UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
WASHINGTON, D.C.

ARB CASE NO. 07-123

ALJ CASE NO.: 2007-SOX-39 and
CASE NO.: 2007-SOX-42

In the Matter of:

KATHY J. SYLVESTER

and

THERESA NEUSCHAFER

Complainants,

v.

PAREXEL INTERNATIONAL LLC

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DISMISSAL OF THE SARBANES-OXLEY COMPLAINTS

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Respondent PAREXEL International LLC ("Respondent"), by its counsel, hereby files this supplemental brief in support of the Administrative Review Board's (the "Board") affirmation of the dismissal of Complainants Kathy J. Sylvester's and Theresa Neuschafer's (collectively, "Complainants") consolidated cases (ARB Case No. 07-123) and in response to the issues presented to the parties by the Board via its November 12, 2010 Notice of Oral Argument and Invitation to File Briefs.

Complainants' claims arise under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-

Oxley Act of 2002, 18 U.S.C. § 1514A (the "Act") and its implementing regulations, 29 C.F.R. Part 1980 (collectively, "Sarbanes-Oxley"). In the original round of briefing following Complainants' appeal of the decision and order dismissing their claims, Respondent demonstrated by reference to the Act, the regulations, interpretive decisions issued through the date of filing and reference to the well-reasoned decision of the Administrative Law Judge that Complainants had not stated claims upon which relief could be granted and dismissal was appropriate. As set out below in response to the specific questions posed by the Board, applicable procedures and ample, consistent precedent through the date of this briefing as to what constitutes "protected activity" under the Act confirm that the decision dismissing these complaints should be affirmed.

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

The pleading requirements of the Federal Rules of Civil Procedure and interpretive case law do apply to administrative whistleblower complaints filed with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") pursuant to Section 806 of the Act, 18 U.S.C. § 1514A. *See, e.g.*, 29 C.F.R. §§ 1980.100(b) and 1980.107(a) (making the Rules of Practice and Procedure of the Office of Administrative Law Judges (the "Rules") applicable to proceedings for administrative hearing of Sarbanes-Oxley whistleblower complaints); 29 C.F.R. § 18.1(a) (Rule 18.1 of the Rules of Practice and Procedure, making the Federal Rules of Civil Procedure applicable to proceedings for administrative hearing before the Office of Administrative Law Judges in any situation not provided for or controlled by those rules, or by any statute, executive order or regulation). *See also Levi v. Anheuser Busch Companies, Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, 2006-SOX-108, 2007-SOX-055

(ARB April 30, 2008) (holding that the pleading standards of Rule 8, Federal Rules of Civil Procedure, apply to Sarbanes-Oxley complaints, taking into account the particularized pleading requirements imposed on Sarbanes-Oxley complaints by 29 C.F.R. § 1980.103(b)).

For the sake of uniformity and compliance with the Administrative Procedures Act, a proceeding before an Administrative Law Judge ("ALJ") under Sarbanes-Oxley and the other statutory schemes whose proceedings are delegated to the Office of Administrative Law Judges is intended to be an adjudicatory proceeding similar to those conducted in federal court, subject to the bounds of any special program requirements for a given statute, executive order or regulation. *See* Preamble to Final Rule, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 48 FR 32538 (July 15, 1983); LEXSEE 48 FR 32538 at 1-2. *See also* Rule 18.1(a).

Within this paradigm as to Sarbanes-Oxley proceedings, and specific to applying the Federal Rules of Civil Procedure to review of a complainant's complaint, the Board has held:

> The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. [footnote omitted] It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims. [citing to 29 C.F.R. § 18.1(a)].

Neuer v. Bessellieu, ARB No. 07-036, ALJ No. 2006-SOX-132, slip op. at note 17 and accompanying text (ARB August 31, 2009).[1]

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[1] Other recent decisions of the Board applying provisions of the Federal Rules of Civil Procedure to adjudicatory administrative proceedings in situations not provided for or controlled by the Rules or any other statute, executive order or regulation include: *Rowland v. National Association of Securities Dealers*, ARB No. 07-098, ALJ No. 2007-SOX-006, and cases cited therein (ARB September 25, 2009) (F.R.Civ.P. 41(a) supported dismissal for failure to prosecute when party failed to respond to orders); *Levi, supra*, (holding that F.R.Civ.P. 12(b)(6) analysis, applying standard for contents of complaint set forth in 29 C.F.R. § 103(b) should be used for consideration of complaint filed with OSHA, but if other material is considered, summary decision standard of 29 C.F.R. §18.40(d) applies); *Harvey v. Home Depot U.S.A., Inc.*, ARB

This non-controversial application of the Federal Rule of Civil Procedure and interpretive case law by the Board in *Neuer* and other cases discussed herein, including Federal Rule of Civil Procedure 12(b) as it applies to analyzing a complaint in the context of a motion to dismiss on the pleading, is both logical and consistent with the overall scheme of the regulations. The applicable regulations require that a complaining party must file a written complaint with OSHA to initiate a Sarbanes-Oxley claim. 29 C.F.R. § 1980.103(b). The regulations further provide that the complaint "should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." *Id.* The latter provision is a near analog of Federal Rule of Civil Procedure 9(b), which provides, in pertinent part, that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See* F.R.Civ.P. 9(b). Accordingly, federal cases would provide closely analogous interpretive guidance to inform administrative decisions applying the particular pleading standard of § 1980.103(b), as contemplated by prior Board decisions[2] and implicit in 29 C.F.R. § 18.1(a).

There is, of course, a distinction between Federal Rules of Civil Procedure 8 and 9 on the one hand, and 29 C.F.R. § 1980.103(b) on the other, in that these federal rules state what a

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Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 2004-SOX-36 and cases cited therein (ARB June 2, 2006) (order of dismissal pursuant to F.R.Civ.P. 12(b)(6) proper when OSHA Complaint failed to state claim upon which relief could be granted and plaintiff did not respond to order to show cause why complaint should not be dismissed for that reason); *Powers v. Pace,* ARB Case No. 04-111, ALJ Case No. 04-AIR-19 (ARB August 31, 2007) at n. 16 and accompanying text (including extended discussion of broad applicability of F.R.Civ.P. 12(b)(6) to cases subject to the Rules, and reviewing prior decision so holding; also noting "gatekeeper" function applicable to AIR 21 and Sarbanes-Oxley claims but nevertheless approving application of (arguably) less rigorous F.R.Civ.P. 12(b)(6) standards for review of sufficiency of complaint alleging Sarbanes-Oxley and AIR 21 claims) (decision later amended to apply to AIR 21 claims only because claimant withdrew her SOX claims).

[2] *See, e.g.*, cases listed in note 1, above.

complaint filed in court "must" contain, while the regulation provides what a Sarbanes-Oxley complaint "should" contain. In the final analysis, this is a distinction without a difference because of the inherent flexibility of the administrative process[3] and because "should" is exhortatory, not permissive.[4]

Furthermore, 29 C.F.R. § 1980.104(b) provides that "[a] complaint of alleged violation *shall be dismissed* unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." (Emphasis added.) It would be anomalous if OSHA has the authority on behalf of the Secretary of Labor to dismiss a Sarbanes-Oxley complaint that fails to make the required showing, but an ALJ, acting on his or her delegation of authority from the Secretary, cannot.[5]

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[3] See discussion below at pp. 6-8 as to how this flexibility provides ample opportunity for a claimant to include in her pleading the factual detail that the regulation requires.

[4] Webster's New World Dictionary (Second College Ed.) defines "should" (at the relevant entry) as "an auxiliary verb used to express a) obligation, duty, propriety, necessity, etc. ..." *See Armstrong v. Commissioner of the Social Security System*, 160 F.3d 587, 590 (9th Cir. 1998) (reviewing use of word "should" in regulation describing medical evidence to be obtained and considered in social security disability claim and holding that "in this context, 'should' means 'must'"); *Herrera v. Barnhart*, 379 F.Supp.2d 1103, 1108 (C.D. Cal. 2005) (same).

[5] For OSHA's purposes in determining whether to dismiss a complaint *ab initio* under 29 C.F.R. § 104(b), the regulation goes on to provide that the complaint should be viewed "on its face, supplemented as appropriate through interviews of the complainant" when OSHA makes its determination whether to dismiss *ab initio* or investigate. The regulations do not impose this supplementation "as appropriate" on the post-dismissal/post-investigation administrative process in the event that one or both parties objects to OSHA's determination and invokes the hearing process, nor is the ALJ bound by any determination made by OSHA at the preliminary stage. *See* 29 C.F.R. § 1980.107(a) and (b) (except as provided in part 1830, proceedings are to be conducted in accordance with Title 29 C.F.R. part 18, and will be conducted *de novo*). However, as discussed herein, the procedures routinely applied under Part 18 and in accordance with the Federal Rules of Civil Procedure provide multiple avenues for a complaining party to address deficiencies in her complaint as filed with OSHA if, "on its face," the complaint does not make a prima facie showing and it does not contain the "full statement of acts and omissions" that it "should," under § 1980.103(b), to be allowed to proceed under § 1980.104 and the applicable principles of Federal Rules of Civil Procedure 8, 9, and 12, as imported by 29 C.F.R. § 1980.100, 29 C.F.R. § 1980.107 and 29 C.F.R. § 18.1.

The "gatekeeper" function contemplated by sections 1980.103 and 104[6] would be subverted if an ALJ did not have the inherent authority under 29 C.F.R. § 18.1 and 29 C.F.R. § 1980.103, after due notice and process, to effect a dismissal on the face of the pleading.

Indeed, such notice and process is part of the procedures firmly established in the administrative process as informed by the Federal Rules of Civil Procedure and interpretive case law surrounding the parallel, important "gatekeeper" function that permits early dismissal of federal court cases that fail to state a claim for relief that is "plausible on its face"[7] or where the court simply has no subject-matter jurisdiction over the claim.[8] That is to say, established procedures and practices give a complainant ample opportunity to amend or otherwise establish that her claim, set forth in the "complaint" submitted to OSHA, meets the *Twombly/Iqbal*) standard of stating a claim that is "plausible" based on the minimum facts called for by 29 C.F.R. § 1980.103(b), specifically, a "full statement of the acts and omissions ... believed to constitute the violations" of the employee protection provisions of the Act. *See* 29 C.F.R. § 1980.103(b).

After objections are filed and proceedings begin before an ALJ, if a respondent invokes its right to seek dismissal on the face of the pleading for failure to state a claim or lack of subject

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[6] *See Powers v. Pace,* ARB Case No. 04-111, at note 16).

[7] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2006) ("We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627 [2005], when we explained that something beyond the mere possibility of loss causation must be ... alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.' *Id.*, at 347") (internal quotes omitted); *see also Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937, 1949-50 (2009)) ("where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct" the complaint must be dismissed).

[8] *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102, 118 S. Ct. 1003 (1998) (federal court must resolve any doubt as to propriety of subject-matter jurisdiction prior to any kind of decision on the merits of the action).

matter jurisdiction, there is ample opportunity for the ALJ (or the Board) to consider matters outside the original pleading to satisfy overarching "fairness" requirements for adjudicatory administrative proceedings, as appropriate within the context of a given case. For example: the complainant may, *as a matter of right,* amend her complaint once before an answer is filed, and thereafter if the amendment is reasonably within the scope of the original complaint;[9] the ALJ may, to avoid prejudicing the complainant's rights, otherwise allow appropriate amendments at any time;[10] the ALJ may issue an order to show cause why an apparently deficient complaint should not be dismissed, giving the complainant an opportunity to show additional facts and circumstances outside the four corners of her complaint that would allow her to state a plausible claim under the standards of 103(b);[11] on receipt of a Rule 12(b) motion the ALJ may order the complainant to respond or amend;[12] the ALJ may follow common federal court practice by issuing an order dismissing the complaint with leave to amend, such that the order becomes "final" only if the party fails to file a timely amendment.[13] In lieu of or in conjunction with pleading amendments, briefing received, and review undertaken in response to a motion to

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[9] 29 C.F.R. § 18.14(e). Notably, a complainant could use either of these procedures to respond to a motion to dismiss by amending her complaint to supplement her "statement of the acts and omissions ... believed to constitute the violations" to supply any additional facts known to her, directly or on information and belief, to counter the deficiencies asserted in the respondent's motion.

[10] *Id.*

[11] *See Harvey v. Home Depot U.S.A., Inc.,* ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, ALJ Nos. 2004-SOX-36, slip op. at 9-10 (ARB June 2, 2006).

[12] *See Levi, supra.*

[13] *See* 2 MOORE'S FEDERAL PRACTICE, § 12.34[5] (Matthew Bender 3d ed.). Of course, leave to amend (whether upon grant of motion to dismiss or on application of the party whose right to amend has been cut off) may be denied for appropriate reasons, including futility, prejudice and delay. *See* 3 MOORE'S FEDERAL PRACTICE, §§ 15.15, 15.16 (Matthew Bender 3d ed.).

dismiss pursuant to 12(b), the ALJ may also consider other matters of record as appropriate, thereby converting the motion to a motion for summary decision. *See, e.g., Levi, supra; Lewandowski v. Viacom*, ARB 08-026, ALJ No. 2007-SOX-088, slip op. at 5-6 (ARB Oct. 30, 2009). Or, as Judge Miller elected in this case, an ALJ may acknowledge in his Decision and Order that other facts and circumstances were proffered in Complainants' "pleadings" but did not factor into the decision because they were conclusory, not supported by fact or simply not relevant. See *Decision and Order Dismissing Complaints* at 6-7 (nos. 19-21) and 10. In effect he found each of the extensive complaints filed by Complainants with OSHA to be complete on its face as a "full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations" as to one or more dispositive elements of the claim. *See* 29 C.F.R. § 1980.104 (as discussed above).

As noted, if Judge Miller had instead determined that information not included in the complaints but within the record – whether proffered by the complainants in response to the motions to dismiss or otherwise – was relevant, and its consideration was thus warranted in assessing whether the complaints *could* state a claim upon which relief could plausibly be granted, he would have been comfortably within his discretion simply to convert the motions to motions for summary decision, and rule on them taking into account the additional material of record. Likewise, the Board may do so on appeal of an ALJ's recommended decision and order ruling on a Rule 12(b) motion. *Compare Levi, supra* (where Board considered propriety of dismissal under Rule 12(b) but applied the summary decision standard "to the extent we consider correspondence and pleadings in addition to Levi's [complaint]") *with Lewandowski, supra* (where Board notes that ALJ converted motion to dismiss to motion for summary decision when she considered document not appended to complaint in reaching decision).

Accordingly, the pleading requirements of the Federal Rules of Civil Procedure and interpretive case law do apply to administrative whistleblower complaints filed with the OSHA pursuant to Section 806 of the Act. The administrative law judge was within his discretion to apply Rule 12(b) of the Federal Rule of Civil Procedure governing motions to dismiss, and the complaints were properly dismissed based upon those standards.

2. 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?

The summary decision provision of 29 C.F.R. § 18.40 does not provide the exclusive means available to the parties for seeking prehearing dismissal by an ALJ of Sarbanes-Oxley claims. *See, e.g., Neuer*, ARB No. 07-036, *supra*. ("It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims. [citing to 29 C.F.R. § 18.1(a)]").

The practice approved by the Board in *Neuer* and similar cases (see note 1, above) is well conceived and should not be disturbed. As noted by the *Neuer* Board, Section 18.1 expressly imports the Federal Rules of Civil Procedure by providing: "The Rules of Civil Procedure for the District Courts of the United States ***shall*** be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1 (emphasis added).[14] The regulations specifically applicable to Sarbanes-Oxley claims, 29 C.F.R.

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[14] Related, the Preamble to the final rule explains:

> Due to the variety of programs under which hearings are conducted, and the intended scope of review, all of these rules are not intended to apply to all cases. Although these rules are designed to make proceedings before the Office of Administrative Law Judges as uniform as possible, they must yield to special program requirements. Therefore, to the extent that any rule herein is inconsistent or at conflict with a rule or procedure required by statute, executive order, or regulation, the latter is controlling.

part 1980, likewise provide that except as provided in the regulations, "proceedings will be conducted in accordance with ... part 18 of Title 29 of the Code of Federal Regulations." 29 C.F.R. § 1980.107(a); *see also* 29 C.F.R. § 1980.100 (same).

Read together so as to give proper effect to each, these regulations establish that unless a provision of the rules applicable to adjudicatory proceedings, including Rule 18.1, is "inconsistent or at conflict with" a procedure required by the Act or the Sarbanes-Oxley regulations, it applies with full force to an adjudicatory administrative proceeding under Sarbanes-Oxley. Dismissal of a complaint in a Sarbanes-Oxley case on a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is not inconsistent or in conflict with the Act or 29 C.F.R. part 1980. As discussed in the next section of Respondent's brief, part 1980 has a special program requirement for submission of a written, fact-intensive complaint to OSHA to trigger the investigative screening process designed to reinstate a complainant, if warranted. The claim then becomes a proceeding subject to part 18 when one or both parties files an objection to findings issued by OSHA based upon the complaint. The only aspect of this special program requirement which "conflicts" is the timing of the "complaint" (meaning that it is submitted by a claimant before the adjudicatory process begins, not to commence that process), not whether the complaint may be challenged by a motion filed under Rule 12.

Moreover, in terms of the interplay of the rules, there is no functional difference between the interplay of Federal Rules of Civil Procedure 12 and 56 as applied in federal court, and a motion to dismiss and a motion for summary decision under 29 C.F.R. § 18.40 in an adjudicatory

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Preamble to Final Rule, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 48 FR 32538 (July 15, 1983); LEXSEE 48 FR 32538 at 1-2.

proceeding.[15] Just as Rule 56 usually operates to weed out claims that cannot be proven at a different stage of the federal court proceeding than Rule 12, so, too, would a motion pursuant to Rule 12(b) or Rule 12(c) (seeking judgment on the pleadings after an answer has been filed) serve in this forum to permit disposition of a case earlier in the process (i.e., pre-discovery) to serve the purposes of judicial economy where the best well-pleaded facts are not sufficient to establish a plausible claim. *Compare Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2006) (the practical significance of the Rule 8 entitlement requirement is that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "a largely groundless claim" be allowed to "take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value" (citations omitted)) *with Powers v. Pace,* ARB Case No. 04-111, ALJ Case No. 04-AIR-19 at note 16 (ARB August 31, 2007) (discussing whether a *more stringent* standard of review should be applied to complaints asserting claims under Sarbanes-Oxley and AIR 21[16] on a Rule 12(b)(6) motion to dismiss because the regulations setting procedures for filing complaints under these statutes include "gatekeeper" provisions, and remanding to the ALJ to determine whether the complaint includes enough "factual matter" to survive under the *Twombly* standard).

Moreover, neither Rule 56 nor 29 C.F.R. § 18.40 restricts the timing of a motion. Both rules contemplate that a motion for summary decision may be filed at any time, including immediately after the commencement of the case. In this regard, the federal rules also work in

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[15] The Board recently affirmed that "[t]he standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 (2009) and is essentially the same standard governing summary judgment in the federal courts." *Fredrickson v. The Home Depot USA, Inc.*, ARB 07-100, ALJ No. 2007-SOX-013, slip op. at 4-5 (ARB May 27, 2010) (applying federal Rule 56 jurisprudence as standard for motion pursuant to Rule 18.40).

[16] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2010).

tandem. That is, if a judge deciding the motion under Rule 12(b) elects to consider matters outside the pleading, by operation of rule the motion is treated as one for summary judgment under Rule 56. *See* Rule 12(d), F.R.Civ.P. In this juxtaposition, it can be seen that the federal rules are intended to work together to permit cases without sufficient merit to be disposed of before hearing, whether on the pleadings or on undisputed material facts.

Thus, given the mandate of 29 C.F.R. § 18.1 as to reliance on the federal rules, and taking into account that 29 C.F.R. § 18.40 does not restrict the timing of a motion for summary decision, section 18.40 should not, and does not, provide the exclusive means available to the parties for seeking prehearing dismissal by an ALJ of Sarbanes-Oxley claims.

3. To what extent, if at all, is the complaint 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?

The complaint filed with OSHA pursuant to 29 C.F.R. § 1980.103 is a claimant's articulation of the acts and omissions which comprise her claim, and as such is relevant throughout her Sarbanes-Oxley proceeding, including subsequent proceedings before an ALJ upon the filing of a hearing request. *See* 29 C.F.R. § 1980.100(b) ("These rules, together with those rules codified at 29 C.F.R. part 18, set forth the procedures for submission of complaints under Sarbanes-Oxley ... objections to findings and orders, [and] litigation before administrative law judges ...").

While 29 C.F.R. § 1980.103, together with § 1980.104,[17] establishes the requirements for a sufficient "complaint" for all purposes and stages of a Sarbanes-Oxley proceeding, section 1980(b) also provides that once "litigation before administrative law judges" commences, the provisions of 29 C.F.R. part 18 must also be taken into account, to the extent not in conflict. *Id.*

[17] See discussion above in response to Board Issue 1.

The Rules set out at 29 C.F.R. part 18 contemplate that a "complaint" may be filed to initiate an adjudicative proceeding, *see* 29 C.F.R. § 18.2(d), and also that a "complaint," once filed, may be amended, both as a matter of right and with permission. 29 C.F.R. § 18.4(e). By implication, if one or both parties files an objection to OSHA's determination, thereby initiating the administrative adjudicatory process contemplated by the statute and 29 C.F.R. § 1980.107, a claimant may rely upon her complaint as filed with OSHA, or she may re-plead at the outset of the adjudicatory process or as the proceeding progresses.

Whichever course a claimant chooses, and whether or not she amends at some point in the proceeding (in response to a motion to dismiss or otherwise), her "complaint" defines her cause of action and is subject to challenge in the adjudicatory forum if it does not state a plausible claim for relief.[18] As discussed above in response to Board Issue 1, 29 C.F.R. § 1980.104(b) provides that "[a] complaint of alleged violation *shall be dismissed* unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint" (emphasis added). OSHA must reject a complaint if it fails to state a prima facie claim. Taking into account the pleading standards set by 29 C.F.R. §§ 1980.103(b) and 1980.104(b) ,in conjunction with the well-developed principles of federal pleading standards imported by 29 C.F.R. § 18.1, the ALJ has the same option and obligation.

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[18] Of course, if a complaint is not tested on its face, or survives a challenge, it becomes incumbent upon the claimant to provide evidence in support of, and ultimately prove, the allegations of her complaint in order to sustain her claim as the case progresses to summary decision and hearing. In this regard and as the case proceeds, the Rules of Practice and Procedure contemplate that in addition to amendments expressly initiated by claimant, her complaint may also be amended or supplemented to include issues not raised by the pleadings but within the scope of the original complaint, or which are tried with the consent of the parties, or which involve occurrences which have happened since the date of the pleadings. *See* 29 C.F.R. § 18.4(e).

4. What must a claimant establish, whether at a 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 questions, please also address the following [see subsections (a)-(e), below]:

Under the Department of Labor's regulations implementing § 1514A of the Act, a claimant must allege [and, to prevail, ultimately prove by a preponderance of the evidence] that she engaged in activity, such as reporting to a supervisor, concerning shareholder fraud-related violations of Section 806's enumerated statutes, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders.[19] 29 C.F.R. § 1980.104(b)(1) (2010). *See also Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 2004-SOX-36, slip op. at 9-10 ("Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that [ ] he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding..."); *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006) (same).

At its core, Sarbanes-Oxley is focused directly on the protection of *investors*, particularly their ability to rely upon the information disclosed by the company for purposes of decision-making. To this end, the preamble to the Act states:

> To ***protect investors*** by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.

Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002) (emphasis added). Further, the Act's legislative history specifically ties the creation of Section 806 to protecting the "unprecedented portion of the American public investing in [publicly traded] companies and depending upon [the companies'] honesty[.]" 148 Cong. Rec. S7418, p.6.

This Congressionally-established, investor-centric focus cannot be forgotten or set aside

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[19] With respect to the content of the report or similar activity, *see* 18 U.S.C. § 1514A(a)(1)(C) and discussion at section 4.c., below.

in the examination of any potential claim raised under Sarbanes-Oxley's provisions. Instead, as the Board has repeatedly held, for activity

> [t]o be protected under the SOX, the whistleblower must ordinarily complain about a material misstatement of fact (or omission) concerning a corporation's financial condition on which an investor would reasonably rely. The protected complaint must "definitively and specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.

Giurovici v. Equinix, ARB Case No. 07-027, ALJ No. 2006-SOX-107, slip op. at 5 (ARB Sep. 30, 2008) (Board consideration of fraud allegation under 18 U.S.C. §1343 (wire, radio, TV fraud) citing *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088-092, slip op. at 9 (ARB Apr. 29, 2008); *see Harvey*, ARB Nos. 04-114, 115, slip op. at 14-15.

The purpose of the retaliation provisions of Sarbanes-Oxley is not to create a generic *wrongful termination* cause of action for any situation where a claimant's allegations could conceivably be aggrandized into a construct involving circumstances which may ultimately affect shareholders. To the contrary, the Board has *consistently* held:

> Not all employee complaints to management are covered by the SOX. The ARB has said that complaints to management of corporate expenditures with which the complainant disagrees are not protected activity under the SOX because they do not directly implicate the categories of fraud listed in the statute or securities violations. "A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."

Fredrickson v. The Home Depot USA, Inc., ARB 07-100, ALJ No. 2007-SOX-013, slip. op. at 6 (ARB May 27, 2010) (quoting and citing *Smith, supra*, citing *Harvey, supra*); *Lewandowski*, ARB 08-026, slip op. at 7-8 (same).

Accordingly, the key to claimant's burden to show "protected activity" is her already completed conduct, that is, the specific corporate practice or event that was articulated as her

report, complaint or other conduct that she points to as her protected activity. To adequately plead and potentially sustain a claim of engaging in protected activity under the Act, a claimant must show that the conduct itself – when it occurred – fell within the protections of Sarbanes-Oxley. This burden *cannot* be met via after-the-fact speculation or conclusory "could happen" allegations seeking to forge a tenuous linkage between what a claimant actually did and what Sarbanes-Oxley protects. *See Giurovici*, ARB Case No. 07-027, slip op. at 7). ("Such speculative allegations after Giurovici's discharge are insufficient to constitute protected activity under the SOX."); s*ee also Smith*, ARB No. 06-064, slip op. at 11 (holding a complainant's speculation does not constitute a complaint relating to any instance of corporate misrepresentation or fraud against shareholders); s*ee also Harvey*, ARB Nos. 04-114, 115, slip op. at 15 ("A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."); *Godfrey v. Union Pacific RR Co.*, ARB Case No. 08-088, ALJ No. 2008-SOX-00005, slip op. at 6 (ARB Jul. 30, 2009) (same).

As such, what a claimant must show is not a matter of pleading *per se*, but rather the demonstration through her pleading (at the pre-hearing stage) or proof (at hearing or on motion for summary decision) that the actual communications she made to the employer (or other investigator) concerned fraud on shareholders. As the Board held in *Giurovici*) ,

> The relevant inquiry is not what Giurovici alleged in his OSHA complaint, but what he actually communicated about alleged fraud in financial matters prior to his [] discharge.

Giurovici, ARB Case No. 07-027, slip op. at 6 citing *Platone,* ARB No. 04-154, slip op. at 17)

Further detailing a claimant's obligations, the Board continued:

> Giurovici did not provide information to, or assist in an investigation by, a federal regulatory or law enforcement agency, or a member or committee of

> Congress. *18 U.S.C. § 1514A*(a)(1)(A), (B). He did not participate in any proceeding relating to an alleged violation under sections 1341, 1343, 1344, or 1348 or any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *18 U.S.C.§ 1514A*(a)(2). Therefore, Giurovici must establish that he provided information to his employer or assisted in an investigation, prior to his April 27, 2006 discharge, regarding conduct that he reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *18 U.S.C. § 1514A*(a)(1)(C).

Id. at *13-14.

At all times, establishment of a Sarbanes-Oxley-protected activity claim hinges upon the central premise of Sarbanes-Oxley – to protect investors in their decision-making process. This essential tenet provides the framework for analyzing the other questions posed by the Board. This essential tenant, applied to the facts of this case, confirms that the reports made by Complainants did not amount to "protected activity" and the ALJ properly dismissed their complaints.

> **(a) 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. §§ 1341, 1343, 1344 or 1348, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders)?**

In *Platone*, the Board expressly and seminally held "an employee must show that [her] communications to [her] employer 'definitively and specifically relate[d]' to one of the laws listed in § 1514A." *Platone,* ARB Case No. 04-154, slip op. at 17, aff'd) , *Platone v. U.S. Dept. of Labor*, 548 F.3d 322 (4th Cir. 2008).[20]

[20] All Circuit Courts of Appeal which have considered this aspect of a claimant's burden have adopted the Board's formulation with approval. *See Vodopia v. Koninklijke Philips Electronics*, 2010 U.S. App. Lexis 22081 (2nd Cir. Oct. 25, 2010); *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). *See also Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("The employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A.").

This holding is consistently echoed by the Board's (and reviewing courts') findings that complaining about violations of law under some other statutory scheme is not protected activity; to be protected, the employee's complaint must refer explicitly to a company's violation under one of the four listed criminal statutes, the rules or regulations of the SEC, or otherwise implicating fraud against shareholders. *Smith*, ARB No. 06-064, slip op. at 10; *Harvey*, ARB Nos. 04-114, 115, slip op. at 16; *see also, e.g., Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (billing discrepancies do not rise to level of shareholder fraud, and are not protected); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 353-356 (4th Cir. 2008) (violations of Federal Drug Administration good manufacturing practices are too attenuated "to having material financial consequences to a reasonable investor" and are not protected); *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 726 (7th Cir. 2009) (finding certain alleged misconduct by company not relevant to "protected activity" inquiry when facts pointed to fraud on client, not shareholders, and incident was not in any event basis for employee's report to company).

As such, any deviation from requiring a claimant to establish their alleged activity definitively and specifically relates to a violation of one or more of the laws listed in Section 806 of the Act would be in direct conflict with well-established Board precedent.

(b) What must a complainant show in order to meet the requirement that the complainant reasonably believes 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?

In order to constitute "protected activity," the Board has long held that the employee must report an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. *Neuer*, ARB No. 07-036, slip op. at 4; *Reddy v. Medquist, Inc.*, ARB Case No. 04-0123, ALJ No. 2004-SOX-35

(ARB Sept. 30, 2005); *Getman v. Southwest Securities, Inc.*, ARB Case No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005).

Drawing from Title VII jurisprudence and ARB analysis of similar statutes, courts examining Sarbanes-Oxley claims have found that to establish she engaged in protected activity, a claimant must show that she had both "a subjective belief and an objectively reasonable belief" that the conduct she complained of constituted a violation of relevant law. *See Welch v. Chao*, 536 F.3d 269 at 275 and 277, n.4 (4th Cir. 2008) citing *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008)) and *Melendez v. Exxon Chems. Ams.*, ARB Case No. 96-051, ALJ No. 93-ERA-00006, slip op. at 25-29 (ARB July 14, 2000).

1. The Subjective Test

A claimant can establish her subjective belief by showing she actually believed the reported conduct constituted a violation of an enumerated law. While good faith in filing is expected, it is the claimant's own actions and communications that establish her belief. Should she, whether through her actions or communications, express doubt as to the reasonableness of her claims or a connection to shareholder fraud, her claim of protected activity should fail. *See Gale v. DOL*, 2010 U.S. App. LEXIS 13104 (11th Cir. Jun. 25, 2010) ("It would make no sense to allow [an employee] to proceed if he himself did not hold the belief required by the statute, and the language of the statute itself requires that the belief be a 'reasonable' one.") (citing *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008)).

2. The Objective Test

An employee must also show the objective reasonability of her belief, including that "a reasonable person in [her] position would have believed that the conduct constituted a violation." *Livingston*, 520 F.3d at 352 & n.2, 355, 356) (citing *Jordan v. Alternative Resources Corp.*, 458

F.3d 332, 340-41 (4th Cir. 2006), *cert. denied*, 549 U.S. 1362, 127 S.Ct. 2036 (2007), and deciding as a matter of law that plaintiff did not have an objectively reasonable belief that she was reporting a violation of relevant law).

The objective reasonableness can be drawn from the employee's job responsibilities and general knowledge. *Allen v. Admin. Review Bd.*, 514 F.3d 468, at 477, 479 (5th Cir. 2008) (because employee was a CPA, the reasonableness of her belief must be evaluated from the perspective of an accounting expert). Phrased differently, the objective reasonability of a connection between a claimant's report and shareholder fraud becomes more tenuous the less related to financial matters the job performed is. In analyzing the context and circumstances of Complainants' reports, the ALJ in these matters explained:

> Since Complainants were employed in nursing or related capacities, not as investment analysts at a financial services firm, no reasonable inference that they were concerned with shareholder fraud could have been derived from their job responsibilities or the nature of their work. In this context, their disclosures to Respondent are outside the scope of protected reporting under SOX.

Decision and Order Dismissing Complaints, at 11.

The objective test also serves to separate speculative claims with marginal connection to shareholder fraud from those where connections are clear and shareholder impact plausible. For example, in the instant matter, Complainants' reports concern alleged misreporting of clinical data on a limited scale by one or two co-workers. *See* Sylvester Complaint ¶ 13; Neuschafer Complaint ¶ 14. On their face, the only references to or implication of Sarbanes-Oxley or its referenced statutes come in the context of conclusory assertions, added by Complainants' counsel long after the actual reports, seeking to mold Complainants' allegations of isolated data misreporting to the extent that they "could constitute" Sarbanes-Oxley-qualified claims. *See, e.g.*, Sylvester Complaint ¶¶ 12, 19-24, 45-51. Even these additional references to FDA practice

guidelines, supplied after-the-fact by counsel, make no reference to shareholder fraud or to violations of the enumerated federal criminal statutes. *See* Sylvester Complaint ¶ 13; Neuschafer Complaint ¶ 14. In contrast, the reports actually made by Complainants were *directly* related to nursing and clinical practices which are part of their normal duties.

As a result, in the case at the bar, the objective reasonability of Complainants' reports as being "definitively and specifically" related to shareholder fraud – when made, not as repackaged in their complaints – is not present. *See also Walton v. NOVA Info. Sys.*, 2008 U.S. Dist. LEXIS 29944, *24-26 (E.D. Tenn. 2007) (claimant cannot establish a reasonable belief of financial statements errors or misreporting when not involved with or familiar with the reports in questions because "such speculative beliefs do not comprise an existing violation as required by section 806") (citing *Livingston*, 520 F.3d at 353-56); *see also Harvey*, ARB Nos. 04-114, 115, slip op. at 15 ("A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."); *Godfrey*, ARB Case No. 08-088, slip op. at 6 and note 29) (citing *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 8 (ARB September 29, 2006) and finding claimant did not meet his burden that he reasonably believed that company itself violated the fraud statutes, SEC rules or regulations, or shareholder fraud law, stating: "[S]peculation or a mere possibility that shareholders would be defrauded because Union Pacific employees parceled purchases does not satisfy the reasonable belief requirement.").

The complaints in the instant matter provide examples of the contrast between the subjective and objective tests. As succinctly, if colloquially, put by the ALJ in his decision dismissing these claims:

> Claimants seem to rely upon the old adage that, "for want of a nail the kingdom was lost[.]"

Decision and Order Dismissing Complaints, at 11. Key in this synopsis is the ALJ's deference to the potential seriousness of Complainants' underlying reports regarding allegedly false clinical data, but nonetheless recognizing the inapplicability of the particular protections of Sarbanes-Oxley to this conduct. *Id.*

> Such complaints about the accuracy and conduct of clinical drug or medical procedure trials do not qualify as protected activity because they do not have a definitive and specific relation to fraud involving shareholders as required by the Act, *Platone*, *Portes*, *Livingston*), and other authorities.

Id. at 12. Accordingly, dismissal of the complaint at issue was appropriate and the decision of the ALJ should be affirmed because the content of the actual reports made by Complainants do not *plausibly* invoke a definitive and specific violation of Section 806's enumerated statutes, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders and, furthermore, the Complainants cannot show that their subjective beliefs that they engaged in protected activity are objectively reasonable.

(c) 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?

Congress intended Sarbanes-Oxley as a source of protection for investors, not as a catch-all wrongful termination statute for any employee of a publically-traded company who raises a concern about perceived corporate wrongdoing of any stripe. Recognizing this distinction in no way diminishes the potential seriousness of a claimant's alleged concerns, but instead comports with the limits on Sarbanes-Oxley's scope as intended by its drafters. *See* Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002).

Sarbanes-Oxley is a means to protect the ability of investors to make decisions upon accurate information, not a platform for employment claims without direct connection to investors' interests, even where criminal conduct is alleged. In *Platone*, the complainant identified federal mail and wire fraud statutes in her OSHA complaint. As the Board noted,

> These statutes are not by their terms limited to fraudulent activity that directly or indirectly affects investors' interests. However, when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests.

Platone, ARB No. 04-154, slip op. at 14-16) .

In *Lewandowski*, the complainant alleged wire fraud as the predicate for her Sarbanes-Oxley-protected activity. *Lewandowski*, ARB 08-026, slip op. at 8-9. After reciting the elements of wire fraud, the Board rejected claimant's allegations that her reports of a fellow employee's sharing of confidential information constituted protected activity stating:

> For a protected complaint based on wire fraud, Lewandowski must have had a reasonable belief that Burke was engaged in wire fraud and Lewandowski must have conveyed that complaint "definitively and specifically" to her employer. [...] Rather, Lewandowski stated to Weston and to Saly that Burke's alleged disclosure of confidential information to competitors and to the media was a breach of Viacom's Business Conduct Statement and showed disloyalty to Paramount. These complaints raising a breach of corporate standards and alleging disloyalty *do not "definitively and specifically" relate to the use of electronic means to defraud Viacom shareholders* or others.

Id. (emphasis added).

Accordingly, to keep to the investor-protective direction Congress intended, a Sarbanes-Oxley claimant's report about an alleged legal violation must "definitively and specifically" relate to the Sarbanes-Oxley subject matter. *Id.* As the ALJ correctly found, these claimants' reports did not. *Decision and Order Dismissing Complaints*, at 10-12.

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

As discussed, the Act is not merely the restatement of the criminal statutes or shareholder fraud-related provisions listed in Section 806, but rather a mechanism to ultimately safeguard investors from corporate attempts to mislead or defraud them in their investment decision-making through fraud or intentional misstatement. To effectuate these safeguards, Sarbanes-Oxley creates protection for employees of publically-traded companies who "complain about a *material* misstatement of fact (or omission) concerning a corporation's financial condition on which an investor would reasonably rely." *Joy v. Robbins & Myers, Inc,* ARB Case No. 08-049, ALJ No. 2007-SOX-074, slip op. at 5 (ARB Oct. 29, 2009) (emphasis added); *Lewandowski*, ARB 08-026, slip op. at 6 (same).

Furthermore, in order to ensure Sarbanes-Oxley's protections extend only to those shareholder information-related activities upon which the Act is focused, "[t]he information that the employee actually communicates must 'definitively and specifically' relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief." *Joy,* ARB Case No. 08-049, slip op. at 5.

As such, the examination of what the complainant reasonably believes, particularly its objective component, and what she communicated in giving the report she claims is "protected activity" defines which aspects of fraud must be established. While Sarbanes-Oxley does not require a lay claimant to establish – element-by-element – statutory or even common law fraud to establish protected activity, a claimant must show enough to establish her belief was reasonable.[21]

[21] The Board has previously held that fraud need not actually be proven, but instead that § 1514A protects an employee's communications based on a reasonable, but mistaken, belief that conduct

See Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009) ("To have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud"); *accord Allen v. Admin. Review Bd.*, 514 F.3d 468, 480, n.9 (5th Cir.2008) (while employee "does not need to prove an actual violation of the law occurred, the employee does need to prove that [her] belief was objectively reasonable under the circumstances").

Accordingly, while technical pleading is not required, a claimant must establish fraud insofar as proving that whatever was reported is both objectively material (i.e., fraudulent information upon which an investor would reasonably rely) and intentional (i.e., reasonably differentiating confusion or mistake from an employer's allegedly conscious misreporting or concealment).

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

Section 806 does independently impose a materiality requirement upon a claimant's alleged communications and/or actions purported to be protected activity.

As referenced in the issue posed by the Board, taken separately, the laws listed in Section 806 include materiality requirements not by their text, but by implication. *See e.g. Neder v U.S.*, 527 U.S. 1, 119 S.Ct. 1827 (1999) (materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§1343), and bank fraud (§1344) statutes, even though the text of the statutes does not mention materiality); *see also Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 341-2 (2005) (a material misrepresentation (or omission) is a basic

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constitutes a securities violation. *See Halloum v. Intel Corp.*, ARB Case No. 04-068, slip op. at 6 (ARB Jan. 31, 2006).

element of securities fraud, including a violation of SEC Rule 10b-5).

In the Sarbanes-Oxley context, materiality need not be thought of in the same terms as the criminal statutes listed in Section 806. Rather, for purposes of assessing whether or not protected activity occurred, a materiality requirement is appropriate for discerning whether the activity alleged is truly linked to Sarbanes-Oxley's core purpose – the protection of investors – or not.

As the Board found in *Platone*,

> A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. With respect to omissions of fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

Platone, ARB No. 04-154, slip op. at 16, citing *Basic v. Levinson*, 485 U.S. 224, 231-32 (1998) (internal citations omitted); *see also Fredrickson v. The Home Depot USA, Inc.*, ARB 07-100, slip op. at 7 ("Thus, to come within the SOX's protection, the employee must ordinarily complain about a material misstatement of fact or omission concerning a corporation's financial condition on which an investor would reasonably rely").

When examining the allegations of purported shareholder impact in a Sarbanes-Oxley claim, Sarbanes-Oxley's inherent materiality requirement serves to differentiate the "conceivable" from the "plausible."[22] For example, in the instant matter, Complainants reports concern alleged misreporting of clinical data on a limited scale by one or two co-workers. *See* Sylvester Complaint ¶ 13; Neuschafer Complaint ¶ 14. In this context, the materiality

[22] *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955 (2006) ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."); *see also Ashcroft v. Iqbal,* 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) .

requirement in and of itself is fatal to the protected-nature of the reports because it underscores the attenuated (at best) connection between isolated reports of alleged data misreporting by one to two employees on one study as information which might be reported to shareholders, let alone being material information upon "which an investor would reasonably rely." *See Smith*, ARB No. 06-064, slip op. at 9.

Accordingly, if the communications and/or actions that a claimant contends are protected activity fail to "definitely and specifically" implicate material facts upon which a reasonable shareholder would rely, the claimant's activity cannot be considered as falling within the protections of Sarbanes-Oxley.

CONCLUSION

For the reasons stated herein and in its motion and subsequent briefs, the Board should confirm the dismissal of Sylvester's and Neuschafer's consolidated claims (ARB Case No. 07-123) against Respondent PAREXEL International LLC.

Dated: December 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December, 2010, a copy of the foregoing *Respondent's Supplemental Brief in Support of Dismissal of the Sarbanes-Oxley Complaints* was served by e-mail upon all counsel of record and by U.S. mail, first class postage prepaid, upon all counsel of record and upon:

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