UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON,	**ARB Case No. 08-032**
Complainant,	OALJ Case No. 2005-SOX-00015

against,

SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG,

Respondents.

BRIEF OF AMICUS CURIAE
SENSIBLE LAW INSTITUTE

SENSIBLE LAW INSTITUTE
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I. INTRODUCTION

Too often, the Occupational Safety and Health Administration ("OSHA"), various and numerous Administrative Law Judges ("ALJs"), the Administrative Review Board (the " Board"), to date, and certain courts have been so concerned about the potential that the whistleblower protections of SOX would be abused by non-intended persons that they have lost sight of the purpose of the statute, and the persons actually intended to be protected. In other words, or as our mothers might say, the enforcers of SOX have not seen the forest for the trees.

The Sensible Law Institute was established by veteran business attorney, Daniel A. Corey, in 2003, for the purpose of providing practical legal advice for small businesses. Mr. Corey has been an instructor for a national provider of continued professional education for certified public accountants and lawyers for the last ten (10) years. He teaches courses in Business Law, Employment Law and Commercial Real Estate Leasing, throughout the country.

For the last two years, Mr. Corey has been representing Thomas Spinner in a whistleblower action against his former employer (Spinner v. Landau & Associates, LLC, ARB Case No. 10-115, ALJ Case No. 2010-SOX-029). Mr. Spinner was a certified public accountant and a certified internal auditor serving as an employee of a "contractor" of a publicly traded company working on SOX compliance testing. His petition for relief was denied on jurisdictional grounds (because he was not an employee of the publicly traded company) by Administrative Law Judge Ralph A. Romano, pursuant to a Recommended Summary Decision Dismissing Complaint issued on June 2, 2010. Mr. Spinner filed a timely Notice of Appeal; simultaneously herewith a Brief in support of that Appeal is being filed with the Board.

It is not our intention here to recite and reargue the particulars of cases of which the Board is fully familiar, as evidenced by the Board's Order Requesting Additional Briefing by the Parties and Inviting Amici Curiae, dated April 15, 2010 (the "Order"). We are confident the parties to this action, and other Amicus Briefs, will fully address those cases and the various legal theories presented therein. Rather, it is our intention to ask the Board to refocus on the circumstances surrounding the passage of SOX and, more specifically, to refocus on the whistleblowers Congress clearly intended to protect. In other words, to look at the "big picture".

II. THE BOARD SHOULD SIMULTANEOUSLY ADDRESS THE IMPLICATIONS OF THE JOHNSON CASE ON EMPLOYEES OF "CONTRACTORS" VIS-À-VIS SOX WHISTLEBLOWER PROTECTIONS

It is without question that the Sarbanes-Oxley Act of 2002, 18 U.S.C.§1514A U.S.C. ("SOX") was enacted by Congress in direct reaction to the Enron accounting and fraud scandal of 2001, costing billions of dollars in shareholder losses and the loss of over 30,000 jobs. It is also without question that the Enron scandal could not have been perpetuated absent the complicity of their outside accounting firm, Arthur Andersen, a "contractor" of Enron.

The Board, in the Order, has recognized the divergence of opinion on the question of whether employees of "subsidiaries" of publicly traded companies are protected under Section 806 of SOX ("Opinions discussing coverage of subsidiaries have spanned the spectrum from universal coverage for subsidiaries to no coverage for subsidiaries." Order at p.2).

Although there is a scarcity of administrative and judicial case law on the question of

whether employees of a "contractor" of a publicly traded company are covered under Section 806 of SOX, the issue is basically the same as the issue before the Board in the Johnson case i.e., Who did Congress intend to provide with whistleblower protections?

Accordingly, it is appropriate that these cases should be addressed together. Otherwise, a whistleblowing employee of a "contractor" may be forced to endure (or, more likely, abandon the effort) the procedural hurdles faced by many of the "subsidiary" complainants in the various cases cited by the Board in the Order. By way of example, the Klopfenstein case cited by the Board was commenced by the complainant on July 3, 2003, and it is still not resolved!

III. THE PARAMETERS OF THE WHISTLEBLOWER PROTECTIONS OF SOX SHOULD BE VIEWED IN LIGHT OF ITS LEGISLATIVE INTENT

Please note, in the foregoing heading, we have chosen the phrase "legislative intent" rather than "legislative history". We have focused on "legislative intent" because potential enforcers of SOX, through shorthand language or quotes taken out context, have too often used the "legislative history" of SOX (via purported "statutory construction" to the point of deconstruction) to reach the conclusion that the words Congress used mean virtually (or, in some cases, like the Spinner case, absolutely) nothing at all.

Congress, in using the words "or any officer, employee, a **contractor, subcontractor, or agent of such company**, may discharge, demote, suspend, threatened, harassed, or in any manner discriminate against an employee in the terms and conditions of employment..." (18 U.S.C. §1514 A (a), emphasis supplied), clearly meant to cover someone (other than an employee of a publicly traded company). Otherwise, the words would be mere surplusage.

Congress certainly recognized that sophisticated entities like Enron operate with a multitude of subsidiaries and the employees of those subsidiaries are crucial to detecting potential fraud. As noted in the comprehensive and well- reasoned opinion of the Administrative Law Judge in the Walters v. Deutsche Bank case, "Senator Leahy revealed that Enron operated through a veil of subsidiaries and entities..., 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.'" Walters v. Deutsche Bank, ALJ No. 2008-SOX- 070, p.9-10.

Similarly, in the Walters case, in addressing the shortcomings of the "labor law test" as applied to the language of the SOX whistleblower statute, the ALJ noted as follows:

"As a consequence, the labor law test would, for example, deny protection to a whistleblower working for a contractor or agent like the accounting firm Arthur Andersen which helped shred Enron documents... Yet, Congress was clearly concerned about whistleblowers in such situations because it knew Enron was an important client of Arthur Andersen... 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." (Id. at p.8).

As the ALJ noted, under the "labor law test", a court could find that an auditor working with Arthur Andersen on the Enron account would not be covered under the whistleblower protections of Section 806. **Does anyone actually believe that if the members of Congress**

were surveyed, at the time of the passage of SOX, and were asked the question "Does Section 806 cover auditors with Arthur Andersen?", that the answer would be anything other than a resounding, unanimous, "Absolutely".

In a similar vein, the Massachusetts District Court, in the very recent Lawson case, in a comprehensive fifty-eight (58) page opinion, dealing primarily with legislative construction, noted the following:

"The Defendants' construction, while not inconsistent with the text, would result in an excessively forced and formalistic reading. The legislative history indicates that Congress was concerned with failure to report instances of fraud against shareholders, failures not only on the part of public company employees, but also employees of those institutions working with the public company. The Senate Report, discussing the collapse of Enron, observed that 'Enron apparently, *with the approval or advice of its accountants, auditors and lawyers*, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron stock price'... the Report goes on to state that 'when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but (sic) they were discouraged at nearly every turn.'... The legislative history of SOX makes clear that Congress was concerned about the related entities of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity." Lawson v. FMR LLC No. 08-10466, 2010 WL 1345153 at p.40-41(D. Mass. March 31, 2010, original emphasis).

Too often, the administrative agencies and the courts have been overly concerned about a potential "slippery slope", pursuant to which employees of companies which Congress clearly did

not intend to cover under the whistleblower protections of Section 806, would somehow fall within its purview if the agency or court found coverage for anybody other than an employee of a publicly traded company. Accordingly, they have bent over backwards, by construing away the very language of the statute ("contractor, subcontractor, or agent of such company"), to assure that it would not be applied to, for example, an employee of a privately held company who buys rubber bands from Wal-Mart (See Fleszar v. U.S. Department of Labor, 598 F.3nd 912 (7th Cir. 2010).

In the Fleszar case, the complainant, who was asserting whistleblower protections under Section 806, was an employee of the American Medical Association (the "AMA"), a not-for-profit privately held company. In dismissing the complainant's Petition for Review of Order of the Board, the Seventh Circuit Court of Appeals held as follows:

"We don't share Fleszar's belief that the phrase 'contractor, subcontractor, or agent' means anyone who has *any* contact with an issuer of securities. Nothing in §1514 A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by §1514 A. In context, 'contractor, subcontractor, or agent' sounds like a reference to the entities that participate in the issuer's activities." (Id. at p.915, original emphasis)

We, wholeheartedly, agree. The above-quoted statutory language surely was not meant to cover an employee merely because the employee's privately held company buys rubber bands from a publicly traded company. However, the language is, equally, surely meant to cover someone who, to use the Fleszar's court's words, "participates in the issuer's activities", or, to use the Lawson's court's word, was "involved" in SOX issues. In the next section of this Brief, we

suggest similar clarifying language.

IV.THE BOARD SHOULD CONSIDER RECOMMENDING TO CONGRESS REVISED LANGUAGE CLARIFYING WHISTLEBLOWER PROTECTIONS UNDER SOX

It has often been noted by courts and commentators that SOX was "hastily passed and poorly drafted". (See, e.g., Lawson, supra at Footnote 4). As a result of the poor drafting in Section 806, the SOX enforcers have often lost sight of its context, and its purpose. As a consequence, many employees have lost the protections that Congress clearly intended.

In a 2007 comprehensive study of over 700 separate decisions dealing with assertions of whistleblower protections under SOX, a scholar with extensive background in SOX enforcement, determined that complainants had an extremely low "win rate" (3.6% at OSHA and 6.5% before ALJs) *See* Richard E. Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, William & Mary L. Rev. 65, 66-67 (2007).

In explaining this extremely low rate, Professor Moberly concluded "that employees rarely won because OSHA and the ALJs determined that a large percentage of employees failed to prove a Sarbanes-Oxley claim as a matter of law, often by narrowly construing the Act's legal parameters." (Id. at p.90, original emphasis) In the context of legal parameters, the author noted as follows: "Moreover, although Sarbanes-Oxley applies to a 'contractor, subcontractor, or agent' of any publicly-traded company, ALJs consistently determined that the Act did not protect employees of privately-held subsidiaries and contractors of publicly-traded companies." (Id. at p. 71)

Since it has been readily acknowledged that SOX was "poorly drafted", why not remedy that situation, rather than having the SOX enforcers going through comprehensive grammatical

review (as in the Lawson case) to reach the correct conclusion (based on clear Congressional intent) or reaching an incorrect conclusion by effectively disregarding completely an important portion of Section 806 ("contractor, subcontractor, or agent of such company").

Accordingly, it is with a substantial degree of chutzpah that we suggest that the Board recommend to Congress that Section 806 of SOX be amended and restated with something similar to the following:

"No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15U.S.C. §781) or that is required to file reports under section 15 (d) of the Securities Exchange Act of 1934 (15 USC §780 (d)), or any officer, employee, contractor, subcontractor, subsidiary or agent of such company **(if and to the extent such contractor, subcontractor, subsidiary or agent is substantially involved in or related to compliance with the matters set forth in subparagraph (1) below)**, may discharge, demote, suspend, threaten, harassed, or in any 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 etc. etc. etc. (using the existing language)."

V. CONCLUSION

We respectfully request that the Board consider addressing the Spinner case mentioned in Section I of this Brief together with the instant Johnson case or, in the alternative, acknowledging

that the Spinner case, in large part, addresses issues similar to the instant Johnson case. In either event, we would ask the Board to consider the circumstances surrounding the passage of SOX and the harm to shareholders, employees and the public sought to be remedied by the SOX whistleblower protections, in construing the current language of the statute, so that it provides protection for employees of "subsidiaries" and "contractors" of publicly traded companies if and to the extent such employees are substantially involved in or related to compliance with the matters set forth in subparagraph (1) of Section 806.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of Amicus Curiae was served by regular mail, unless email is indicated, on the following persons of the following address on this 14th day of July, 2010:

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