UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON

Complainant,

against,

SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG,

Respondents.

ARB Case No. 08-032

OALJ Case No. 2005-SOX-00015

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION and NATIONAL WHISTLEBLOWERS CENTER

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INTERESTS OF *AMICI CURIAE*

A. Interest of *Amicus* Government Accountability Project

The Government Accountability Project (GAP) is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP played a role in the passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX), 18 U.S.C. §1514A, and is cited in its legislative history. *See* 148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002).

B. Interest of *Amicus* National Employment Lawyers Association

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace, including whistleblowers. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

C. Interest of *Amicus* National Whistleblowers Center

Established in 1988, the National Whistleblowers Center (NWC) assists corporate employees who suffer from illegal retribution for disclosing violations of federal law. In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron debacle and make similar threats to the nation's financial markets." 148 CONG. REC. S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as GAP). Senator Leahy recognized the role of the NWC in the enactment of SOX:

> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblowers Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

S. Rep. 107-146 at 10.

SUMMARY OF ARGUMENT

The Sarbanes-Oxley Act (SOX) extended the reach of securities regulation to the non-public subsidiaries of public corporations. A non-public subsidiary that appears on a parent's Sarbanes-Oxley disclosures, SOX Section 302(a)(4)(B), 15 U.S.C. § 7241(a)(4)(B), is by definition a "controlled" entity, which the Securities Exchange Act treats as a unified part of the publicly-traded parent.

Congress made the Sarbanes-Oxley prohibition on retaliation against whistleblowers, §806, 18 U.S.C. §1514A congruent with the coverage of the rest of the Sarbanes-Oxley Act. That coverage is not limited by the more restrictive doctrines of state corporation law or of labor law. Section 806 expressly incorporates §§12 and 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. §§78l and 78o(d) and the SEC Rules, which treat subsidiaries as an integral part of their parents.

Since 1934, the Securities Exchange Act has not been limited by the formalities of the corporate shell that control state law, nor by the doctrines of operational centralization that limit labor law. If it were so limited, there would be little substance to the Sarbanes-Oxley Act. It defies Congress' express direction to hold that the activities of corporate subsidiaries are covered by all other provisions of SOX, but are somehow exempt from SOX §806's prohibition on retaliation against employees who report the very wrongdoing SOX was passed to prevent.

The Administrative Review Board (ARB) asked for 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?

The answer to this question is plainly "yes." The plain text of section 806, 18 U.S.C. § 1514A, covers any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." This definition encompasses any non-public subsidiaries of a publicly-traded company, where the Securities Exchange Act treats the subsidiary as "controlled" by the parent. *See* Rule 1-02 (Regulation S-X) 17 C.F.R. § 210 and Rule 12b-2, 17 C.F.R. § 240.12b-2.

Where the parent owns a majority of the subsidiary, the subsidiary is <u>categorically</u> deemed "controlled" by the parent under the SEC Rules without further proof of its agency, integration of operations, or other restrictive standards in other areas of the law. *See In re Mutual Funds Investment Litigation*, 566 F.3d 111, 130-131 (4th Cir. 2009). Even a non-majority-owned subsidiary, if it is sufficiently connected to the parent to be subject to the other requirements of

Sarbanes-Oxley, must be subject to section 806 as well.

The ARB need not guess at whether a subsidiary is a covered entity: parents are already required by SOX to disclose all subsidiaries they control and to certify that the parent controls their financial integrity. SOX Section 302(a)(4)(B), 15 U.S.C. § 7241(a)(4)(B). If a subsidiary appears on the parent's certification, it is by definition part of the parent for purposes of SOX and sections 12 and 15(d) of the Securities Exchange Act.

A reading that ignores the Securities Exchange Act definition flies in the face of Congress' purpose. SOX was passed to address the abuses of Enron, which accomplished its fraud through non-public subsidiaries. If SOX whistleblower protection insulates such subsidiaries from coverage, then Congress failed to protect employees reporting the very fraud that motivated the Act.

(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?

Under the Securities Exchange Act, a "controlled" entity includes a subsidiary in which the publicly-traded corporation owns a majority share. In the eyes of securities law, a non-public subsidiary is an agent of the issuer in any action that affects sections 12 and 15(d). No further "agency" test imported from other contexts is necessary or authorized.

(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?

No. The "integration" that counts for the Securities Exchange Act is made out by the mere fact of a parent's ownership. The Securities Exchange Act does not impose any further requirement of operational integration. If Congress had intended to limit SOX coverage in this way, it would not have employed the broader standard under sections 12 and 15(d) of the Securities Exchange Act.

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

It is unnecessary and inappropriate for the ARB to invent any theory of coverage more restrictive than the broad standard Congress legislated.

ARGUMENT

I. CONGRESS EXPRESSLY APPLIED SECTIONS 12 AND 15 OF THE SECURITIES EXCHANGE ACT TO SARBANES-OXLEY, WHICH COVER SUBSIDIARIES OF A PUBLICLY TRADED COMPANY.

Under Section 806 of Sarbanes-Oxley, 18 U.S.C.A. § 1514A, a covered company is a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C.

§78o(d))" or "any officer, employee, contractor, subcontractor, or agent of such company." Congress did not qualify or limit this definition.

Congress made it clear that Sarbanes-Oxley should be read consistently with the Securities Exchange Act. Section 3(b)(1) of Sarbanes-Oxley, 15 U.S.C.A. § 7202(b)(1), expressly provides:

> 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.A. § 7202(b)(1).

A. A subsidiary is part of the publicly traded parent for purposes of Securities Exchange Act section 12 registration and section 15(d) reporting.

Under the Securities Exchange Act, the definition of an entity registered under section 12, or subject to disclosure under section 15(d), includes any subsidiaries sufficiently controlled by the parent to subject it to the SEC Rules.

A security registered under section 12 "shall" contain in the registration statement:

> (b)(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the

> security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following...

15 U.S.C.A. § 78l(b)(1). The SEC Rules, which Congress incorporated in Sarbanes-Oxley, 15 U.S.C.A. § 7202(b)(1), define "control" as ownership in another entity, without further need to show agency, integrated enterprise or other connections:

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means 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 shares, by contract, or otherwise.

Rule 1-02 (Regulation S-X) 17 C.F.R. § 210 and Rule 12b-2.

This definition makes potential control, through the mere fact of ownership, enough to establish control. This definition contrasts with the more restrictive rules against piercing the corporate veil under state corporation law, or against "single employer" status under labor law. *Compare, e.g., IBS Fin. Corp. v. Seidman & Assoc.*,136 F.3d 940, 947 (3d Cir. 1998) ("controlling person" liability made out by "potential power to influence and control the activities of a person, as opposed to the actual exercise thereof") *with Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (no piercing of corporate veil under state law where parent did not actually exert its potential power) and *Schweitzer v.*

Advanced Telemarketing Corp., 104 F.3d 761, 763 (5th Cir. 1997) (actual control required for "single employer" status in labor law.).

The SEC regulations defining what must be disclosed under Section 15 expressly provide:

> 17 C.F.R. § 210.3-01 Consolidated balance sheets
>
> (a) There shall be filed, for the registrant <u>and its subsidiaries</u> consolidated, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there shall be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement.

(Emphasis added.) Similarly, SOX Section 302(a)(4)(B), 15 U.S.C. § 7241(a)(4)(B) requires parents to list their controlled subsidiaries, and certify the parent's financial controls over their conduct. It is therefore unnecessary for the ARB to guess at what subsidiaries are covered. The parent's own SOX disclosures will identify which entities it controls. A subsidiary listed on its parent's Sarbanes-Oxley reports cannot claim some special exemption from SOX §806, when it is subject to every other provision of SOX.

B. The "control" provision of sections 12 and 15(d) is satisfied by ownership, without more.

Courts interpreting other employment statutes view the "control" language of the Securities Exchange Act as <u>a deliberate Congressional choice to treat</u>

subsidiaries as an integral part of the parent, in a way that does not apply to other statutes lacking this language. For example, in *Union Pacific Corp. v. U.S.*, 5 F.3d 523, 526 (Fed. Cir. 1993), the Federal Circuit distinguished the Railroad Retirement Tax Act (RRTA) from the Securities Exchange Act, 15 U.S.C. § 78l: "Unlike the Securities Act of 1933 or the Securities Exchange Act of 1934, the RRTA - passed by the same Congress as these Acts - does not contain language covering any entity 'directly or indirectly controlling or controlled by or under common control with' another entity. *See* 15 U.S.C. § 78l(b)(1)-(2) (1988) (emphasis added); *see also* 15 U.S.C. § 77b(1), (3) (1988). If the RRTA had included 'controlling' language, it would cover as a railroad 'employer' a parent company whose subsidiary is a carrier." *Union Pacific Corp.*, 5 F.3d at 526 (emphasis added).

Sections 12 and 15(d) are in turn governed by the "joint and several liability" provisions of section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a), which uses the same "control" language. Section 20(a) expressly imposes joint and several liability on "persons" who directly or indirectly control other "persons" subject to the provisions of the Act. For example, the Fourth Circuit last year reaffirmed that a subsidiary is a "controlled" entity subject to the Securities Exchange Act merely by virtue of the parent's ownership:

> Plaintiffs' allegations adequately plead control of JCM by JCG. First, plaintiffs have alleged that JCG wholly owned JCM. The Eleventh Circuit has specifically noted that "[t]he legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (citing H.R.Rep. No. 73-152, at 12 (1933)). Regarding control in the corporation context, one commentator explained:
>
>> An enterprise may control another organization and, indirectly, that organization's agents and employees. An enterprise's section 15 or 20(a) control of another organization may arise from virtually any source on which any other controlling person's status can be based. For example, a corporation may be a controlling person when it owns the majority of the shares of another corporation on the basis of its authority to control (legal control) the subsidiary.
>
> Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 Notre Dame L.Rev. 263, 314 (1997); *see also Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.*, 735 F.Supp. 587, 590-91 (S.D.N.Y. 1990) (holding that plaintiffs' allegation that defendants were sole shareholders of the allegedly controlled corporation "clearly meets" the § 20(a) standard).

In re Mutual Funds Investment Litigation, 566 F.3d 111, 130-131 (4th Cir. 2009). *See also Baron v. Smith*, 380 F.3d 49, 56 (1st Cir. 2004) (parent and subsidiaries were required to disclose financial data under section 15(d) of the Securities Exchange Act, 15 U.S.C. § 78o(d)).

There may be situations where even less than a majority of ownership will still establish "control" for purposes of sections 12 and 15(d). Such subsidiaries will appear on the parent's SOX disclosures under SOX Section 302(a)(4)(B), 15 U.S.C. § 7241(a)(4)(B). In these situations, if the subsidiary is subject to all other requirements of Sarbanes-Oxley, it is subject to section 806 as well.

Congress made SOX coverage coextensive with sections 12 and 15(d).This is exactly why Congress did not need to put the word "subsidiary" in section 806 (but did feel the need to include "any officer, employee, contractor, subcontractor, or agent of such company"). Subsidiaries (persons controlled by the issuer) are clearly part of the registration requirements of sections 12 and 15(d) of the Securities Exchange Act and are therefore subject to section 806 of SOX.

C. The ARB has no authority to legislate additional restrictions on SOX coverage that Congress did not provide.

On this point, the Administrative Law Judges (ALJs) in *Morefield v. Exelon Servs., Inc.*, ALJ No. 2004-SOX-002 (ALJ Jan. 28, 2004) and *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070 (ALJ Mar. 23, 2009) were absolutely correct. Where Congress has expressly selected a statutory definition, the agency has no authority to amend it by adding restrictions that Congress did not intend. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

D. Denial of SOX protection to employees of corporate subsidiaries nullifies Congress' purpose.

The insertion of additional restrictions on coverage outside the statutory text is not only outside Congress's intent; it prevents a remedy for the very abuses that motivated the Act.

The political impetus for SOX arose from the abuse of non-public <u>subsidiaries</u> controlled by public corporations. If the reason for the enactment of SOX had to be distilled to a single word, that word would be "Enron." The Congressional record is replete with references to Enron and its proliferation of subsidiaries as the catalyst for this Act. Ironically, attached to the last 10-K Enron filed with the SEC before it imploded in 2001 was a 56-page list of hundreds of subsidiaries and limited partnerships. *See* Enron Corp., Annual Report (Form 10-K), at 108 - 56 (Apr. 2, 2001). The various frauds that caused Enron's downfall occurred at these subsidiaries and limited partnerships. In fact, Enron's S-4 registration statement, filed with the SEC on October 9, 1996, states: "Essentially all of Enron's operations are conducted through its subsidiaries and affiliates..." Enron Corp., Registration Statement (Form S-4), at 6 (Oct. 10, 1996).

When Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what [Enron] were doing on this chart. <u>There is no way we could have known about this without that kind of a whistleblower</u>. Look at this. They had all these hidden corporations-Jedi, Kenobi, Chewco, Big Doe-I guess they must have had "little doe"-Yosemite, Cactus, Ponderosa, Raptor, Braveheart, Ahluwalia, I think they were probably watching too many old reruns when they put this together. The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.

148 CONG. REC. S7358 (2002) (emphasis added). Yet under the standard argued here by non-public subsidiaries, the very employees of Enron subsidiaries that Congress meant to protect would not be protected, simply because they were not directly employed by the publicly-traded parent.

Senator Durbin said that section 806 "creates protections for corporate whistleblowers. We need them. If insiders don't come forward, many times you don't know what is happening in large corporations." 148 CONG. REC. S6537 (2002). These goals would be completely frustrated if international companies simply moved their fraudulent activities to subsidiaries. It flouts the obvious purpose of Congress to hold that, notwithstanding its central concern with Enron's "hidden corporations," it did not intend to protect the very whistleblowers at the subsidiary in a position to blow the whistle on that fraud. The few direct employees of the parent Enron would not have been in the same position. If the securities laws are designed to reach the conduct of "controlled" non-public subsidiaries, then it follows that SOX whistleblower protection was intended to reach their employees as well. As Judge Levin correctly held in *Walters v. Deutsche Bank AG*, 2008-SOX-70 (ALJ Mar. 23, 2009), "the legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like the accounting firm of Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal. Yet, application of the labor agency test probably would have been fatal to the claim of an Andersen whistleblower, and has been fatal to claims of whistleblowers in wholly owned subsidiaries . . . Under such circumstances, simply to state the labor law test in the context of Sarbanes-Oxley seems sufficient to refute it, <u>because it leaves essentially unchanged conditions Congress passionately wanted to reform</u>." *Walters*, 2008-SOX-70 at 8 (emphasis added.)

In *Walters,* Judge Levin summarized SOX's legislative history as follows:

> The role Congress envisioned for the whistleblower was best described by Senator Leahy: "When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why." See, Senate Banking Committee Legis. History, Vol. III. at 1300-01. Senator Leahy revealed that Enron operated through a veil of subsidiaries and entities including Ponderosa, Jedi Capital, Big Doe, Sundance, Little River, Yosemite, OB-1 Holdings, Pregrine, Kenobe, Braveheart, Mojave, Chewco, and Condor, Osprey, Zenith, Egrit, Cactus, Big River, Whitwing, and Raptor, among others, and observed that without an inside whistleblower: "There is no way we could have known about this… If you look at that, [the Enron corporate structure] you do not know these entities belong to Enron." *Id.*
>
> *** Senator Leahy emphasized that Congress was dealing not only with the web of subsidiaries Enron and other corporations had used systematically to defraud stockholders, but the realization that the average investor and professional accountant, in many instances, were unlikely, without inside assistance, to untangle the complex corporate structure in which fraud or financial misrepresentation could fester undetected.

Id. at 9-10. Judge Levin concluded that, "the predominant purpose of Section 806 is fraud detection, not worker protection … ." *Id. at* 11.

This purpose is consistent with a scope of coverage that follows the full extent of transactions affecting the parent company's financial reports. It is inconsistent with a narrow scope that looks to control of the employment relationship. SOX's whistleblower protection is not motivated by the nature of the employment relationship itself, as *e.g.*, the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*) is, but rather by the public policy to protect insider employees who help with the detection and proof of fraud, wherever it might be. This purpose follows the scope of entities included in the parent company's public reports, not the scope of control over the employment relationship.

E. Remedial statutes like SOX must be read broadly.

When Congress plainly states its intent to remedy a social and economic danger, courts and agencies are required to construe the remedial statute broadly.

The ARB has recognized that a whistleblower protection statute "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp.*, USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the Energy Reorganization Act, 42 U.S.C. § 5851, *citing English v. General Elec. Co.*, 496 U.S. 72 (1990) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

To allow corporations to insulate Enron-like misconduct (by separating themselves from their wholly-owned subsidiaries) makes a mockery of SOX's purpose. It leads to absurd anomalies in the application of Sarbanes-Oxley. For example, in *SEC v. Koninklijke Ahold N.V. (Royal Ahold)*, SEC Litigation Release No. 18929 (October 13, 2004), the SEC sued the parent (Royal Ahold) for fraud that occurred at its wholly-owned subsidiary, U.S. Foodservice. While the SEC had jurisdiction to sue Royal Ahold for the fraud at U.S. Foodservice, the ALJ dismissed a whistleblower complaint against U.S. Foodservice for lack of jurisdiction. *Ambrose v. U.S. Foodservice, Inc.*, 2005-SOX-00105 (ALJ Apr. 17, 2006). This flies in the face of Congress' statutory direction in section 3(b)(1) of Sarbanes-Oxley, 15 U.S.C.A. § 7202(b)(1), which bears repeating:

> 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.A. § 7202(b)(1).

Unfortunately, a few opinions from Department of Labor ALJs reflect that they have succumbed in the past to arguments to insert new restrictions on SOX protection that Congress did not intend, from the very entities that SOX intends to regulate. *See, e.g.*, *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006); *Perez v. H&R Block, Inc.*, ALJ

No. 2009-SOX-042 (ALJ Dec. 1, 2009). The doctrine behind these cases is a good example of how SOX has been misapplied. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 135 (2007) ("administrative decision makers … in some cases misapplied, Sarbanes-Oxley's substantive protections to the significant disadvantage of employees."). It makes no sense that Congress would intend for the SEC to have jurisdiction to sue for a violation, and also intend that the whistleblower who exposes that violation is not covered under the same securities law definitions (and in this case, in the same parent-subsidiary relationship). This result is repugnant both to the Congressional intent of protecting whistleblowers, and the intent of securities laws to protect shareholders.

When consumers buy a public company's stock, they are buying ownership in the company and also ownership in the subsidiaries. The subsidiaries are as much a part of the stock as the parent company. They are a part of the company that issued the security and part of the underlying value owned by the shareholders. The shareholders own the company, including the subsidiaries. Congress adopted the section 12 registration and 15(d) reporting requirements of the Securities Exchange Act in SOX to protect the shareholder's stake in the company, including its subsidiaries. The whole corporate family is subject to securities laws since stock value reflects the activities, transactions and direction of the whole entity — including its subsidiaries. If the whistleblower works at a subsidiary, he works at part of the publicly traded entity regulated by the Securities Exchange Act.

F. The ARB should articulate its position, by explaining the need to correct its prior decisions.

To the extent that the ARB required evidence of any particular agency relationship between a given respondent and its parent company in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006), *on remand* (ALJ Oct. 13, 2006) (finding a subsidiary an agent where common managers involved in termination decision), *aff'd* ARB No. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009), this ARB has the power and the obligation to rectify that unwarranted requirement. After *FCC v. Fox Television Stations, Inc.*, 556 U.S. ____, 129 S. Ct. 1800, 1810 (2009), the Supreme Court gives agency wide leeway to change its policy when it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action." *Id., quoting Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins.*, 463 U. S. 29, 43 (1983).

The ARB should now relieve parties and ALJs from repetitive litigation of an issue that Congress did not intend to be litigated: the scope of each subsidiary's agency on behalf of its parent. A parent's active control of the subsidiary's employment practices is not necessary to find that the subsidiary is an agent of the parent within the securities law context of SOX. If the subsidiary's conduct is otherwise covered by SOX, it is by definition under the control of its parent in the eyes of the Act.

II. "AGENCY" IS MADE OUT BY THE MERE FACT OF A SUBSIDIARY'S REPORTING SUBJECT TO SECTIONS 12 AND 15(d).

The ARB may also satisfy Congressional intent by making the "agency" test coextensive with the rule of "control" defined in the Securities Exchange Act. The "agency" test applied in *Klopfenstein* is permissible, provided that the Board recognizes that under the Securities Exchange Act, sections 12 and 15(d), the agency of a "controlled" subsidiary is made out <u>in every case</u> by the subsidiary's duty under SOX to report its financial status through the parent and submit to the parent's financial controls.

Klopfenstein's error was not so much in invoking the concept of agency, but in ignoring the securities-law context for determining it. The common-law rule of agency is generally stated as: "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Restatement*

(2d) Agency § 1; *see also Restatement (3d) Agency* § 1.01 (draft approved, publication expected 2006). The person "for whom action is to be taken is the principal" and "the one who is to act is the agent." *Restatement (2d) Agency* § 1.

This test cannot be applied separate from the securities law context that Congress commanded the Board to apply in 15 U.S.C.A. § 7202(b)(1). Under securities law, a signed certification under section 302 of SOX, 15 U.S.C. § 7241, as well as management's assessment of internal controls under section 404 of SOX, 15 U.S.C. § 7262, demonstrate a principal/agent relationship between parent and the controlled subsidiary. Section 12 of the Securities Exchange Act requires parent companies to report activities and information about their subsidiaries in their public filings. Section 12(b)(1) of the registration requires inclusion of "[s]uch information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer…." Regulation S-X, 17 C.F.R. 210, and Regulation S-K, 17 C.F.R. 229, govern reporting under sections 13 and 15(d) of the Act and are replete with examples of how the business, activities, transactions and financial statements, etc. of the subsidiaries are to be reported on the sections 13 and 15(d) reports. SOX section 302(a)(4)(B) requires the CEO and CFO of the issuer to certify, in part, that they have "[d]esigned such disclosure controls . . . to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities . . . ." 15 U.S.C. § 7241(a)(4)(B) (emphasis added).

Thus, the internal controls required by SOX are, by law, controlled by the parent company, and obligatory on the subsidiaries. The subsidiaries are legally bound to act under the control of the parent company in their compliance with SOX. If a subsidiary were to balk at the parent's direction, this failure to comply would be a material weakness in the parent's internal controls and would constitute a violation of SOX that the parent would be required to report. The subsidiaries have a legal duty to report their activities accurately to the parent, and to abide by the parent's instructions on the maintenance of internal controls. Every subsidiary acts on behalf of the parent, and is therefore an agent of that parent as to any matters encompassed by the disclosure and registration provisions of the Act.

In this relationship, the controlled subsidiary is deemed as a matter of the Securities Exchange Act to be acting as an agent of the parent, subject to the parent's control under sections 12, 13(b)(2) and 15(d) of the Securities Exchange Act of 1934 and sections 302 and 404 of the Sarbanes-Oxley Act. "The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (citing H.R.Rep. No. 73-152, at 12 (1933)); *In re Parmalat Securities Litigation*, 376 F.Supp.2d 472, 516-517 (S.D.N.Y. 2005) (agency of controlled subsidiary made out by parent's "power to direct or cause the direction of the management and policies of [the allegedly controlled] person, whether through the ownership of voting securities, by contract, or otherwise.").

Therefore, consolidated subsidiaries are by definition agents of the parent where a certification is present under section 302 of SOX. So when a subsidiary retaliates against a whistleblower for reporting the parent's or the subsidiary's violation of law, they are necessarily acting as agents of the issuer on a matter governed by sections 12 and 15(d) of the Securities Exchange Act.

III. UNDER SECURITIES LAW, ALL CONTROLLED SUBSIDIARIES ARE "INTEGRATED ENTERPRISES" WITH THEIR PUBLICLY TRADED PARENTS.

For the same reason, a subsidiary is part of an "integrated enterprise" with its controlling parent for purposes of securities law. Sections 12 and 15(d) of the Securities Exchange Act, as well as the disclosure provisions of SOX, treat any "controlled" entity as part and parcel of the publicly traded parent's operation for registration and disclosure.

Because the Securities Exchange Act does not limit its reach to entities that have a "centralized control over labor relations," there is no justification for importing this limitation from other areas of the law. Once Congress applies a standard of coverage, courts may not supersede it with more restrictive standards developed in other areas of the law. There is no further relevance to the common law or other employment laws that may impose a more restrictive definition. *See Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service*, 380 U.S. 255, 256-257 (1965) (reversing the Alabama courts' application of state-common-law standards, holding that Congress gave the National Labor Relations Board authority to apply a broader federal test to whether a radio station could be considered a "single employer" for purposes of the NLRA).

CONCLUSION

The Board should hold that all subsidiaries in which publicly traded companies own a controlling interest are themselves covered employers under section 806 of SOX.

July 15, 2010 Respectfully submitted,

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