exchange. Nothing in the language of the statute limits the law's protections to U.S.-based employees, and to read such a restriction into the language of the statute where the misconduct and retaliation were orchestrated within the United States would be contrary to the statute's central legislative purpose.

The absence of any statutory language limiting coverage of the Sarbanes Oxley whistleblower protection to those employees that are physically located in the United States makes that statute's whistleblower protection similar to the whistleblower provision of the False Claims Act, 31 U.S.C. § 3730(h) ("FCA"). In *Shekoyan v. Sibley International Corp.*, 217 F.Supp 2d 59 (D. D.C. 2002), the plaintiff, whose primary workstation was in the Republic of Georgia, reported misappropriation of U.S. government funds to management officials at his employer's headquarters in Washington, D.C. In finding that the FCA anti-retaliation protection applied to the plaintiff, notwithstanding his employment abroad, the court relied upon the fact that:

[T]he plaintiff's allegations, if proven true, demonstrate that the crux of the inappropriate conduct occurred within the United States. As the nature of the protection offered by the whistleblower provision of the FCA is to remedy retaliation for a false claims disclosure, it is noteworthy that the plaintiff allegedly notified [defendant's] officials in Washington, D.C. of the fraudulent misappropriation of United States government funds by its employees in the Republic of Georgia, the officials informed him to "keep it quiet", and he was subsequently terminated when his contract with the defendant was not renewed.

217 F.Supp.2d at 71-72. Notably, the court distinguished the plaintiff's FCA whistleblower claim from a Title VII claim that the plaintiff had also asserted because the Title VII claim related entirely to conduct abroad:

This conduct regarding the plaintiff's FCA claim is distinguishable from the conduct complained about in the plaintiff's Title VII claim because the genesis of the FCA whistleblower claim is the disclosure of the misappropriation of government funds and the subsequent retaliation for such disclosure, conduct that occurred within the United States, whereas the plaintiff's Title VII claim involves discrimination at the workplace, conduct that occurred abroad.

Id. at 72.

As in *Shekoyan*, the "genesis" of Villanueva's claims in this case -- the orchestration of the underlying fraud about which he complained and the retaliation against him -- took place here in the United States. Accordingly, the whistleblower protections of the Sarbanes Oxley statute, like those of the FCA in *Shekoyan*, provide protection for Villanueva's complaints, notwithstanding that his actual place of employment was abroad.

CONCLUSION

For all of the forgoing reasons, Complainant submits that the Department of Labor has jurisdiction over his claim in this proceeding.

Dated: New York, New York
 August 6, 2009

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CERTIFICATE OF SERVICE

I hereby certify that, on this August 6, 2009, a copy of the within Complainant's Initial Brief, was sent via Federal Express, Overnight Delivery, to counsel for the respondents as follows:

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