UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of: CARRIE S. JOHNSON, Complainant, vs. SIEMENS BUILDING TECHNOLOGIES, INC. and SIEMENS AG, Respondents.	ARB Case No. 08-032 ALJ Case No. 2005-SOX-015

BRIEF IN REPLY TO BRIEF OF AMICUS CURIAE SENSIBLE LAW INSTITUTE

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INTRODUCTORY STATEMENT

Contrary to the Amicus Curiae Brief of the Sensible Law Institute ("SLI") submitted by Mr. Corey, the issues involved in the pending case of *Spinner v. David Landau & Associates, LLC* (ARB Case Nos. 10-111, 10-115) have nothing to do with the four discrete issues upon which the Administrative Review Board has requested briefing in this matter. *See* Order Requesting Additional Briefing By the Parties and Inviting Amici Curiae ("Order") at 4-5. Unlike the parent-subsidiary issues involved here – which implicate two interrelated corporate entities – the threshold issue in *Spinner* is whether the whistleblower protections of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or "Section 806") apply to an arms-length, business-customer relationship between two distinctly separate, stand-alone entities: Mr. Spinner's former employer, the privately held David Landau & Associates, LLC ("DLA"), and its publicly held customer. For that reason alone, there is no reason to consider the *Spinner* case in conjunction with the instant matter, and SLI's brief should be disregarded.[1]

Even more importantly, while "ALJs and the courts [may] have struggled" with the question of whether SOX applies to a non-public subsidiary of a publicly held corporation, "resulting in a variety of diverging and conflicting opinions," Order at 2, that has simply not been the case with regard to Section 806's application to the business-customer or contractor-customer relationship. Indeed, notwithstanding Mr. Corey's absolute refusal to accept the almost *universal* consensus of Administrative Review Board, administrative law judge and federal judicial opinion on this issue – broken only by the rogue *Lawson v. FMR LLC* decision,

[1] DLA's contentions regarding the proper dismissal of Mr. Spinner's Complaint on jurisdictional grounds, and why his claim also fails on the merits, has been and will be briefed in the *Spinner* matter, which is the proper context in which his appeal and the jurisdictional issue it involves should be decided.

discussed *infra* – the fact remains that there is not, as he contends, "a scarcity of administrative and judicial case law" on this issue. In fact, the law on this issue is quite clear and settled, as reflected in the numerous cases which SLI (and Mr. Corey in the *Spinner* case) have chosen to ignore. That includes the Board's own decision in *Fleszar v. American Medical Association*, ARB No. 07-091, 08-061 (March 31, 2009), *aff'd*, 598 F.3d 912 (7th Cir. 2010), decided just last year, and affirmed by the Seventh Circuit Court of Appeals less than six months ago.

In sum, there is no reason for the Board to address the application of Section 806 to privately held contractors in this matter, because the law as to that issue is clear and settled, and because that issue has nothing to do with the parent-subsidiary issues involved in this case. Consequently, SLI's request that Mr. Spinner's claims be injected into this case, or that the Board revisit and revise the settled law regarding those claims, should be denied.

ARGUMENT

I. SLI'S POLICY CLAIMS ARE CONTRADICTED BY BOTH THE LEGISLATIVE HISTORY AND THE LEGISLATIVE INTENT BEHIND SECTION 806

In its overreaching endeavor to have the Board reject and re-write the settled law regarding SOX's application to a privately held business/publicly held customer relationship, SLI claims that because SOX arose from the Enron scandal – which itself involved a whistleblower employed only by the publicly held company – it must have been intended to cover any privately held company which provides SOX-related financial services to a publicly held corporation, simply by virtue of that business or customer relationship. Unfortunately, for SLI (and Mr. Spinner), the members of Congress who actually authored and passed SOX expressed disagreement with that contention. In fact, SOX's sponsor and namesake, Senator

Sarbanes, was unequivocal in this regard:

> **let me make very clear that it applies *exclusively* to public companies – that is, to companies registered with the Securities and Exchange Commission. *It is not applicable to pr[ivat]e companies, who make up the vast majority of the companies across the country.***

148 Cong. Rec. S7351 (July 25, 2002) (emphasis added); *see also* 148 Cong. Rec. S6330 (July 8, 2002 ("*this bill applies only to public companies who are required to report to the SEC*"). Indeed, the Congressional record (*i.e.,* the legislative history) is replete with such intent, from both houses of Congress. For example, as reflected in the House of Representatives:

> Mr. Etheridge: **Mr. Speaker, we must all remember that *this bill regulates public corporations, not privately-held companies.***

148 Cong. Rec. H5475 (July 25, 2002) (emphasis added). Likewise, in the Senate:

> Mr. Dodd: It occurs to me as well, in this bill, we are not requiring for all businesses these requirements. These are for businesses that have to file with the SEC.
>
> Mr. Sarbanes: That is right, which is a limited universe.
>
> Mr. Dodd: It is a limited universe. My point is, we are not talking about every entity that conducts business for profit. ***We excluded the overwhelming majority of businesses that are private entities*, that have no filing requirements with the SEC. Our colleague from Wyoming felt very strongly about this point, that *we only deal with public companies, the 16,000 public companies.***
>
> * * * * *
>
> Mr. Durbin: I listened closely as the Senator from Maryland explained the bill before us. He has worked closely with the Senator from Wyoming ***to make sure it just applies to public corporations*** . . .
>
> * * * * *
>
> Mr. Corzine: It is not in any way related ***to the group of organizations with which we are attempting to deal, which are large, publicly traded corporations,*** . . .

148 Cong. Rec. S6493, S6495, S6496 (July 9, 2002) (emphasis added). Indeed, even the

Judiciary Committee Report on which SLI relies[2] fatally undermines Mr. Corey's contentions that Section 806 was meant for the unlimited financial sector application which he seeks.

Thus, the Judiciary Committee stated, with regard to the unambiguous purpose of Section 806, non-cryptically entitled, "Whistleblower Protection for Employees of *Publicly Traded* Companies," that "[t]his section would provide whistleblower protection to employees of *publicly traded* companies." Senate Judiciary Committee Report 107-146 at 13 (May 6, 2002) (emphasis added). This painfully obvious, "it means what it says" interpretation is further confirmed in a later discussion of Section 806: "Section 6 of the bill would provide whistleblower protection *to employees of publicly traded companies* who report acts of fraud . . . to supervisors or appropriate individuals *within their company*" because this protection is needed "*for employees of publicly traded companies.*" *Id.* at 18-19 (emphasis added). To reinforce this intent further, the Report goes on to state that "[t]he bill does not supplant or replace state law, but sets a national floor for employee protections in the context of *publicly traded companies.*" *Id.* at 20. In this regard, "[t]he bill also would protect *employees of certain publicly traded companies* who provide information to the U.S. government (whistleblowers). *Those companies* would not be able to discharge, demote, suspend, threaten, harass, or discriminate against *such employees* in the terms and conditions of their employment." *Id.* at 25 (emphasis added).

In short, if Congress had truly intended the broad scope urged by SLI, it clearly went to great pains to hide it when explaining the law's provisions.

SLI also contends that by using the words "or any officer, employee, contractor or

[2] As cited in *Walters v. Deutsche Bank AG*, 2008-SOX-070 (ALJ March 23, 2009), another parent-subsidiary case which has nothing to do with the issues in *Spinner*.

subcontractor of [a publicly traded] company," Congress must have meant to cover someone other than an employee of a publicly traded company. In SLI's view, this is because any other interpretation would render the words "mere surplusage." SLI Brief at 4. But that would be true only if one completely disregarded (as in the *Lawson* case), not only the legislative history discussed above, but the title of Section 806, as specifically chosen by Congress: "Whistleblower Protection for Employees of *Publicly Traded* Companies." When read in this context (*i.e.*, the proper context),

> **the term "employee" in the employment discrimination prohibition refers to an employee of a publicly traded company.** ***In that light, the terms "contractor" and "subcontractor" in the provision reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a publicly traded company.***

Goodman v. Decisive Analytics Corp., 2006-SOX-11 at 9-10 (ALJ Jan. 10, 2006) (bold and italics added, underline in original); *see also Minkina v. Affiliated Physician's Group*, 2005-SOX-00019 at 6 (ALJ Feb. 22, 2005) ("this language simply lists the various potential actors who are prohibited from engaging in discrimination *on behalf of a covered employer.*") (emphasis added). The Seventh Circuit has also taken this common sense view, in its decision affirming the Board in *Fleszar*:

> **In context, "contractor, subcontractor, or agent" sounds like a reference to entities that participate in the [publicly traded corporation's] activities.** ***The idea behind such a provision is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air").***

Fleszar v. U.S. Dep't of Labor, 598 F.3d 912, 915 (7th Cir. 2010) (emphasis added). In other words, a publicly held corporation cannot escape liability by hiring a privately held corporation to "do its dirty work" by terminating the former's own whistleblower. Since SLI itself

"wholeheartedly, agree[s]" with *Fleszar*, SLI Brief at 7, its urging for a different interpretation here and in *Spinner* makes even less sense. Such an interpretation should be soundly rejected.

II. THE STANDARD FOR APPLYING SECTION 806 TO PRIVATELY HELD CONTRACTORS IS CLEAR AND WELL-SETTLED

As this Department's administrative decisions have made overwhelmingly clear, Section 806 was intended to protect, and only protects, (1) employees of publicly traded companies, and (2) employees of privately held companies who are subjected to employment decisions made on behalf of publicly traded companies. *Fleszar v. American Med. Ass'n*, ARB No. 07-091, 08-061 at 4; *Paz v. Mary's Center for Maternal & Child Care*, ARB No. 06-031 at 2 (Nov. 30, 2007); *Flake v. New World Pasta Co.*, ARB No. 03-126 at 4 (Feb. 25, 2004); *Reno v. Westfield Corp., Inc.*, 2006-SOX-00030 at 3 (ALJ Feb. 23, 2006); *Goodman*, *supra*, at 9-10; *Minkina*, *supra*, at 5; *see also Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307, 317-19 (S.D.N.Y. 2005) ("[t]he Act makes plain that neither publicly traded companies, nor anyone acting on their behalf, may retaliate against qualifying whistleblower employees. Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies."). Thus, in order for SOX to apply to an employee of a privately held contractor of a publicly held company, "[t]he contractor or agent when discriminating against the employee must have been acting on *behalf* of the publicly traded company." *Reno*, *supra*, at 3 (emphasis in original); *Fleszar*, *supra*, at 4 (adopting and affirming ALJ's holding that respondent-employer's contractual relationships with publicly traded companies, standing alone, were insufficient to make it a covered employer under the whistleblower protection provisions). There is simply no divergence of administrative authority on this point.

Nevertheless, since Mr. Spinner cannot meet that standard in his own case (as set forth in DLA's *Spinner* briefs), he seeks to disregard and change it in this one. Such a change is completely unnecessary.

Mr. Corey's desperate reliance on a single, unpublished, and irrefutably wrongly decided and results-oriented district court decision from Massachusetts, which has never been relied upon by any judicial or administrative authority, and is the only case that has rejected the decisions cited above, does not change this conclusion. In *Lawson v. FMR LLC*, No. 08-10466-DPW, 2010 U.S. Dist. LEXIS 31258 at *59 (D. Mass. March 31, 2010), the court reached the unsupported blanket conclusion that "Section 806 protects employees of any related entity of a public company." *Id.* at 53. The sweeping mental gymnastics that the court used to reach that conclusion demonstrate quite clearly why it adds nothing to any cogent analysis of privately held contractor liability, and should be disregarded.

The court began its analysis by claiming that "[t]he statute protects 'an employee,' but does not directly state at which entity the individual must be employed." *Id.* at 27. By this statement, one can only conclude that the court missed the actual title of Section 806, which could not be more direct in stating that it applies to "Employees of Publicly Traded Companies." But rather than overlook the title, the court chose to disregard it by speculating, pages later, that it could be mere shorthand for covering a broader scope of employees than it actually states. According to the *Lawson* court: "The rationale for the shorthand is even more compelling when one considers that the alternative heading would have been 'Employees of Publicly Traded Companies and Their Related Entities,' or worse, 'Employees of Publicly Traded Companies, Their Officers, Employees, Contractors, Subcontractors, or Agents." *Id.* at

39-40. This, of course, reverses the proper analysis, by assuming that the text means something other than that which is plainly stated in the title.

The court engaged in the same "could have, would have, should have" type of analysis when considering the legislative history specific to Section 806. According to *Lawson*, the Senate Judiciary Committee's unambiguous statement that "Section 806 'would provide whistleblower protection to employees of publicly traded companies,' [is] unclear as to "whether this constitutes a statement that employees of non-public companies are specifically excluded, or are instead limited to shorthand generalizations about Section 806." *Id.* at 41. In this same vein, the court claimed that Senator Sarbanes' statement that the Act "'applies exclusively to public companies'" "could mean that it applies to public companies and those parties that act on their behalf (such as officers, employees and contractors), rather than to private companies that provide no services to public companies at all." *Id.* at 42. In other words, Congress could have meant anything beyond what it actually said, as long as it fit the result that the court wished to reach.

In this regard, it is respectfully submitted that basing a decision on judicial speculation as to what a statute or legislator might say or could have said, but does not say, is hardly the best or proper way to adjudicate parties' rights. Yet that is exactly what the *Lawson* court did. It is also what SLI would have the Board do in injecting *Spinner* into this matter, and in recommending alternative, *ex post facto* statutory language in the hopes of saving Mr. Spinner's case.

In another glaring analytical inconsistency, the court claimed that "[d]ecisional law has done little to enlighten the issue" of the proper application of Section 806 to a contractor-

customer relationship. *Id.* at 32. Yet within the next three paragraphs, the court conceded that "[a] narrow reading of the proper scope of Section 806 is shared by other federal district courts and is found in DOL administrative decisions," and that "ALJs within the Department of Labor who have addressed this issue have reached similar conclusions." *Id.* at 34-36 (citing cases). As the court further conceded, that narrow reading was "not inconsistent with the text" of the statute. *Id.* at 49. Significantly, at no point did the court site *any* court case or administrative decision which shared its contradictory and unduly expansive reading of the law's scope (because, quite frankly, none appear to exist). Thus, the decisional law provides no enlightenment only if one chooses to ignore it, as did the *Lawson* court, and as does SLI here.

Even more importantly, the district court based its ruling on the finding that this Board "has yet to provide the ALJs with definitive clarification on these matters." *Id.* at *36. But this is also untrue. In fact, the Administrative Review Board, and numerous administrative law judges, *have repeatedly ruled against* both SLI's and the *Lawson* court's unreasonably broad interpretation of SOX coverage. *See, e.g.*, *Fleszar*, *supra*, at 4 (holding that a non-publicly traded company's contractual relationships with publicly traded companies, standing alone, are insufficient to make it a covered employer under SOX's whistleblower provisions); *Paz*, *supra*, at 2 (dismissing complaint for lack of jurisdiction because his employer was not a publicly traded company); *Flake*, *supra*, at 4 (holding that "the whistleblower protection provisions of [SOX] cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act"). This is because, as the Department has cogently recognized,

> ***Any broader interpretation means every non-publicly traded company becomes subject to SOX if it engages in any contractual relationship with a publicly***

traded company. At present, the caption and language of the SOX employee protection provision does not extend its jurisdictional reach that far.

Goodman, supra, at 10; *Roulett v. American Capital Access*, 2004-SOX-00078 at 8-9 (ALJ Dec. 22, 2004) (refusing to apply SOX to privately held financial services provider because "[t]he Act provides specific requirements for its coverage, which [should not be] expand[ed] to a non-publicly traded company solely because it engages in financial business with publicly traded companies").

As the above demonstrates, *Lawson* provides absolutely no justification for establishing a new legal standard, or for disregarding the overwhelming weight of authority holding that for Section 806 to apply to a privately held contractor, that entity must have been acting on behalf of a publicly held company (in Mr. Spinner's case, the contractor's customer) in discharging the complainant. Consequently, SLI's request that Board do so, particularly in the completely different context of the parent-subsidiary case presented here, should be rejected.

CONCLUSION

For the reasons discussed above, it is respectfully requested that SLI's Brief be disregarded, that the Board not use this matter to address SOX's application to a contractor-customer relationship, and that the jurisdictional issues and merits of the *Spinner* matter be resolved in the context of that case.

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Dated: August 2, 2010

CERTIFICATION OF SERVICE

I certify under penalty of perjury that on this date, I caused a true and exact copy of the attached Brief to be served on the following, via first class mail:

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