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Issue Date: 10 June 2009

CASE NO.: 2009-SOX-00006

In the Matter of:

WILLIAM VILLANUEVA
Complainant

v.

CORE LABORATORIES NV
SAYBOLT DE COLOMBIA LIMITADA
Respondents

DECISION AND ORDER DISMISSING CASE FOR LACK OF JURISDICTION

I. Statement of the Case

This case arises out of a complaint of discrimination filed by William Villanueva ("Villanueva" or "the Complainant") against Core Laboratories NV ("Core Labs") and Saybolt de Colombia Limitada ("Saybolt Colombia") (collectively the "Respondents") pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX" or "the Act"). On July 28, 2008, Villanueva filed a complaint with the Occupational Safety and Heath Administration of the U.S. Department of Labor ("OSHA") alleging that he was terminated by the Respondents in retaliation for blowing the whistle about tax fraud being perpetrated in Colombia. Villanueva alleges that Core Labs is responsible for operating a transfer pricing scheme whereby it directed Saybolt Colombia (and other foreign Core Lab subsidiaries) to transfer sales to a related offshore entity for purposes of shielding a portion of income from taxation. He also alleges that Saybolt Colombia, at the direction of Core Labs, improperly claimed Value Added Tax ("VAT") exemptions in Colombia for certain transactions transferred to the offshore entity. By letter dated August 29, 2008, the Regional Administrator for OSHA, acting as an agent for the Secretary of Labor ("the Secretary"), found no jurisdiction under the Act because the adverse actions alleged by Villanueva all occurred outside of the United States.

Villanueva filed a timely notice of appeal objecting to the Secretary's findings, and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. On November 5, 2008, I ordered the parties to show cause in writing why the case should not be dismissed because the Court lacks subject matter jurisdiction under the Act. The parties have filed formal responses to the Order to Show Cause and have also filed the following

documents which are considered part of the record in this proceeding: (1) A faxed letter dated January 9, 2009, from the Claimant's Counsel advising the court that the Claimant waives the provisions of 18 U.S.C. § 1514A(b)(1)(B); (2) Joint Statement of Undisputed Facts filed on May 11, 2009; and (3) Respondent's [sic] Supplemental Facts filed on April 14, 2009.

Because Villanueva is a foreign national working at a foreign subsidiary of Core Labs—which is itself a Netherlands company whose shares are registered under Section 12 of the Securities Exchange Act of 1934—and because the alleged fraud as well as the termination occurred in Colombia, I find that cause has not been shown and the case is DISMISSED for lack of subject matter jurisdiction under the Act.

II. Background

Villanueva is a Colombian national living and working in Bogota, Colombia for Saybolt Colombia. *See* Agreed Facts ¶3; Aff. of Mark F. Elvig ¶3. He holds a Colombian law degree and was employed by Saybolt Colombia for more than twenty-four years, serving as Saybolt's General Manager for the last sixteen years. *See* Agreed Facts ¶¶ 7, 8, & 13. Saybolt Colombia is a Colombian limited liability company headquartered in Bogota which is ninety-five percent owned by Saybolt Latin America B.V. ("Saybolt Latin America"), a Netherlands limited liability company, and five percent owned by an individual who is a Colombian national. *See* Agreed Facts ¶¶ 3 & 4. Saybolt Latin America is wholly owned by Saybolt International B.V., a Netherlands company which, in turn, is wholly owned by the Respondent, Core Labs. *See* Agreed Facts ¶¶ 5 & 6. Core Labs and its affiliates provide services to the petroleum industry through seventy offices in more than fifty countries and Core Labs' securities are registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, and are publically traded on the New York Stock Exchange. *See* Agreed Facts ¶¶ 1 & 2. Villanueva brings Core Labs into the equation by asserting that Core Labs controlled all of the actions of Saybolt Colombia and as such, the two companies should be treated as one under SOX. *See* Complainant's Brief in Support of Subject Matter Jurisdiction, p. 6.

Villanueva alleges that Core Labs orchestrated a "transfer price fixing scheme" whereby it required Saybolt Colombia to utilize an offshore subsidiary in the Dutch Antilles, Core Laboratories Sales NV ("Core Lab Sales"), as the contracting party on contracts for inspection services performed by Saybolt Colombia for non-Colombian clients. *See* Declaration of Villanueva, at pp. 2-3. As part of the scheme, 10 percent of the revenues generated from the contracts were paid to Core Lab Sales, even though Core Lab Sales had nothing to do with procuring the contracts or conducting the services. *Id.* The result, according to Villanueva, is an underreporting of taxable revenue to the Colombian taxing authorities. *Id.* at 3. Additionally, Villanueva alleges that Saybolt Colombia, at the direction of Core Labs' Colombian accounting department, wrongfully claimed VAT exemptions on work transferred to Core Lab Sales. *Id.* Villanueva concludes that these actions also resulted in diminished tax revenue to the Colombian government. *Id.*

In January 2008, Villanueva began reporting these alleged tax irregularities to a number of Core Labs and Saybolt Colombia employees, including: Core Labs' head of accounting in Colombia; Core Labs' accounting assistant for Colombia; Core Labs' chief accounting officer in

Houston; Core Labs' general counsel; a Colombian tax law firm; Saybolt Colombia's outside counsel; and Core Labs' regional manager for Saybolt Latin America. *Id.* at pp. 3-11; *see also*, Compl. at pp. 2-7. Between January and April 2008, Villanueva was provided copies of opinion letters from two Colombian law firms regarding the alleged irregularities. *See* Declaration of Villanueva, at pp. 5-11. The legal opinions did not find fault with Saybolt Colombia's transactions with Core Lab Sales or the VAT exemptions claimed. *Id.* Notwithstanding these opinions, Villanueva refused to sign Saybolt Colombia's tax returns which were due to be filed with Colombian tax authorities by April 17, 2008. *See* Agreed Facts ¶¶ 14 & 15. Villanueva asserts that the opinion letters from the Colombian law firms were "disingenuous legal opinions that avoided the legal issues and were deliberately premised on a false set of facts" and provided him with little comfort in signing the tax returns. *See* Declaration of Villanueva, at p. 11.

Villanueva claims that Saybolt Colombia and Core Labs committed two acts of retaliation against him for blowing the whistle on the alleged tax fraud scheme. *Id.* at 12. First, he states that on April 3, 2008, he was passed over for a pay raise when all other Saybolt Colombia employees received a raise. *Id.* He states that Ivan Piedrahita, Core Labs' Regional Manager for Saybolt Latin America, and Jan Heinsbroek, President of Saybolt Latin America, were responsible for the decision to withhold a pay raise, and both gentlemen were located in Core Labs' offices in Houston, Texas at the time. *Id.* The second act of retaliation alleged by Villanueva was his termination on April 29, 2008. *Id.* On that date, Villanueva received a termination letter written in Spanish and delivered to him personally at his office in Colombia. *Id.* According to Villanueva, the letter was written and delivered by Mr. Piedrahita, an employee based at Core Labs in Houston. *Id.*

III. Discussion

SOX encompasses many statutes and schemes aimed at investor protection goals, and the whistleblower protections found at 18 U.S.C. § 1514A are a relatively small portion of the Act. *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir.), *cert. denied* 548 U.S. 906 (2006). The statute which controls the instant proceeding protects "employees of publically traded companies" who lawfully "provide information ... or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation" of federal statutes prohibiting various frauds (specifically bank, mail, securities, and wire frauds), any rule or regulation of the Securities and Exchange Commission, or any other provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A;[1] *see also Carnero*, 433 F.3d at 5.

[1] 18 U.S.C. §1514A(a) provides in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*) ... 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 ... [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> **(A)** a Federal regulatory or law enforcement agency;
>
> **(B)** any Member of Congress or any committee of Congress; or

"The § 1514A whistleblower provision ... serves to 'encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies.'" *Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (*quoting* S. Rep. No. 107-146, at 19). The First Circuit has found that Congress intended the Act to apply only domestically. *See Carnero*, 433 F.3d at 7-18. The Act does not extend extraterritorially to cover a foreign employee working overseas for a foreign company conducting its business in a foreign country. *Id.* Jurisdiction over Villanueva's claim under SOX hinges on whether or not the adjudication of his claim requires extraterritorial application of the Act.

Villanueva argues that the adjudication of his claim will not require an extraterritorial application of SOX because all of the accounting practices that led to the alleged tax fraud in Colombia emanated from executives located at Core Labs' headquarters in Houston, Texas. *See* Claimant's Brief in Support of Subject Matter Jurisdiction at 1-2. He also argues that the retaliation was orchestrated and controlled by executives at Core Labs in Houston. *Id.* at 1-2, 4. Villanueva states that he "simply seeks to enforce the anti-retaliation prohibition of Sarbanes Oxley with respect to conduct by employees and officers of Core Labs who work in the United States." *Id.* at 4. Villanueva argues that it is irrelevant that he was working in Colombia (or that he is a Colombian national for that matter) because the focus of the inquiry should be on locus of the fraudulent activity and the retaliation, all which occurred in the United States. *Id.* Villanueva points to the case of *O'Mahony v. Accenture, Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) as supplying the foundation for his arguments. *Id.* at 4-10.

Pealing away the veneer, Villanueva's arguments have little support as the facts of the instant case are more aligned with *Carnero* than *O'Mahony*, and the application of SOX in this case would clearly be an impermissible extraterritorial extension of the Act. I begin with a brief discussion of the cases. In *Carnero*, 433 F.3d at 2-3, the complainant was a citizen of Argentina, residing in Brazil, and working for a Latin American subsidiary of Boston Scientific Corporation ("BSC"), a publicly traded company listed on the New York Stock Exchange. Carnero alleged that he was wrongfully terminated for revealing that the BSC subsidiary created false invoices and inflated sales figures in Latin America. *Id.* The First Circuit upheld dismissal of the case, finding that SOX does not have extraterritorial application to extend protection to foreign employees working abroad for a foreign subsidiary. *Id.* at 18. After conducting an extensive review of the legislative history of the whistleblower provisions of the Act, the Court concluded that the employee protection provisions of SOX do "not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.* Carnero, like Villanueva, alleged that the publically traded parent located in the United States exerted "extensive and continuous control" over the foreign subsidiary. *Id.* at 3. Carnero, unlike Villanueva, even made frequent trips to the U.S. to meet with his "supervisors." *Id.* The Court did not find that the alleged control from the domestic parent was sufficient to bring Carnero within the reach of the Act, negating the extraterritorial application. *Id.* at 6-7. In fact, the Court assumed for purposes of its decision that Carnero was a covered employee of BSC, the domestic parent. *Id.*

(C) a person with supervisory authority over the employee. ...

In *O'Mahony*, 537 F. Supp 2d at 507-08, the complainant worked for a United States subsidiary of Accenture, Ltd, a Bermuda based company with shares publically traded on the New York Stock Exchange. While working for the U.S. subsidiary, O'Mahony was sent to France to open a new office for the corporate parent. *Id.* O'Mahony remained in France from 1992 to 2001. During five of those years, her employer was able to obtain an exemption from paying social security taxes to France because of an agreement between France and the U.S. that allowed an exemption for U.S. employees temporarily placed in France. *Id.* After the exemption expired, O'Mahony informed her employer that it had to start paying social security taxes on her behalf to France. *Id.* at 508. O'Mahony later received word from the corporate parent that it believed a better course of action was to not pay the French taxes and conceal the fact that she was still working in France. *Id.* Shortly after O'Mahony informed the parent company that she objected to their actions and would not participate in the concealment, she was demoted by her employer. *Id.* The decision to demote her was made by an executive at the U.S. subsidiary where O'Mahony was employed. *Id.* In reversing the Department of Labor's decision to dismiss the claim, the U.S. District Court found the case distinguishable from *Carnero* and held that an extraterritorial application of the Act was not required. *Id.* at 510-15. The court found the following facts distinguishable from *Carnero*. First, O'Mahony was employed and compensated by a *U.S. subsidiary* of a foreign company, working eight years in the United States, and was paid by the U.S. subsidiary from the beginning of her employment until just prior to her demotion in December 2004. *Id.* at 511. The court stated: "Unlike the parties in *Carnero*, the employment relationship in this case, until 2004, was between a United States employer and its employee." *Id.* Second, the alleged fraud and retaliation both occurred in the United States. *Id.* The domestic subsidiary perpetrated the alleged fraud in the United States by first deciding not to pay the French social security taxes and then acting on that decision by physically withholding the payment. *Id.* The alleged retaliation was undertaken by executives located in the United States and employed at the domestic subsidiary. *Id.* And finally, the lawsuit was filed against a foreign parent company and its U.S. subsidiary for alleged misconduct by the United States subsidiary. *Id.*

In stark contrast to *O'Mahony*, Villanueva does not have any connection with the United States. During his 24 year career with Saybolt Colombia, he was never a U.S. citizen or resident, he was never assigned to work in the United States, and he was never directly employed by any other Core Labs affiliate. *See* Agreed Facts ¶¶9, 10, & 11. Villanueva is a *foreign citizen* who worked *outside of the United States* for a *foreign subsidiary*—the exact scenario faced by the court in *Carnero*. While the First Circuit may have left the door ajar to allow the Act to apply to an overseas worker, *see* 433 F.3d at 18 n.17, Villanueva can not fit within the confines of that space.[2] Consistent with *Carnero*, the Administrative Review Board and the Office of Administrative Law Judges have refused to extend SOX coverage to employees in foreign jurisdictions. *See Ede v. Swatch Group*, USDOL/OALJ Reporter (PDF), ARB No. 05-053, ALJ Nos. 2004-SOX-68/69 (ARB June 27, 2007) (No SOX coverage for two complainants because their work for the respondent occurred exclusively outside of the United States); *Beck v.*

[2] In deciding *Carnero*, the Court commented that the case was decided "necessarily on its own facts." 433 F.3d at 18 n.17. It went on to state that there may be other situations comprised of different facts where the Act may apply, for instance "to cover an employee *based in the United States* who is retaliated against for whistleblowing while on temporary assignment overseas." *Id.* (emphasis added). Villanueva, a Colombian resident directly employed by a foreign company operating in Colombia, clearly would not fit within any exception envisioned by the First Circuit.

Citigroup, Inc., 2006-SOX-00003, slip op. at 2, 9-10 (A.L.J. Aug. 1, 2006) (The complainant, a foreign national working exclusively in Germany and employed by a German division of an American parent company, was denied protection under SOX even though the allegations of misconduct were being reported to company officials in the United States and employees of the American parent company participated in the decision to terminate the complainant. The court found that none of these facts altered the foreign nature of the employment relationship); *Di Giammarino v. Barclays Capital, Inc.*, 2005-SOX-00106, slip op. at 1-3 (A.L.J. July 7, 2006) (The complainant, who had dual United States and Italian citizenship, worked exclusively in the Respondent's London offices and was discharged in London; thus jurisdiction was found to be lacking under SOX); *Concone v. Capital One Financial Corp.*, 2005-SOX-00006, slip op. at 2, 6 (A.L.J. Dec. 3, 2004) (A foreign national whose entire employment was outside the United States was not a covered employee under SOX).

Even if I were to focus solely on the location of the where the alleged fraudulent conduct and retaliation occurred as Villanueva suggests, I would have to conclude there is still not a sufficient nexus with the United States. All of the alleged fraud involved actions taken by Saybolt Colombia outside of the United States. Under the transfer pricing scheme, Saybolt Colombia assigned contracts to Core Lab Sales in the Dutch Antilles. The contracts covered inspection services performed by Saybolt Colombia outside of the United States which allegedly resulted in the underpayment of tax to the Colombian government. Even if the policy for the transfer pricing scheme came from Core Labs in Houston, the overt acts and the alleged harm all happened outside U.S boarders.

The same holds true for the alleged retaliation. Initially, Villanueva did not receive a pay raise that was granted to other Saybolt Colombia employees in Colombia. This involved the payment of salary to a foreign national, directly employed by an overseas company, for work performed outside the United States. When Villanueva was ultimately discharged, it was by a letter written in Spanish and hand delivered to him at his office in Colombia. All of these actions occurred outside the United States and involve an employment relationship between a foreign employer and its foreign employee. The court in *Carnero* cautioned:

> If the whistleblower protection provision is given extraterritorial reach in a case like the present one, it would empower U.S. courts and a U.S. agency, the DOL, to delve into the employment relationship between foreign employers and their foreign employees. Carnero, whose direct employers were two Latin American corporations, has asked the United States district court for, among other relief, his reinstatement. The door would thus be opened for U.S. courts to examine and adjudicate relationships abroad that would normally be handled by a foreign country's own courts and government agencies pursuant to its own laws. In enacting other laws that affect employment relationships extraterritorially, members of Congress have recognized "the well-established principle of sovereignty ... that no nation has the right to impose its labor standards on another country." ... We believe if Congress had intended that the whistleblower provision would apply abroad to foreign entities, it would have said so, and certainly would

> have considered, before enacting the law, the problems and limits of extraterritorial enforcement.

433 F.3d at 15, *quoting* S. Rep. No. 98-467 at 27-28 (1984). Even assuming that the retaliatory decisions were made by executives at Core Labs in Houston, that can not alter the outcome for Villanueva. "[T]he possible participation by U.S.-based company officials in the decision to terminate Complainant [does not] change the outcome, as ... [it does] not alter the foreign nature of the employment relationship." *Beck*, 2006-SOX-00003, slip op. at 9-10.

While almost complete, I need to address one additional point. Villanueva cites to *Penesso v. LCC International, Inc.*, 2005-SOX-00016 (A.L.J. March 4, 2005), as being analogous to the instant case. *See* Complainant's Brief in Support of Subject Matter Jurisdiction, p. 9. In *Penesso*, the complainant was employed in Italy by an Italian subsidiary of an American corporation. *See* Slip op. at 1. Although the opinion is short on facts, the ALJ focused on the following to find the whistleblower provisions of SOX applicable: (1) the Complainant was a United States citizen; (2) "[M]uch of the protected activity took place in the United States"; and (3) "[A]t least one of the alleged retaliatory actions—the decision not to issue bonuses in 2003—took place in the United States." *Id.* at 3. While *Penesso* pre-dates the Court of Appeals decision in *Carnero*, armed with the lower court's opinion, the ALJ found these facts sufficient to distinguish the complainant from *Carnero*. *Id.* As I stated earlier, Villanueva has no connection with the United States and all of the alleged protected activity and retaliation occurred abroad. There are no parallels between *Penesso* and the instant case, and even if there were, I would decline to follow *Penesso* because it is not binding and it pre-dates the First Circuit Court of Appeals decision in *Carnero*.

Accordingly, based upon the foregoing, I find that I lack jurisdiction under the Act to adjudicate this claim because it would require an impermissible extraterritorial application of Section 806 of the Act.

IV. Order

IT IS ORDERED that the Complainant's claim against the Respondents is **DISMISSED WITH PREJUDICE** based upon the lack of jurisdiction.

SO ORDERED.

A

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the

administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).