UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of:	
CARRI S. JOHNSON,	**ARB CASE NO.: 08-032**
Complainant,	**ALJ CASE NO.: 2005-SOX-015**
v.	
SIEMENS BUILDING TECHNOLOGIES, INC. and SIEMENS AG,	
Respondents.	

BRIEF OF SEMPRA ENERGY TRADING LLC AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Pursuant to the April 15, 2010 Order Requesting Additional Briefing by the Parties and Inviting *Amici Curiae*, Sempra Energy Trading LLC,[1] through its counsel, submits this brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving questions concerning the whistleblower protection provisions of Section 806, 18 U.S.C. § 1514A, of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"). Specifically, the question facing the Board is whether an employee of a private subsidiary of a publicly held company may bring an action against his immediate, non-publicly held employer under Section 806.

Congress enacted SOX on July 30, 2002, in response to numerous corporate and accounting scandals in or about 2001 – most notably, the financial collapse of Enron Corporation as a result of various accounting, auditing, and financial wrongdoings. The stated purpose of the Act is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . ." SOX, Pub. L. No. 107-204, 116 Stat. 745 (2002), at Preamble.

In furtherance of this stated purpose, the Act includes the Corporate and Criminal Fraud Accountability Act of 2002, the general purpose of which was to create and enhance criminal penalties for those defrauding publicly traded securities investors, those destroying evidence, and to protect certain whistleblowers of publicly traded companies. S. Rep. No. 107-146, 107th Cong., 2d Session, at 1 (May 6, 2002). The civil whistleblower provision of the Act, Section

[1] Sempra Energy Trading LLC ("SET") is the respondent in the matter of *Kennon Mara v. Sempra Energy Trading LLC*, ARB Case No. 10-051, ALJ Case No. 2009-SOX-018. On October 5, 2009, finding that SET "is not a covered employer under SOX because SET is not a publicly-traded company and it did not act an agent on employment matters for either Sempra Energy or RBS," the ALJ granted SET's motion for summary judgment and dismissed Mara's complaint with prejudice. *Mara v. Sempra Energy Trading LLC*, ALJ Case No. 2009 SOX-018, 2009 WL 6470478, at *12, 14 (ALJ Oct. 5, 2009).

806, which is at issue in this matter, does not expressly cover the private subsidiaries of publicly held companies. Rather, Section 806 extends only to companies:

> 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 . . .

18 U.S.C. § 1514A(a). The statutory language reflects the legislative intent to "provide whistleblower protection to employees of *publicly traded companies* who report acts of fraud . . . [so as] to encourage and protect those who report fraudulent activity that can damage innocent investors in *publicly traded companies*." S. Rep. No. 107-146, 107th Cong., 2d Session, at 18 19 (May 6, 2002) (emphasis added).

Because the statute is silent as to the coverage of non-publicly held subsidiaries, and the legislative history does not indicate congressional intent to include non-publicly held subsidiaries as covered companies, well-established principles of statutory construction dictate that non-publicly held subsidiaries are not categorically covered by Section 806. Thus, as explained in detail below, private subsidiaries of publicly held companies are covered by Section 806 only when they act as agents of the publicly held parent with respect to employment matters.

STATEMENT OF THE ISSUES

In considering whether an employee may bring a Section 806 whistleblower claim against the private subsidiary of a publicly held company, the Board has posed the following questions to *amici curiae*:

> (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 important factor?

(Order Requesting Additional Briefing by the Parties and Inviting *Amici Curiae* (Apr. 15, 2010).)

ARGUMENT

I. It Is Well-Settled That Private Subsidiaries Are Not Categorically Covered Under Section 806.

As the Occupational Safety and Health Administration ("OSHA") has recognized, Section 806 does not expressly include private subsidiaries of publicly traded companies within its coverage. *Ambrose v. U.S. Foodservice, Inc.*, ARB Case No. 06-096, "Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae" (Sept. 1, 2006).[2] Nothing in the plain language of Section 806 remotely suggests that private subsidiaries are categorically covered by the statute. In fact, the title of Section 806(a) is designated as "Whistleblower Protection for Employees of *Publicly Traded Companies*," indicating that only publicly traded companies fall within the statute's purview. 18 U.S.C. § 1514A(a) (emphasis added). The plain statutory language of Section 806 does not use the term "subsidiary," let alone "private subsidiary," to describe the categories of companies covered by the statute.

The whistleblower provision's silence with respect to subsidiaries, and particularly private subsidiaries, is telling. Although Section 806 omits any reference to subsidiaries, other sections of the Act expressly include subsidiaries within the class of regulated entities. *See, e.g.*, 15 U.S.C. §§ 7241(a)(4)(B), 78m(k)(1).[3] The law is well-settled that "[where] Congress includes

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[2] The DOL's amicus brief is available http://www.dol.gov/sol/media/briefs/Ambrose(A)-09-01-2006.htm.

[3] Pursuant to 15 U.S.C. § 7241(a)(4)(B), the signing office of a public company must:

> have designed such internal controls to ensure that material information relating to the issuer 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 . .

(Emphasis added.)

Pursuant to 15 U.S.C. § 78m(k)(1):

> It shall be unlawful for any issuer (as defined in section 7201 of this title), directly or indirectly, *including through any subsidiary*, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer.

(Emphasis added.)

particular language in one section of the statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"), *superseded by statute on other grounds*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006); *Burlington N. & Sana Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006) (*quoting Russello*); *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 174 (3d Cir. 2005) (same); *Shotz v. City of Plantation*, 344 F.3d 1161, 1168 (11th Cir. 2003) ("Congress knows how to use specific language to identify which particular entities it seeks to regulate."). Thus, because certain sections of the Act explicitly include subsidiaries while Section 806 does not, as a matter of statutory construction Section 806 cannot be deemed to categorically include private subsidiaries. *See Lowe v. Terminix Int'l Co.*, No. 2006-SOX-89, 2006 WL 0576807, at *5 (ALJ Sept. 15, 2006).

This silence is consistent with the well-established principles of corporate law that a parent corporation is not liable for the acts of its subsidiaries, and the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate. *United States v. Bestfoods*, 524 U.S. 51, 63 (1998); *see also Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) ("mere ownership of a subsidiary does not justify the imposition liability on the parent") (citation omitted); *Baluf v. Loral Elec. Sys.*, 988 F. Supp. 339, 344 (S.D.N.Y. 1997) ("The doctrine [of limited liability] therefore creates a strong presumption that a parent is not the employer of its subsidiary's employees.") (*citing Frank v. U.S. West*, 3 F.3d 1357, 1362 (10th Cir. 1993); *see also Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996), *aff'd*, 166 F.3d 1199 (2d Cir. 1998).

Section 806's silence with respect to subsidiaries does not permit the Board to abrogate these sound principles of corporate law. Corporate formalities should be observed absent express intent by the legislature to the contrary, otherwise such formalities are meaningless. Thus, courts require specific authorization from Congress before circumventing these principles of corporate law. *See, e.g., Bestfoods*, 524 U.S. at 63; *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("The text of the [Foreign Sovereign Immunities Act] gives no indication that Congress intended us to depart from the general rules regarding corporate formalities. Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."); *c.f. Int'l Bhd. of Painters & Allied Trades Union v. George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) ("Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history."). As discussed above, the Act is devoid of the specific authorization required to abrogate this basic tenet of corporate law.

Additionally, the legislative history does not provide the required authorization. Quite the opposite, references to the covered entities in the legislative history are limited to publicly traded companies. For instance, in his introduction to the Senate Conference Report, Senator Sarbanes, a co-sponsor of the bill, made "very clear that [the Act] applies *exclusively to public companies* – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7350-04, 7351 (July 25, 2002) (emphasis added).

With respect to Section 806, specifically, the legislative history indicates that Congress did not contemplate that private subsidiaries of publicly held companies would be categorically covered by the Act's whistleblower provision. Rather, Section 806 was meant to:

> provide whistleblower protection to employees of *publicly traded companies*. It specifically protects them when they take lawful acts to disclose information or otherwise

> assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting or stopping fraud."

S. Rep. No. 107-146, 107th Cong., 2d Session, at 12 (May 6, 2002) (emphasis added). By enacting the whistleblower provision, Congress sought to provide "protection for employees of publicly traded companies who blow the whistle on fraud and protect investors" similar to the protections already offered to "many government employees who act in the public interest by reporting wrongdoing." *Id.* at 9. By contrast, nothing in the legislative history concerning Section 806 suggests that Congress intended to extend the statutory protections to employees of non-publicly held subsidiaries of those publicly traded companies.

Limiting Section 806's coverage to public companies comports with the Congress's stated intent, repeated throughout the legislative history, to protect "Americans investing in *public companies*" and "to restore confidence in the integrity of the *public markets*." S. Rep. No. 107-146, 107th Cong., 2d Session, at 9-10 (May 6, 2002); *see also* 148 Cong. Rec. S7350-04, 7358 (July 25, 2002).

Thus, as many ALJs have recognized, "[t]o include non-publicly traded subsidiaries as a 'company' merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress." *Teutsch v. ING Groep, N.V.*, Nos. 2005-SOX-101, 102, 103, 2006 WL 5201332, at *3 (ALJ Sept. 25, 2006); *see also Lowe*, 2006 WL 6576807, at *5; *Bothwell v. Am. Income Life*, No. 2005-SOX-0057, 2005 WL 4889047, at *4 (ALJ Sept. 19, 2005). Had Congress wished to categorically include private subsidiaries of publicly traded companies as covered employers under Section 806, it could have drafted the statute to reflect that intent. Because Congress did not do so, and because the legislative history does not support the contention that Congress intended the phrase "publicly traded companies" to categorically

include the private subsidiaries of public companies, the ARB should not now read language into the statute that does not exist. *See Bothwell*, 2005 WL 4889047, at *5.

For this reason, the Board should decline to follow the rationale in *Morefield v. Exelon Servs., Inc.*, No. 2004-SOX-002, 2004 WL 5030303, (ALJ Jan. 28, 2004) and *Walters v. Deutsch Bank AG*, No. 2008-SOX-070, 2009 WL 6496755 (ALJ Mar. 23, 2009). The ALJ in *Morefield* held that private subsidiaries were categorically covered by Section 806 because "[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." 2004 WL 5030303, at *3. Yet *Morefield* pays no regard to the well-established principles of statutory construction cited above and fails to explain why Congress would not expressly include private subsidiaries in the statutory language.[4]

In *Walters*, the ALJ's analysis of the legislative history is similarly mistaken. Citing to Senator Leahy's report on the discovery of thousands of "affiliates, off-the-books special purpose entities, and subsidiaries" that Enron hid behind, the ALJ concluded that, because "the subsidiaries were the vehicles through which the fraud was facilitated or accomplished," Congress must have intended to include subsidiaries within the coverage of Section 806. *Walters*, 2009 WL 6496755, at *14. The ALJ, however, neglects to mention that the whistleblower that uncovered many of Enron's hidden corporations was Sherron Watkins, an employee of Enron Corporation – the parent, not a subsidiary. *See* 148 Cong. Rec. S7350-04,

[4] The SOX requirements placed on publicly traded companies to maintain "accuracy and integrity in financial reporting at all levels of the corporate structure," such as Section 302(a)(4)(B) –cited by the ALJ in *Morefield* as evidence that Congress meant to include subsidiaries within the purview of Section 806 – do not support the contention that non-public subsidiaries are categorically covered by Section 806. Section 302(a)(4)(B) places a burden on the *publicly traded company* – not the subsidiary – to design internal controls ensuring that subsidiaries share material information required of SOX compliance reports. Thus, it makes sense that Section 806 covers only the publicly traded company, as it is the public entity with which Congress was concerned.

7358 (July 25, 2002). Senator Leahy praised "that kind of whistleblower," commenting that "these corporate insiders are the key witnesses that need to be encouraged to report fraud." *Id.* Thus, the legislative history shows that, although Congress was concerned about hidden corporations set up by public companies to defraud investors, Congress expected those hidden or fraudulent subsidiaries to be uncovered by corporate whistleblowers *within the public companies*. Therefore, the Board should disregard the analysis in *Walters*.

Clearly, to hold, as the ALJs in *Morefield* and *Walters* incorrectly did, "that non-public subsidiaries are subject to the whistleblower protection provisions simply because their parent company is required by other SOX provisions to report the subsidiary's financial information or to adopt an umbrella compliance policy would widen the scope of the whistleblower protection provisions beyond what Congress appears to have intended." *Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 500-01 (D. Md. 2008) (citations omitted). Thus, the Board should conclude that private subsidiaries are not categorically covered by Section 806 of the Act.

2. A Non-Publicly Held Subsidiary Is Covered by Section 806 Only if It Is an Agent of a Publicly Held Company.

To the extent a non-publicly held subsidiary is covered by Section 806, it is so covered only if it acts as an agent of a publicly held company. In addition to publicly held companies, Section 806 applies to any "agent of such company." 18 U.S.C. § 1514A(a). As the Board has repeatedly held, whether a non-public subsidiary may be held liable as an agent for a publicly held company should be determined according to the principles of the general common law of agency. *Klopfenstein v. PCC Flow Techs. Holdings*, Nos. 07-21, 21, 2004-SOX-11, 2009 WL 6546648 (ARB Aug. 31, 2009) [*Klopfenstein II*] (*citing Klopfenstein v. PCC Flow Techs. Holdings*, No. 04-149, 2004 SOX-11, 2006 WL 3246904 (ARB May 31, 2006) [*Klopfenstein I*]).

As the Board affirmed in *Klopfenstein I*, the Restatement of Agency sets forth the common law principles of agency applicable to Section 806 claims: "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." *Klopfenstein I*, 2006 WL 3246904, at *10 (*quoting* Rest. 2d Agen. § 1(1), (comment b) (emphasis in original). This agency must be related to employment matters. *Id.* at *10-11.

Courts widely agree with the Board's position that, to be a covered agent under Section 806, a non-publicly held subsidiary must have acted as an agent of its publicly held parent with respect to employment matters. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 4-7 (1st Cir. 2006); *Malin*, 638 F. Supp. 2d at 501; *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220, at *5 (E.D. Mich. May 14, 2007); *Brady v. Calyon Secs. (USA)*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1369-70 (N.D. Ga. 2004). Thus, "a non-publicly traded company can be deemed to be the agent of a publicly traded company if the publicly traded company directs and controls the employment decisions." *Brady*, 406 F. Supp. 2d at 318 n.6.[5]

The Board should continue to follow *Klopfenstein I* and *II* because their holding corresponds with the general purpose of SOX – to curb and uncover the fraudulent acts of

[5] Administrative decisions also have required the agency relationship to relate to employment matters. *See, e.g., Perez v. H&R Block, Inc.*, No. 2009-SOX-42, 2009 WL 6470484, at *6 (ALJ Dec. 1, 2009) (relevant factors include "whether the principal was involved in decisions relating to the complainant's employment"); *Johnson v. Siemens Bldng Techs., Inc.*, No. 2005-SOX-15, 2007 WL 7139503, at *5 (ALJ Nov. 27, 2007) (no coverage where there were no allegations that parent was involved in employment decisions related to complainant); *Stone v. Instrumentation Laboratory Spa*, No. 2007-SOX-21, 2007 WL 7135803 (ALJ Sept. 6, 2007) ("key issue is whether or not [the parent] was involved in matters related to the hiring and firing, discipline, pay and employment records, supervision and work assignments of the Complainant and other [subsidiary] employees"); *Savastano v. WPP Group, PLC*, No. 200-SOX-34, 2007 WL 6857428, at *6 (ALJ July 18, 2007) "for an employee of a

publicly traded companies so as to protect the *public* markets for American investors. By extension, Section 806 extends whistleblower protections expressly to employees of publicly traded companies and other entities, such as their agents, acting on their behalf. To ensure the necessary nexus between a public company and an employer acting on its behalf, the scope of the agency must extend to employment-related matters.

Importantly, the whistleblower protections of Section 806 should not be extended to employees of private companies that have acted as agents for public companies in just any context, regardless of how limited the agency relationship was. *See Brady*, 406 F. Supp. 2d at 318 ("The mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protection provisions of Sarbanes-Oxley."). Nothing in the Act suggests that the whistleblower protections were intend to extend beyond employees of employers acting on behalf of publicly traded companies. *Id.*; *see also* Brent B. Nicholson, *The Perils of Parenthood and Other Dangerous Relationships Under the Whistleblower Protection Provision of the Sarbanes-Oxley Act of 2002*, 2 Entrepreneurial Bus. L.J. 415, 434-35 (2007) (statutory language and legislative history "means that those persons or entities can create liability for a section 12 or section 15(d) reporting company when they engage in prohibited conduct *on behalf of* the publicly traded company") (emphasis in original).

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nonpublic subsidiary to be covered under Section 806, the non-public subsidiary must act as an agent of its publicly held parent, and the agency must related to employment matters").

3. The Integrated Enterprise Is Not, and Should Not Be, Applicable to Section 806.

The Board, which has not commented on the applicability of the integrated enterprise doctrine in the context of Section 806 whistleblower claims, should conclude that the test should not be used to determine whether non-publicly held subsidiaries are covered by Section 806.

The National Labor Relations Board ("NLRB") developed the integrated enterprise doctrine for the purpose of applying the National Labor Relations Act's jurisdictional standards regarding minimum business volume to separate entities "which are closely related." N.L.R.B. Twenty-first Ann. Rep. 14-15 (1956), *endorsed in Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). In its Twenty-first Annual Report to Congress, the NLRB outlined the now-familiar four factors courts should consider in to determine whether sufficient integration exists to warrant exercise of its jurisdiction: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. (*Id.*)

Certain ALJ decisions have applied the integrated enterprise doctrine to determine whether a non-publicly subsidiary of a publicly held corporation may be covered by the civil whistleblower provisions of the Act. *See, e.g., Perez v H&R Block, Inc.*, No. 2009-SOX-42, 2009 WL 6470484 (Dec. 19, 2009); *Carciero v. Sodexho Alliance, S.A.*, No. 2008 SOX-12, 2009 WL 6496745 (ALJ Feb. 19, 2009); *Merten v. Berkshire Hathaway, Inc.*, No. 2008 SOX-40, 2009 WL 7835816 (ALJ Oct. 21, 2008); *see also Trusz v. UBS Realty Investors, LLC*, No. 3:09cv268, 2010 WL 1287148, at *6-7 (D. Conn. Mar. 30, 2010). In these decisions, the stated rationale, if any, for utilizing the integrated enterprise test in the Section 806 context is simply that the test has been applied by the courts to various federal labor-related policies. *Perez*, 2009 WL 6470484, at *6. The rationale for this application is inapposite and the Board should refuse to apply the integrated enterprise doctrine to Section 806 claims.

The integrated enterprise test was formulated by the NLRB to address jurisdictional issues in another context:

> Because the [NLRB] was concerned only with labor law and policy, it developed a test for corporate "sameness" that, likewise, concerned itself only with those aspects of corporations having a direct relevance to labor relations. So, for example, the integrated enterprise test is not concerned with such traditional alter ego hallmarks as "nonpayment of dividends," because such aspects of a corporation's finances are not as directly related to management's labor policy as are other aspects of corporate functioning.

Pearson v. Component Tech. Corp., 247 F.3d 471, 485-86 (3d Cir. 2001) (citation omitted). The National Labor Relations Act, applicable to all employers (whether or not they are unionized) clearly was intended to have a more expansive reach than SOX, which regulates publicly traded companies. The integrated enterprise simply was not designed for answering coverage questions under Section 806, which by its terms is limited to individuals blowing the whistle on fraudulent financial activity at publicly traded companies.

Congress did not expressly adopt this test for the purposes of the Act, which it clearly could have done. Congress expressly approved the use of the integrated enterprise test in the context of federal employment discrimination laws such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act by including the test as part of those statutes' provisions regarding the extraterritorial application of the civil rights laws. *See* 42 U.S.C. § 2000e-1(c)(3); 28 U.S.C. § 623(h)(3). By contrast, there is no corresponding evidence of congressional intent to utilize the integrated enterprise test in the context of SOX whistleblower actions – whether brought against foreign corporations or domestic, private subsidiaries.

In any event, the integrated enterprise test is of limited service in Section 806 claims, as the statute already provides for potential liability for private subsidiaries of publicly held companies through the application of common law agency principles. Because, as stated above, the application of agency law comports with the explicit statutory language, and there is no

indication of Congressional intent to expand the scope of Section 806 beyond the bounds of agency, there is no reason to apply the integrated enterprise test in the context of the civil whistleblower provision.

Utilizing another test to determine whether a non-publicly held subsidiary is covered by Section 806 would only muddy the issue. As the United States Court of Appeals for the Seventh Circuit has recognized, "the 'integrated enterprise' test [is] too amorphous to be applied consistently. Such inconsistencies [make] it difficult for a corporation to determine when it could be held liable for the actions of its affiliate." *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001) (internal citations omitted); *see also Papa v. Katy Indus.*, 166 F.3d 937, 942-43 (7th Cir. 1999). Utilization of the "amorphous" integrated enterprise test will have the unintended consequence of disparate application of the Section 806 whistleblower provisions based upon the enumerable ways of applying the four factors to complex and factually distinct cases. Thus, the Board should decline to adopt the integrated enterprise test.[6]

[6] If the Board were to adopt the integrated enterprise test, the Board should consider the second factor – "centralized control of labor relations" – the most important factor. Although none of the four factors are controlling, the "centralized control of labor relations" has long been held to be key to a determination of integration. *See, e.g., Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995); *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983); *Schade v. Coty, Inc.*, No. 00 Civ. 1568, 2001 U.S. Dist. LEXIS 8440, at *19-20 (S.D.N.Y. June 20, 2001); N.L.R.B. Twenty-first Ann. Rep. 14-15 (1956). Additionally, a focus on the centralized control of labor relations would be in keeping with the Board's application of the general principles of common law agency to Section 806 claims in *Klopfenstein I* and *II*.

CONCLUSION

For the reasons set forth above, the Board should conclude that a non-public subsidiary of a publicly held company is covered by Section 806 of SOX only when it acts as an agent of its parent company with respect to employment matters.

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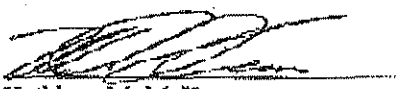
Respectfully submitted,

PROSKAUER ROSE



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