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July 15, 2010

VIA FACSIMILE ONLY
Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue NW
Room S-5220
Washington, DC 20210

RE: Johnson v. Siemens Building Technologies, Inc., Siemens AG
ARB Case No. 08-032
ALJ Case No. 2005-SOX-00015

Dear Administrator:

Enclosed please find a corrected copy of Carri S. Johnson's brief submitted to the Board on July 14, 2010. Corrections were made to the Table of Contents and Table of Authorities.

Respectfully submitted,

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FROM: Jacqueline Williams, Esq.

RE: **CORRECTED TABLE OF CONTENTS & TABLE OF AUTHORITIES**
Supplemental Briefing-Requested by ARB
Johnson v. Siemens Building Technologies, Inc., Siemens AG
ARB Case No. 08-032, ALJ Case No. 2005-SOX-00015

DATE: July 15, 2010

NUMBER OF PAGES INCLUDING COVER SHEET: 32

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON,

Complainant,

ARB Case No. 08-032

OALJ Case No. 2005-SOX-00015

against,

SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG,

Respondents.

BRIEF OF CARRI S. JOHNSON

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STATEMENT OF THE ISSUE

The Board requested additional briefing on the following questions:

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

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

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

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

STATEMENT OF THE CASE

Carri S. Johnson respectfully submits this brief pursuant to the ARB's April 15, 2010 Order in *Carri S. Johnson v. Siemens Building Technologies, Inc. and Siemens AG*, ARB Case No. 08-032, ALJ Case No. 2005-SOX-015. Ms. Johnson's case was dismissed by the ALJ on November 27, 2007. The ALJ concluded that Siemens Building Technologies, Inc. ("SBT") did not act as an agent of Siemens AG when it dismissed Ms. Johnson and that SBT was not a covered entity under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX").

Ms. Johnson filed an appeal of the dismissal and a Motion to Reopen Evidentiary Record & Motion for Relief from Judgment based on Siemens' bribe-for-business scandal that surfaced in late 2006. Ms. Johnson also requested a Stay in the instant matter on the basis of legally inaccurate interpretations of SOX and Section 806 in particular. Ms. Johnson requested the Stay with the idea that Congressional intervention may result in a correction of or shift in the

Department of Labor's approach to Section 806, hoping that such a correction or shift would serve the public interest by providing for a uniform approach to the whistleblower provisions.

Ms. Johnson's appeal, Motion to Reopen Evidentiary Record & Motion for Relief from Judgment, and the request for a Stay are pending before the Board.

ARGUMENT

I. A Subsidiary Is Covered Under Section 806 As A Matter Of Law

A. The Sarbanes-Oxley Act of 2002 Is A Securities Statute

The Board seeks a workable test for purposes of determining the scope of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") and how to apply the anti-retaliation provisions to subsidiaries of publicly traded companies. This task has been historically difficult, in part, because SOX is a statute of a different color: Section 806 is in fact a hybrid, a blend of securities regulation, whistleblower statutes, and criminal law.[1] And while reliance on familiar and perhaps settled analyses is a useful starting point, to resolve Section 806 matters under agency theories or corporate veil-piercing theories as those theories have historically been applied to whistleblower and employment discrimination statutes misses the mark and defeats the purpose of Sarbanes-Oxley and Section 806 if the well-developed body of securities laws and regulations is ignored. The purpose of Sarbanes-Oxley is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." H.R. 3763, Pub. L. 107–204, July 30, 2002. The Act is based upon the notion that the financial markets will operate efficiently if the public is fully informed. The Act falls

[1] Section 806 is codified in Title 18, Part I, Chapter 73 of the United States Code-"Obstruction of Justice."

primarily under the umbrella of *securities* regulation, a violation of Section 806 is a violation of the *securities* laws.

A review of the history and purpose of laws regulating the securities industry lends guidance to analyses under Sarbanes-Oxley and serves to fill in some legislative gaps in the statute where Congress may have assumed an understanding of concepts implicit in these laws, concepts that have to date, with limited but noteworthy exceptions, been entirely disregarded. Such a review is appropriate, part because the Securities Exchange Commission is charged with interpreting SOX and Section 806. *See* 15 U.S.C.A. § 7202. *See also Lawson v. FMR, LLC*. 2010 WL 1345153, *17 (D.Mass. 2010):

> I find no provision of SOX that delegates rule-making authority to OSHA or the Department of Labor, although a provision of the act explicitly delegates such authority to the SEC. 15 U.S.C. § 7202(a). OSHA did not invoke any authority to interpret the statute in promulgating 29 C.F.R. § 1980.101. Moreover, OSHA summarized the rule as establishing "the procedures and time frames for the handling of discrimination complaint" under SOX. 69 Fed.Reg. 52,104, 52,104. OSHA goes on to state that "[t]hese rules are procedural in nature and *are not intended to provide interpretations of the Act*." Id. at 52,105. OSHA was apparently defining the terms used in its own regulations for the procedures involved in Section 806 complaints. *OSHA's regulation and comments do not constitute an exercise of authority to interpret the statute, and warrant no deference under Chevron.*

Lawson, at *17 (emphasis added).

Plaintiffs Section 806 claims have been routinely denied historically perhaps because, with few exceptions, courts and agencies tend to work with what they know. And this makes sense from an economic perspective. Cost-effective use of already scarce judicial resources always makes sense. But attention must be paid when the analyses of remedial legislation

continually *thwarts* the purpose of the statute. In September 2008, the Wall Street Journal reported that

> the government has ruled in favor of whistleblowers 17 times out of 1,273 complaints filed since 2002 [according to United States Department of Labor records]. Another 841 cases have been dismissed. *Many of the dismissals were made on the grounds that employees worked for a corporate subsidiary* [according to Professor Richard Moberly, a University of Nebraska law professor.

Jennifer Levitz, *Whistleblowers Are Left Dangling*, WALL ST. J., Sept. 4, 2008 (emphasis added).

As another advocate has pointed out,[2] on the very day that SOX was signed into law—July 30, 2002—President George W. Bush issued a Statement on Signing the Sarbanes-Oxley Act of 2002. Former President Bush stated

> Today I have signed into law H.R. 3763, "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." The Act adopts tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders.
>
> ******
>
> Several provisions of the Act require *careful construction by the executive branch* as it faithfully executes the Act.
>
> ******
>
> Given that the legislative purpose of Section 1514A of title 18 of the U.S. Code, enacted by Section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive branch *shall construe Section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.*
>
> George W. Bush
> The White House
> July 30, 2002

[2] Jason A. Archinaco, Esq., White and Williams LLP, represented UBS whistleblower Timothy P. Flynn, before the United States Department of Labor (OSHA.

Thus, on the same day that SOX was enacted, former President Bush attempted to gut the act and directed the executive branch (including administrative agencies) to gut the act by construing 1514A(a)(1)(B) as only protecting corporate whistleblowers' disclosures to a Congressional committee already conducting an investigation. One would not normally expect a President to sign a bill into law and then issue an executive order later that same day indicating that the Act is not to be construed as written. But this may provide a level of insight as to why—*nearly eight years after SOX was enacted*—we still have no real workable test for determining Section 806's scope. The specific issue whistleblower protection for reports to members of Congress was resolved after the authors of Section 806--Senators Patrick J. Leahy and Charles E. Grassley—engaged in correspondence with the White House and then Solicitor of Labor Howard Radzely (the White House stated that the scope of 18 U.S.C. 1514A "will ultimately be addressed by the courts.") 149 Cong. Rec. S1725-01, 2003 WL 193278 (January 29, 2003). But this does not mean that the executive branch *wanted* Section 806 addressed by the courts. Nor does it mean that the executive branch did not pick up its cue from President Bush's SOX signing statement. As set forth below, the "integrated enterprise test" –historically endorsed by the Solicitor of Labor--serves to *deny* SOX whistleblowers redress for violation of Section 806. An amicus brief submitted by the Solicitor of Labor in 2008 espoused just such a test and advocated just such a result.

Ms. Johnson believes that the Board genuinely seeks a test that serves to protect whistleblowers to the fullest possible extent but also limits the scope of Section 806 to claims that, directly or indirectly, implicate and relate to any sort of fraud against shareholders or the

statutory provisions cited in Section 806. Ms. Johnson submits that the Board must review Section 806 claims and coverage under the well-settled body of securities law.

The Sarbanes-Oxley Act of 2002 ("SOX") is a securities statute. A violation of SOX is a violation of the Securities Exchange Act of 1934. 15 U.S.C. § 7202(b)(1). Therefore, a violation of SOX Section 806 is a violation of the Securities Exchange Act of 1934.

The Securities Exchange Act of 1934 provides in relevant part:

> (b) Enforcement
>
> (1) In general
>
> A violation by *any person* of this Act, *any rule or regulation of the Commission issued under this Act*, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and *any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.*

15 U.S.C. § 7202(b)(1) (emphasis added).

The reference to "this Act" in the text of 15 U.S.C.A. § 7202(b)(1) is to the Sarbanes-Oxley Act of 2002:

> HISTORICAL AND STATUTORY NOTES
>
> Revision Notes and Legislative Reports
>
> 2002 Acts. House Conference Report No. 107-610 and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 542.
>
> References in Text
>
> This Act, referred to in text, means the Sarbanes-Oxley Act of 2002, Pub.L. 107-204, July 30, 2002, 116 Stat. 745, which enacted this chapter [15 U.S.C.A. § 7201 et seq.], 15 U.S.C.A. §§ 78d-3, 78o-6, and 78kk, and 18 U.S.C.A. §§ 1348 to 1350, 1514A, 1519, and 1520, amended 11 U.S.C.A. § 523, 15 U.S.C.A. §§ 77h-1, 77s, 77t, 78c, 78j-1, 78l, 78m, 78o, 78o-4, 78o-5, 78p, 78q, 78q-1, 78u, 78u-1,

> 78u-2, 78u-3, 78ff, 80a-41, 80b-3, and 80b-9, 18 U.S.C.A. §§ 1341, 1343, 1512, and 1513, 28 U.S.C.A. § 1658, and 29 U.S.C.A. §§ 1021, 1131, and 1132, enacted provisions set out as notes under 15 U.S.C.A. §§ 78a, 78o-6, 78p, and 720[illegible], 18 U.S.C.A. §§ 1341 and 1501, and 28 U.S.C.A. § 1658, and amended provisions set out as notes under 28 U.S.C.A. § 994.

Id.

Thus, publicly traded companies violate the Securities Exchange Act of 1934 when the company takes prohibited actions defined in Section 806.

Section 806 mirrors the intent and purpose of the Securities Exchange Act of 1934. Like SOX, the Securities Exchange Act of 1934 is "remedial and is to be construed liberally. It has been interpreted as requiring only some indirect means of discipline or influence short of actual direction to hold a 'controlling person' liable." *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967), *cert. denied*, 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1143 (1968).

In addition to providing protection from retaliation by "any officer, employee, contractor, subcontractor, or agent of such company", Section 806 provides protection from unlawful retaliation by any "person" who violates the statute:

> **b) Enforcement Action.—**
>
> **(1) In general.**— A person who alleges discharge or other discrimination *by any person* in violation of subsection (a) may seek relief under subsection (c), by—

15 U.S.C. 1514(A)(b) (emphasis added).

Thus, the broad scope of protections afforded under Section 806 is evident *on the face of the statute*. The broad scope of Section 806 was intended by the authors of Section 806:

> We want to point out, as clearly and emphatically as we can, that there is simply no basis to assert, given [the broad language of Section 806], that employees of subsidiaries of the companies identified in the [Section 806] were intended to be excluded from its protections.

Letter to Secretary of Labor Elaine Chao (Senators Patrick J. Leahy and Charles E. Grassley), September 9, 2008.

The scope of Section 806 was acknowledged and reinforced in *Walters v. Deutsche Bank AG*, 2008-SOX-70 (March 23, 2009):

> While it is obviously accurate to note *the absence of a specific reference to subsidiaries in Section 806*, it is equally accurate to note that *subsidiaries are subject to the regulatory reforms required by Sarbanes-Oxley* through requirements imposed upon their corporate parents. Thus, subsidiaries are not routinely accorded separate identities under Sarbanes-Oxley; nor are they regulated separately. Rather, Sarbanes-Oxley reforms *permeate the subsidiaries* through obligations or restrictions imposed on their publicly traded parent to communicate, maintain, and enforce financial and accounting reforms throughout its subsidiaries. . . . Although not, in most instances, mentioned in a particular provision, the subsidiaries comply because the *publicly traded parent company is responsible for enforcing their compliance*, and it has the authority and the control to enforce its will.

Walters, at 21 (emphasis added).

The scope of the Securities Exchange Act of 1934 is similarly broad. "Person" is defined as under the Securities Exchange Act of 1934 as follows:

> The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of government.

15 U.S.C. § 78c(9).

The broad protections afforded SOX whistleblowers under Section 806 are clear. Section 806 provides in relevant part that no "officer, employee, contractor, subcontractor, or agent of [a publicly traded company] may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided or otherwise assist in an investigation regarding *any conduct* which the employee reasonably believes constitutes a violation of Section 1341, 1343, 1344, or 1348, *any rule or*

> *regulation of the Securities and Exchange Commission*, or *any provision of Federal law relating to fraud against shareholders . . . .*"

18 U.S.C. 1514A(a)(1) (emphasis added).

Ms. Johnson has previously submitted that the proper test for determining coverage under Section 806 is whether a subsidiary's revenue is included in the consolidated financial statements of the publicly traded parent company. Ms. Johnson submits that such a test appropriately balances the competing concerns of protecting whistleblowers to the fullest extent possible and exposing publicly traded corporations to unlimited liability for claims that may be unrelated to fraud against shareholders or the statutory provisions referenced in 18 U.S.C. 1514A. A "consolidated financial statement test" is easy to administer and serves the purpose of

> protecting the public, shareholders, and Americans' confidence in the marketplace. Congress enacted SOX as a direct response to the fraud perpetrated by Enron Corporation (now known as Enron Credit Recovery Corporation)—through the misuse and abuse of its shell corporations and subsidiaries. . . . [I]t is unreasonable to argue that subsidiary corporations would not be covered by the whistleblower protection provisions of SOX.

Letter to Secretary of Labor Elaine Chao (Senators Patrick J. Leahy and Charles E. Grassley), September 9, 2008.

Ms. Johnson proposes that Section 806 analysis must start with the securities laws. The best formulation for Section 806 coverage to date is, in fact, a "consolidated financial statement test". As the ALJ stated in *Morefield v. Exelon Service*, 2004-SOX-00002 (January 28, 2004):

> [a] publicly traded corporation is, for Sarbanes-Oxley purposed, the sum of its constituent units; and Congress insisted upon accuracy and integrity in *financial reporting at all levels* of the corporate structure, *including the non-publicly traded subsidiaries*. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization.

Id. (emphasis added).

Thus, the Board may (and perhaps must) look to the well-developed (and long-settled) theories of liability and redress in the decisional law and regulations interpreting and enforcing the Securities Act of 1933 and the Securities Exchange Act of 1934. SOX falls primarily under the umbrella of *securities* regulation, a violation of Section 806 is a violation of the *securities* laws. The purpose of Sarbanes-Oxley is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." H.R. 3763, Pub. L. 107-204, July 30, 2002.

B. Section 806's Title Does Not Control Interpretations Of The Statute

Unfortunately, whistleblower protection has been denied on the basis of Section 806's *title*: "Whistleblower Protection for Employees of *Publicly Traded* Companies". (emphasis added). *See Rao v. Daimler Chrysler Corp.*, 2007 WL 1424220 (E.D. Mich. May 14, 2007) ("Congress only listed employees of public companies as protected individuals under § 1514A and it is not the job of this Court to rewrite clear statutory text"); *Brady v. Calyon Securities*, 406 F.Supp.2d 307 (S.D. New York Nov. 8, 2005) ("A specific requirement . . . is that defendant be a publicly traded company").

While the title of a statute must be considered when interpreting an act, "it is the *substance of the law*, rather than the designation or name given it by the legislative body that is controlling. Sutherland Statutory Construction, Vol. 2A, 47:3, at 284 (Statutes and Statutory Construction, West 2009) (emphasis added). "A statutory heading . . . is 'but a short-hand reference to the general subject matter involved'". *Lawson v. FMR LLC*, 2010 WL 1345153,

*12 (D.Mass. March 31, 2010) (citing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)).

"If the bill title is general and comprehensive, it will be liberally construed to embrace any provision directly or indirectly related to the subject expressed in the title and having *a natural connection to it*." Sutherland Statutory Construction, Vol. 1A, 18:7, at 29 (Statutes and Statutory Construction, West 2009) (emphasis added). A title need not "specify all the provisions of an act." *Id.* at 18:9, page 87. "Numerous provisions may included a brief general title, and the title need not, and should not, be an index to or an abstract of the contents of a statute. Particulars are to be found *in the act*, not in the title. (emphasis in original) A descriptive heading (not a title) does not constitute part of the statute and *does not control the interpretation of the statute*." *Id.* at 18:11, pages 95-96. (emphasis added).

The "particulars in the act" in the instant case do extend coverage to subsidiaries in the form of "officer[s], employee[s], contractor[s], subcontractor[s] or agent[s]" of publicly traded companies. 15 U.S.C. 1514A(a). Ms. Johnson submits that subsidiaries of publicly traded companies are categorically included by Section 806 on the basis of *Morefield* and *Walters*. Ms. Johnson also respectfully submits that the "consolidated financial statement" test sufficiently balances the competing interests and most importantly, provides a roadmap for Section 806 claims going forward.

C. The Board May Look To The Well-Developed Body Of Securities Laws In Determining Liability Under Section 806

The securities laws in this country have long attributed secondary or "control person" liability to prevent a parent corporation from using subsidiaries to act in their place and do things

that the parent corporation itself is forbidden to do under federal securities laws. Another theory behind "control person" liability is that the corporate parent is in the best position to design, maintain, communicate, and enforce guidelines throughout the corporation.

The Securities Exchange Act of 1934 provisions provide in relevant part:

> **Sec. 20. Liability of Controlling Persons and Persons Who Aid and Abet Violations.**
>
> (a) *Every person who, directly or indirectly*, controls *any person* liable under *any provision of this Act or of any rule or regulation thereunder* shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. 78t (emphasis added).

The SEC defines "control" as "the possession, *direct or indirect*, of the power to direct or cause the direction of the *management and policies of a person*, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2 (emphasis added).

Section 20 of the 1934 Act *nowhere* requires active participation in the primary violation. And because Section 20 sounds in strict liability, there is no showing required with respect to the culpability of the control person. A Complainant only need show that the "individual corporate defendants controlled an entity that violated the securities laws." *In re Twinlab Corp. Securities Litigation*, 103 F.Supp.2d 193, 208 (E.D.N.Y Jul. 5, 2000). It is a long-settled rule of law that for purposes of control under the securities laws and regulations, influence can be an element of control. *Chromalloy American Corp. v Sun Chemical Corp.*, 611 F.2d 240 (8th Cir. 1979).

A publicly traded parent corporation can be characterized as a "control person" on a number of levels:

1. Section 402 of SOX places responsibility for establishing and maintaining internal controls on the publicly traded parent company's principal executive officer and principal financial officer:

Section 402(4) of Sarbanes-Oxley requires the principal executive officer and the principal financial officer must certify in each annual or quarterly report that:

***

> the signing officers are responsible for establishing and maintaining internal controls and have designed such internal controls to ensure that material information relating to the company and its *consolidated subsidiaries* is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared. They must also have evaluated *the effectiveness of the company's internal controls* as of a date within 90 days prior to the report and presented their conclusions about the effectiveness of their internal controls based on their evaluation as of that date. (emphasis added).

2. The Securities Exchange Act of 1934 requires

> Every issuer which has a class of securities registered pursuant to Section 781 of this title and every issuer which is required to file reports pursuant to Section 78o(d) of this title shall—
>
> ******
>
> (B) devise and maintain a system of *internal accounting controls* sufficient to provide reasonable assurances that-
>
> ******
>
> > (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets . . . .

15 U.S.C.A. 78m(b)(2)(B)(ii) (emphasis added).

See also Smith v. Corning, 496 F.Supp.2d 244, 249, n.1 (W.D. New York 2007):

> It is clear that 13(b)(2) [15 U.S.C. § 78m(b)(2)] and the rules promulgated thereunder are rules of general application which were enacted to (1) assure than an issuer's books and records accurately and fairly reflect its transactions and the disposition of assets, (2) protect the integrity of the independent audit of issuer financial statements that are required under the Exchange Act, and (3) promote the reliability and completeness of financial information that issuers are required to file with the Commission or disseminate to the Exchange Act.

(citing *S.E.C. v. World-Wide Coin Investments, Ltd.*, 567 F.Supp. 724, 747 (D.C. Ga. 1983).

A corporation . . . violates the Securities Exchange Act of 1934 when it "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls." *Sequeira v. KB Home*, 2009 WL 6567043, *12 (S.D. Texas 2009).

Control person liability can be established by virtue of officers and directors signatures on annual reports and registration statements. *In re Worldcom, Inc., Securities Litigation*, 294 F.Supp.2d 392 (S.D. N.Y. 2003)

> [T]he ruling here reflects the scheme established by Congress. It has imposed a heightened pleading standard for a Section 10(b) claim but not for a Section 20(a) claim. (citation omitted). If a plaintiff succeeds in pleading a Section 10(b) violation, then Congress has determined that those who control that violator may be sued too. Finally, as a practical matter, just what is a signature on an SEC filed document meant to represent if it does not represent a degree of responsibility for the material contained in that document? The very fact that a director is required to sign these critical documents charges the director with power over the documents and represents to the corporation, its shareholders, and the public that the corporation's director has performed her role with sufficient diligence that she is willing and able to stand behind the information contained in those documents. As the SEC explained when it announced the requirement in 1980:
>
> With an expanded signature requirement, the Commission anticipates that directors will be encouraged to devote the needed attention to reviewing the Form 10-K and to seek the involvement of other professionals to the degree necessary to give themselves sufficient comfort. In the Commission's view, this added

> measure of discipline is vital to the disclosure objectives of the federal securities laws, and outweighs the potential impact, if any, of the signature on legal liability.

Id. at 420 (citing Integration of Securities Act Disclosure Systems, Amendments to SEC Rules 17 C.F.R. Parts 229, 231, 239, 240, 241 & 249, Releases Nos. 33-6231, 34-17114; AS-279, 45 F.R. 63630 (Sept. 25, 1980).

See In re Worldcom, Inc., Securities Litigation, 294 F.Supp.2d 392, 419-420 (S.D. N.Y. 2003)

> Having chosen to speak to the investing public through the issuance of the analyst reports, they had an obligation to communicate in good faith and to disclose material information. To the extent that there is a substantial likelihood that a fuller and more specific disclosure of their relationship to WorldCom would have been considered by a reasonable person to be important when deciding, based on the information conveyed in the analyst reports, to buy or sell WorldCom securities, then the omission of that disclosure may be found by a fact finder to have been a material omission.

Id. at 431.

The *Worldcom* court also indicated that if Section 20(a) contained the requirement that scienter be pleaded and proved, there would be little purpose served by Section 20(a) since a defendant who acts with scienter is liable under Section 10(b). *In re Worldcom*, at 420 n18.

There is no question that a publicly traded parent company benefits from its corporate parenthood. Or that such a parent company would communicate to its corporate "family" financial accounting and corporate governance policies to achieve financial goals. A communication, for example, by an executive to a subsidiary employee that the employee is responsible for adhering to strict corporate financial guidelines would surely create in the employee's mind the idea that the author of the communication had the power to affect the employee's employment status.

As Ms. Johnson stated in her Motion to Reopen Evidentiary Record & for Relief From

Judgment, weaknesses in corporate internal controls are the precursor to financial reporting misstatements and ultimately, fraud on the market and on investors. Such fraud directly implicates Section 806: "Defects in procedures for monitoring financial results and controls have been blamed for recent corporate failures." (citing Title III-Corporate Responsibility, Report of the Committee on Banking, Housing, and Urban Affairs of the United States Senate to accompany S. 2673. July 3, 2002 ("Corporate Responsibility Report") *in* Sarbanes-Oxley Act of 2002: Law and Explanation, p. 175, eds. J. Hamilton, T. Trautmann. The Corporate Responsibility report iterates that under Sarbanes-Oxley, "management is responsible for creating and maintaining adequate internal controls." *Id.* at 180.

If a corporation has adequate internal controls that are adhered to, the adherence may go a long way toward avoiding liability under the Sarbanes-Oxley and similar securities laws and regulations. In that same vein, if a corporation has internal controls that are consistently disregarded so that financial goals may be met, management is responsible and may not delegate that responsibility

Because the Securities Exchange Act of 1934 is remedial legislation, courts have generally recognized that the "control person" provisions should be broadly interpreted. *Stadia Oil and Uranium Co. v. Wheelis*, 251 F.2d 269, 275 (10th Cir. 1957).[3] "Because control person liability is deemed to be separate and distinct from the liability of the controlled person, an action may be brought against a corporation or similar entity as a control person *without* joining the individual *employees, officers, or agents* alleged to be the primary violators, and that conversely, individuals alleged to be control persons of an entity may be sued under a control person theory

[3]"It is an old maxim of the law that a person will not be permitted to do indirectly what he cannot do directly." Stadia Oil and Uranium Co. v. Wheelis, 251 F.2d 269, 275 (10th Cir. 1947).

without joining the entity." 183 A.L.R. Fed. 141 at 2[a] (citing *In re CitiSource, Inc. Securities Litigation*, 694 F. Supp. 1069 (S.D.N.Y. 1988); *Keys v. Wolfe*, 540 F. Supp. 1054 (N.D. Tex. 1982), judgment rev'd on other grounds, 709 F.2d 413 (5th Cir. 1983); *Kemmerer v. Weaver*, 445 F.2d 76 (7th Cir. 1971); *Briggs v. Sterner*, 529 F. Supp. 1155 (S.D. Iowa 1981).

And while control person liability is secondary in nature, "liability need not be actually visited upon the primary violator before a controlling person may be held liable for the primary violator's wrong." *In re Citisource, Inc. Securities Litigation*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988). "Liability of the primary violator's wrong is simply an element of proof of a Section 20(a) claim . . . ." *Id.* A plaintiff "need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint." *Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149, 1170, n.47 (D.C. Circuit 1977).

D. The Level of Ownership of a Subsidiary Does Not Play a Factor In Section 806 Coverage

As stated above, Section 806 coverage extends to subsidiaries by virtue of the nature and structure of a publicly traded corporation, the long-considered theories of liability under the Securities Exchange Act of 1934, and the inclusion of subsidiary revenue in the publicly traded parent's consolidated financial statements. Section 806 coverage *categorically* includes subsidiaries. As Ms. Johnson submits *supra*, non-publicly traded subsidiaries are agents *per se* of the publicly traded parent company, the analysis should be *per se* coverage for subsidiaries of publicly traded companies.

But even if the Board decides that the level of ownership *does* play a factor in Section 806 coverage, the Board may once again turn to the securities laws for guidance. The Securities

Exchange Act of 1934 indicates that *five percent* (5%) interest in a security is sufficient interest to require the reporting of that interest:

> **(d) Reports by persons acquiring more than five per centum of certain classes of securities.**
>
> (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to Section 78l of this title . . . is directly or indirectly the *beneficial owner of more than 5 per centum of such class* shall, within ten days after such acquisition, *send to the issuer* of the security at its principal executive office, by registered or certified mail, *send to each exchange* where the security is traded, and *file with the Commission*, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as *necessary or appropriate in the public interest or for the protection of investors*--
>
> (A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;
>
> (B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in Section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;
>
> 15 U.S.C. § 78m(d)(1) (emphasis added).

> (C) if the purpose of the purchases or prospective purchases is *to acquire control of the business of the issuer of the securities*, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;
>
> 15 U.S.C. § 78m(d)(1)(C) (emphasis added).

II. Non-Publicly Held Subsidiaries Are Agents Per Se of Publicly Traded Companies

The difficulty of creating and applying an agency test for purposes of Section 806 coverage is apparent when one considers that nearly all courts reviewing Section 806 claims have dismissed the claims on the basis of agency not shown by the Complainant. *Cf. Walters v. Deutsche Bank AG*, 2008-SOX-00070, at 9, n9 (March 23, 2009) As the ALJ stated in *Walters*,

> [N]othing has changed since July 2006, when Professor [Richard] Moberly completed his study, to alter his conclusion that the results of his detailed analysis: 'demonstrate that administrative decision makers . . . in some cases misapplied Sarbanes-Oxley's substantive protections to the significant disadvantage of employees."

Id.

Ms. Johnson has previously suggested that the *Morefield* court had it exactly right: "A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units and Congress insisted upon accuracy and integrity in financial reporting at *all levels of the corporate structure, including the non-publicly traded subsidiaries*." *Morefield v. Exelon*, 2004-SOX-00002 (ALJ Jan. 28, 2004). (emphasis added).

The *Klopfenstein* decision gave further guidance on the issue of subsidiary coverage employing agency analysis. As the Board stated in *Klopfenstein I*, "[w]hether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency. General common law principles of agency are set forth in the Restatement of Agency, a 'useful beginning point for a discussion of general agency principles.' Although it is a *legal*

concept, 'agency depends upon the existence of required *factual elements*: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control.' Rest. 2d Agen. § 1(1), comment b." *Klopfenstein I*, at 14-15 (emphasis in the original).

The *Walters* court refined and enhanced the *Morefield* and *Klopfenstein* reasoning, rejecting the notion that the Section 806 whistleblower provision was primarily a labor law:

> [P]roof of agency for financial reporting purposes or even the commission of fraud that may wipe out the equity of public shareholders has not been factored into the administrative labor law decisions denying Section 806 coverage. . . . Instead, whistleblowers have been required to prove that they worked for a subsidiary that acted as an agent on behalf of the principal parent for personnel matters or employment matters related to the whistleblower; and *the burden erected a formidable, if not in most instances an insurmountable, obstacle to coverage*.
>
> If Congress wanted to encourage corporate insiders to monitor and report financial fraud and deception, and clearly it did, very little in cases that apply the labor law test and deny that protection seems consistent with that goal. To the contrary, any employee of a subsidiary familiar with the labor test case law might still find it difficult to ignore the advice of the attorney who advised Enron of the minimal risk associated with the terminating of a whistleblower. Yet even more important, the burdens and hurdles associated with proof of agency for labor law purposes seem misdirected and unnecessary not only because Section 806 imposes direct responsibility on the publicly traded company, but also because Section 806 is fundamentally an antifraud law, not a labor law. This, moreover, is not an isolated fringe assessment foundering about in a sea of contrary opinion; it is the unanimous consensus of every Senator who commented on the issue. About this, the legislative history is crystal clear.
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> Section 806 . . . does not protect employees for the sake of improving their labor standards or conditions. Whistleblowers can act on a wholly voluntary basis and if they remain silent, their jobs are not in jeopardy. They can "get along" if they "go along". Inaction and silence will provide all the protection they need. Yet, the primary goal of Section 806 is not labor protection. . . . Although it uses job protection as the method to achieve its purpose, the whistleblower protection provision in Section 806 is intended by Congress to serve as a vital antifraud

> reform designed to protect public investors by creating an environment in which whistleblowers can come forward without fear of losing their jobs.

Walters v Deutsche Bank AG, 2008-SOX-00070 (March 23, 2009), at 8-9 (emphasis added).

Restatement (3d) of the Law Of Agency ("Restatement 3d") lends some guidance and provides in relevant part: "An agency relationship arises only when the elements stated in §1.10 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.". "Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts. Although agency is a consensual relationship, *how the parties to any given relationship label it is not dispositive. Nor does party characterization or nonlegal usage control whether an agent has an agency relationship with a particular person as principal.*" Rest. (3d) Agen. §1.02, comment a (emphasis added). "It is essential to the common-law definition of agency that the party designated as principal has the right to control the party designated as agent and that the party designated as agent act on behalf of the party designated as principal. . . . *It is appropriate for the court to consider whether the parties characterization serves a function other than circumventing an otherwise-applicable statute, regulation, or rule of law, or invoking a statute, regulation, or rule of law to limit or prevent liability.*" Rest. (3d) Agen. §1.02, comment b (emphasis added).

"[U]nder common law principles, a principal is liable for the deceit of his agent committed in the very business he was appointed to carry out. This is true even though the latter's specific conduct was carried on without knowledge of the principal." *Myzel v. Fields*, 386 F.2d 718, 738, (8th Cir. 1967), *cert. denied*, 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1143 (1968). "[W]here the evidence show the 'controlling person' is the actual intended beneficiary . .

. 'control' under the [Securities Exchange Act of 1934] does not require knowledge of the specific wrongdoing any more than a principal must know in advance of his agent's fraud." *Id.* "[O]ne cannot do indirectly through another what he cannot do himself." *Id.* at 739.

III. The Integrated Enterprise Test Is Inapplicable to Section 806

The "integrated enterprise" test was developed by the National Labor Relations Board for purposes of determining whether two entities were sufficiently related to meet the *jurisdictional requirements* of labor and anti-discrimination statutes. *Radio and Television Board Techs. Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965). *See also Pearson v. Component Tech. Corp., 247 F.3d 486* (3rd Cir. 2001). The test focuses on "economic realities" rather than on corporate formalities. *Id.*

Ms. Johnson submits that a "jurisdictional test" has no place in Section 806 analysis:

> The place to start in rethinking the proper standard is with the purpose, so far as it can be discerned, of exempting tiny employers from the antidiscrimination laws. The purpose is not to encourage or condone discrimination; and Congress must realize that the cumulative effect of discrimination by many small firms could be substantial. The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail. See Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir.1995) (reviewing legislative history); Miller v. Maxwell's International Inc., 991 F.2d 583, 587 (9th Cir.1993).

Papa v. Katy, 166 F.3d 937, 943 (7th Cir. 1999).

The place to start in rethinking the proper standard is with the purpose of the legislation or act. *Id.* at 944.

And if an "economic realities test" *has* a place in Section 806 analysis, what better way to show "economic realities" than to analyze a publicly traded parent company's consolidated financial statements.

As stated above, the *Walters* court recognized that the goal of protecting investors and public markets is an anti-fraud provision, not a labor or employment law. Applying traditional labor-employment analysis to Section 806 claims is a *sure* way of denying whistleblowing complainants redress for retaliation. In fact, applying labor-employment analysis to Section 806 claims *may be a form of retaliation in itself.* Even if the Board were to endorse the "integrated enterprise test", the most important factor is *not* the "centralized control of labor relations test". The most important factor for Section 806 purposes would be "common ownership and financial control". The nexus between the *goal* of Section 806 and liability under Section 806 must be a close one, close enough to encourage individuals like Ms. Johnson, Mr. Merten, Mr. Carciero, and Ms. Mara to do it all over again—no matter the cost—because they know it is the right thing to do.

CONCLUSION

Whistleblowers are the "only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when,' crucial questions *not only in the Enron matter but in all complex securities fraud investigations. . . .*" *Walters*, at 11 (citing the Senate Judiciary Committee Report on SOX).

Ms. Johnson submits that the Board adopt a "consolidated financial statement test" for purposes of determining coverage under Section 806 is appropriate. Such a test is clear,

relatively easy to understand and administer, and balances the competing interests of protecting whistleblowers without subjecting publicly traded parent companies to unlimited liability under Section 806. Such a test also serves the greater purpose of providing certainty and finality in remedial legislation, to the extent that anything can be "certain" or "final".

Respectfully submitted,

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