ADMINISTRATIVE REVIEW BOARD

UNITED STATES DEPARTMENT OF LABOR

In the Matter of:		
KATHY J. SYLVESTER and THERESA NEUSCHAFER,		ARB CASE NO. 07-123
Complainants,		ALJ CASE NOS. 2007-SOX-039 2007-SOX-042
v.		
PAREXEL INTERNATIONAL LLC		
Respondent.		
BEFORE: THE ADMINISTRATIVE REVIEW BOARD		

BRIEF OF COMPLAINANTS KATHY J. SYLVESTER AND THERESA NEUSCHAFER

Table of Contents Page

Table of Authorities

Statutes:

Rules

Regulations:

Rulemaking:

Congressional Record:

STATEMENT OF ISSUES

Whether the pleading requirements of the Federal Rules of Civil Procedure particularly Rules 8(a), 9(b), 12(b) and 15(a), and the interpretive case law apply to administrative whistleblowing complaints filed with the Department of Labor pursuant to Section 806 of SOX, 18 U.S.C.A. §1514A?

Whether 29 C.F.R. §18.40 provides the exclusive means available to the parties for seeking pre-hearing dismissal by an administrative law judge (ALJ) of SOX claims?

To what extent, if at all, is the compliant filed with OSHA pursuant to 29 C.F.R. §1980.103 relevant to subsequent proceedings before an ALJ upon the filing of a hearing request?

What must a claimant establish, whether at the pre-hearing stage or at hearing on the merits, to sustain a claim of having engaged in protected activity under Section 806 of SOX? In answering this question, please also address the following:

Whether the claimant must establish that the protected activity definitively and specifically relates to a violation of one or more of the laws listed in Section 806 of SOX (i.e. 18 U.S.C. Sections 1341, 1343, 1344, or 1348, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders)?

What must a complainant show in order to meet the requirement that the complainant reasonably believe that the employer's conduct at issue violated one or more of the laws listed in Section 806 of SOX? Under the "subjective" test? Under the "objective" test?

Whether the claimant must establish that the asserted violation of the laws listed in Section 806 of SOX involves or relates to fraud against shareholders?

Whether the claimant must establish the various elements of fraud (e.g. materiality of the alleged misrepresentation or concealment, intentional concealment or misrepresentation, etc.)?

Notwithstanding that many of the laws listed in sections 806 of SOX contain materiality requirements, should Section 806 be interpreted to independently impose a materiality requirement on communication and/or actions that a claimant contends are protected activity?

STATEMENT OF THE CASE[1]

Statement of Facts and Procedural History:

Complainant Kathy Sylvester worked as a Case Report Forms Department Manager. Complainant Theresa Neuschafer worked as a Clinical Research Nurse. Neither graduated college. Both were specifically trained by Parexel, and it was reinforced by their management, that the false recording of clinical data was a fraud in violation of Food and Drug Administration (FDA) Good Clinical Practice (GCP), that Sarbanes-Oxley Act (SOX) involved shareholder fraud in violation of SOX, and that this conduct was also a crime. They reported the false recording of the clinical data due to their SOX training, related management instructions, company SOX policy and related documents. These were credible complaints. Rather than correct the fraud in this clinical study, Parexel elected to cover up the scope of this false data and then target the Complainants for termination.

The details of Ms. Sylvester's and Ms. Neuschafer's complaints are set forth in the attachments to Complainants' Brief In Support Of Their Appeal Of The Decision And Order Dismissing Complaints ("Complainants' Brief"). Ms. Sylvester pled in detail the false clinical data incidents. Ms. Neuschafer pled similarly; she discovered this fraudulent data and reported the false data to three members of management, Kathy Sylvester, Miempie Fourie, and Elizabeth Jones. Attachment to Complainants' Brief; Complaint of Theresa Neuschafer (hereinafter "Neuschafer Complaint") at para. 15 – 16, 40, 53-54.

[1] The Complainants invited the Briefs of Amici Curiae National Whistleblowers Center and Douglas Evans in this proceeding.

The Occupational Safety and Health Administration investigated the complaints. At no time during the investigation did the DOL raise any issue concerning their sufficiency. The Complainants were not satisfied with the quality or outcome of the investigation and elected to seek relief before an Administrative Law Judge under SOX.

The Respondent filed a Motion to Dismiss which was opposed by Complainants. Ms. Sylvester and Ms. Neuschafer filed affidavits in Complainant's Consolidated Reply To Respondent's Motion To Dismiss Their Respective Complaints ("Reply to Motion to Dismiss"). These affidavits alleged detailed facts about training on SOX and other facts supporting their pleadings. Reply to Motion to Dismiss Attachments A and C. These affidavits were supported by attached documents. One of the documents is PowerPoint's from training supporting the claim of training where recording of false data was discussed as a violation of SOX and also fraud. *Id.* at Attachment A ("Neuschafer Affidavit") Exhibit ("Ex.") 1. In another attached document Parexel discusses "Accuracy of Books and Records and Public Reports". The Complainants were advised that the Company was legally responsible for the accuracy of data and records that support what is submitted to the Securities and Exchange Commission and that "You are responsible for the accuracy of your records and reports." *Id.* at Ex. 3. Prior to reporting the fraudulent recording of the clinical data the Complainants were advised by their leadership that if one was caught doing this it was fraud and that they could be fined or imprisoned. *Id.* at Ex. 4. In a document entitled "Your Support Needed To Comply With The Sarbanes-Oxley Act", dated April 5, 2005, the Chairman and Chief Executive Officer and the President and Chief Operating Officer advised Complainants "Sarbanes-Oxley Compliance is not just a financial exercise, but extends to controls around any activity in the Company that effects, or potentially effect, the financial statements." *Id.* at Ex. 2.

Parexel stated in its Annual Report that failure to comply with Good Clinical Practices (GCP) mandated by the Food and Drug Administration (FDA) could injure shareholders. In the Annual Report Parexel advises its shareholders of risks under a large heading entitled "If The Company Fails To Comply With Existing Regulations, Its Reputation and Operation Results Would Be Harmed". *Id.* at Ex. 6, p. 16. Shareholders, including Complainants who owned shares, are advised that if the regulations concerning the conduct of clinical trials are not followed, then Parexel could face actions that adversely affect "the Company's reputation, its prospect for future work, and its operating results". The great cost and financial injury of repeat research and redo trials is also discussed.[2] *Id.*

The Complainants were denied a hearing wherein they could have proved their case. Instead, the Complainants are before the ARB without a developed record. Adding insult to injury, the ALJ below failed to make any record, raising serious and to date unanswered questions concerning what process, if any, was afforded to the Complainants.

The ALJ Decision and Order Dismissing Complaints

The Decision and Order Dismissing Complaints ("ALJ Decision") found that there was no subject matter jurisdiction.

Factual findings in the ALJ Decision included:

- A key duty of Sylvester as Case Report Forms Manager was to ensure the reporting of accurate research data and Good Clinical Practice (GCP) to the FDA, a responsibility regulated by the U.S. Code of Federal Regulations (CFR)." ("Decision and Order Dismissing Complaints" ("ALJ Decision") at para. 4.
- Sylvester reported to her management the recording of false clinical data in violation of the CFR. *Id.* at para. 8.

[2] Complainants retained an expert witness from the Johns Hopkins School of Medicine to address this exposure to research and redo requirements as well as other issues related to violation of GCP.

- Sylvester was retaliated against due to this reporting, and that when Sylvester reported this retaliation, her management refused to take action. Id. at para. 10. Soon thereafter Sylvester was terminated because of a "corporate decision" that she was not a "team player." *Id.* at para. 13.[3]

- Neuschafer reported this recording of false clinical data to her supervisor. *Id.* at para 15.

- Neuschafer also reported this conduct to Sylvester who then reported the incident pursuant to her job duties. *Id.*

The ALJ Decision applied the following legal standard for Section 806 protected activity:

> Protected activity under Section 806 of SOX may be deemed to have three essential elements 1) the report or action must involve a purposed of a federal law or SEC rule or regulation relating to fraud against shareholders; 2) the complainant's belief about the purported violation ***must be objectively reasonable*** (emphasis added); 3) and the complainant must communicate her concern to either her employer, the federal government, or a member of Congress. *Id.* at p. 9.

Regarding the sufficiency of the pleading the ALJ Decision held that:

> Violation of GCP could constitute a violation of Federal law including the CFR, 18 U.S.C. §1961 (pattern of racketeering activity under the Racketeering and Influenced Corrupt Organizations Act), 18 U.S.C. 1342 (mail fraud), 18 U.S.C. §1343 (wire fraud), 18 U.S.C. §1344 (financial institution fraud) or other federal or state law. However, **until enforcement action is taken**, such allegations are **speculative** and are deemed **insufficiently material** to Respondent's financial picture to form a basis for securities fraud or to affect shareholders investment decisions. (*emphasis added*) *Id.* at footnote 5.

The ALJ Decision also found that because the Complainants were employed in the nursing profession they were not entitled to any inference that they were concerned with SOX fraud. *Id.* at p. 11. Rather, the Complainants' lack of financial sophistication was cynically applied to find that they could not reasonably believe there was a violation of SOX under this "objective test".

The ALJ Decision also relied on Fourth Circuit *dicta* to find that the Complainants' did not engage in protected activity because they were required to alleged conduct that "at its

[3] Had Complainants been allowed to litigate this claim they would have established that Parexel seldom terminated employees and that the reasons provided for their respective terminations were pretextual.

core, involves shareholder fraud" *Id.* at p. 8 *citing* Livingston v. Wyeth 520 F.3d 344 (4th 2008).[4]

The ALJ Decision failed to weigh the affidavits and supporting documents that indicate that Complainant's Parexel management told them that it considered the breach of GCP to be a crime and that Complainant's Parexel management emailed that the recording of false clinical data of the exact type later reported by Complainants was a crime for which one could go to jail. The ALJ Decision ignored the Parexel document that linked this recordkeeping and data to its reporting duties under the SEC. The ALJ Decision also ignored that Parexel defined SOX compliance as "not just a financial exercise" or that SOX "extends to controls around any activity in the Company that effects, or potentially effect, the financial statements." Most important the ALJ Decision ignored Parexel's own SEC filings and report to its shareholders that fully explain how violation of GCP can impact operating results, damage the company's reputation, damage the company's future and cause financial damage from a research and redo requirement.

Petition for Review and Subsequent Proceedings

Complainants' Petition for Review was timely filed and accepted by the ARB. Complaints' Brief was filed on November 7, 2008. On July 17, 2009 the ARB issued an order instructing the ALJ to reconstruct the record in this case. As of January 28, 2010 the ALJ had failed to do so. On that date the ARB requested that the parties provide any documents to develop said record. On February 5, 2010 Complaints sent to the ARB a Supplement To Petition For Review Of The Dismissal Of Their Sarbanes-Oxley Complaint,

[4] This language relied on by the ALJ Decision was relegated to *dicta* by the Fourth Circuit in Welch v. Chao. Welch v. Chao, 536 F.3d 269 at n. 3 (4th Cir. 2008) *cert. denied* ___ U.S. ___, 129 S. Ct. 1985, 173 L. Ed. 2d 1084 (2009).

Complainant's Consolidated Reply to Respondent's Motion to Dismiss Their Respective Complaints, and the Entry of Appearance of Counsel Dieck. On November 12, 2010, the ARB issued a Notice of Oral Argument and Invitation to File Briefs.

ARGUMENT

Summary of Argument

The Federal Rules of Civil Procedure ("Fed. R. Civ. P." or "Federal Rules") do not apply to Section 806 administrative proceedings. The Code of Federal Regulations (CFR), SOX Section 806 casehandling procedures, Department of Labor (DOL) Rulemaking history, and case law make it clear that the Federal Rules of Civil Procedure are not applicable to the administrative procedures under Section 806 of SOX. Assuming, *arguendo*, that they did apply, the Complaints satisfied the heightened pleadings standards under recent case law.

The exclusive prescribed method for pre-hearing disposition of Complainants' case is the summary judgment process set forth in 29 C.F.R. §18.40. Complainants were denied this factfinding process and a record for review.

The ARB must honor the language of SOX and focus on whether or not Complainants possessed a "reasonable belief" of a violation of SOX. The "reasonable belief" statutory phrase has been broadly interpreted under a range of remedial statutes to protect complainants who act in good faith, whether or not their complaint has merit.

The objective and subjective tests found in the present SOX case law demand a rigorous, case-by-case, fact driven analysis as to whether each complainant's conduct was reasonable. No taxonomy or bright line test can replace this fact intensive, particularized analysis. Such detailed analysis, relying on a fully developed record, was denied in this case. Had it been conducted at hearing as contemplated by DOL regulations, the Complainants

would have established that they possessed the requisite reasonable belief and acted reasonable persons in conformance with Section 806.

The legislative history further underscores the intent of Congress to ensure that this whistleblower provision is broadly interpreted to the conduct engaged in by Complainants. There is no requirement that complainants establish the various elements of fraud or materiality to possess a reasonable belief.

The use of "definitively and specifically" to limit Section 806 protection is not supported by the language of that statute. Rather, this language, not found in the statute, is used to swallow the whole of the expressly stated "reasonably believes" statutory language and its related legislative intent.

I. Assuming *Arguendo* That The Federal Rules of Civil Procedure and Case Law Are Relevant to SOX Complaints The Complainants Satisfied These Standards

Assuming, *arguendo*, that the Complainants were required to satisfy the pleading standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), it is clear that they did so. The Iqbal and Twombly decisions dictate that the ALJ Decision be reversed. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2008); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) A reading of the Sylvester and Neuschafer complaints reveals a factually detailed description of the events leading to their termination. This is supplement by Complainants Reply to Motion to Dismiss. Iqbal lays out the required pleading standard in federal district court litigation. According to Iqbal,

> (U)nder Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' As the Court held in Twombly, the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

Ashcroft v. Iqbal at 1949 (citations omitted)

To survive a motion to dismiss, a complaint need not contain "detailed factual allegations." Bell Atl. Corp. v. Twombly at 1964 All that is required is "only enough facts to state a claim to relief that is plausible on its face," *Id.* at 1974.

In considering a Motion to Dismiss a SOX whistleblower complaint, a Court is required to "take all well-pleaded facts contained in the Complaints as true, and ..... draw all reasonable inferences in the Plaintiffs' favor. These facts 'may be derived from the complaint, from documents annexed to or fairly incorporated in it, and from matters susceptible to judicial notice.'" Lawson v. FMR LLC, 2010 U.S. Dist. LEXIS 31258, *3 (March 31, 2010 D. Mass.) (citation omitted). This case was decided after Iqbal was settled law. In Lawson the SOX whistleblower complaint was deemed sufficiently plead even where "(F)rom the face of the Complaint, it is not readily apparent precisely which activities (Plaintiff) alleges to be 'protected' for purposes of SOX or the common law." *Id.* at *5. The Court then considered Plaintiff's Brief in Opposition to the Motion to Dismiss and found a sufficiently pled complaint. The Court denied the Motion to Dismiss and then certified the case to the First Circuit Court of Appeals on an unrelated SOX whistleblower issue. Lawson v. FMR LLC, 2010 U.S. Dist. LEXIS 76461 (July 28, 2010 D. Mass.).

In the present case, the ALJ Decision does not dispute that sufficient facts were plead to establish that a violation of GCP "could constitute a violation of Federal law including the CFR, 18 U.S.C. §1961 (pattern of racketeering activity under the Racketeering and Influenced Corrupt Organizations Act), 18 U.S.C. 1342 (mail fraud), 18 U.S.C. §1343 (wire fraud), 18 U.S.C. §1344 (financial institution fraud) or other federal or state law." ALJ Decision at footnote 5. The ALJ's Decision then fails by equating an initial pleading with the requirements of proof at trial. Moreover, it claimed that such pleadings can never be material until the SEC engages in enforcement action. *Id.* This reasoning fails because there is nothing in the Iqbal or Twombly decisions that applies a "speculation" test in such fashion.

The Iqbal test is one of plausibility. It is clearly plausible that the reporting of false clinical data can constitute mail, wire, financial institution, and other SOX fraud that is material to and can severely damage a shareholder.[5]

The ALJ Decision uses the word "materiality" and finds that the Complainants have failed to establish it but then recognizes the materiality of the pleadings when it holds that the violation of GCP could constitute a violation of a bevy of Federal laws including RICO, mail fraud, wire fraud, financial institution fraud and illegality contemplated by SOX. *Id.* While discussing "materiality" the ALJ Decision ignores the documents provided in the Reply to Motion to Dismiss wherein Parexel's own documents, including SEC filings, indicate the materiality of GCP practices. The ALJ Decision then elects to add the "enforcement" requirement to this pleading standard, holding that materiality can only be satisfied by the onset of a Securities Exchange Commission (SEC) enforcement action. This is not grounded in the law and fails a common sense test. The legislative history does not indicate that SOX contemplates any such "enforcement" tripwire. One must use common sense and question whether anyone will step forward as a whistleblower if one can only be protected after SEC enforcement action has started. Further complicating this analysis is that many times an enforcement action may or may not be maintained for reasons not related to the underlying materiality of the SOX complaint. Also, the enforcement action might not be maintained until years after a valid SOX complaint that rooted out this fraud and usually will not occur prior to the SOX requirement that one file a complaint within 90 days of the Section 806 retaliation. This "enforcement" requirement is contrary to the intent of SOX and discourages employees from revealing possible shareholder fraud.

[5] Complainants believe it was also reversible error for the ALJ to ignore their extensive filings, including affidavits, provided in their Reply to the Motion to Dismiss.

II. While The Complainants Satisfied The Iqbal and Twombly Pleading Standards They Were Not Required To Do So – The Federal Rules of Civil Procedure Do Not Apply To Administrative Whistleblowing Complaints Under SOX

The Code of Federal Regulations and DOL Rulemaking make it clear that the Federal Rules of Civil Procedure ("Fed. R. Civ. P.) are not applicable to the filing of an administrative whistleblowing complaint under Section 806 of SOX. Through 29 C.F.R. § 1980.103, Section 1980 establishes that a complaint filed with OSHA pursuant to 29 C.F.R. Section 1980.103 is not relevant to subsequent proceedings before an ALJ upon the filing of a hearing request.

29 C.F.R. § 1980.103 states in part:

> § 1980.103 Filing of discrimination complaint.
>
> (a) Who may file. An employee who believes that he or she has been discriminated against by a company or company representative in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.
>
> (b) Nature of filing. **No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.** (emphasis added)

This language establishes that a complaint need only: 1) be in writing and 2) include a full statement of the acts and omissions with pertinent dates of the alleged violations. Because no particular form of complaint is required, it follows logically that the Federal Rules cannot supplant the Code of Federal Regulations.

These regulations then address how this complaint is to be handled by OSHA. They state that OSHA will proceed based on the complaint "supplemented as appropriate through interviews of the complainant . . .." 29 C.F.R. § 1980.104(b)(2).

The Occupational Safety and Health Act (OSHA) rulemaking for casehandling under Section 806 further underscores that a SOX complaint is not a complaint under the Federal Rules and what is sufficient for a SOX retaliation complaint. On May 28, 2003, OSHA published in the Federal Register an Interim Final Rule under Section 806. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 29 CFR Part 1980, 68 Fed. Reg. 31859 (May 28, 2003).

The public was afforded the opportunity to comment on these Interim Rules. This Interim Rule was then codified by the Final Rules for Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002. In these Final Rules the DOL addresses public comment on the format of the initial complaint. OSHA states:

> Section 1980.103 Filing of Discrimination Complaint
>
> (omitted text)
> To the extent that SHRM and HRPA are suggesting that a complaint on its face must make a prima facie showing to avoid dismissal, OSHA has consistently believed that supplementation of the complaint by interviews with the complainant may be necessary and is appropriate. Although the Sarbanes-Oxley complainant often is highly educated, not all employees have the sophistication or legal expertise to specifically aver the elements of a prima facie case and/or supply evidence in support thereof. The regulations thus recognize that supplemental interviews may become part of a complaint. See §§ 1980.104(b)(1) and (2).

Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Final Rule, 29 CFR Part 1980, 69 Fed. Reg. 52103 (Aug. 24, 2004)

These Final Rules also state:

> that it would be overly restrictive to require a complaint to include detailed analyses when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists . . . .

Procedures for the Handling of Discrimination Complaints Under the Sarbanes-Oxley Act, 69 Fed. Reg. 163, 52103, 52106 (Aug. 24, 2004) ("Final Rules for the Casehandling of Section 806 Complaints").

These Final Rules reject the requirement that the Complainant set forth a *prima facie* complaint. The purpose of the complaint is to "trigger an investigation" with possible later supplementation by interviews with the complainant. It is simply impossible to reconcile these explicit Federal Regulations with pleadings standards under the Federal Rules.

Finally, the Secretary of Labor has long recognized that administrative complaints are informal filings. Richter et al. v. Baldwin Associates, No. 84-ERA-9-12, slip op., at 9-10 (Sec'y of Labor March 12, 1986); *see also* Ruud v. Westinghouse Hanford Co., ARB Case No. 96-087, n.27 (ARB November 10, 2007).[6]

III. The Complainants Were Denied The Benefits Of The Summary Judgment Procedure Which Is The Exclusive Means For Pre-Hearing Dismissal Of A Sox Claim

The Code of Federal Regulations provides the sole method for a summary decision in a SOX case. 29 CFR § 18.40 Section (d) states:

> (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

[6] Amici cites additional case law that buttresses the argument that these administrative complaints are "informal filings".

The use of the words "summary judgment" and the language in this Section aligns with the summary judgment language of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 56). Courts have recognized this similarity. Gale v. Department of Labor 384 Fed. Appx. 926; 2010 U.S. App. n2 (per curiam) ("Summary decision is akin to a grant of summary judgment under Federal Rule of Civil Procedure 56. *See* 29 C.F.R. § 18.40(d) (2010).") The motion for summary judgment is the exclusive means available to the parties for seeking pre-hearing dismissal of SOX claims by an administrative law judge.

IV. Both Complainants Engaged In Protected Activity Under Section 806

The SOX whistleblower states, in pertinent part:

> § 1514A. Civil action to protect against retaliation in fraud cases
> (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. 78(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 [18 USCS § 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…(*emphasis added*)

The case law establishes that a broad range of whistleblowing activity is protected under the reasonable belief standard. Under SOX "(a)n employee need not cite a code section he believes was violated" to trigger the protection provided under §1514.A. Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2009).

The Ninth Circuit agreed with Welch and held that the SOX legislative history clearly supported a finding that a good faith belief of the violation of SOX satisfied §1514A. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1000 (9th Cir. 2009). The Ninth Circuit reasoned that "the legislative history of Sarbanes-Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and [that] there should be no presumption that reporting is otherwise, absent specific evidence." *Id.* at 1002 *citing* 148 Cong. Rec. 57418-01, 57420 (daily ed. July 26, 2002) (statement of Sen. Leahy).

The Van Asdale opinion cannot be reconciled with the ALJ Decision's logic that subject matter jurisdiction could not attach under a materiality standard until an enforcement action was undertaken. Rather, the Van Asdale Court noted that even though the whistleblower in the case had not reached a final conclusion as to whether fraud had occurred, this conduct was protected activity. The Court reasoned that "...in passing the Sarbanes-Oxley Act, Congress noted the existence of 'a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally.' (*citing* S. Rep. No. 107-146, at 5 (2002)). Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure." *Id.* at 1002

The Eleventh Circuit recently considered what constitutes a reasonable belief under SOX. Gale v. Department of Labor 384 Fed. Appx. 926. The Court recognized that all other circuits that have addressed the issue have held that this determination encompasses both a subjective and objective component. *Id.* at 929 *citing* Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1000 (9th Cir. 2009); Harp v. Charter Comm., Inc., 558 F.3d 722, 723 (7th Cir. 2009); Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009); Welch v. Chao, 536 F.3d 269,

275 (4th Cir. 2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1985, 173 L. Ed. 2d 1084 (2009); Allen v. Administrative Review Bd., 514 F.3d 468,477 (5th Cir. 2008).

The Eleventh Circuit accepted the Fourth Circuit's test that protected activity is found where "a reasonable person...would have believed that the conduct constituted a violation." *Id.* at 929 *citing* Livingston v. Wyeth, Inc., 520 F.3d at 352.

In this effort to determine what is a "reasonable belief" under SOX, the Courts use a compound "objective" and "subjective" test According to the Welch decision the subjective test is satisfied the employee "actually believed the conduct complained of constituted a violation of pertinent law." Welch, 536 F.3d at 277 n.4

The objective test requirement is not found in the legislative history of SOX. Under this test the courts have found that one does not need to invoke the particular law violated and there is no requirement that the actual fraud have actually occurred. Van Asdale at 1000; Allen, 514 F. 3d at 477 (An employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected); Fraser v. Fiduciary Trust Co. Int'l, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006). The Seventh Circuit, in Harp, held that objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Harp, 558 F. 3d at 723, *citing* Allen v. Administrative Review Bd., 514 F.3d at 477.

The ARB has interpreted Section 806 to find a reasonable belief even where the Complainant was wrong. Halloum v. Intel Corp., ARB No. 04-068, 2006 WL 3246900, at 5 (Dep't of Labor Jan. 31, 2006) (finding that reasonable belief was satisfied even though

employer's alleged fraudulent accounting method was found to be an accepted accounting principal).

In the fact pattern of Complainants' case, Complainants asserted that they were educated by their employer that this recording of fraudulent clinical data was a SOX violation relating to shareholder fraud. They supply evidence that Parexel communicated this both internally via memos addressing SOX, training, email, and other communication and externally in their Annual Report to shareholders. Thus the issue before the ARB is whether or not one is acting as a reasonable person when that individual believes what they have been taught by their employer in training, what is then underscored in company documents discussing SOX, and what is reported to shareholders as a risk that affects operating results is a reportable violation of SOX.[7]

The rooting out of corporate fraud against shareholders and other SOX violations encourages a wide range of activities to protect shareholders. The U.S. District for the Eastern District of New York reasoned that:

> Given that SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it is reasonable to construe the statute broadly. See 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003) ("The law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market").

Mahony v. Keyspan Corporation, 2007 U.S. Dist. LEXIS 22042, *13-14 (March 12, 2007 E.D.N.Y.)

Case law under similar remedial statutes also support a broad interpretation of "reasonable belief" as opposed to a statutory trap for those who speak truth to power and

[7] This reporting was also not a "generalized theory" as found in the Day v. Staples fact pattern because of the fact that Complaints were told what constituted a violation of SOX and dutifully followed their employer's instructions. Day v. Staples, 555 F.3d 42.

report what they believe to be a violation of SOX. The Ninth Circuit Court of Appeals defined the "reasonable belief" test for retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII) as follows:

> The reasonableness of [a plaintiff's] belief that an unlawful employment practice occurred must be assessed according to an objective standard -- one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a reasonable mistake may be one of fact or law. We also note that it has been long established that Title VII, as remedial legislation, is construed broadly. This directive applies to the reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters.

Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir 1994), *cert. denied*, 513 U.S. 1081 (1995).

The Ninth Circuit reasoned that whether the plaintiff was right or wrong in alleging a violation of the law was not important but rather that the inquiry is only as to whether the plaintiff reasonably believed that an unlawful employment practice occurred. *See also* Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir 1996) ("an individual who is reasonably mistaken about her own coverage by employment discrimination laws may assert a claim for retaliation where there exists no evidence the whistleblowing complaint was in any way brought in bad faith or meant to harass the employer.")

Similarly, in Horton v. Department of the Navy, et. al., *66* F.3d 279 (D.C. Cir. 1999), the United States Court of Appeals reversed a decision by the Merit Systems Protection Board ("MSPB") in a whistleblower case. Applying the "reasonably believes" standard of 5 U.S.C. § 2302(b)(8), Horton rejected the MSPB's reasoning that a "trivial" complaint could not constitute a reasonable belief. Important to the Federal Circuit was the intent of Congress in describing the use of the term "reasonably believes" in the statute. It noted that in using these words Congress expressed the following intent, "[t]he Committee intends that

disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." *Id.* at 282.[8]

DOL Rulemaking is also consistent with a broad scope of inclusion under Section 806. The DOL in its rulemaking stated that the SOX whistleblower language was "similar to the 1992 amendments to the ERA (Energy Reorganization Act) codified at 42 U.S.C. 5851." Under the ERA the ARB has recognized that a whistleblower protection statute "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." Fields v. Florida Power Corp., USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the ERA, 42 U.S.C. § 5851, citing English v. General Elec. Co., 496 U.S. 72 (1990) and Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws")).

To date, SOX law is unsettled with many decisions relying on a mix of *dicta* resulting in narrow holding of the case often using the "definitively and specifically" language. Some, like the ALJ Decision on appeal, lift quotes from these complex fact patterns instead of recognizing that each case presents it own unique test of what constitutes a "reasonable belief". Cynics argue that this is because many courts do not have the time, or the inclination, to engage in the time consuming fact finding and related analysis. In any event, efforts to provide a taxonomy for subjective or objective elements will fail; each situation is

[8] Complainants have previously cited numerous District Court decisions that similarly support a finding that the Complainants engaged in whistleblower activity protected under Section 806. Bishop v. PCS Administration, et. al., 2006 U.S. Dist. LEXIS 37230 (N.D.I. 2006); Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004); Mahony v. Keyspan Corporation, 2007 U.S. Dist. LEXIS 22042 (March 12, 2007 E.D.N.Y.); Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8 (June 15, 2004); Portes v. Wyeth Pharmaceuticals, Inc., 2007 U.S. Dist. LEXIS 60824 (2007 S.D.N.Y.); Parexel International Corporation v. Feliciano et. al., 2008 U.S. Dist. LEXIS 98195 (E.D. Pa. December 4, 2008).

unique. The determination of whether a SOX complaint relates to an underlying prohibited act under SOX so as to constitute a "reasonable belief" can best be accomplished after discovery and usually via an adversary proceeding where testimony is taken and impartial fact finders carefully contemplate the record and legal standards. The Complainants were denied such a process or record.

Any attempt to ignore the intent of Congress and the well established law of the elements of a reasonable belief fails the common sense test. Shareholder fraud, and related illegal conduct under SOX, or related perceived illegal conduct under SOX, is often incremental with a rising scale of fraudulent conduct sometimes beginning with conduct that is in a "grey" area where developing case law has not caught up with the reality of the shareholder fraud. Experts may disagree as to whether such conduct is actually related to shareholder fraud, the scope of coverage of these underlying laws, and other complex issues of relation to shareholder fraud. New methods of shareholder fraud are probably being invented as this case is litigated. In many circumstances the final discovery of the elements of, and the scope of, the fraud is after investors and Main Street America have suffered irretrievable loss. Public policy should encourage the early vetting of such conduct instead of nearly nonexistent whistleblowing protection that drops complainants through a trap door.

V. The Congressional Intent Under Sox And Related Remedial Whistleblower Law Supports A Finding Of Protected Activity Under This Fact Pattern

The Congressional intent in enacting SOX is clear. The Senate Report states:

> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions

> which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (*See* generally *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478). Sen. Rpt. 107-146, at 19 (May 6, 2002).

Senator Leahy stated "The legislative history of section 806 indicates that Congress intended to apply to 18 U.S.C. 1514A(a)(1) the normal "reasonable person" standard used and interpreted in a wide variety of legal contexts. *see* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). The DOL adopted this legislative intent by its Final Rules for the Casehandling of Section 806 Complaints. DOL states that "Congress intended to apply to 18 U.S.C. 1514A(a)(1) the normal ''reasonable person'' standard used and interpreted in a wide variety of legal contexts. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy)." Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Final Rule, 29 CFR Part 1980, 69 Fed. Reg. 52103, 52105 (Aug. 24, 2004)

In the Passaic Valley Sewage Commissioners decision specifically cited and relied upon by the U.S. Senate in shaping the SOX law, the Third Circuit Court of Appeals held that the whistleblower statute should be interpreted broadly, citing a large number of cases calling for "broad protective coverage to internal complaints". *Id.* at 492.

The legislative history shows Congress "intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts . . . ." Day v. Staples, 555 F.3d 42, 54 (2009) *quoting* S. Rep. No. 107-146, at 19. The Day decision continues "It

also states that '[t]he threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.' *Id. quoting* 148 Cong. Rec. 57420 (daily ed. July 26, 2002) (statement of Sen. Leahy).

DOL should return to the legislative intent of the whistleblowing provision of SOX.

VI. Although They Did So, The Complaints Are Not Required To Allege Shareholder Fraud

The ALJ Decision found that the Complainants did not allege sufficient fraud to protect them. Complainants' believe that they did so. The Fourth Circuit Livingston decision language relied upon by the ALJ Decision was later minimized to mere *dicta* by the same Court. To date, the Fourth Circuit has declined to find that a complaint under Sox must "relate to fraud". Welch v. Chao, 536 F.3d 269 at n.3. The U.S. District Court for the Southern District of New York, long recognized for its sophistication in the handling of securities and other complex business litigation stated: "General principles of statutory construction weigh against reading § 1514A as providing whistleblower protection only to employees who provide information concerning fraud against shareholders." O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506, 516-17 (S.D.N.Y. 2008); *accord* Smith v. Corning, Inc., 496 F. Supp. 2d 244, 248 (W.D.N.Y. 2007); Deremer v. Gulfmark Offshore Inc., 2006-SOX-2 (ALJ June 29, 2007); Hughart v. Raymond James & Associates, Inc., 2004-SOX-9 (ALJ Dec. 17, 2004); Hendrix v. American Airlines, Inc., 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004). *see also* Reyna v. ConAgra Foods, Inc., 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007) (finding that § 1514A "clearly protects an employee against retaliation based upon that employee's reporting of mail fraud or wire fraud regardless of

whether that fraud involves a shareholder of the company"). *contra* Lawson v. FMR LLC, 2010 U.S. Dist. LEXIS 76461 (July 28, 2010 D. Mass.).

VII. The SOX Whistleblower Provision Does Not Contain An Independent Materiality Requirement

In Welch v. Chao the Fourth Circuit stated that although many of the laws listed in § 1514A of SOX contain materiality requirements, nothing in § 1514A indicates that § 1514A contains an independent materiality requirement. Welch, 536 F.3d at 276. In any event, Parexel established materiality. They advised the Complainants that SOX is more than just a financial exercise but rather extends to the controls that Complainants ultimately blew the whistle on. Parexel also advised shareholders that the failure to follow GCP was a material risk that could damage "operating results" and not incidentally destroy the reputation of Parexel.

In any event, as a remedial statute and from a public policy perspective, it makes no sense to require the whistleblower to undertake the duties of the SEC and courts by determining the complex issue of materiality.

VIII. The Platone Decision Must Be Reconsidered

The use by the ARB of the phrase "definitively and specifically" in the Platone decision has been used to swallow the whole of Section 806. Platone v. FLYi, Inc., 2006 DOLSOX LEXIS 105 (Dep't of Labor Sept. 29, 2006), *aff'd* Platone v. Department of Labor, 548 F.3d 322 (4th Cir. 2008). When one reviews Section 806 the closest one gets to finding this language is the use of the words "relates to" that are found in a clause serving as a "catch all" to cover "...any provision of Federal law relating to fraud against shareholders." 18 U.S.C. §1514A(a)(1). Platone improperly narrows the protection of Section 806 and its "reasonable belief" language and therefore makes it too easy for an ALJ or other fact finder

to ignore this "reasonably believes" language found in SOX and related legislative intent in favor of latching on to the "definitively and specifically" language not found in SOX.

This ARB has the opportunity to remedy this error.

IX. The Complainants Also Engaged In The Protected Activity of Participation Under 18 U.S.C. §1514A(a)(2)

Complainants also engaged in conduct protected under 18 U.S.C. §1514A(a)(2). This section provides protection for those perceived by their management to be intending to participate in a SOX proceeding. The Complainants invoked their SOX training and related internal instruction to begin the complaint process. By beginning the SOX action under internal company procedures and related accounting controls, they must also be afforded the protection of this provision of Section 806. The Complainants incorporate by reference the argument of Amicus. As noted herein, the Complainants were advised that SOX was not just a financial exercise but rather extended to various internal controls including the clinical fraud reported by Complainants.

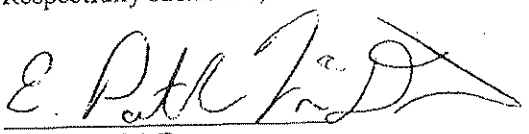
CONCLUSION

The Complainants had a reasonable belief that the Sarbanes-Oxley Act was being violated when they registered their opposition to the fraudulent recording of clinical data. A rich factual background supports this finding under existing law. Nevertheless this present law can be improved for whistleblowers.

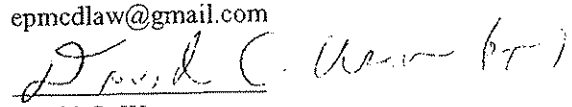
The ARB's interpretation of SOX whistleblower law needs to be clarified to overhaul a now confusing legal minefield where no employee seeking to honor the intent of SOX is safe from the trap door discussed herein. The terms "definitively and specifically relate" and the concept of "materiality" are used inappropriately to swallow the whole of a remedial statute designed to protect the public not the wrongdoer. The ARB went astray with the Platone

decision. The subjugation of the "reasonably believes" language in Section 806 of SOX resulted in a SOX whistleblower law that is perceived as toothless. The federal courts have relied upon the expertise of ARB administrative law to similarly narrow and undermine SOX whistleblower protection at great risk to the investor and the public. This ARB must return to the intent of SOX.

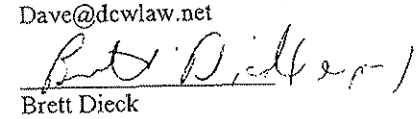
Respectfully submitted,



E. Patrick McDermott
Attorney for Complainants Kathy J. Sylvester and Theresa Neuschafer
Law Office of E. Patrick McDermott LLC
2666 Ogleton Road
Annapolis, MD 21403
410-990-0792
410-741-3979 (fax)
epmcdlaw@gmail.com



David C. Weaver
Attorney for Complainants Kathy J. Sylvester and Theresa Neuschafer
Holtzinger Weaver, P.A.
100 North Court Street
Frederick, MD 21701
301-694-4949
301-831-4318 (fax)
Dave@dcwlaw.net



Brett Dieck
Attorney for Complainants Kathy J. Sylvester and Theresa Neuschafer
The Law Office of Brett Dieck, LLC
11035 Stratfield Court
Marriottsville, MD 21104
443-325-7700
443-325-7707 (fax)
Briett.dieck@dieckclaw.com

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of Complainants Kathy J. Sylvester and Theresa Neuschafer was served by regular mail, unless email or facsimile is indicated, on the following persons of the following address on this 30th day of December, 2010:

Joseph Schuler and Matthew F. Nieman
Jackson and Lewis LLP
10701 Parkridge Blvd., Ste. 300
Reston, VA 20191

Stephen M. Kohn,
Richard R. Renner,
National Whistleblowers Legal Defense and
Education Fund
3233 P St., N.W.
Washington, DC 20007
(202) 342-6980
(202) 342-6984 (FAX)
BY EMAIL: sk@whistleblowers.org; rr@whistleblowers.org

Brett M. Dieck
The Law Office of Brett M. Dieck, LLC
11035 Stratfield Court, Marriottsville, MD 21104
443-325-7700
443-325-7707 (FAX)
BY EMAIL: Brett.Dieck@Diecklaw.com

David C. Weaver
Holtzinger Weaver, P.A.
100 N Court St
Frederick, MD 21701
BY EMAIL: dave@dcwlaw.net

Administrative Review Board
200 Constitution Ave., NW, # S-5220
Washington, DC 20210
VIA FAX (202) 693-6220
AND REGULAR MAIL

Parexel International, LLC
Corporate Office
200 West Street
Waltham, MA 02451

Directorate of Enforcement Programs
U.S. Department of Labor/OSHA
200 Constitution Avenue, NW
Room N-3603, FPB

Washington, DC 20210
VIA FAX – 202-639-1681

Associate Solicitor
U.S. Department of Labor/SOL
200 Constitution Avenue, NW
Room N-2716, FPB
Washington, DC 20210
VIA FAX – 202-693-5689

Hon. John M. Vittone
Chief Administrative Law Judge
Office of Administrative Law Judge
800 K Street, N.W. Suite 400
Washington, D.C. 20001-8002
VIA FAX - 202-693-7365

Hon. Edward Terhune Miller
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
VIA FAX - 202-693-7365

Regional Solicitor
U.S. Department of Labor
The Curtis Center, Suite 630 East
170 S. Independence Mall West
Philadelphia, PA 19106-3306
VIA FAX - 215-861-5162

Regional Administrator
Region 2
U.S. Department of Labor, OSHA
The Curtis Center, Suite 740 West
170 S. Independence Mall West
Philadelphia, PA 19106-3306
VIA FAX - 215-861-5162

Bayley Reporting, Inc.
The Pines Office Center
Suite B2
12600 Seminole Boulevard
Seminole, FL 33778
VIA FAX 727-585-0300

E. Patrick McDermott
Law Office of E. Patrick McDermott LLC
2666 Ogleton Road
Annapolis, MD 21403
410-990-0792
410-741-3979 (fax)
epmcdlaw@gmail.com