UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

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In the Matter of

WILLIAM VILLANUEVA,

Complainant,

v.

CORE LABORATORIES NV
SAYBOLT DE COLOMBIA LIMITADA,
Respondents.

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ARB Case No.: 09-108

ALJ Case No.: 2009-SOX-006

COMPLAINANT'S REBUTTAL BRIEF

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PRELIMINARY STATEMENT

This Rebuttal Brief is submitted on behalf of the Complainant, William Villanueva, in further support of his appeal from the decision, dated June 10, 2009, of Administrative Law Judge Jonathan C. Calianos (the "ALJ").

ARGUMENT

POINT I

THIS CASE DOES NOT INVOLVE THE EXTRATERRITORIAL APPLICATION OF SOX

In an apparent effort to divert this Board's attention from the central issue in this case, Core Lab devotes almost half of the "argument" section of its brief to establishing that the whistleblower protection provisions of SOX do not apply "extraterritorially." However, as the Complainant's initial brief made plain, Complainant does not assert that these provisions may be applied extraterritorially and does not seek to do so in this case. Rather, as in the case of *O'Mahony v. Accenture LLP*, 537 F.Supp.2d 506 (S.D.N.Y. 2008), exercising jurisdiction in this case does not involve the extraterritorial application of the statute because it involves assertion of jurisdiction over conduct undertaken here in the United States by United States-based executives of Core Lab who are based at the company's Houston headquarters.

A. The Underlying Fraud and Retaliation Took Place Within the United States

In *O'Mahony* the court concluded that "the Court has subject matter jurisdiction over Accenture LLP because the alleged wrongful conduct and other material acts occurred in the

United States by persons located in the United States, and hence the exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law." In focusing on the locale of the wrongful conduct, the *O'Mahony* court relied on the "conducts test" for jurisdiction under which courts seek to determine "whether the wrongful conduct occurred in the United States." 537 F.Supp.2d at 512.

Here, as in *O'Mahony*, all of the wrongful conduct at issue occurred in the United States and the ALJ therefore erred in rendering a factual finding that the underlying fraud and retaliation took place abroad – especially given that he did so in a summary disposition of the case prior to any discovery and without the benefit of a hearing.

In *O'Mahony*, the court determined that "Accenture LLP perpetrated the alleged fraud by deciding in the United States not to pay French social security contributions owed on O'Mahony's behalf." 537 F.Supp.2d at 511. Here, Villanueva alleges that the decision to evade Colombian taxes was made by Core Lab's senior U.S. executives in Houston who also implemented the decision by directly controlling all aspects of Saybolt Colombia's accounting. Notably, the ALJ in this case improperly distorted the record by holding that only the *policy* behind the transfer pricing scheme came from the United States. In fact, Villanueva was prohibited by Brigg Miller, Core Lab's Chief Accounting Officer in Houston, from making any changes to this practice, notwithstanding that Villanueva was Saybolt's CEO. Indeed, Miller directly overruled Villanueva's instructions to the Houston accounting department to correct the fraudulent transactions. *See* Villanueva Declaration, Ex. B (email from Miller to Villanueva, dated January 2, 2008, stating "William, the correction you are demanding cannot be made ...") Likewise, Mark

Elvig, Core Lab's General Counsel in Houston, prohibited Villanueva from obtaining any outside legal advice in Colombia regarding the fraudulent directions being issued by Houston headquarters.[1] *See* Villanueva Declaration, Ex. K (email from Elvig to Villanueva, dated April 21/08, stating "...you are not authorized to disclose or produce any information at this time to that firm in connection with the project you wish to consult with them about. Disregard of this instruction will be viewed as a violation of your confidentiality obligations to this company and dealt with in a very serious manner").

Hence, the facts supporting jurisdiction in this case are at least as strong as those in *O'Mahony*, and arguably stronger because the actual implementation of the decision to evade taxes was carried out in Houston by Core Lab's accounting executives and employees.

Likewise, the decision to terminate Mr. Villanueva in retaliation for his whistleblowing was also implemented by Ivan Piedrahita, Core Lab's Regional Manager for Saybolt Latin America who is based in Houston and is employed by Core Lab's U.S. subsidiary, Saybolt LP.[2] All of the circumstances – including the fact that Piedrahita was based in Houston and was the person to whom Mr. Villanueva directly reported – create a strong inference that the decision to was made in Houston by the U.S. executives who also implemented the decision. At a

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[1] In his affidavit submitted in connection with this case, Elvig conceded that he was "employed by Core laboratories LP, as General Counsel for the entire Core Laboratories Group of Companies .... As General counsel, I am responsible for the overall worldwide legal affairs of Core Lab ..." Core Laboratories LP is a subsidiary of Core Laboratories NV and is a U.S. partnership. *See* Core lab's 2007 10-K, Exhibit 21.1, #50.

[2] See email contained in Villanueva Decl. Ex. M; Core Lab's 2007 Form 10-k, Exhibit 21.1, #130.

minimum, a factual issue exists which precludes a summary disposition and it was improper for the ALJ to credit Core Lab's version of who decision-maker was without permitting discovery and a hearing. Notably, Heisbroek himself never submitted an affidavit claiming to have made the decision, a fact that heavily supports an inference that he did not.[3]

Core Lab attempts to rely on this Board's decisions in *Ahluwalia v. ABB, Inc.*, ARB Case No. 08-008 (ARB June 30, 2009) and *Pik v. Goldman Sachs Group, Inc.*, ARB Case No. 08-062 9 (ARB June 30, 2009). However, there is no indication from the Board's decisions in either case that either the underlying fraud complained of or the retaliation at issue were undertaken here in the United States by U.S. executives as was the case here. Indeed, in *Pik* this Board's decision specifically notes that "all alleged adverse employment actions took place in London." These decisions are therefore distinguishable from the instant case for this fundamental reason and it is respectfully submitted that the Board should adopt the reasoning of the District Court in *O'Mahony* and hold that, where both the underlying fraud and the retaliation at issue were perpetrated in the United States by U.S.-based employees, exercising jurisdiction over the case does not involve the extraterritorial application of SOX and therefore is appropriate.

B. Under the Agency Theory Adopted by This Board Complainant Was Employed by the U.S.-based Core Lab

As set forth in Complainant's Initial Brief, while Villanueva was not directly employed by Core Lab, the parent company that is headquartered in the United States, Saybolt – the

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[3] Although not relevant to the issue of jurisdiction, respondent's argument that Villanueva did not make trips to the U.S. is incorrect as he did make such trips. *See, e.g.,* Villanueva Decl. Ex. B (confirming that Villanueva "[has] attended more than one presentation on this policy ..."

Colombian subsidiary of Core Lab – functioned as a single entity with Core Lab and, indeed, was described in legal documents as being a "division" of Core Lab. As set forth in detail in Villanueva's declaration submitted to the ALJ in this case, Core Lab's Houston executives and staff directly controlled all aspects of Saybolt's business, finances and operations. For example: (a) Core Lab Houston had to approve all hiring and firing of employees at Saybolt and all compensation and pay raises (Villanueva Decl. Exs. L, M); (b) all sales contracts entered into between Saybolt and its international customers had to be signed by Core Lab Houston (Villanueva Decl. Ex. N); (c) Core Lab Houston had to approve the sale of all Saybolt assets (Villanueva Decl. Ex. O); (d) all Saybolt bank accounts were controlled from Houston and the only two permitted signatories on the accounts were Core Lab's Treasurer and Core Lab's Chief Accounting Officer, both of whom were in Houston (Villanueva Decl. Ex. P); (e) all of Saybolt's accounting was performed and controlled by Core Lab's employees and officers in Houston and Core Lab issued detailed accounting policies mandating the manner in which Saybolt accounted for transactions (Villanueva Decl. Exs. C, Q); (f) Core Lab Houston also mandated that all Saybolt employees receive training in, and abide by, Core Lab's corporate ethics code and took affirmative steps to provide mandatory training regarding same (Villanueva Decl. Exs. R, S); and (g) Core Lab's officers in Houston directly met to the Colombian clients (Villanueva Decl., Ex. G).

As this Board has previously held, "[w]hether a particular subsidiary ... is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to the general common law of agency." *Klopfenstein v. PCC Flow Technologies*, ARB

04-149, 2004 SOX-11 (ARB May 31, 2006) *10. In *Klopfenstein*, this Board relied on the fact that the parent company's officers and employees were involved in both the underlying fraud and the challenged decision to terminate the Complainant's employment. Here, the underlying fraud was orchestrated and perpetrated by the parent, Core Lab, in Houston, which also had complete control over Saybolt's operations, accounting, hiring and firing. Moreover, it is undisputed that the decision to terminate Villanueva was made and implemented by Core Lab in Houston, and not by Saybolt Colombia. Hence, for purposes of exercising jurisdiction over this case, this Board should determine that Core Lab and Saybolt are functionally one and the same and therefore – to the extent that the *O'Mahony* rule of jurisdiction is premised on complainant being employed by a U.S. employer – Complainant has met this requirement.

CONCLUSION

For all of the forgoing reasons, Complainant submits that the Department of Labor has jurisdiction over his claim in this proceeding.

Dated: New York, New York
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