Tom

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON, *Complainant-Appellant,* v. SIEMENS BUILDING TECHNOLOGIES, INC. and SIEMENS AG *Respondent-Appellee.*	)	ARB Case No. 08-032 ALJ Case No. 2005-SOX-015

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE

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INTEREST OF THE *AMICUS CURIAE*

This *amicus curiae* brief is filed per the Administrative Review Board's ("ARB") April 15, 2010 Order Requesting Additional Briefing By The Parties And Inviting *Amici Curiae*.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber has filed *amicus* briefs in approximately 1,700 cases. The Chamber's briefs have been described as "helpful"[1] and "influential"[2] by courts and commentators.

Many of the Chamber's members are publicly traded employers subject to the whistleblower protection provisions in § 806 of the Sarbanes-Oxley Act ("SOX") 18 U.S.C. § 1514A(a) as well as private subsidiaries or affiliates of those companies. Accordingly, the question of whether and when § 806 applies to private subsidiaries of publicly traded employers is extremely important to the Chamber's nationwide constituency.

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[1] *See, e.g., Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

[2] David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1026 (2009).

QUESTIONS PRESENTED BY THE ADMINISTRATIVE REVIEW BOARD

In the April 15, 2010 Order Requesting Additional Briefing By The Parties And Inviting *Amici Curiae*, the ARB posed the following questions:

- Is a subsidiary categorically covered under § 806? If so, does the level of ownership of the subsidiary play a factor in that coverage?
- 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 § 806 agency test?
- Is the "integrated enterprise" test applicable to § 806? If so, should the ARB consider the "centralized control of labor relations" the most appropriate factor?
- Is there any other theory under which subsidiaries would be covered under § 806?

The Chamber answers these questions below.

INTRODUCTION AND SUMMARY OF ARGUMENT

SOX's whistleblower provisions were enacted in response to corporate scandals that damaged shareholders and shook investor confidence. They were designed to encourage employees who were aware of fraud that could materially impact shareholders to "blow the whistle" without fear of retaliation by providing a cause of action arising from adverse employment actions tainted by retaliatory animus.

Guided by these goals, Congress made it clear in the plain text of § 806 that SOX's whistleblower provisions enable employees of *publicly traded* companies to pursue claims before the U.S. Department of Labor and federal courts in order to deter retaliation for SOX-protected whistleblowing. In fact, § 806 makes no mention of subsidiaries and instead states that it applies to a "company with a class of securities registered under Section 12 of the Securities Exchange Act ["SEA"] ... or that is required to file reports under Section 15(d) of the SEA ... ." Likewise, § 806 is titled "Protection For Employees Of *Publicly Traded* Companies Who Provide Evidence Of Fraud," and subsection (a) is titled "Whistleblower Protection for

Employees Of *Publicly Traded* Companies." (emphasis added). In addition, legislative history exposes Congress's intention to limit § 806 to publicly traded companies, as does Congress's inclusion of subsidiaries in other sections of the statute.

Thus, it is not surprising that myriad decisions, including decisions from federal courts and ALJs, have been influenced by this conspicuous indicia of congressional intent in holding that private subsidiaries are not covered by § 806 simply because they are owned by a publicly traded company. However, courts have applied various exceptions to the general rule that private companies are not covered by § 806, the two most salient of which are the "agency test" and the "integrated enterprise test."

In crafting agency tests, some courts have focused on whether the publicly traded parent was directly involved in the challenged adverse employment action, while other courts have considered other, unrelated interactions between the companies where one serves as the other's agent. As the ARB aptly recognized in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, Case No. 04-149, 2006 WL 1516650, at *11 (ARB May 31, 2006), the appropriate application of the agency test focuses on whether and to what extent the parent was actually involved in the challenged adverse employment action. Federal courts and ALJs have followed *Klopfenstein*, recognizing the impropriety of holding a parent liable for its subsidiary's conduct where the parent had no involvement in that conduct. Any other result would ignore the presumption against a parent's liability for its subsidiary's conduct and would not effectuate Congress's goal of encouraging good-faith whistleblowing by deterring conduct driven by a retaliatory motive.

In addition, a limited number of courts have applied the integrated enterprise test to determine whether § 806 covers private subsidiaries. That test focuses on whether there is "centralized control over labor and employment relations," whether operations are interrelated,

whether there is common management and whether there is common ownership or financial control. Courts have rightly held that centralized control over employment decisions is the most important factor, recognizing that a number of the other factors are common to parent-subsidiary relationships. Still, this test is not well suited to this particular context, as it strays from the core consideration of whether the publicly traded parent was actually involved in the challenged employment decision. Again, it would be unreasonable and would defeat the purpose of § 806 to impose liability based on factors unrelated to whether a company was involved in the challenged employment decision.

DISCUSSION

I. As A General Rule, § 806 Does Not Cover Private Subsidiaries Of Publicly Traded Companies

A. The Text Of § 806 Only Covers Publicly Traded Companies, And Courts, The ARB And ALJs Have Excluded Private Subsidiaries From § 806's Coverage

At the outset, the text of § 806 itself compels the conclusion that it does not cover private subsidiaries of publicly traded companies. Indeed, § 806 states that it applies to a

> *company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under Section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor or agent of such company ... .*
>
> > *(1) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company,* may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or

> regulation of the Securities and Exchange Commission, or any provision of Federal law.

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

Moreover, § 806 is titled "Protection For Employees of ***Publicly Traded*** Companies Who Provide Evidence Of Fraud," and subsection (a) is titled "Whistleblower Protection For Employees Of ***Publicly Traded*** Companies." 18 U.S.C. § 1514A (emphasis added).

Federal courts have focused on this plain language, and its lack of any reference in § 806 to private subsidiaries, in determining that employees of private subsidiaries are not covered. *See Rao v. Daimler Chrysler Corp.*, Case No. 06-cv-13723, 2007 WL 1424220, at *4 (E.D. Mich. May 14, 2007) (concluding that a private subsidiary is not an agent of its publicly traded parent for purposes of coverage under § 806 merely because of its subsidiary status).

Likewise, in a relatively early decision, the ARB has found that § 806 does not apply to companies that are not publicly traded. *See Flake v. New World Pasta Co.*, Case No. 2003-SOX-00018, 2003 DOLSOX LEXIS 38, at *13 (ARB Feb. 25, 2004) ("I find that Respondent does not have a class of securities registered under section 12 of the SEA of 1934, nor is it required to file reports under section 15(d) of the SEA of 1934. Accordingly, Respondent is not subject to the provisions of section 806 of the Act.").

A limited number of ALJs have found that private subsidiaries were covered by § 806. *See Morefield v. Exelon Servs., Inc.*, Case No. 2004-SOX-00002, 2004 WL 5030303 (Jan. 28, 2004); *Gonzalez v. Colonial Bank*, Case No. 2004-SOX 00039, 2004 DOLSOX LEXIS 44 (Aug. 20, 2004); *Walters v. Deutsch Bank AG*, ALJ Case No. 2008-SOX-070 (ALJ Mar. 23, 2009). However, those few decisions have been repudiated and are dwarfed by the overwhelming majority of ALJ decisions finding private subsidiaries are not covered § 806. *See, e.g.*, *Savastano v. WPP Group, PLC*, Case No. 2007-SOX-00034, 2007 DOLSOX LEXIS 54 (ALJ

July 18, 2007); *Lowe v. Terminix Int'l Co.*, Case No. 2006-SOX-00089, 2006 DOLSOX LEXIS 101 (ALJ Sept. 15, 2006); *Ambrose v. U.S. Foodserv., Inc.*, Case No. 2005-SOX-105, 2006 WL 3246896 (ALJ Apr. 17, 2006); *Barron v. ING N. Am. Ins. Corp.*, Case No. 2005-SOX-50, 2006 WL 3246884 (ALJ Feb. 17, 2006); *Stalcup v. Sonoma College*, Case No. 2005-SOX-00114, 2006 DOLSOX LEXIS 6 (ALJ Feb. 7, 2006); *Goodman v. Decisive Analystic Corp.*, Case No. 2006-SOX-00011, 2006 WL 3246820 (ALJ Jan. 10, 2006); *Bothwell v. Am. Income Life*, Case No. 2005-SOX-00057, 2005 DOLSOX LEXIS 55 (ALJ Sept. 19, 2005); *Minkina v. Affil. Phys. Group*, Case No. 2005-SOX-00019, 2005 WL 4889024 (ALJ Feb. 22, 2005).

B. Congress' Inclusion Of Private Subsidiaries In Other Sections Of SOX Shows Its Omission Of Private Subsidiaries From § 806 Was Intentional

The ARB should find that Congress intentionally omitted private subsidiaries from § 806 for the additional reason that Congress included private subsidiaries in sections of SOX other than 806. The U.S. Supreme Court has recognized the presumption that Congress intentionally omitted language in one section of a statute where it included that language in another section of the same statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citations omitted) ("[W]here Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Here, while Congress made no reference to private subsidiaries of publicly traded companies in § 806, various other sections of SOX expressly reference private subsidiaries. For example, SOX prohibits members of audit committees of public companies from being affiliated with those companies *or their subsidiaries*. 15 U.S.C. § 78j-1(m)(3)(B)(ii). Likewise, SOX requires reports to include material information relating to the issuer *and its consolidated subsidiaries*. 15 U.S.C. § 7241(a)(4)(B).

Given Congress' selective inclusion of subsidiaries in other sections of SOX, courts have concluded that Congress's exclusion of subsidiaries from § 806 was intentional, rather than a mere drafting mistake. *See Rao*, 2007 WL 1424220, at *4 ("The inclusion of a reference to subsidiaries in another section of the statute, when combined with the absence of the term in the whistleblower section, is more likely evidence of an intent to not include subsidiaries in the whistleblower section, than an indication that Congress assumed that the uncommonly broad interpretation would be given to the word 'company.'").

C. The Legislative History Reveals Congress's Intent To Limit § 806 To Publicly Traded Companies

Although the text of § 806 is unambiguous as to the scope of its coverage, it also is worth noting that the legislative history favors the conclusion that Congress intended for § 806 to be limited to publicly traded companies. For example, Senator Leahy, one of the drafters of § 806, specifically argued that whistleblower protections were needed for employees of publicly traded companies. Cong. Rec. S. 1785, 1787-88 (Mar. 12, 2002) (Leahy) ("[T]he bill would provide whistleblower protection to employees of *publicly traded* companies . ... Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies . ...") (emphasis added).

Likewise, Senator Sarbanes expressly stressed that the statute is not applicable to private companies. 148 Cong. Rec. S 7350, 7351 (2002) (Sarbanes) ("[I want to] make very clear that [the Act] applies *exclusively to public companies* – that is, to companies registered with the Securities Exchange Commission. *It is not applicable to pr[ivat]e companies, who make up the vast majority of companies across the country.*") (emphasis added). Likewise, the Senate Judiciary Committee's Report on SOX provides that § 806 "would provide whistleblower

protection to employees of *publicly traded* companies." S. Rep. No. 107-146, at *13 (2002) (emphasis added).

D. Excluding Private Subsidiaries From § 806's Coverage Is Consistent With The Principle That Parents Are Not Automatically Liable For Their Subsidiaries' Conduct

The U.S. Supreme Court has embraced the principle that parent companies are not automatically liable for acts of their subsidiaries with which they were not involved, recognizing that a parent company is an independent legal entity. *See U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998) ("[I]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation ... is not liable for the acts of its subsidiaries.").

ALJs likewise have embraced this principle in § 806 cases. *See, e.g., Lowe*, 2006 DOLSOX LEXIS 101, at *17 ("The common meaning ascribed to the term company does not include for general legal purposes subsidiaries."); *Hughart v. Raymond James & Assoc., Inc.*, Case No. 2004-SOX-009, 2004 WL 5308717, at *4 (ALJ Dec. 17, 2004) ("Generally, a parent corporation is not liable for the torts of its subsidiary because a corporation is an independent legal entity whose form cannot be disregarded.").

Thus, finding that § 806 covers private subsidiaries merely because they are owned by a company that is publicly traded would run afoul of this principle. Indeed, it would effectively disregard the separate nature of the respective companies, and, contrary to the Supreme Court's direction, would subject the companies to liability merely because of their corporate affiliation.

E. Implications Of The Dodd-Frank Wall Street Reform and Consumer Protection Act

On June 29, 2010, a Conference Report setting forth the Dodd-Frank Wall Street Reform and Consumer Protection Act was issued by the House-Senate conference committee. H.R. Rep. No. 111-517 (2010). The Conference Report consolidated and revised the Restoring American

Financial Stability Act and the companion House bill, the Wall Street Reform and Consumer Protection Act of 2009. The Conference Report expands SOX to expressly cover private subsidiaries. Specifically, § 929A, titled "Protection For Employees Of Subsidiaries And Affiliates Of Publicly Traded Companies," states: "Section 1514A ... is amended by inserting 'including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company' after 'the Securities Exchange Act of 1934 (15 U.S.C. 780(d)).'"

This sharp contrast from § 806 (as it is presently constituted) exposes Congress's conscious, intentional decision to omit private subsidiaries from § 806. If Congress intended for § 806 to cover private subsidiaries it would have used the same or similar language to that which now appears in the Conference Report.

Notably, the Conference Report has not yet been enacted, and nothing in it suggests that its whistleblower protection provisions apply retroactively. Thus, answers to the ARB's questions of whether and to what extent § 806 applies to private subsidiaries still have significant implications for pending litigation and litigation filed before this bill is enacted.

II. An Appropriate Exception Would Permit Coverage Of A Private Subsidiary Where It Acts As The Parent's "Agent" In Making The Allegedly Retaliatory Employment Decision

§ 806 imposes liability where an employer takes an adverse employment action against an employee *because* he or she "blew the whistle" on conduct that amounts to a fraud on shareholders. In other words, like many anti-retaliation statutes, Congress enacted § 806 to deter and punish adverse employment *driven by retaliatory motives*. *See Fort v. Tennessee Commerce Bankcorp, Inc.*, Case No. 4-1760-08-017, 2010 DOLSOX LEXIS 23, at *15 (ALJ March 17, 2010) (finding violation of § 806; "There is also evidence of animus and intent to retaliate against Complainant in emails ... before Complainant's administrative leave on March 7, 2008.

Mr. Cox stated in one email that he was "in a 'get even' mode and I am enjoying every minute of it.") (emphasis in original). Thus, it would be anomalous and unfair to impute liability to a parent company that did not take part in the challenged employment decision, as that company cannot be said to have acted *for the purpose of retaliating* against the employee.

By contrast, in instances where a parent played an integral role in the retaliatory decision – *e.g.*, by making the decision and/or directing the subsidiary to implement it – then agency principles would justify expanding § 806's coverage. This application of the agency exception to the general rule limiting § 806's coverage to publicly traded companies is consistent with decisions rendered by the ARB, federal courts and ALJs. *See Klopfenstein*, 2006 WL 1516650, at *11 (discussed *infra*); *Rao*, 2007 WL 1424220, at *5; *Savastino*, 2007 DOLSOX LEXIS 54 (dismissing § 806 claim because private employer did not act as public parent's agent in discharging employee); *Mara v. Sempra Energy Trading, LLC*, Case No. 2009-SOX-012, 2009 DOLSOX LEXIS 25 (ALJ Oct. 5, 2009) (same).

Klopfenstein illustrates the principles on which the ARB and other tribunals have appropriately relied in determining whether an agency relationship exists between a publicly traded parent and its private subsidiary. 2006 WL 1516650. There, the ARB found that the question of whether a subsidiary is a publicly traded employer's agent should be answered "according to principles of the general common law of agency." *Id.* at *10. The ARB then turned to an analysis of the Restatement, which recognizes that an agency relationship exists where (i) there is a the manifestation by the principal that the agent shall act for it, (ii) the agent accepts that undertaking, and (iii) the parties have reached an understanding that principal controls the undertaking. *Id.* (citing Rest. 2d Agency § 1(1), comment *b*).

The ARB then stressed that the principal's involvement in decisions impacting the complainant's employment was a substantial consideration in determining whether an agency

relationship existed. *Id.* at *10. And it underscored the key fact that the individual who made the decision to discharge the complainant was the president of the parent and the executive vice president of the subsidiary. *Id.* Accordingly, the ARB remanded the case, directing that the "ALJ should make whatever factual findings are necessary to properly apply agency principles in determining whether either or both [the parent and the individual defendant] were [the subsidiary's] agents with *regard to the termination of [the complainant's] employment*." *Id.* at *11 (emphasis added).

Consistent with the reasoning in *Klopfenstein*, courts have rejected more liberal applications of the agency test by declining to extend coverage where the private subsidiary was the publicly traded parent's agent only with respect to general corporate matters and not the challenged employment decision. *See Malin v. Siemens Med. Sol. Health Servs.*, 638 F. Supp. 2d 492, at 500-01 (D. Md. 2008) (*infra*); *Reno v. Westfield Corp., Inc.*, Case No. 2006-SOX-00030, 2006 WL 3246834, at *3 (ALJ Feb. 23, 2006) (acting as an "agent of a publicly traded company is not enough to impose liability under [§ 806]" where the private subsidiary did not act as the publicly traded parent's agent in retaliating against the employee); *Brady v. Calyon Secs.*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005) (finding employee was not covered by § 806 where his employer was only an agent of a publicly traded company in circumstances unrelated to his employment); *Merten v. Berkshire Hathaway Inc.*, Case No. 2008-SOX-40, 2008 DOLSOX LEXIS 78 (ALJ Oct. 21, 2008) (the fact that the publicly traded parent's ethics policy applied to its private subsidiary was insufficient to establish a principal-agency relationship).

These decisions, moreover, are in harmony with the presumption against parent liability for subsidiary conduct. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) ("The doctrine of limited liability creates a strong presumption that a parent corporation is not

the employer of its subsidiary's employees. ... Only evidence of control suggesting a significant departure from the ordinary relationship between a parent and its subsidiary – domination similar to that which justifies piercing the corporate veil – is sufficient to rebut this presumption ... and to permit an inference that the parent corporation was a final decision-maker in its subsidiary's employment decisions.").

In sum, an agency exception to the general rule that § 806 only covers publicly traded companies should be narrowly circumscribed to serve § 806's purposes of deterring and punishing those who actually make employment decisions and do so based on retaliatory animus. These purposes are simply not achieved through a looser application of agency principles that would apply simply because of general corporate interactions that are divorced from the decision-making process giving rise to the retaliation complaint.

III. The "Integrated Enterprise Test" Is Not An Appropriate Exception To § 806

The integrated enterprise test is not appropriate an appropriate method of determining whether a private subsidiary is covered by § 806. Per the ARB's April 15, 2010 Order, the following addresses the factors this test uses, explains why it is not appropriate in the § 806 context, and then identifies the factor that deserves the most focus if the ARB is still inclined to use it.

A. Factors Of The Integrated Enterprise Test

The integrated enterprise test examines the following characteristics of affiliated companies to determine if they are so related that they may be characterized as one employer: whether there is centralized control over labor and employment relations; whether operations are interrelated; whether there is common management; and whether there is common ownership or financial control. *See Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001);

Trusz v. UBS Realty Investors, LLC, Case No. 09-cv-268, 2010 WL 1287148, at *6 (D. Conn. Mar. 30, 2010).

B. The Integrated Enterprise Test Is Not An Appropriate Method Of Determining Whether § 806 Covers Private Subsidiaries

There are several fundamental reasons why the integrated enterprise test is poorly suited to a determination of whether § 806 should cover a private subsidiary. At the outset, this test unreasonably heightens the risk that parents that had no involvement with – much less even any knowledge of – the alleged retaliatory employment action could be subject to liability, as it takes other unrelated factors into consideration.

For example, the fact that a parent and subsidiary share corporate services (*e.g.*, auditing or tax services), maintain a consolidated benefits program, or even have a single e-mail system and intranet is of no moment in the § 806 context if the parent had nothing to do with a complainant's retaliatory discharge. Likewise, why should the fact that the companies have some directors in common if those directors were not involved in the alleged retaliation?

Expressing the same reaction to this test, courts have recognized that that the mere existence of common ownership, management and overlapping policies are not sufficient to justify treating a parent corporation and its subsidiary as a single employer where there is no nexus to the subsidiary's day-to-day employment decisions. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) (noting that common ownership is an ordinary aspect of parents and their subsidiaries).

In fact, the court in *Malin* aptly recognized that

> [T]o hold 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.

638 F. Supp. 2d at 500-01. *Cf. Trusz*, Case No. 09-cv-268, 2010 WL 1287148, at *6 (D. Conn. Mar. 30, 2010) (finding companies to be integrated employers for purposes of analogous state whistleblower statute where they shared common management, human resource strategies, training and compensation plans and parent was involved in subsidiary's operations).

Further, for these same reasons, the integrated enterprise test is at odds with the above-referenced decisions rejecting more liberal interpretations of agency principles to impute liability where the agency relationship is unrelated to the challenged employment decision. Put another way, the appropriate way to determine whether affiliated corporate entities are an "integrated enterprise" for purposes of coverage under § 806 is to examine whether the parent had a direct hand in the alleged retaliatory employment decision.

Lastly, courts have declined to use the integrated enterprise test in the analogous Title VII context, deeming it too amorphous to be applied consistently. *See Papa v. Katy Indus.*, 166 F.3d 937, 940-42 (7th Cir. 1998) (rejecting use of integrated employer test to determine if employer with less than 15 or 20 employees should be covered by federal anti-discrimination laws; concluding that the test is too amorphous to be applied consistently); *Worth v. Tyler*, 276 F.3d 249, 260 (7th Cir. 2010) (citing *Papa*). There is no plausible reason why the integrated enterprise test would be better suited to the § 806 context than the Title VII context.

C. If The Integrated Enterprise Test Is Adopted, "Centralized Control Over Labor And Employment Relations" Should Be Given The Greatest Weight

If the ARB decides to use the integrated enterprise test, the test should strictly focus on whether the parent has control over the subsidiary's labor and employment relations. This factor focuses on which "entity made the final decisions regarding employment matters related to the person claiming discrimination[.]" *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993); *Lusk*, 129 F.3d at 777 ("Th[e] analysis ultimately focuses on the question whether the parent

corporation was a final decision-maker in connection with the employment matters underlying the litigation, and all four factors are examined only as they bear on this precise issue.").

The need for a laser-like focus on this factor dovetails with the need to limit the agency test to situations where a publicly traded employer is intimately involved in the challenged adverse employment action. Again, § 806 imposes liability based on a decision-maker's retaliatory *motive*.

Consistent with this reasoning, courts have held that this is the most important factor. *See Romano v. U-Haul Int'l*, 233 F.3d 655, 677 (1st Cir. 2000); *Perez v. H&R Block, Inc.*, Case No. 2009-SOX-42, 2009 DOLSOX LEXIS 92, at *42 (ALJ Dec. 1, 2009).

CONCLUSION

WHEREFORE, the Chamber respectfully submits that principles of law and fairness favor limiting the scope of § 806's coverage to publicly traded companies and excluding private subsidiaries. The Chamber also recognizes the propriety of a narrow agency exception limited to situations where an unlawful motive should be imputed to the companies at issue.

DATED: July 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on July 15, 2010, he caused a true and correct copy of the foregoing BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE to be served upon the following by U.S. mail, proper postage prepaid, on this 15th day of July, 2010:

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