UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matte of:	
Ms. CARRI JOHNSON,	ARB Case No. 08-032
Complainant,	ALJ Case No. 2005-SOX-15
v.	
SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG,	
Respondents.	

ADMIN. REVIEW BOARD
JUL 15 2010
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JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS
S EMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG
IN RESPONSE TO THE BOARD'S APRIL 15, 2010 ORDER

Gregg F. LoCascio, P.C.
Rebecca Ruby Anzidei
Michael D. Shumsky
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Tel. (202) 879-5000
Fax (202) 879-5200
gregg.locascio@kirkland.com
rebecca.anzidei@kirkland.com

Counsel for Respondents Siemens Building Technologies, Inc. and Siemens AG

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INTRODUCTION

On April 15, 2010, the Administrative Review Board ("ARB" or "Board") issued an order inviting the parties and any interested *amici curiae* to submit supplemental briefs addressing whether employees of a publicly traded parent company's privately held subsidiary may receive whistleblower protection under section 806 of the Sarbanes-Oxley Act ("SOX" or "the Act"), and if so, the appropriate standard for determining whether such employees are entitled to that section's protections. *See* April 15, 2010 Order at 4-5. Pursuant to that order, respondents Siemens Building Technologies, Inc. and Siemens AG respectfully submit this joint supplemental brief to aid the ARB in its consideration of these issues.

In short, respondents believe that the statute unambiguously forecloses a broad, general application of section 806's whistleblower protections to employees of privately held companies—even where such companies are owned in whole or part by a publicly traded company. On its face, section 806 extends its protections only to "employees of publicly traded companies," and given the background corporate-law principles against which Congress adopted that language, the statute thus plainly provides that employees of a privately held subsidiary are not entitled to protection merely because a publicly traded parent corporation has an ownership interest in that private entity. Consistent with that understanding, the majority of courts and ALJs that have addressed these issues properly have held that the Act does not generally apply to employees of private subsidiaries—even if those privately held entities are owned in whole or part by publicly traded companies.

To the extent there is any basis for extending section 806 beyond its plain text, only two circumstances provide a colorable basis for doing so. ***First***, courts have long recognized that the corporate veil can be pierced in cases where a parent company establishes "sham" affiliates in order to evade legal requirements, and there is no reason to think that Congress intended to disregard that longstanding principle of corporate law when it wrote section 806. Where the traditional veil-piercing test is met, it thus is permissible to extend section 806 whistleblower protection to individuals who *nominally* are employed by a sham subsidiary, on the theory that such individuals are—*in reality*—employees of the publicly traded parent. ***Second***, the statute prohibits the "agent[s]" of a publicly traded corporation from engaging in prohibited retaliatory conduct, and numerous ALJs have interpreted that language to extend whistleblower liability where a privately held subsidiary engages in prohibited conduct at the behest of the publicly traded parent. Outside of these two circumstances, however, there is no colorable basis whatsoever for extending whistleblower protections under section 806 beyond the statute's plain terms.

In keeping with the Board's Order, this brief will not provide a detailed analysis of how the statute should be applied to the facts of this case. It bears repeating, however, that Ms. Johnson's claims fail under *any* of the tests that the ARB appears to be considering, as both respondents and the Assistant Secretary of Labor for Occupational Safety and Health (OSHA) explained in their earlier briefing. *See* Siemens Br. 2, 25-28 (Mar. 5, 2008) (explaining that Ms. Johnson's claims fail under the "agency" test, the "veil-piercing" test, or the Assistant Secretary's proposed "integrated employer" test); OSHA Br. at 2 (Mar. 14, 2008) ("Applying [the 'integrated employer'] test to the limited facts of record in this case, the Board should affirm the ALJ's ruling that the complainant was not protected by the SOX whistleblower provision."); *id.* at 20-23 ("Based on the Record Evidence, SBT and Siemens AG are not Integrated Employers under the Four-Factor Test."). There is thus no legal or factual basis for overturning ALJ Craft's decision in this case, because it was based on *undisputed* factual findings regarding the relationship between Siemens Building Technologies, Inc. and Siemens AG that squarely foreclose liability under *any* conceivable interpretation of section 806. *See* ALJ Dec. at 3-8. Accordingly, and regardless of the test that it adopts in this appeal, the ARB should affirm the ALJ's decision dismissing Ms. Johnson's claims against respondents.

ARGUMENT

I. Section 806 Applies Exclusively To The Employees Of Publicly Traded Companies.

As its title makes clear, section 806 establishes "[w]histleblower protection for employees *of publicly traded companies*." 18 U.S.C. § 1514A(a) (emphasis added). To that end, it prohibits any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934," or any "officer, employee, contractor, subcontractor, or agent of such company," from retaliating against any of the publicly traded company's "employee[s]" who engages in certain protected activities. *Id.* By its plain terms, section 806 thus does not extend its protections to employees *of privately held subsidiaries* in which a covered, publicly traded company has an ownership interest, and the ARB should interpret section 806 in a manner consistent with this plain text.

To the extent the ARB is inclined to extend the scope of section 806's protections beyond the clear and unambiguous textual limitations set forth in the statute, however, there are only two colorable theories for doing so: a veil-piercing theory, under which the statutory protections can be extended to individuals nominally employed by a sham subsidiary established by a publicly traded company, or an agency theory, under which liability can be extended where privately held subsidiaries engage in prohibited conduct at the behest of the publicly traded parent.

A. The Plain Text And Structure Of Section 806 Make Clear That It Protects Only "Employees Of Publicly Traded Companies."

The statutory text is the starting point for statutory construction, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), and the text of section 806 could not be plainer. Its title makes clear that the protections set forth in that section extend only to "employees *of publicly traded companies*," 18 U.S.C. § 1514A(a) (emphasis added), and there is no statutory basis for departing from that clear indication of legislative intent. *See INS v. Nat'l Center for Immigrants' Rights, Inc.* 502 U.S. 183, 189 (1991). Instead, the remaining language in section 806 only underscores what the section title says: that it protects only "employees of publicly traded companies," 18 U.S.C. § 1514A(a). Thus, while the operative provisions of section 806 use the term "employees" without further elaboration, those provisions operate to bar *publicly traded companies and their agents* from engaging in *employment-related* retaliatory conduct. As a general matter, neither a publicly traded company nor its agents are in a position to take prohibited employment-related actions against anyone other than the publicly traded company's *own* employees, and that helps explain why OSHA's Assistant Secretary previously agreed with respondents that "[b]y its terms, section 806 does not expressly include subsidiaries of publicly traded companies within its coverage." OSHA Br. at 7.

Nor is there any other basis in the statute for extending section 806's whistleblower protections beyond those enumerated in the statute. Even if section 806 itself were not clear about the scope of its coverage, Congress typically is presumed to incorporate—rather than abrogate—settled legal norms when it legislates, *see, e.g.*, *Morissette v. United States*, 342 U.S. 246, 263 (1952), and our legal system has long respected the corporate form. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (collecting authorities, and describing this norm as "deeply ingrained in our economic and legal systems") (quotation omitted). As the Supreme

Court thus has held, where Congress legislates "against this venerable common-law backdrop," any attempt to reshape "the liability implications of corporate ownership demands application of the rule that … 'the statute must speak directly to the question addressed by the common law.'" *Id.* at 63 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). Section 806, however, fails to provide any indication—much less a "direct" one—that Congress intended to abrogate the common law's longstanding respect for the corporate form by treating a subsidiary's employees as though they were employees of the parent company. Again, it refers exclusively to the employees of publicly traded companies themselves, with no reference whatsoever to the employees of their privately held affiliates or subsidiaries.

That stands in notable contrast to the remainder of SOX. Indeed, several other provisions of the statute expressly reference a publicly traded company's subsidiaries, and thereby demonstrate that where Congress intended to include subsidiaries within the scope of the Act's coverage, it did so explicitly. *See, e.g.*, 15 U.S.C. § 7241(a)(4)(B) (requiring officers of publicly traded companies to "design[] 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") (emphasis added); 15 U.S.C. § 78m(k)(1) (making it unlawful for an issuer "*including through any subsidiary*" to take certain actions with respect to loans) (emphasis added). The fact that Congress expressly addressed subsidiaries in other provisions of the statute *but did not do so here* is powerful evidence that section 806 was not intended to reach subsidiaries as a matter of course; after all, "where Congress include[s] particular language in one section of a 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).

Consistent with the foregoing analysis of the statute's text and structure, many courts and ALJs interpreting section 806 thus have held that stock ownership alone cannot give rise to a publicly traded company's liability for the actions of its subsidiary. *See, e.g.*, *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220, at *4 (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."); *id.* ("[T]he general principle of corporate law [is] that a parent is not automatically liable for the actions of a subsidiary, absent a clear intent from Congress to the contrary.") (citing *Lowe v. Terminix Int'l Co., LP.*, ALJ No. 2006-SOX-0089, at 7-8 (Sept. 15, 2006)); *Bothwell v. Am. Income Life*, ALJ No. 2005-SOX-57, at 6 (Sept. 19, 2005) ("In drafting the whistleblower protection in SOX, Congress specifically defined the employers subject to its limitations. If Congress had wanted to include non-publicly traded subsidiaries of publicly-traded parent companies as covered employers, it could have done so in drafting the statute."). The Board should follow those well-reasoned decisions here and adopt their plain-text interpretation of the statute as its own.

To be sure, one ALJ has gone considerably further—holding that "Congress intended the term 'employees of publicly traded companies' in Section 806 to include the employees of the subsidiaries of publicly traded companies." *Morefield v. Exelon Servs., Inc.*, ALJ No. 2004-SOX-002, at 2 (Jan. 28, 2004); *see also Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-70 (Mar. 23, 2009). With respect, however, those decisions cannot be reconciled with the statute's text or structure. For its part, *Morefield* reasons that subsidiaries must be treated in precisely the same way as parent companies because they "are an integral part of the publicly traded company, inseparable from it for purposes of evaluating the integrity of its financial information, and they must be treated as such." ALJ No. 2004-SOX-002, at 2. But that assertion directly conflicts with the Su preme Court's instruction in *Bestfoods*: that the corporate form is to be respected unless Con ress expressly demonstrates an intent to reshape "the liability implications of corporate ownership." 524 U.S. at 63. Again, Congress did no such thing in section 806, and the remainder of the statute demonstrates that when Congress did intend to extend the statute to subsidiaries it did so expressly (and as *Bestfoods* requires).

Nor s it enough to observe that Sarbanes-Oxley has "anti-fraud" goals and then assert, as *Walters* di that it is appropriate to extend whistleblower protections to the employees of privately h d subsidiaries because doing so would further the "special policy considerations" giving rise) this statute. ALJ No. 2008-SOX-70, at 10-11, 13-17. One can always say that the broad purp ses and policy objectives giving rise to a statute would be better served if the law were applie l more broadly than it is written, but that has never been a reason to read statutory limitations out of existence. At bottom, Congress's decision to impose certain limits on the reach of se tion 806's whistleblower protections was no less "purposeful" than its decision to create secti n 806's protections in the first place: *Both* the protections of section 806 *and* their limitations vere integral parts of the statutory scheme. *See, e.g.*, 148 Cong. Rec. S7351 (daily ed. July 25. 2002) (statement of Sen. Sarbanes) ("[L]et me make very clear that [the Act] applies *exclusively to public companies*—that is, to companies registered with the Securities and Exchange Commission.") (emphasis added).

Acc rdingly, respondents respectfully submit that section 806 is best interpreted as it is written: to pply only to "employees of publicly traded companies," and not those of a publicly traded com any's privately held subsidiary.

B. The Veil-Piercing And Agency Theories Provide The Only Conceivable Grounds For Extending Section 806 Beyond Its Plain Textual Limitations.

Tha having been said, the case law supports two colorable exceptions to the general rule that section 806 protection does not extend beyond publicly traded companies. *First*, it is well-settled that the corporate veil may be pierced where a parent company establishes a sham subsidiary i order to engage in misconduct, and courts—including the Supreme Court in *Bestfoods*— previously have held that federal statutes typically incorporate traditional veil-piercing rul s. And second, some courts and ALJs interpreting section 806 have noted that the provision p ohibits retaliation by an "agent" of a publicly traded company, and thus have reasoned th it section 806 may prohibit retaliation by privately held subsidiaries when those entities are cting as agents of the publicly traded parent.

1. Liability Under A Veil-Piercing Theory

As ne Supreme Court explained in *Bestfoods*, federal statutes that implicate issues relating to ne corporate form presumably incorporate the common-law veil-piercing doctrine, under whic the corporate form may be disregarded "when, *inter alia*, the corporate form would otherwise b misused to accomplish certain wrongful purposes." 524 U.S. at 62. Respondents see no basi to depart from that settled approach here. In short, where a sham subsidiary engages in prohibite l retaliatory conduct against its (nominal) employees, those employees are entitled to the protecti ns set forth in section 806 because they are—in reality—employees of the publicly traded pare t company that established the sham subsidiary.

Acc rdingly, there is no reason to think that publicly traded corporations will begin using "dummies, straw parties, subsidiaries or other amenable agents" to evade the protections of section 806 *See, e.g.*, Johnson Br. 5 n.2 (Feb. 4, 2008). Again, the courts have long recognized the applic ion of traditional common-law veil-piercing even without an explicit textual authorizati n, and nothing in SOX prevents the ARB from adopting that theory in order to prevent pul licly traded companies from using sham subsidiaries to evade the proscriptions and protections set forth in section 806.

2. Liability Under An Agency Theory

At tl ; same time, section 806 prohibits an "agent of any such [publicly traded] company" from retalia ıng against "employees." Relying on this language, certain courts and ALJs have carved out .n exception under which the protections set forth in section 806 apply where a privately he l company acts *as the agent of* a publicly held company in retaliating against one of its own emı oyees. Indeed, the ARB itself reached a similar result in *Klopfenstein*, stating that a private sub: diary would be covered under the statute's whistleblower provisions only if it were acting as it publicly traded parent's agent when it engaged in the challenged conduct. *See Klopfenstei. v. PCC Flow Technologies Holdings, Inc.*, ARB No. 04-149 (May 31, 2006); *see also* April 1 ;, 2010 Order at 2 (*Klopfenstein* "embraced common law agency theory"); *Andrews v. ING Nor ı America Ins. Corp.*, ARB No. 06-071 (Aug. 29, 2008); *Lowe v. Terminix Int'l Co.*, ALJ No. 2C)6-SOX-89, at 8 (Sept. 15, 2006) (explaining that in *Klopfenstein*, "the Board could have held t at the agency factual issue was rendered moot by the subsidiary's legal unity with the parent u ıder the Act [if subsidiaries were meant to be automatically covered]. That it did not do so is con istent with the clear language of the Act.").

Rel; ng on the Restatement of Agency, *Klopfenstein* thus explained that common-law agency prin .iples should be used to determine whether a privately held subsidiary was acting as its parent's gent when it engaged in allegedly prohibited conduct under SOX. *See Klopfenstein*, ARB No. 0 -149, at 14-15. It then set forth two general rules to guide the application of those principles u ıder section 806. It first explained that a private entity could be covered under SOX only if an ıgency relationship exists with the publicly traded company with respect to the challenged :mployment decision, *id.* at 16, as several courts have held in this context.[1] And,

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[1] *See, e.g., Rc* ·, 2007 WL 1424220, at *5 ("[The] agency at issue must also relate to employment matters in order to be covered ur ler the whistleblower protection provisions of § 1514A."); *Brady v. Calyon Sec. (USA)*, 406 F. Supp.

consistent v th traditional agency norms, it next explained that "'agency depends upon the existence of equired 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 o be in control.'" *Klopfenstein*, ARB No. 04-149, at 14-15 (quoting Rest. 2d Agency § 1( ), comment b).

Gene ally speaking, both the veil-piercing and agency theories set forth above are consistent v th the purposes of the SOX, including *both* its investor-protection goals *and* its careful focu on the actions of publicly traded companies (who, pursuant to an agency theory, must "be i control" before liability can attach, *Klopfenstein*, ARB No. 04-149, at 14-15 (quotation c nitted)). *See, e.g.*, 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbar s). And to the extent the ARB believes it can expand the scope of section 806 liability bey nd what the plain text of the statute authorizes, these approaches likewise have the benefits of llowing well-established legal principles and being easily applied. After all, both the agency nd veil-piercing tests depend on familiar common-law principles that have been used for de ades by federal courts, state courts, and administrative agencies in a wide variety of contexts. A cordingly, to the extent the ARB believes it is permissible to extend the protections set forth in section 806 to individuals other than "employees of publicly traded companies," these appro ches most closely conform to the statute's text and structure, and will be the most easily admi istered by the ALJs tasked with implementing those tests in the first instance.

2d 307, 318 & n.6 (S.D.N.Y. 2005) (similar); *cf. Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988) ("N ot only must an arrangement exist between the two corporations so that one acts on behalf of the other and within us al agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.").

II. The "Integrated Employer Test" Is Not An Appropriate Basis For Extending The Protections Of Section 806.

In recent briefs filed with the ARB, the Assistant Secretary for OSHA has urged the Board to import the so-called "integrated employer test" into section 806 in order to expand that section's coverage beyond its plain terms (and, indeed, beyond the veil-piercing and agency theories set forth above). Respondents respectfully disagree with that approach, and submit that there is no plausible basis for importing that test into this context. Instead, the "integrated employer test" was created to resolve a unique problem—specifically, how to construe obvious ambiguities brought about by other statutes' imprecise and unusually vague definitions of the term "employer"—that simply is not present in section 806.

More specifically, many federal employment law statutes apply only to "employers" that have more than a fixed number of employees. Problems frequently arise under these laws, however, because they define the term "employer" in exceptionally broad terms—and thus naturally raise questions about whether "the employees of two or more corporations should be aggregated to meet the coverage threshold." OSHA Br. at 11. To take just one example of this phenomenon, the Family and Medical Leave Act (FMLA) defines an "employer" as, among other things, "*any person* engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day." 29 U.S.C. § 2611(4)(A)(i) (emphasis added). It then defines the term "person" to have the same meaning that the term is given in the Fair Labor Standards Act, *id.* § 2611(8), which in turn defines "person" as any "*individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.*" *Id.* § 203(a) (emphasis added). Given the expansive statutory definition of the term "employer" in these statutes—including the remarkably expansive definition in the FMLA, which by its plain terms includes "organized group[s]" of business affiliates—courts fashioned the "integrated employer" test to resolve the peculiar problems that arise in this unique context. *See, e.g.*, *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) ("Although a direct employment relationship provides the *usual* basis for liability under the civil rights statutes, the *ambiguity of the term employer* in the civil rights statutes has driven courts to fashion a variety of tests [including the integrated employer test] by which a defendant that does not directly employ the plaintiff may still be considered an employer under those statutes.") (emphasis added).

Indeed, with one exception not relevant here (discussed immediately below), every case cited in the Assistant Secretary's previous brief in this appeal involves the interpretation of a statute that uses the term "employer" in a broad and ambiguous fashion.[2] Thus, far from suggesting that the ARB should adopt the integrated employer test, these cases counsel against its adoption: When Congress seeks to use the "integrated employer" test, it knows how to do so by using the statutory term "employer" in a fashion that makes clear that liability should extend beyond traditional bounds. Yet no comparable language appears in section 806, which instead applies only to "employees of publicly traded companies"—not "employees" of "groups of corporations one of which is publicly traded."

The sole exception identified by the Assistant Secretary—in which a court used a variation of the integrated employer test outside the context of a statute establishing a coverage threshold—is *Beverly Enterprises v. Herman*, 130 F. Supp. 2d 1, 22 (D.D.C. 2000). But that

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[2] *See, e.g.*, *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977) (using test to define an "employer" under Title VII, 42 U.S.C. § 2000e(b)); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1257 (11th Cir. 2004) (similar; interpreting Family and Medical Leave Act, which applies to "employer," 29 U.S.C. § 2611(4)); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1005-06 (9th Cir. 2004) (similar use of term "employer" under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2101(a)); *Pearson v. Component Tech. Corp.*, 247 F.3d 471 (3d Cir. 2001) (same under WARN Act); *Haulbrook v. Michelin North Am., Inc.*, 252 F.3d 696, 703 n. 1 (4th Cir. 2001) (similar use of "employer" under Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A)).

case is not remotely on point. In *Beverly*, the court addressed the meaning of an Executive Order that expressly required "the Secretary of Labor to establish guidelines for determining whether a parent and subsidiary are to be considered as a single entity"; the Secretary had in fact established such guidelines; and the court simply remarked that, "[i]n an analogous context, this circuit has established similar factors for deciding whether multiple companies can be considered a single entity," citing the integrated employer test. *Id.* at 22. Suffice it to say, that offhand remark hardly supports the incorporation of the integrated employer test into this context, and SOX does not otherwise direct the Secretary to treat parents and subsidiaries as a single entity (as the Executive Order in *Beverly* did). *Beverly* thus is as far afield from this case as the other precedents that the Assistant Secretary has cited, and there is therefore no basis for importing the integrated employer test into section 806.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the ARB should adhere to the plain language of the statute by (1) holding that the employees of privately held subsidiaries of publicly traded companies do not come within the protection of section 806 merely because of the publicly traded parent's shareholder status, and (2) declining to import the integrated employer test into the section 806 context. Regardless of whether the ARB applies the statutory test, incorporates a veil-piercing exception, extends coverage to agents of the parent company, or adopts the integrated-employer test, however, it should affirm the ALJ's decision dismissing the complainant's claims based on the detailed—and undisputed—factual findings rendered by ALJ Craft in this matter.

Dated: July 5, 2010

Respectfully submitted,

Gregg F. LoCascio, P.C.
Rebecca Ruby Anzidei
Michael D. Shumsky
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Tel. (202) 879-5000
Fax (202) 879-5200
gregg.locascio@kirkland.com
rebecca.anzidei@kirkland.com

Counsel for Respondents Siemens Building Technologies, Inc. and Siemens AG

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Joint Supplemental Brief Of Respondents Siemens Bu lding Technologies, Inc. And Siemens AG In Response To The Board's April 15, 2010 Order vere sent via overnight mail this 15th day of July 2010 to:

Jacq eline L. Williams, Esq.
252 Hennepin Avenue
Min eapolis, MN 55405
(alsc sent by email and facsimile)

Administrative Review Board
Room S-5220
200 Constitution Avenue, NW
Washington, DC 20210
(original and 4 copies; also sent by facsimile)

Rach el Goldberg
U.S. Department of Labor
200 Constitution Avenue, N.W.
Roo N-2716
Was ington, DC 20210

Furt er distribution on this 15th day of July 2010 to:

M. P tricia Smith
Solic tor of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Roor S-2002
Wash ington, DC 20210

David Michaels
Assistant Secretary
U.S. Department of Labor, OSHA
Room S-2315
200 Constitution Avenue, N.W.
Washington, DC 20210

Willi m C. Lesser, Esq.
Acti g Associate Solicitor
Divi on of Fair Labor Standards
U.S. Department of Labor
Roor N-2716, FPB
200 Constitution Avenue, N.W.
Wash ngton, DC 20210

Directorate of Enforcement Programs
U.S. Department of Labor, OSHA
Room N-3603, FPB
200 Constitution Avenue, N.W.
Washington, DC 20210

Debc ah Greenfield, Esq.
U.S. Department of Labor
200 Constitution Avenue, N.W.
Roor S-2002
Wash ngton, DC 20210

Area Director
U.S. Department of Labor, OSHA
1310 W. Clairemont Avenue
Eau Claire, WI 54601

Honc able Stephen L. Purcell
Acti g Chief Administrative Law Judge
Offic of Administrative Law Judges
800 K Street, N.W., Suite 400
Wash ngton, DC 20001-8002

Regional Solicitor
U.S. Department of Labor
Room 844
230 South Dearborn Street
Chicago, IL 60604

Hon rable Alice M. Craft
Adn nistrative Law Judge
Offi e of Administrative Law Judges
36 E 7th Street, Suite 2525
Cinc nnati, OH 45202

SEC Headquarters
Office of Enforcement
450 5th Street, N.W.
Washington, DC 20549

Regi nal Administrator
Regi n 5
U.S. Department of Labor, OSHA
Roo 1 3244
230 outh Dearborn Street
Chic go, IL 60604

Securities and Exchange Office
175 W. Jackson Boulevard
Suite 900
Chicago, IL 60604

Paul E. Hash
Jack on Lewis LLP
3811 Turtle Creek Blvd., Suite 500
Dall s, Texas 75219

Rebecca Ruby Anzidei