U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

IN THE MATTER OF

WILLIAM VILLANEUVA,
Complainant

ARB CASE NO. 09-108

vs.

ALJ CASE NO. 2009-SOX-00006

CORE LABORATORIES NV
SAYBOLT DE COLOMBIA LIMITADA
Respondent

RESPONDENTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ARGUMENT AND AUTHORITIES 5

A. The ALJ Correctly Found that Section 806 Does Not Apply Extraterritorially. 6

B. The ALJ Correctly Concluded That He Lacked Jurisdiction Under SOX to Adjudicate Complainant's Claim. 11

1. Complainant's Status as a Foreign National Working for a Foreign Company Outside the United States is Dispositive Under First Circuit and Controlling Board Precedent. 11

2. Complainant's Reliance on *O'Mahony v. Accenture* is Misplaced. 13

3. Complainant's Cites to Cases Involving Extraterritorial Application of Statues Other than SOX are Irrelevant. 19

IV. CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Page

CASES

Ahluwalia v. ABB, Inc.,
ARB Case No. 08-008, ALJ Case No. 2007-SOX-044 (ARB June 30, 2009) ..... passim
Beck v. Citigroup, Inc.,
ALJ No. 2006-SOX-00003 (ALJ Aug 1, 2006) ..... passim
Carnero v. Boston Scientific Corp.,
433 F.3d 1 (1st Cir. 2006) ..... passim
Concone v. Capital One Financial Bank Corp.,
ALJ No. 2005-SOX-00006 (ALJ Dec. 3, 2004) 11, 12
Di Giammarino v. Barclays Capital, Inc.,
ALJ No. 2005-SOX-00106 (ALJ July 7, 2006) 11
E.E.O.C. v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 7, 8, 9
Ede v. The Swatch Group,
ARB Case No. 05-053, ALJ Case Nos. 2004-SOX-00068-69
(ARB June 27, 2007) ..... passim
Environmental Defense Fund, Inc. v. Massy,
986 F.2d 528 (D.C. Cir. 1993) 22
Klopfenstien v. PCC Flow Technologies,
ARB Case No. 04-149, ALJ Case No. 2004-SOX-11 (ARB May 31, 2006) 17
Los Angeles News Service v. Reuters Television International, Ltd.,
149 F.3d 987 (9th Cir. 1998) 23
O'Mahony v. Accenture LTD,
537 F. Supp. 2d 506 (S.D.N.Y. 2008) ..... passim
Penesso v. LCC International, Inc.,
2005-SOX-00016 (ALJ Mar. 4, 2005) 12, 21
Pik v. Goldman Sachs Group, Inc.,
ARB Case No. 08-062, ALJ Case No. 2007-SOX-092 (ARB June 30, 2009) ..... passim
Russello v. United States,
464 U.S. 16 (1983) 8
Securities and Exchange Commission v. Berger,
322 F.3d 187 (2d Cir. 2003) 20
Shekoyan v. Sibley International Corp.,
217 F. Supp. 2d 59 (D.C. Cir. 2002) 23
Stevens v. Premier Cruises, Inc.,
215 F.3d 1237 (11th Cir. 2000) 22

STATUTES

18 U.S.C. § 1513(d) 7
18 U.S.C. § 1514A 10, 11
18 U.S.C. § 1514A(a) 6
18 U.S.C. § 1514A(b)(2) 8

OTHER AUTHORITIES

S. Rep. 107-146, 2002 WL 863249 (May 6, 2002) 9
S. Rep. 107-205, at 11, 2002 WL 1443523 (July 3, 2002) 9

RESPONDENTS' REPLY BRIEF

Respondents Core Laboratories N.V. ("Core Lab"), a Netherlands limited liability company, and Saybolt de Colombia Limitada ("Saybolt Colombia" or "Saybolt"), a Colombian limited liability company, (collectively referred to as "Respondents") submit this brief in reply to Complainant William Villanueva's Initial Brief.

I. INTRODUCTION

This appeal stems from a complaint that Complainant filed with the Department of Labor ("DOL") against Core Lab and Saybolt Colombia alleging violations of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"). On August 29, 2008, the Regional Administrator for OSHA, acting as an agent of the Secretary of Labor, found that OSHA lacks jurisdiction to investigate the adverse actions alleged by Complainant because they occurred outside of the United States.

Complainant objected to the Secretary's findings and requested a *de novo* hearing before an Administrative Law Judge. On November 5, 2008, Judge Jonathan C. Calianos ordered the parties to show cause on why the case should not be dismissed for lack of subject matter jurisdiction. On June 10, 2009, after reviewing the parties' evidence and briefing on the jurisdictional issue, Judge Calianos dismissed Complainant's claim:

> 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.

(Decision and Order Dismissing Case for Lack of Jurisdiction ("D&O"), at 2.) Complainant petitioned the Board for review of Judge Calianos' Decision and Order, which resulted in this appeal.

The ALJ did not err in dismissing Complainant's claim for lack of jurisdiction under SOX. To the contrary, in accordance with controlling ARB precedent, the ALJ refused to apply Section 806 to Complainant, a foreign national and resident, who worked exclusively outside the United States for a foreign entity. Because Section 806 does not apply extraterritorially, its protections do not extend to foreign individuals like Complainant.

II. STATEMENT OF FACTS[1]

The relevant facts can be briefly stated. Complainant William Villanueva is a Colombian national who lives in Bogota, Colombia. (D&O, at 2; Joint Statement of Undisputed Facts ("Agreed Facts"), at ¶ 3; Aff. of Mark F. Elvig, at ¶ 3.) Complainant was employed by Saybolt

[1] Complainant's argumentative and citation-less "Statement of Facts" merely parrots the self-serving allegations contained in his Declaration and the Argument section of his brief. Statements such as "Villanueva's efforts over the course of more than three months to raise and address with Core Lab's senior executives in Houston two issues of tax fraud that were being orchestrated and implemented directly from Core Lab's executive offices in Houston were met with stonewalling, delays and disingenuous legal opinions that avoided the legal issues and were deliberately premised on a false set of facts" (Initial Brief, at 9) are meritless, unsupported allegations that have no place in a Statement of Facts. The Board should consider Complainant's Statement of Facts, if at all, as argument. Further, Complainant's so called "facts" for the most part relate to the merits of his case and not the jurisdictional question before the Board. While this appeal concerns only the issue of jurisdiction, Respondents strongly dispute Complainant's contention that Saybolt Colombia was engaged in any violation of Colombian tax laws, much less fraud. Indeed, as recited herein, Respondents went to lengths, upon receiving Complainant's charge that its practices were non-compliant, to confirm, including via independent legal and accounting advice, that its policies as applied in Colombia are lawful.

Colombia, a Colombian limited liability company, for more than twenty-four years and served as its General Manager for approximately sixteen years.[2] (D&O, at 2; Agreed Facts, ¶¶ 7, 8, & 13.)

Saybolt Colombia, which is headquartered in Bogota, Colombia, is ninety-five percent owned by Saybolt Latin America B.V., a Netherlands limited liability company, and five percent owned by an individual who is a Colombian national. (D&O, at 2; Agreed Facts, at ¶¶ 3-4.) Saybolt Latin America B.V. is wholly owned by Saybolt International B.V., a Netherlands limited liability company, which is in turn one hundred percent owned by the Respondent Core Lab. (D&O, at 2; Aff. of Mark F. Elvig, at ¶ 4.) Only Core Lab, a Dutch company which, through its affiliates provides services to the petroleum industry in more than fifty countries, has securities registered or is required to report under the Securities Exchange Act of 1934. (D&O, at 2; Agreed Facts, at ¶¶ 3-4.)

Complainant alleges that while working for Saybolt Colombia he discovered that the company was engaged in a "classic 'transfer pricing' scheme" whereby it utilized an offshore Saybolt affiliate in the Dutch Antilles, Core Laboratories Sales NV, as the contracting party for inspection services that Saybolt Colombia performed for non-Colombian clients. (D&O, at 2; Complainant's Initial Brief ("Initial Brief"), at 2-4.) He alleges that as a result of the scheme, Saybolt Colombia underreported its taxable revenue to Colombian tax authorities and improperly claimed an exemption to Colombia's VAT tax. (D&O, at 2; Initial Brief, at 2-4.)

In early 2008, Complainant sent an e-mail to two Saybolt accounting employees in Colombia raising his contentions regarding the alleged scheme. (D&O, at 2-3.) Specifically, Complainant felt that Core Lab's worldwide accounting policy regarding allocation of revenue

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[2] The position of General Manager of Saybolt Colombia is the highest ranking executive position in that corporate entity.

from certain business transactions violated Colombian tax laws when applied by Saybolt in Colombia. (D&O, at 2-3.) In his e-mail, he recommended modifying Saybolt Colombia's accounting practices to "avoid[] a fraud to the **Colombia financial statements**" which are filed with **Colombian tax authorities** in connection with Saybolt Colombia's **Colombian income tax returns**. (Initial Brief, at 4; Exhibit A to Declaration of William Villanueva, at 1 (emphasis added).) Complainant alleges that he later communicated his concerns by e-mail to Core Lab's Chief Accounting Officer and its General Counsel in Houston, Texas. (D&O, at 2-3.)

Based on Complainant's concerns regarding the application of the worldwide accounting policy by Saybolt Colombia in Colombia, the company sought the independent opinion of Colombian legal counsel who determined the policy to be compliant with Colombian law. (D&O, at 3; Dec of William Villanueva, at ¶ 12, 24.) Application of the policy in Colombia also was certified by Saybolt's independent Colombian auditor. (Aff. of Mark F. Elvig, at ¶ 5.) Despite this fact, in April 2008, Complainant refused to sign Saybolt Colombia's 2007 income tax return for submission to Colombian tax authorities. (D&O, at 3; Agreed Facts, at ¶¶ 14-15.) Because Complainant was the only individual authorized to sign Saybolt Colombia's tax return, his refusal to perform this specific obligation of the General Manager position placed Saybolt at risk of incurring serious financial penalties from the Colombian government. (Aff. of Mark F. Elvig, at ¶ 6.)

On April 29, 2008, based upon serious performance deficiencies, not limited to the fact that he had refused to perform certain of the essential functions of his job as General Manager of Saybolt, Complainant was discharged in coordination with Colombian counsel. (D&O, at 2; Agreed Facts, at ¶ 16; Aff. of Mark F. Elvig, at ¶ 6.) He was notified of his termination by letter,

written in Spanish and hand-delivered to him in Colombia, by Ivan Piedrahita, the Regional Manager for Saybolt Latin America B.V. (D&O, at 3.) Jan Heinsbroek, President of Saybolt Latin America B.V., and a director of Saybolt International B.V., Dutch entities that do not have securities registered and are not required to report under the Securities Exchange Act, was the decisionmaker with respect to Complainant's termination. (Aff. of Mark F. Elvig, at ¶ 7.) Heinsbroek is a non-United States citizen who works and resides in the Netherlands. (Aff. of Mark F. Elvig, at ¶ 7.)

III. ARGUMENT AND AUTHORITIES

SOX's worker protection provision provides that:

> 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 that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in 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 relating to fraud against shareholders, when the information 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
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discovery, or terminate misconduct)

18 U.S.C. § 1514A(a). The provision is silent with respect to its territorial reach. Consequently, there is no indication in the statute that Congress intended it to apply to an individual like Complainant—a foreign national, working in a foreign country for a foreign subsidiary of a covered employer, who alleges fraud by the foreign subsidiary and allegedly suffers retaliation outside the United States. The ALJ correctly determined that (1) SOX's whistleblower protections do not reach beyond the borders of the United States, and (2) adjudication of Complainant's claim would require improper extraterritorial application of SOX. Complainant has shown no error in the ALJ's determination of the facts of this case or the applicable law, and there is no basis for the Board to reverse his decision.

A. The ALJ Correctly Found that Section 806 Does Not Apply Extraterritorially.

Following the reasoning of the First Circuit's decision in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006), Judge Calianos found that Congress intended SOX to apply "only domestically" and that SOX's protections do "not extend extraterritorially to cover a foreign employee working overseas for a foreign company conducting its business in a foreign country." (D&O, at 4 (quoting *Carnero*, 433 F.3d at 7-18).) His finding is compelled by *Carnero* and controlling Board precedent, specifically, as well as by broadly applicable decisional law regarding the extraterritorial application of U.S. statutes.

When a statutory provision is silent as to its territorial reach, and no contrary congressional intent clearly appears, there is a presumption against extraterritorial application. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). SOX's employee protection provision does not apply extraterritorially because the provision is silent as to its territorial reach and Congress expressed no intent that the provision apply outside of the United States. Neither

the language of the provision, the enforcement scheme it creates, nor its legislative history suggests that Congress intended it to apply to claims of employees working outside of the United States.

The absence of language in Section 806 indicating that it should have extraterritorial reach is particularly instructive in light of the fact that Congress expressly provided for extraterritorial application of other sections of SOX. *See Carnero*, 433 F.3d at 9 (1st Cir. 2006); *Beck v. Citigroup, Inc.*, ALJ No. 2006-SOX-00003, at 6 (ALJ Aug 1, 2006). For example, Section 806 contains no reference to foreign entities, but Section 106 expressly deals with foreign accounting firms and carves out certain exceptions for foreign accountants in order to deal with the difficulties inherent in United States regulation of overseas professionals. *Carnero*, 433 F.3d at 9. Similarly, Section 1107 of SOX, which provides criminal sanctions for retaliation against anyone giving truthful information to law enforcement officers relating to the commission of any federal offense, contains an express provision for extraterritorial jurisdiction. *See* 18 U.S.C. § 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section."). Where, like here, Congress has included particular language in one section of a statute but omitted it in another section of the same statute, it must be presumed that Congress acted intentionally and purposefully in doing so. *Russello v. United States*, 464 U.S. 16, 23 (1983); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991). Congress' silence as to extraterritorial application of Section 806, particularly in light of its express grant of extraterritorial jurisdiction in other sections of SOX, can only reasonably be inferred to indicate a lack of any intention that Section 806 apply outside the United States. *See Carnero*, 433 F.3d at 9, *Beck*, 2006-SOX-00003, at 6.

That Congress did not intend for Section 806 to be applied extraterritorially is also evident from the enforcement scheme created in that section, which does not address any of the unique problems that arise from extraterritorial application of a statute. Indeed, it is clear from the provision's enforcement mechanism that Congress did not even consider the implications of extraterritorial application. *Carnero*, 433 F.3d at 13. In enacting Section 806, Congress did not, for example, discuss the grant of extraterritorial investigatory powers to the Department of Labor to allow the agency to investigate SOX whistleblower claims overseas. *Id.*, at 15. Equally problematic is the fact that Section 806 provides the DOL only sixty days to complete its investigation of a SOX whistleblower complaint. *See* 18 U.S.C. § 1514A(b)(2). This short time period seems unrealistic if the DOL is to conduct investigations overseas. *Carnero*, 433 F.3d at 15. Moreover, if an administrative hearing on a SOX whistleblower claim is to be held, it must be "conducted expeditiously," and Section 806 contains no exception to this rule to provide either the resources or flexibility needed to deal with foreign matters. *See* 18 U.S.C. § 1514A(b)(2); *Carnero*, 433 F.3d at 16. Finally, Congress made the judicial venue provisions of the statute expressly applicable only to whistleblower violations within the United States and to complainants residing here on the date of the violation, with no corresponding basis provided for venue as to foreign complainants claiming violations in foreign countries. *Id.* It is evident from this exclusively United States-centric enforcement scheme that Congress simply did not contemplate the filing of administrative complaints by employees—even those of otherwise covered employers—working abroad. *Id.* at 17; *see Arabian Am. Oil Co.*, 499 U.S. at 256 (concluding that Congress' restrictive intent as to geographic reach of Title VII was evidenced by the lack of extraterritorial venue and other enforcement mechanisms in the statute).

The legislative history of Section 806 also reveals that Congress never intended the provision to apply extraterritorially. The congressional debate over Section 806 focused on concern about the lack of whistleblower protection for employees in many **states of the union**. *See* Carnero, 433 F.3d at 11. Senator Leahy, the provision's sponsor, explained that its purpose was to provide federal protection to private sector corporate whistleblowers, as was already done with federal government employees, in light of the "patchwork and vagaries of current **state** [whistleblower protection] laws." *See* S. Rep. 107-146, 2002 WL 863249 (May 6, 2002) (emphasis added). Nowhere in the legislative history of Section 806 is there any indication that the provision was drafted with the purpose of extending the right to seek administrative and judicial civil relief to employees working in nations outside of the United States. *Carnero*, 433 F.3d at 13. While the legislative history of Section 806 contains repeated references to "states," there are no parallel references to foreign countries. *Id.* By contrast, the legislative history of certain other provisions of SOX shows that Congress expressly considered the application of those provisions to foreign entities. For example, the aforementioned Section 106, which applies to foreign public accounting firms, has history revealing Congress' intent for that section to apply abroad. *See* S. Rep. 107-205, at 11, 2002 WL 1443523 (July 3, 2002) ("Thus, accounting firms organized under the laws **of countries other than the United States** that issue audit reports for public companies subject to U.S. securities laws are covered by the bill in the same manner as domestic accounting firms, subject to exemptive authority of both the [Public Company Accounting Oversight] Board and the SEC." (Statement of Senator Sarbanes (emphasis added)). The fact that Congress never considered or even mentioned the extraterritorial application of Section 806, particularly when it expressly addressed

extraterritorial application of other sections of SOX, establishes that Congress did not intend for Section 806 to apply outside the United States.

Because there is no indication whatsoever in the statute or the legislative history that Congress intended SOX's employee protection provision to apply to workers outside the United States, federal and administrative courts, including the Board and the only federal circuit to have addressed the issue, have concluded that Section 806 does not apply extraterritorially. *See Carnero*, 433 F.3d at 18 ("We hold that 18 U.S.C. § 1514A does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders."); *Pik v. Goldman Sachs Group, Inc.*, ARB Case No. 08-062, ALJ Case No. 2007-SOX-092, at 4 (ARB June 30, 2009) (adopting *Carnero's* conclusion that SOX's employee protection provision does not apply extraterritorially); *Ahluwalia v. ABB, Inc.*, ARB Case No. 08-008, ALJ Case No. 2007-SOX-044, at 4 (ARB June 30, 2009) (same); *Ede v. The Swatch Group*, ARB Case No. 05-053, ALJ Case Nos. 2004-SOX-00068-69, at 4-5 (ARB June 27, 2007) (same); *see also Beck v. Citigroup, Inc.*, ALJ No. 2006-SOX-00003, at 4 (ALJ Aug. 1, 2006); *Di Giammarino v. Barclays Capital, Inc.*, ALJ No. 2005-SOX-00106 (ALJ July 7, 2006); *Concone v. Capital One Financial Bank Corp.*, ALJ No. 2005-SOX-00006 (ALJ Dec. 3, 2004).[3] Complainant here advances no persuasive argument that the Board should reverse its prior decisions as to this conclusion.

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[3] Two courts have applied Section 806 to employees working outside of the United States. *See O'Mahony v. Accenture LTD,* 537 F. Supp. 2d 506 (S.D.N.Y. 2008; *Penesso v. LCC International, Inc.*, 2005-SOX-00016 (ALJ Mar. 4, 2005). Neither of these courts found that Section 806 applies extraterritorially. Instead, they concluded that extraterritorial application of Section 806 was not required because the specific factual circumstances of the cases created a substantial nexus between the respective complainants and the United States. *O'Mahony*, 537 F. Supp. 2d at 515 ("[T]he exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law."); *Penesso*, 2005-SOX-00016, at 3 ("[U]nlike *Concone* and *Carnero*, this case has a substantial nexus to the United States, and

B. The ALJ Correctly Concluded That He Lacked Jurisdiction Under SOX to Adjudicate Complainant's Claim.

1. Complainant's Status as a Foreign National Working for a Foreign Company Outside the United States is Dispositive Under First Circuit and Controlling Board Precedent.

As a result of his finding that SOX does not apply extraterritorially, Judge Calianos noted that "[j]urisdiction over Villanueva's claim under SOX hinges on whether or not the adjudication of his claim requires extraterritorial application of the Act." (D&O, at 4.) After thoroughly analyzing federal and Board decisional law, the ALJ determined that he "lack[ed] jurisdiction to adjudicate this claim because it would require an impermissible extraterritorial application of Section 806 of the Act." (Id.) The ALJ's finding is supported both by the undisputed, dispositive facts of this case and First Circuit and controlling Board precedent on the issue of extraterritorial application of SOX.

The First Circuit and the ARB have held that Section 806 does not protect a foreign national employee who works for a foreign company outside the United States. *Carnero*, 433 F.3d at 2, 18; *Ede*, No. 05-053, at 5. This is true even if the employee is employed by a company whose U.S. employees are protected by section 806. *See Ede*, No. 05-053, at 5; *Pik*, ALJ No. 2007-SOX-00092, at 2.

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it is appropriate for the complainant to bring this claim under §1514A of the Sarbanes-Oxley Act."). For the reasons argued above, these decisions are misguided to the extent that they applied Section 806 to persons employed outside the United States. Moreover, they are distinguishable, as discussed in Section B, *infra*, because Complainant had no substantial nexus with the United States. He was a foreign national and resident who worked exclusively for a foreign entity outside the United States. Additionally, *Penesso* was decided prior to the ARB's decision in *Ede*, which concludes that section 806 does not protect employees who work exclusively outside the United States. *Ede,* No. 05-053, at 5; *see also* D&O, at 7 ("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*.").

Indeed, the ARB recently confirmed that the dispositive factors in determining whether jurisdiction exists under SOX Section 806 are: (1) the Complainant's nationality; (2) the country of incorporation of the Complainant's employer; and (3) the country in which the Complainant was assigned to work. *See Pik,* No. 08-062 at 4 ("[Complainant] was a **foreign national** employed by GSSL, **a foreign corporation, outside of the United States**. [Complainant] did not challenge **these dispositive facts** in his response to the Order to Show Cause." (emphasis added)); *Ahluwalia*, No. 08-008, at 5 ("But **the facts necessary to resolve this case**, i.e., that Ahluwalia was a **foreign national** employed by **a foreign corporation outside of the United States**, were before the ALJ when he issued his Decision and Order." (emphasis added)).

In this case, Complainant is a Colombian national and resident who worked for a foreign company outside the United States. (D&O, at 2, 5.) As part of the briefing requested by the ALJ below, the parties submitted a Joint Statement of Undisputed Facts. In the statement, the parties agreed that:

> 3. Saybolt de Colombia Limitada ("Saybolt Colombia") is a Colombian limited liability company headquartered in Bogota, Colombia.
>
> ....
>
> 9. During the time that Mr. Villanueva was employed by Saybolt Colombia, he was never a United States citizen or resident.
>
> 10. During the time that Mr. Villanueva was employed by Saybolt Colombia, he was never assigned to work in the United States.
>
> 11. Mr. Villanueva has never been directly employed by any Core Lab affiliate other than Saybolt Colombia. ...

(Agreed Facts, at ¶ 3, 9, 10, 11.) Thus, it is undisputed that Complainant is a foreign national who was working in a foreign country for a foreign company. These facts control the disposition

of this case: **Under First Circuit and controlling ARB precedent, these facts, standing alone, establish that the Court lacks jurisdiction over Complainant's claim.** *Carnero*, 433 F.3d at 2, 18; *Pik*, No. 08-062 at 4; *Ahluwalia*, No. 08-008, at 5; *Ede*, No. 05-053, at 5.

2. **Complainant's Reliance on *O'Mahony v. Accenture* is Misplaced.**

In an effort to divert the Board's attention from the dispositive facts, Complainant argues, based on the Southern District of New York's decision in *O'Mahony v. Accenture LTD*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008), that adjudication of his claim does not require extraterritorial application of SOX. (Initial Brief, at 15.) The reasoning of the *O'Mahony* decision, which is not controlling here, is questionable in light of the *Carnero, Pik, Ahluwalia,* and *Ede* decisions. Nevertheless, even if *O'Mahony* was persuasive on its facts, it would not support a finding of jurisdiction over Complainant's claim.

In *O'Mahony*, the complainant worked for a United States subsidiary of Accenture, Ltd, a Bermuda-based company with shares publicly traded on the New York Stock Exchange. *Id.* at 507-08. While working for the U.S. subsidiary, O'Mahony was transferred from the United States to France to open a new office for the corporate parent. *Id.* O'Mahony remained in France from 1992 to 2001. *Id.* During five of those years, her U.S. employer was able to obtain an exemption from paying French social security tax because of an agreement between France and the United States that allowed such exemption for United States employees temporarily working 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 alleged that the corporate parent and her employer intended not to pay the French taxes but to conceal the fact that she was still working in France. *Id.* O'Mahony objected to the parent company's

decision and was, shortly thereafter, demoted. *Id.* The decision to demote her was made by an executive at the United States subsidiary which directly employed O'Mahony. *Id.*

The *O'Mahony* court concluded that some factual circumstances may so link a complainant to the United States that a court need not apply Section 806 extraterritorially to hear her claim. *See id.* at 515. With respect to O'Mahony, the court found that it did not need to extend Section 806 extraterritorially to cover the claim of a **United States employee** assigned to work temporarily in France for the **United States subsidiary** of a publicly traded Bermuda parent company. *Id.* at 515. In reaching this conclusion, the court found three facts dispositive: (1) the complainant was employed and compensated by a United States based entity; (2) the alleged illegal conduct that gave rise to the whistleblowing occurred in the United States and the alleged retaliation against the complainant was undertaken by executives located in the United States; and (3) the complainant brought an action against the foreign parent and United States subsidiary for alleged misconduct of the United States subsidiary occurring in the United States. *Id.* at 511.

None of the facts found to create a substantial nexus between the complainant in *O'Mahony* and the United States are present in this case. Unlike in *O'Mahony*, Complainant was never employed by a United States entity.[4] He was at all times during his employment a Colombian national and resident employed by Saybolt Colombia, a foreign entity, which is only

[4] Despite Complainant's argument to the contrary (Initial Brief, at 17), the fact that O'Mahony was employed by a United States entity was clearly a significant factor in the court's decision that her claim did not require extraterritorial application of SOX. Indeed, the *O'Mahony* court referred to this fact as one of the "three notable factual differences" which distinguished *O'Mahony* from *Carnero*. *O'Mahony*, 537 F. Supp. 2d at 510 ("Unlike the plaintiff in *Carnero*, O'Mahony was employed and compensated by a United States subsidiary of a foreign corporation.")

an indirect affiliate of an entity subject to SEC jurisdiction. (D&O, at 5-6, Agreed Facts, at ¶ 9-11.) Saybolt is ninety-five percent owned by Saybolt Latin America B.V., a Dutch company, and five percent by an individual who is a Colombian national. (D&O, at 2, Agreed Facts, at ¶ 4.) Saybolt Latin America B.V., is wholly owned by Saybolt International B.V., a Netherlands limited liability company, which is in turn one hundred percent owned by Core Lab, a Dutch company. (D&O, at 2, Agreed Facts, at ¶ 5.) Only Core Lab has securities registered or is required to report under the Securities Exchange Act. (D&O, at 2, Agreed Facts, at 2.) Saybolt Colombia has no United States based employees. (Aff. of Mark F. Elvig, at ¶ 3.) It has no United States incorporated entities or individuals in its ownership chain. (Aff. of Mark F. Elvig, at ¶ 4.) Moreover, because Complainant has only been employed in Colombia, his employment records and numerous witnesses necessary for defense of his claim also are located in Colombia.[5] (Aff. of Mark F. Elvig, ¶ 8.)

Secondly, unlike the United States-based illegal conduct alleged in *O'Mahony*, the alleged tax fraud which gave rise to Complainant's whistleblowing occurred in Colombia.

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[5] Complainant argues that adjudication of his claim does not require extraterritorial application of SOX because Saybolt Colombia is an "agent" of Core Lab. (Initial Brief, at 18.) First, Core Lab is a Netherlands company (Agreed Facts, at ¶ 6); any alleged agency relationship between Saybolt Colombia, a Colombia company, and Core Lab, a Netherlands company, is irrelevant to the issue of Complainant's territorial nexus with the United States. But second, and more importantly, the Board has held that its test for determining whether a non-public subsidiary is a "covered employer" under the SOX due to its agency relationship with a public parent is irrelevant to issues of extraterritorial application. *See Ahluwalia*, No. 08-008, at 5 ("We have held that, in some circumstances, a subsidiary may be considered an agent of a public parent for purposes of coverage under Section 806. But our lack of jurisdiction in this case is a consequence of Ahluwalia's status as a foreign national working in a foreign country for a foreign company, not the subsidiary status of [the respondent]."). Plaintiff's reliance on *Klopfenstien v. PCC Flow Technologies*, ARB Case No. 04-149, ALJ Case No. 2004-SOX-11 (ARB May 31, 2006), is, consequently, misplaced.

(D&O, at 6.) While Complainant asserts that the Saybolt worldwide accounting policy was developed in the United States (Initial Brief, at 19), the specific activity about which he complained was the application of the accounting policy **in Colombia** allegedly in violation of **Colombian** tax law by Saybolt, **a Colombian entity** which is not publicly traded or required to report under the Securities Exchange Act. The ALJ properly summarized Complainant's allegations in his Decision & Order:

> 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. [borders].

(D&O, at 6.) Further, the origin of all Complainant's communications regarding Saybolt's alleged tax fraud was Colombia; Complainant does not contend that he ever visited the United States or that he reported alleged fraud on any such trip.[6] Further, the application of the accounting policy challenged by Complainant was in accord with legal opinions obtained from Colombian attorneys and certified by Saybolt Colombia's independent Colombian auditor. (Aff. of Mark F. Elvig, ¶ 5.)

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[6] Complainant alleges to have first raised this issue by e-mail to Saybolt accountants in Colombia and later, also by e-mail, to executives of another Core Lab affiliate in the United States. (Initial Brief, at 4-9.) The fact that Complainant contends to have reported Saybolt's alleged misconduct to Core Lab officials in the United States does not alter the fundamentally foreign nature of his claim. *See Beck*, 2006-SOX-00003, at 9-10 ("Nor do the allegations of misconduct being reported to parent company officials in the U.S. ... change [the fact that the Court does not have jurisdiction over complainant's claim], as they do not alter the foreign nature of the employment relationship.").

Additionally, the alleged retaliation occurred in Colombia, not the United States. (D&O, at 6.) Villanueva was discharged by written notification delivered to him in Colombia. (D&O, at 3.) The decisionmaker with respect to Complainant's termination was Jan Heinsbroek, President of Saybolt Latin America B.V., and a director of Saybolt International B.V.,[7] Dutch entities that do not have securities registered and are not required to report under the Securities Exchange Act; Heinsbroek is a non-United States citizen resident in the Netherlands where he works. (Aff. of Mark F. Elvig, ¶ 7.) Complainant summarily contends that there is a factual dispute regarding "who made the [termination] decision and where it was made" which should have precluded the ALJ from resolving the jurisdictional issue "prior to discovery and in a summary manner." (Initial Brief, at 10.) However, as discussed *supra*, the location of the making of the decision to terminate Complainant is not a material (or dispositive) fact under ARB precedent. *See Pik*, No. 08-062 at 4; *Ahluwalia*, No. 08-008, at 5. Further, there is no real factual dispute as to the locale of the alleged retaliation: Complainant does not deny that he was terminated in Colombia. It is this fact—that the termination occurred outside of the United States—that the ALJ found material in his Decision and Order. (D&O, at 6.) Even if the decision to terminate Complainant had been directed from the United States, the Court would lack jurisdiction over his claim. *See Beck*, 2006-SOX-00003 ("Nor [does] ... the possible participation by U.S.-based company officials in the decision to terminate Complainant change the outcome [that the Court does not have jurisdiction], as [it does] not alter the foreign nature of the employment relationship."); (D&O, at 7.)

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[7] Complainant asserts that Jan Heinsbroek is identified as "Vice President of Core Lab" in Core Lab's 2008 annual report. (Initial Brief, at 9-10 n.4.) This is inaccurate. The annual report actually identifies Heinsbroek as "Vice President, Reservoir Description," a reference to the Saybolt portion of the Reservoir Description segment of Core Lab's business.

Finally, in stark contrast to the posture of the parties in *O'Mahony*—an action against the foreign parent and its United States subsidiary for the alleged misconduct of the United States subsidiary in the United States—Complainant brings his action against his Colombian employer and its ultimate, but indirect, Dutch corporate parent. Neither of the Respondents is alleged to have committed illegal activities in the United States. This fact underscores Complainant's lack of nexus with the United States.

The *O'Mahony* court reasoned that extraterritorial application of a statute is not implicated if "(1) ... the wrongful conduct occurred in the United States [or] (2) ... the wrongful conduct had a substantial adverse effect in the United States or upon United States citizens." *O'Mahony*, 537 F. Supp. 2d at 512 (citing *Securities and Exchange Commission v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003)). Even assuming the court was correct in applying this reasoning to Section 806, the wrongful conduct alleged in this case did not have such a connection to the United States. The alleged tax fraud involves acts in Colombia undertaken by a Colombian company which are alleged to have violated Colombian tax laws. Likewise, the alleged retaliatory act, Complainant's discharge, occurred in Colombia. Thus, Colombia is the locus of the alleged wrongful conduct and its effects. (D&O, at 6-7.) These facts demonstrate that the Board is being asked to intervene in a dispute between foreigners that occurred abroad concerning compliance with foreign laws and regulations. Congress never intended Section 806 to apply to such a situation. *See Carnero*, 433 F.3d at 15.

Nor does Complainant's cite to *Penesso v. LCC International, Inc.*, 2005-SOX-00016 (ALJ Mar. 4, 2005), save his claim. Like *O'Mahony*, *Penesso* is distinguishable from the current case in several important ways: (1) the complainant was a United States citizen; (2) much of the

alleged protected activity took place in the United states; and (3) at least one of the retaliatory actions took place in the United States. *Penesso*, 2005-SOX-00016, at 3. Further, *Penesso* pre-dates the *Carnero* decision and, more importantly, the Board's controlling decisions in *Ede, Pik,* and *Ahluwalia*. Under these circumstances, *Penesso*'s anomalous outcome is of little, if any, analytical value to the Board in this case, and the ALJ did not err in declining to follow it. (D&O, at 7 ("I would decline to follow *Penesso* because it is not binding and it pre-dates the First Circuit Court of Appeals decision in *Carnero*.")

3. Complainant's Cites to Cases Involving Extraterritorial Application of Statues Other than SOX are Irrelevant.

In support of his argument that the ALJ had jurisdiction over his claim, Complainant cites a number of federal court decisions which examine issues of extraterritorial application of statues other than SOX, such as the National Environmental Policy Act and the U.S. Copyright Act. (Initial Brief, at 22-26.) Because there is both federal appellate and controlling Board precedent on the specific issue of the permissible territorial reach of SOX, these cases, which are not controlling authority, are irrelevant. Moreover, application of the principles gleaned from these cases nevertheless would compel the conclusion that adjudication of Complainant's claim would require extraterritorial application of Section 806.

For example, Complainant cites *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000). (Initial Brief, at 23.) In *Stevens*, the Eleventh Circuit took up the question of whether the Americans with Disabilities Act ("ADA") applies to foreign-flagged cruise ships sailing in United States waters. In finding that the ADA applies to such ships, the court reasoned that "an extraterritorial application of a statute involves regulation of conduct *beyond U.S. borders*. Accordingly, a foreign-flag ship sailing in United States waters is not extraterritorial."

Id. The facts of *Stevens*—particularly the fact that the ships in question sailed **in United States waters**—are distinguishable from the current case. As the ALJ pointed out: "Villanueva has no connection with the United States and all of the alleged protected activity and retaliation occurred abroad." (D&O, at 7.) Complainant does not even allege that he ever visited the United States, which stands in stark contrast to foreign-flagged ships that routinely sail in United States waters as was the case in *Stevens*.

The other cases cited by Complainant are similarly distinguishable: *Environmental Defense Fund, Inc. v. Massy*, 986 F.2d 528 (D.C. Cir. 1993), involved the application of the National Environmental Policy Act to the National Science Foundation—**a United States federal agency**—in Antarctica, which the court found "**is not a foreign country**, but rather a continent that is most frequently analogized to outer space" and over which the United States has "predominant" "governmental authority." *See id* at 533-34 (emphasis added). In *Los Angeles News Service v. Reuters Television International, Ltd.* 149 F.3d 987 (9th Cir. 1998), the Ninth Circuit held that the Los Angeles News Service, **an American company**, could recover extraterritorial **damages** (*i.e.* damages which resulted from dissemination of United States copyrighted materials abroad) from defendants where defendants undertook the "infringing acts of copying" (*i.e.*, the acts which violated the Copyright Act) **in New York**. *Id.* at 992 ("We therefore hold that LANS is entitled to recover damages flowing from exploitation abroad of **the domestic acts of infringement committed by defendants**." (emphasis added)). *Shekoyan v. Sibley International Corp.*, 217 F. Supp. 2d 59 (D.C. Cir. 2002), involved application of the False Claims Act to Sibley International, **a United States-based government contractor**, when plaintiff, a United States permanent resident temporarily assigned to perform contract work in

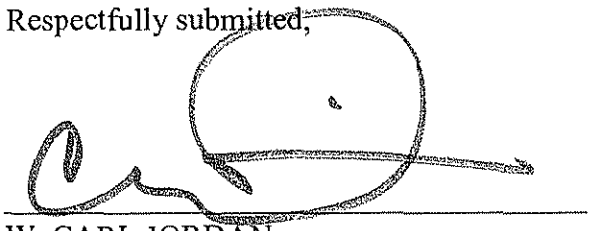
the Republic of Georgia, reported misappropriation of **United States government funds** abroad. *Id.* at 70-73.

In summary, Complainant fails to cite a single case in which a court extended the territorial reach of a United States statute to a claimant who, as is the case here, had no or minimal contact with the U.S. (D&O, at 7.)

IV. CONCLUSION

Complainant William Villanueva is a foreign citizen who worked for a foreign company outside the borders of the United States. SOX's protections do not apply to foreign employees like Complainant. Consequently, Respondents Core Laboratories N.V. and Saybolt de Colombia Limitada respectfully request that the Board affirm the Decision and Order of Administrative Law Judge Calianos dismissing Complainant's claim for lack of jurisdiction.

Respectfully submitted,



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I hereby certify that a true and correct copy has been served on Complainant's attorney by facsimile and United States certified mail on September 8, 2009, at the following address:

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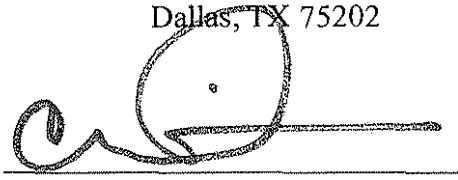

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