U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 05 October 2005

CASE NO.: 2005-SOX-00033

In the Matter of

SCOTT BECHTEL,
Complainant,

v.

COMPETITIVE TECHNOLOGIES, INC.,
Respondent.

Appearances:

For the Complainant:

Taylor Spalding Flannery, Esq.
Robert L. Bauman, Esq.

For the Respondent:

Mary E. Pivec, Esq.
Julia H. Perkins, Esq.

Before:

Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, 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. section 1514A ("the Act") enacted on July 30, 2002. Codified at 18 U.S.C. section 1514A et seq., the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. Further, Congress has stated that the Act will be governed by 49 U.S.C. section 42121(b), which are the procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. 1514A(b)(2)(B).

Employees who "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 [certain provisions of the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders..." may bring a civil action to protect against retaliation for their actions. 18 U.S.C. section 1514A(a)(1). The Act extends such protection to employees of companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. section 78l)["SEA of 1934"] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 78o(d))". 18 U.S.C. section 1514A(a).

The Act authorizes the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") to investigate complaints and issue findings. Parties who disagree with OSHA's findings may request a hearing before the Office of Administrative Law Judges for the United States Department of Labor ("OALJ"). The Department of Labor has promulgated regulations that apply to its investigations of complaints of violations of the Act, found at 29 C.F.R. part 1980. Pursuant to 29 C.F.R. § 1980.107(a), the Rules of Practice and Procedure before OALJ apply to hearings on complaints under the Act. See, 19 C.F.R. part 18.

I. PROCEDURAL HISTORY

On September 23, 2003, Scott Bechtel ("Complainant") filed a claim[1] with OSHA, alleging that his employer, Competitive Technologies, Inc. ("Respondent; CTT") terminated his employment in violation of the Act[2]. OSHA conducted an investigation and on February 2, 2005, issued its Finding that Complainant's complaint had merit, and ordered his preliminary reinstatement. On February 15, 2005, Respondent timely filed objections to OSHA's findings with the Office of Administrative Law Judges for the United States Department of Labor ("OALJ") and requested a formal hearing. The case was immediately assigned to me.

By Order issued February 16, 2005, I denied Respondent's request for a change of venue. On February 17, 2005, I issued a notice of hearing and pre-hearing Order. In my Order of March 3, 2005, I summarized discussions I held with the parties in a pre-hearing conference held by telephone on March 2, 2005. By Order issued March 28, 2005, I granted a motion for continuance of the scheduled hearing date, and rescheduled the hearing for May 16, 2005. By Order issued March 29, 2005, I denied Respondent's motion for a stay of OSHA's preliminary Order to reinstate Complainant. By Order issued April 25, 2005, I denied Respondent's motion for reconsideration of my denial of the imposition of a stay and directed the parties to show cause why Complainant's motion for sanctions and attorney's fees should not be granted. On June 2, 2005, I denied Complainant's motion for sanctions, because Complainant had moved that issue to Federal District Court for enforcement, thereby depriving me of jurisdiction.

[1] The case was originally consolidated with a complaint filed by another employee of Respondent, Wil Jacques. His matter was dismissed after settlement, and exhibits introduced at the hearing on his behalf have been excluded.

[2] Complainant's initial filing referred to verbal complaints that he made to OSHA employees, but does not specify the dates of those conversations. References to his formal written complaint throughout this Decision refer to his written complaint filed with OSHA on September 23, 2003.

With the agreement of the parties, I bifurcated the proceeding into separate liability and remedies phases. The hearing before me addressed the issues underlying liability, with the understanding that the record would be supplemented to address remedy issues if necessary. Hearing in this matter commenced on May 17, 2005 in New Haven, Connecticut and concluded on May 20, 2005, with the telephonic testimony of a witness.

Before the hearing, the parties submitted a "Joint Order for Protective Order" that applied to many of the parties' documents. I declined to consider this Order, as it failed to explain the need for such action in conformance with the Rules of Practice and Procedure before OALJ, 29 C.F.R. § 18.15. The parties declined my invitation to file a conforming motion. At the hearing, I advised the parties that I would consider each document individually on motion to determine whether a protective Order was appropriate. Neither party sought a protective Order for any exhibit on any grounds during the course of the hearing.[3]

After the hearing, Respondent moved for dismissal of the case on the grounds that Complainant had failed to meet his burden of establishing a *prima facie* case. I denied that motion. Respondent then moved for a directed verdict on the record in its favor. I declined to issue a ruling because of conflicts in the testimony, but agreed to reconsider the motion upon receipt of the hearing transcript. After I reviewed the transcript, I again denied Respondent's motion for summary judgment by Order issued June 10, 2005.

The parties filed written closing arguments. Respondent moved to exclude Complainant's closing argument on the grounds that it was untimely filed. Complainant's submission was filed by FAX on the date that it was due, and was subsequently sent by mail. Because I had not authorized the parties to file closing argument by FAX, Respondent's motion is not without foundation. See, 29 C.F.R. §18.3(f). However, because I allowed the parties to follow other pleadings by FAX, I admit the argument to the record despite this breach in procedural protocol. Therefore, I deem the submission as timely filed, and DENY the motion.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties may not be specifically referenced throughout, but each has been carefully reviewed and thoughtfully considered.

II. ISSUE

Whether Respondent CTT took adverse action against Complainant Scott Bechtel in retaliation for his alleged protected activities in violation of the Act.

[3] In deference to the joint motion of the parties, I have declined to include a description of each exhibit in this Decision and Order.

III. CONTENTIONS OF THE PARTIES

A. Complainant

Complainant alleges that his employment with Respondent was terminated due to his protected activity.

B. Respondent

Respondent denies that Complainant engaged in protected activity, and further contends that Complainant's termination was unrelated to any purported protected activity, but rather was due to the company's need to improve its financial condition.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulations of the Parties

The parties stipulated that the complaint was otherwise timely filed and that they were subject to the jurisdiction of the Act. Tr. at 45-46.

B. Summary of the Evidence

1. Testimonial[4]

(John) Scott Bechtel

Mr. Bechtel holds a bachelors degree in Physics and a Masters of Science and Industrial Administration Degree. Tr. at 94. Mr. Bechtel joined CTT in February, 2001. Tr. at 95. He was responsible for assisting technology developers and inventors to commercialize their technologies by either developing the production of a product using their technology or by finding other companies who licensed or patented the technology for development or manufacturing. Tr. at 95-96. Complainant described the "Aerielle Bug" as a sample of a technology that he developed after the inventor assigned his patents to CTT in exchange for royalties. Tr. at 97-101. In his role in marketing technologies, Complainant attended consumer electronic shows and sought out prospective licensees, and convinced inventors to assign their patents and licenses to CTT. Tr. at 103-104.

Before Complainant accepted an offer of employment with CTT, he discussed remuneration and benefits with Frank McPike, who was then the President and Chief Executive Officer ("CEO") of the company. Tr. at 105. Among the benefits was CTT's incentive bonus plan. Tr. at 106. Complainant also expected that he would receive a review of his performance after six months on the job. Tr. at 107. Complainant recalled that his first job assignment was conducting the due diligence research necessary to help CTT evaluate the acquisition of a

[4] Unless indicated by quotation, the summary of the testimony is not a verbatim recitation, but rather, a cumulative narrative of the testimony of the witnesses. Testimony adduced at the hearing is denoted in this Decision and Order as "Tr.".

competitor, Arthur D. Little. Tr. at 108. Complainant developed a business plan for the company, and also oversaw the progress of a start-up-company, Digital, in which CTT had invested resources. Tr. at 108-109.

Complainant was not involved in the part of CTT's business that enforced patent and licensing infringement through litigation, except that he advised the legal department of infringement, and attempted to secure voluntary compliance with license requirements before litigation was initiated. Tr. at 109-100. Complainant did engage in activities involved in providing service to inventors by assuring that royalty reports were accurate. Tr. at 11-113.

Complainant had worked for CTT for about sixteen months before John Nano was named the new CEO and President of the company in mid-June, 2002. Tr. at 114. From the start of his tenure, Mr. Nano advised the employees of CTT that certain business models, such as investing in other companies, were not effective, and said that he wanted the employees "to focus primarily on licensing, patents, finding technologies, identifying market needs, and finding technologies that would match those". Tr. at 114. Complainant testified that the time he spent on licensing increased after Mr. Nano became president and CEO, which he admitted was "a viable way to make money." Tr. at 114-115.

Complainant believed that his job performance was good, and that he had experienced successes. Tr. at 116. He received a bonus of $10,000.00 authorized by Mr. Nano, who wrote "[g]reat job on project management of the Aerielle opportunity". Mr. Bechtel related this acknowledgment to his management of a concept that he had introduced to the company. Tr. at 116. Mr. Nano also congratulated Complainant on getting a license from Fujikon. Tr. at 117. In December, 2002, shares of stock valued from $700.00 to $800.00 were placed in his retirement account in recognition of his contributions to CTT's success. Tr. at 118. A presentation made by Mr. Nano at the annual meeting of shareholders included slides that depicted a ceremony in Korea that acknowledged Complainant and the licensee of Complainant's Aerielle Bug technology. Tr. at 119-120.

Complainant testified that he was generally aware that Congress had enacted the Act to protect shareholders from fraud. Tr. at 122. In early December, 2002, Complainant was provided with information regarding the Act, and was advised that he was expected to participate in a disclosure review meeting. Tr. at 124; 133. Respondent had formed a disclosure committee, that included John Nano, Frank McPike, Jeanne Wendschuh, Sharon Garber, George Yahwak and Paul Levitsky. Complainant and Wil Jacques were asked to participate because they had awareness of matters that might need to be disclosed. Tr. at 486, 704. Complainant attended a meeting on December 9, 2002, that involved a discussion over a speakerphone by an individual associated with Price Waterhouse who explained SEC disclosure requirements. Tr. at 124-125. Mr. Bechtel understood that he was expected to certify that 10-Q filings were proper. Id. Before that meeting, he had no involvement with the company's SEC filings. Tr. at 126.

Complainant spent time reviewing the material before the meeting, which included a written summary of potential disclosure risks and a checklist to help identify potential disclosure irregularities. Tr. at 127-28. At the meeting, he expressed concerns that certain oral agreements with which he was familiar might need to be disclosed. Tr. at 130. Complainant described

meeting with a licensee named PLAKOR who advised that an individual named Dov Hyman had arranged the meeting and would probably get a commission. Tr. at 131. Mr. Nano had introduced Complainant to Mr. Hyman and told him that Mr. Hyman would be consulting for CTT. Tr. at 132. Mr. Bechtel did not see Mr. Hyman's name on the list of agreements that he was given to review as part of the disclosure package, and was concerned that this violated disclosure requirements. Id. In addition, Complainant recalled that Mr. Nano had promised him a commission of 10% of revenue from Aerielle, which he considered to be an oral agreement. Tr. at 134-135. To the best of Complainant's recollection, the promise of commission was made sometime in the summer of 2002. Tr. at 136. Complainant did not ask Mr. Nano for clarification of whether the commission would be based on gross or net revenue, but he remembered saying that he did not want to exchange his bonus plan rights for this kind of commission deal. Tr. at 137. He was also aware that Mr. Jacques had been offered compensation orally as well. Tr. at 134-136; 471, 476, 530, 470, 496.

In addition to the oral agreements, Mr. Bechtel was also concerned that the company should disclose the threat of litigation by Lehigh University, and he raised this concern at the December, 2002 disclosure meeting. Tr. at 141. Also, Mr. Bechtel was concerned that CTT intended to terminate the incentive compensation plan that was in effect when he was hired and replace it with another sort of plan, which he believed should have been disclosed. Tr. at 141-144. In addition, Mr. Bechtel believed that CTT's intention to limit litigation to enforce patents constituted a negation of contract obligations to some of the company's clients. Tr. at 146. Another issue that Mr. Bechtel raised at the December 2002 meeting involved the date that litigation in the "LabCorp" matter was resolved. Tr. at 147-148.

Complainant was concerned that the proposed changes to the incentive plan constituted a fraud on the employees, and he discussed his concerns with CTT's general counsel, George Yahwak. Tr. at 320. Complainant recalled that Mr. Yahwak believed that certain representations were made by the company, and that fraud could conceivably be found in management's inclusion or exclusion of certain income from the revenue upon which bonuses under the plan would be paid. Tr. at 321. Complainant admitted that he could not specifically recall asking any company official to clarify the term "operating income" as used in the incentive compensation plan. Tr. at 322-323.

Complainant advised the disclosure committee that he could not certify the disclosure form because he could not certify that he was not aware of any other agreements that CTT had entered into. Complainant recalled that the disclosure committee determined that the issues he raised did not need to be disclosed. Tr. at 500, 660; EX 103. He did not believe that the issues he raised had been properly addressed, and so he refused to sign the forms. Tr. at 152.

Sharon Garber asked Complainant several times whether he signed the forms, and Frank McPike asked him to sign them also. Complainant argued with Mr. McPike, who insisted that he sign the form, and Complainant felt threatened because he felt under pressure to sign something with which he disagreed. Tr. at 153. Complainant believed that he could be held liable civilly and criminally for signing something that he considered false, though he did not say that to Mr. McPike. Tr. at 154. He recalled Mr. McPike telling him that he had to sign the papers, to which

he responded "or what? I'm fired?". Tr. at 153. Mr. McPike left Complainant's office without response. Id.

Complainant sought the advice of CTT's counsel, George Yahwak, on the issues involving disclosure and signing the statements. Tr. at 154. Before his involvement with the disclosure committee, Complainant had been unaware that he was considered a company officer. He was concerned about whether he could be held liable for errors and omissions and whether insurance coverage for that liability extended to him. Tr. at 160. The issue was resolved by the company's removal of Complainant as an officer of the company, thereby absolving him from responsibility for signing. Tr. at 156. According to Complainant, following his discussion with Mr. Yahwak, Mr. Nano came to his office with a letter removing him as an officer of the company, and said to him "[i]s this what you want. You are a good employee. I would hate to lose you". Tr. at 158, see B-CX 160. Complainant did not think the letter represented his understanding with Mr. Yahwak, and he drafted another edition of the letter, which both he and Mr. Nano signed. Tr. at 159-160; B-CX 35.

Mr. Bechtel was concerned that his ability to perform his job was undermined by the terms of his removal as an officer because he was advised that he did not have the authority to legally bind CTT in business and financial matters. Tr. at 160. Mr. Bechtel testified that he "didn't see a solution. It was, you know, either that or I was under the impression of getting fired". Mr. Bechtel also objected to the letter referring to his concerns for liability under the Act as the impetus for his removal as officer, because he "didn't understand primarily how [he] had incurred the obligation to sign off because [he] had never been told [he] was an officer. And secondarily, you know, if in fact I was an officer and never was told, then here I was going on the record saying I wouldn't sign, and that created a problem for Mr. Nano…" Tr. at 161. However, Complainant believed that the letter alleviated him from responsibility to sign any disclosure documents required by the Act. Tr. at 162-163. He did subsequently learn that Respondent carried "errors and omissions" insurance for his conduct as an officer. Id.

Before the December, 2002 disclosure meeting, Complainant considered his relationship with Mr. Nano a good one, and thought he and the company were meeting goals. Tr. at 164. However, Mr. Bechtel related an argument that he had with Mr. Nano in August, 2002, when they had traveled to New York to meet with representatives of a Japanese trading company. Tr. at 165-166. The argument involved the proposal to change the incentive compensation plan, and Mr. Nano's alleged assertion that "he knew how to work the numbers so we would never see a penny of that money". Tr. at 166. Despite this argument, Complainant believed that his relationship with Mr. Nano was good, until he noticed a change in Mr. Nano's dealings with him shortly after the December 9, 2002 disclosure meeting. Tr. at 167. Complainant testified that Mr. Nano became "hostile", and described how he cut off funding for brochures for a consumer electronic show, and prohibited any further spending on the Aerielle project. Tr. at 168. Complainant also recalled that sometime after December 9, 2002, Mr. Nano came to Mr. Bechtel's office, "paced back and forth and…said: "I like Koreans because Koreans are very loyal." Tr. at 169. Mr. Nano offered no explanation for this observation, but Mr. Bechtel perceived that Nano was mad at him. Id.

Complainant stated that in March, 2003, he received another draft of SEC forms that was similar to the one he had received prior to the December disclosure meeting. Tr. at 169. Complainant was troubled because he had understood he would not have to sign disclosures, and he consulted then general counsel Paul Levitsky, who advised him that he was expected to sign. Tr. at 170. Mr. Bechtel was determined that the process would be properly implemented, and he spent approximately ten to twelve hours reviewing the documentation looking for disclosure risks. Tr. at 171.

Mr. Bechtel attended the meeting of the disclosure committee in March, 2003. Tr. at 182. Mr. Yahwak had left the company, and Mr. Bechtel was concerned that his reasons for leaving CTT were properly reported on the quarterly forms required by the SEC. Id. Mr. Bechtel also inquired whether a potential lawsuit against the company by Mr. Yahwak should be disclosed. Tr. at 186-188. He again raised the issue of whether CTT needed to disclose oral agreements and the changes to the incentive compensation plan. Tr. at 190. Complainant asked about whether the reported amount of withdrawal of proceeds from a venture capital firm was correct. Tr. at 191.

In addition, Complainant raised his concern about when Mr. Nano learned the results of the LabCorp litigation. Tr. at 193-194. Complainant had retrieved from the trash a press release announcing that CTT had won that lawsuit weeks before the announcement was made, and had heard a rumor that the company received information about the outcome of the litigation from the deciding judge's chambers before the decision was officially issued. Id. On the day he found the press release, Complainant overheard Mr. Nano saying in a telephone conversation "how can I buy 10,000 shares without". Tr. at 197. Based upon past conversations with Mr. Nano, Complainant had concluded that Nano only invested in company stock, and Complainant drew the conclusion that Mr. Nano was engaged in some irregularity involving stock trading that could have been contrary to CTT's standards of conduct. Tr. at 198-199.

Complainant recalled Mr. McPike cautioning employees about using inside information with respect to trading stock, both verbally and in a memo. Tr. at 200-201. Complainant knew that Respondent's corporate standards of conduct prohibited such conduct. Tr. at 200; B-CX 8.2. Complainant investigated whether Mr. Nano had indeed bought company stock on insider information by reviewing an internet message board that tracked CTT's stock trading volume. He saw that on October 18, 2002, 12,500 shares of CTT stock were traded, which he considered a high volume of transactions. Tr. at 203. He also contacted personnel at CTT's shareholders' publicity professional, Johnnie Johnson, about the press release, and learned that press releases were sometimes written in advance. Tr. at 205-206. Complainant also asked his attorney whether it would be a violation of a law for a judge's court to give information about a decision before it was made public. Tr. at 207. Mr. Bechtel also asked Respondent's Chief Accounting Officer, Jean Wendschuh to review records that would identify who bought stock on that date. Tr. at 208. Complainant also told a fellow employee, Laurie Murphy, who was familiar with stock trading, about his concern. Tr. at 209.

Complainant discussed his concerns about Mr. Nano's potential inside trading with Mr. Levitsky, who advised him that Mr. Nano wrote press releases in advance. Tr. at 209. Complainant felt threatened by his exchange with Mr. Levitsky, which he recalled: "I think I

suggested that I could not, it was my understanding that I could not be fired or threatened for investigating this sort of thing, and Mr. Levitsky said you are right. You can't be fired for Sarbanes-Oxley but we can find another, or there can be another reason to fire you…" Tr. at 209. Complainant declined to submit anything in writing to Mr. Levitsky on the subject. Tr. at 213.

In preparation for another SEC filing disclosure meeting held in March, 2003, Complaisant asked Mr. Nano directly when he learned of the results in the LabCorp litigation. Tr. at 204. According to Complainant, Mr. Nano said "that he learned about it the same time as everyone else did, and that would have been when the clerical staff interrupted our meeting of [November 21, 2002], our management meeting, and brought in the news…that said we won." Tr. at 204-205.

Complainant attended the quarterly disclosure meeting held on March 13, 2003, and raised issues regarding whether CTT had a side agreement with Mr. Craig Carlson and with Mr. George Yahwak's consulting company. Tr. at 220-222. The issue regarding the incentive compensation plan was also raised. Tr. at 223. After the March disclosure meeting, Complainant worked with Ms. Wendschuh to devise a plan for airing disclosure concerns before the meeting. Tr. at 233.

Late in the day on March 14, 2003, Complainant was in a meeting with his colleague Mr. Jacques, when Mr. Nano arrived and asked them to sign the disclosure acknowledgement document. Tr. at 214. Complainant recalled that he and Mr. Jacques refused to sign, and then spent close to two hours discussing his concerns with Mr. Nano. Tr. at 215. Complainant raised his concern about insider trading, and advised Mr. Nano that they were considering raising this issue with the FCC. Tr. at 215-216. According to Complainant, Mr. Nano responded "the second you go that route, or it was either the second or the minute, but the point was you go that route you're out of here immediately." Tr. at 216. Complainant suggested to Mr. Nano that that course of action would be illegal termination, and Mr. Nano explained that he writes press releases in advance, and "convinced [them] that [they] really couldn't prove it happened and so [they] tended to want to let it go, and we had a long discussion about trust." Id.

At that meeting, Complainant and Mr. Jacques talked with Mr. Nano about their other objections to signing the disclosure document. Tr. at 217. Complainant recalled Mr. Jacques also challenging Mr. Nano to pay him a promised bonus for passing the patent bar examination, which Mr. Nano agreed to pay. Id. Complainant also asked for a performance review, which Mr. Nano agreed to provide. Id. Complainant believed the meeting ended amicably and both he and Mr. Jacques signed the disclosure form, with Mr. Jacques noting an exception. Tr. at 218.

After the meeting in March, 2003, Complainant felt that Mr. Nano attacked his progress on a project in development, the Carlson Technologies. Tr. at 228. Complainant responded with a written explanation that he believed was "responsive" but Mr. Nano's treatment of Complainant thereafter "got nastier and nastier, and you know, more demanding and I can't be real specific but, I mean, there was a general air of hostility and tension, and he was often critical and loud at staff meetings of things that [Complainant] would discuss or suggest." Tr. at 229. Mr. Nano held weekly meetings on Monday mornings where employees gave progress reports on

their projects, and the Carlson project was discussed each week. Tr. at 230-231. Complainant recalled that after March, Mr. Nano demanded more immediate results on getting that technology licensed and getting revenue out of it, which Complainant thought was unreasonable given the intricacies involved in developing the technology. Tr. at 231.

Complainant recalled that in May, 2003, CTT developed a presentation for the Korean enterprise KTTC to sell that business on developing and commercializing Respondent's technologies. Tr. at 234-235. Complainant had concerns that CTT did not have the rights to represent all of the technologies that it had marketed to KTTC, and he advised Mr. Nano specifically of his concern on one technology, and generally spoke about his concerns at staff meetings. Tr. at 236. In June, 2003, the presentation was made in Korea, and Complainant remained concerned that Respondent did not have all the rights to represent the holders of technologies. Tr. at 237. Complainant recalled also discussing his concerns at a Board of Director's meeting in May, 2003. Tr. at 238.

Complainant returned from Korea in mid-June and commenced his regular duties. Tr. at 246. A staff meeting was held on June 30, 2005, which Complainant attended. Tr. at 247. Complainant tape recorded segments of the meeting that included discussions about his progress on a project, and about Mr. Jacques' progress on a project. Tr. at 247-248. Later that day, Complainant was called into a meeting with Mr. Nano and Mr. Levitsky. Tr. at 248. Complainant used a digital recorder that he had purchased a few months before to record the conversation that ensued, and then uploaded the recording to his computer. Id. (Both a copy of the taped conversation and a transcript of the recording were submitted, B-CX 84 and 85). Complainant purchased a digital recorder for the purpose of creating his own record of conversations and meetings at CTT. Tr. at 385.

On cross examination, Complainant testified that CTT had experienced financial losses the year before he joined them. Tr. at 274. Complainant agreed that the salary and benefits that CTT offered him were subject to the company's discretion. Tr. at 277. With respect to the incentive bonus plan in effect when Complainant was hired, Mr. Bechtel did not ask for a copy of it or ask what revenue bonuses would be based on. Tr. at 280. After he read a copy of the plan, Complainant understood that bonus determinations would be made following the close of a fiscal year, and he acknowledged that neither he nor any other employee received a bonus at the close of the 2001 fiscal year on July 31, 2001. Tr. at 281. The company had an operating loss of $2 million in that year. Id. Complainant understood that bonus determinations were made upon the performance of the company and the performance of the individual. Tr. at 284.

Complainant recalled that CTT issued a press release in November, 2001 that announced that it had prevailed in its litigation in the LabCorp case. Tr. at 284. Complainant read the release when it was issued. Tr. at 285; EX 5. Complainant had nothing to do with drafting the press release, nor did he play any role in the development of the technology or the litigation. Tr. at 288-289. Complainant also played no role in the litigation involving a case known as "Materna", but discussed with other CTT employees whether revenue realized by the company as the result of that case would be distributed among the employees. Tr. at 291-292.

Complainant stated that shortly after Mr. Nano's arrival at CTT, he directed everyone to focus on developing revenue. Tr. at 293. Complainant recalled that Mr. Nano advised him that litigation revenues could be excluded from the operating income that determined bonuses, and further told him that the incentive plan in place did not guarantee any bonus payments, which were subject to the control of the Board of Directors. Tr. at 294-295. Complainant was aware that a study was undertaken by the Hay Group in the spring of 2002 that looked at how executives of CTT were compensated. Tr. at 310. This study was authorized before Mr. Nano's tenure with CTT. Tr. at 313.

Complainant acknowledged that Mr. McPike attempted to persuade him to accept a change in the incentive compensation plan. Tr. at 324. Complainant also admitted that he believed that the proceeds from litigation like the Materna and LabCorp cases would be included in the operating income upon which bonuses would be calculated. Tr. at 325-326. However, Mr. Bechtel did not carefully read the bonus compensation plan document until after he was terminated. Tr. at 326-327.

Complainant explained the details of an agreement with a manufacturer, ATO, to provide Aerielle bug units for retail sale in the United States. Tr. at 334. The plan was designed to provide an incentive to ATO to deliver the bugs by October 15, 2002. Tr. at 334-335. Complainant participated in the drafting of a press release describing the project and indicated that ATO would display components of the project at a consumer show in Las Vegas in 2003. Tr. at 336. In September, 2002, Complainant had a dispute with Mr. Nano about the participation of Mr. Marvin Weinberger as consultant to the Aerielle Program. Id. Mr. Bechtel believed that Mr. Weinberger undermined the designer of the Aerielle bug by criticizing certain of its elements at a presentation in August, 2002. Tr. at 337-338. Mr. Bechtel sent an email to Mr. Yahwak complaining about Mr. Weinberger. Tr. at 339; EX 10. Eventually, Mr. Nano agreed to exclude Mr. Weinberger from the Aerielle project, but he advised Complainant that he would be held responsible for its progress. Tr. at 340-341.

The Aerielle producers did not provide manufactured bugs in October or November, and on December 9, 2002, the manufacturer's representative asked for an extension of time to amend the licensing agreement. Tr. at 344; EX 14. Complainant informed Mr. Nano of the situation, and Mr. Nano subsequently appeared hostile to Complainant about the circumstances. Tr. at 350-352. Complainant was aware that Mr. Nano was focused on the company producing revenue, and admitted that as of December 9, 2002, he had not produced any new revenue. Tr. at 371.

Complainant testified that he expected to be able to license the Carlson technology, and on that basis, Mr. Nano authorized payment of $50,000.00 for the technology. Tr. at 352-353. However, his intended licenser did not enter into an agreement with CTT. Tr. at 356.

After he found the press release in the trash in October, 2002, Complainant told Mr. Jacques that he thought Mr. Nano was engaged in insider trading, but he did not tell Mr. Yahwak, the general counsel, or Ms. Wendschuh, the Comptroller. Tr. at 363. In March, 2003, Complainant asked Ms. Wendschuh to provide him with records of trades that were made in October, 2002, but did not specifically identify Mr. Nano as a potential trader. Tr. at 365.

Complainant verified that Mr. Nano had not reported purchasing CTT stock to the SEC. Tr. at 366. Complainant asked an acquaintance to try to verify whether Mr. Nano bought stock in October without reporting the purchase to SEC, but his contact could not confirm whether he had. Tr. at 369.

Complainant conceded that he did not record his exceptions to the disclosure forms rather than refusing to sign them, although that course of action was not prohibited. Tr. at 376-377. Mr. Nano was present during the March, 2003 meeting, when Complainant raised his concerns about disclosure, and Nano did not object to his raising the concerns. Tr. at 379. Complainant stated that during his meeting with Mr. Nano in March 2003, when he believed that Mr. Nano threatened to fire him, Complainant responded that such a termination would be illegal. Tr. at 381. Complainant admitted that he did not tell Mr. Levitsky, Ms. Wendschuh, Ms. Garber, or Mr. McPike of this threat. Tr. at 382-383. Complainant did not tell CTT's audit committee. Tr. at 383. His initial complaint to OSHA did not mention the threat. Tr. at 383.

Complainant testified that he was aware of the efforts of Mr. Nano and others to secure capital financing to keep CTT in business in the May to June, 2003 time period. Tr. at 390. During June, 2003, when Complainant was on business in Korea, he became aware that the SEC had issued a Wells[5] notice to CTT. Tr. at 389; B-CX 81; 82. At a staff meeting on June 30, 2002, Mr. Nano expressed his displeasure that the Carlson technology had not yet yielded revenue, and also that a technology sponsored by Mr. Jacques had not yielded revenue. Tr. at 392-393. At the meeting with Mr. Nano and Mr. Levitsky later that day, when he learned his employment was terminated, Complainant almost immediately made a reference to the Act. Tr. at 394. Complainant admitted that he hoped to record Mr. Nano or Mr. Levitsky making a statement that would help his claim of discrimination under the Act. Tr. at 395. Complainant also explained that he expected the meeting to be contentious, and he wanted to record exactly what was said to avoid a potential later dispute about what was said. Tr. at 422-423.

Complainant testified at deposition on March 31, 2003. B-CX 158. He described his education and work experience in greater detail than he had at the hearing before me. Id. at 10 through 31. Complainant testified extensively that one reason he believed that Nano had advance notice that litigation had been favorably resolved was because he and other company executives unexpectedly received bonuses around the time that he overheard Mr. Nano asking to "buy 10,000 shares without". Id. at 115-117. Mr. Bechtel also explained that his understanding of the term "material" as it related to information that must be disclosed to the SEC was "whether or not it would influence whether or not an investor might buy or sell the stock". B-CX 158 at 143-144.

Willie Jacques

Mr. Jacques has a diverse business background that led him to become interested in intellectual property licensing. Tr. at 433-438. He holds a MBA degree in marketing. Id. Mr. Jacques was introduced to CTT through a colleague who was employed by the company, and he joined CTT as Vice President of Marketing in September, 1997. Tr. at 445, 449; CXJ-1. Mr.

[5] A Wells notice is issued by the SEC to companies with insufficient assets to remain trading as a public company.

Jacques attempted to negotiate the proposed terms and conditions of employment, as well as the compensation package which included the incentive compensation plan that was based on a pool of money rather than commissions, but he eventually accepted the company's offer. Tr. at 441-444. Mr. Jacques' duties included identifying and evaluating technologies that CTT could promote for licensing. Tr. at 445. Mr. Jacques was assigned certain projects for development, and he also developed an information database that CTT used. Tr. at 446.

Sometime after Mr. Nano became CEO and President, Mr. Jacques became aware that changes to the incentive compensation plan were being made. Tr. at 470. He understood that the changes would base compensation on commissions related to individual performance. Tr. at 471. Because he thought his compensation would be affected by the plan to pay bonuses based on commission, Mr. Jacques sent Mr. Nano a memo regarding the issue and then met with him. Tr. at 472-475. After his meeting with Mr. Nano, Mr. Jacques spoke with Complainant about the changes to the bonus compensation plan and learned that Complainant had a discussion with Mr. Nano in which he stated that he could "work the numbers" so that no one received any compensation under the old plan. Tr. at 478. Mr. Jacques talked with all the executives of the company, who all believed that they would lose money with the changes to the compensation plan. Tr. at 480. Mr. Jacques and Complainant thought that the proposed change was potentially fraudulent because they had been working under the expectation that they would share in the company's revenues, and they saw the potential for less opportunity for a bonus under the proposed plan. Tr. at 481-482. Mr. Jacques recalled a conversation with Mr. Yahwak and others during which Mr. Yahwak expressed his view that the change in compensation could be viewed as fraud. Tr. at 483.

Mr. Jacques was told to attend a disclosure review committee meaning and being provided with information regarding disclosures under the Act. Tr. at 484-485. He attended a training session conducted by an individual from Price Waterhouse who reviewed the information over a speakerphone. Tr. at 485. Jacques understood that his role was to review financial filings for potential disclosure risks. Tr. at 486. The first disclosure meeting was held in December, 2002, and Mr. Jacques was provided a draft copy of SEC filings for comment. Tr. at 487. At the meeting, he raised issues regarding the disclosure of a number of matters, including certain agreements, potential litigation involving Lehigh University, the new commission plan, a press release announcing a process that the company had not licensed, and issues involving consultants and the confidential nature of certain transactions. Tr. at 489-492.

Mr. Bechtel told Mr. Jacques about his suspicions regarding Mr. Nano's insider trading, and they spoke with Ms. Wendschuh about whether in her capacity as secretary of the company, she had seen documents that related to potential insider trading. Tr. at 502-504.

Prior to the March SOX committee meeting, Mr. Jacques received materials that related to the SEC filings that CTT was obliged to make. Tr. at 506. Mr. Jacques recalled that at the March meeting, Complainant raised issues that he believed should have been disclosed. Tr. at 518. Mr. Jacques recalled a general discussion about potential insider trading, and said that counsel Paul Levitsky asked Mr. Bechtel to give him evidence of insider trading. Tr. at 519.

Late one evening after the March disclosure meeting, Mr. Jacques was with Mr. Bechtel when Mr. Nano came and told them that they had to sign off on the SOX certification. Tr. at 520. Mr. Jacques told Mr. Nano that he had concerns and was not going to sign it, and then Mr. Nano "and Scott started talking, you know, about some stock that was traded on a particular day and how he walked by his office and he heard him, you know, potentially making this trade, you know, and the most that I had to say about that is that that would be a serious infraction, you know." Tr. at 521. Mr. Jacques had specific memory of this conversation because it was loud, and he remembered Mr. Nano stating that he wrote his press release in advance, and he heard Mr. Bechtel tell Mr. Nano that he heard him trading stock and that it was a serious SEC violation. Tr. at 522. Mr. Jacques testified that Mr. Bechtel said that he thought it needed to be reported, which Mr. Jacques agreed with: "…I'm kind of thinking, I'm reporting this too, and [Mr. Nano] pretty much made a comment to the point of, you know, if you do that, you're definitely going to be out of here." Tr. at 522. Mr. Jacques recalled that the conversation was loud, and Mr. Bechtel closed the door, and then they sat down and started to discuss the matter further. Mr. Jacques testified that Mr. Nano told them "you've got no case here...you guys have got to sign this thing or you can go work someplace else". Tr. at 523. Mr. Jacques remembered:

> emotionally hopping out of my chair and literally looking at John and saying, well, you know what, I don't need to go through this and you're probably right. I can find another place to work, I really don't need to go through this. I don't need this. If you guys are doing, you know, manipulat[ing] stock, whatever, I don't care. But you know what, at the end of the day, I just don't need this, and I'm not going to sign this thing because I can't even trust you. How can I trust what you're telling me know, John? I can't even trust you to keep your own work for promises you make to me, and I was making direct reference and told about the increase in salary after passing the patent bar, and it was the thing that came to my mind. So I said, you know, you don't even keep your own promises. Why should I believe that anything you're telling me now about whether or not you're complying with this SOX thing is true or not. The bottom line is when I put my signature on…these two piece of papers…I don't know what happens to either of them. All I know is that my signatures sits on a piece of paper saying I certify to something that you might be doing, you know.

Tr. at 522-524.

Mr. Jacques testified that he and Mr. Nano were "kind of screaming at each other" and Mr. Bechtel urged them to sit down and calm down. Tr. at 524. Mr. Jacques did so, but reiterated to Mr. Nano that he had brought these issues up in December, and did not want to be the "fall guy" if the information was wrong or manipulation was shown. Tr. at 524-525. The parties then discussed other topics. Id. Mr. Jacques did sign the certification, after noting his objections on the form. Tr. at 527. According to Mr. Jacques, the meeting ended "on a good note", with the parties agreeing that they would work to avoid similar discussions and to develop business. Tr. at 531. Mr. Jacques could not say with certainty that this occurred on the same day as the SOX disclosure meeting. Tr. at 520. He remembered that the discussion took place late in the day, and estimated that the meeting spanned an hour or less. He remembered that it was dark when he left the building, and that most of the employees had gone. Tr. at 526.

Mr. Jacques' deposition testimony of March 20, 2005, was essentially similar to his testimony at the hearing. See, B-CX 157.

Paul A. Levitsky

Mr. Levitsky has been employed by Respondent for more than four years, and has held the position of General Counsel since March, 2003. Tr. at 606. Mr. Levitsky recalled being with Mr. Bechtel when he raised the question of whether the change in compensation plan could be construed as fraud. Tr. at 607. Mr. Levitsky recalled that at times, his predecessor as General Counsel, Mr. Yahwak, agreed with certain aspects of Mr. Bechtel's contentions, but did not use the word fraud himself. Tr. at 608. According to Mr. Levitsky, Mr. Yahwak expressed his opinion that even with the implementation of a new plan, people would be owed money under the old plan. Id. Mr. Yahwak did not completely embrace Mr. Bechtel's views about the propriety of changing the plan. Tr. at 609. Mr. Bechtel raised the topic of the compensation plan in several conversations at several sites. Tr. at 610. Mr. Levitsky recalled hearing Mr. Bechtel accuse Mr. Nano, Mr. Carver, and the Board of Directors of CTT of committing fraud with respect to the compensation plan. Tr. at 611-612. Mr. Levitsky recalled that Mr. Jacques and Mr. Bechtel raised their concerns about the change in the compensation plan at the March, 2003 SOX meeting. Tr. at 616. Mr. Levitsky also acknowledged that Mr. Bechtel discussed a press release with him, but could not recall all of the details of the conversation. Tr. at 616.

Mr. Levitsky also testified by deposition on April 20, 2005. B-CX 148. His deposition testified supplements his testimony at the hearing in that he provided greater detail about the types of technology that Respondent represents and discussed in greater detail his role as Assistant General Counsel and later General Counsel of CTT. Mr. Levitsky testified that the CEO and CFO of the company would determine which disclosures should be made, and that the disclosure committee made recommendations regarding disclosures. Id. at page 37-42. Mr. Levitsky asserted that he understood that the SEC 10Q and 10K reports required disclosure of only material financial transactions. Id. at 38-40. He deferred to the company's financial experts and counsel familiar with the SEC for the definition of material. Id. at 77.

Mr. Levitsky recalled that Complainant came to his office around the time of the March, 2003 disclosure meeting and stated that he had problems signing the statement, but declined to specify the reasons for his reluctance. B-CX 148 page 89. Mr. Levitsky told him that corporate procedure identified steps he could take to raise a concern, including going to the CEO, the Corporate Compliance Officer or the Audit Committee, but Complainant did not want to go that route. Id. at 90.

Jeanne Wendschuh

Ms. Wendschuh served as Respondent's Comptroller from February, 1992 through March, 2005. Tr. at 638. During her tenure with the company, she served as secretary of the corporation and as Chief Accounting Officer. Tr. at 639. Respondent had worked with operating losses during the years from 1994 until 1998, and had operating income and net income in 1999 and 2000. Tr. at 640. In 2001, Respondent was involved in litigation to enforce patent and license rights of technologies that eventually yielded income for the company, but that

required substantial expenditures. Tr. at 641-643. From 2001, the company's cash position was steadily declining, and it had the potential of not being a going concern. Tr. at 643. Ms. Wendschuh stated that "a going concern is something that in accounting anyway, a company needs to be able to look forward and project…that it has the resource, either in its current assets or that it will have the resources coming in as revenue that will support its operations and that it will be able to meet its obligations." Id.

In June, 2002, at the end of Respondent's fiscal year, Mr. Nano came on board. Tr. at 644. He became involved in negotiating contracts and trying to secure financing for the company. Id. He held weekly meetings with all employees except administrative staff to discuss how projects were generating revenue. Tr. at 647-648. Given the financial state of the company, the production of revenue was a priority, and at the meetings, Mr. Nano challenged people about projects that were not producing revenue. Tr. at 648-650.

Upon passage of SOX, Respondent instituted a financial disclosure committee whose purpose was to assure compliance with SOX disclosure requirement. Tr. at 653. CTT consulted a large accounting company, which prepared a checklist for committee members to review when determining what needed to be reported to the SEC in compliance with SOX. Tr. at 654. SEC required quarterly reports, "10-Qs", that were prepared in house and reviewed by Respondent's audit firm. Tr. at 655-657. An annual report, the 10-K, was prepared in a similar manner. Id. Before the reports were filed, the members of the disclosure committee reviewed them and then met to discuss the draft reports. Id. Ms. Wendschuh and Mr. McPike evaluated issues raised by committee members to determine whether disclosure was necessary. Tr. at 660. The Act did not increase the numbers or types of disclosures that companies were required to make to the SEC, but rather increased the focus on internal controls and imposed certification requirements upon company officials. Tr. at 757-758.

Ms. Wendschuh's minutes of a disclosure committee meeting held in December, 2002, reflected that individuals raised four issues for potential disclosure. Tr. at 662-663; B-CX 27. Ms. Wendschuh could not recall who raised a particular issue, but she testified that the items "were discussed and addressed and disposed of as deemed not material." Tr. at 663. Regarding the need to disclose an oral agreement with Dov Hyman, Ms. Wendschuh stated that "[i]f there was an agreement relating to … negotiations with a particular potential licensee, my understanding would be that it could only relate to his compensation for those, and as long as there wasn't a license without revenue, then there wouldn't be any disclosure matter." Tr. at 663-664. Ms. Wendschuh did not believe it was necessary to disclose potential litigation involving infringement of technology, nor was it necessary to disclosure a compensation plan based on revenue because Respondent had no new revenue. Tr. at 665.

Ms. Wendschuh's minutes of a disclosure committee meeting held in February, 2003, document the discussion involving who would replace the recently departed chief counsel George Yahwak, who had served as co-chair of the committee. Tr. at 668-669; EX 43. The members also again discussed a potential agreement with Dov Hyman, potential litigation, and the proposed change in employee compensation plan. Tr. at 670. Ms. Wendschuh did not consider any of these issues subject to disclosure, as "license agreements were in the normal course of our business, they were not considered necessarily disclosable unless there were terms

that were material to the financial statements." Tr. at 671. She described litigation as a "gain contingency", which did not have to be reported. Id. The proposed change to the company's compensation plan did not have to be reported because it had not been adopted by the Board of Directors; it was approved by the Board in late March, 2003, and included as an exhibit to the 10-Q report of April, 2003. Tr. at 671; 682-683. Ms. Wendschuh's notes from a meeting of February 21, 2003, reflect that Complainant was unwilling to sign the fraud certification letter required of committee members because he did not want to be personally liable. Tr. at 672; B-CX 42.

Ms. Wendschuh recalled advising Complainant that not all agreements or business deals had to be disclosed on a 10Q or 10K. Tr. at 678; 699-700. She acknowledged that the company kept a computer database that recorded only written agreements, and agreed that the lack of documentation regarding oral agreements was a concern, because without documentation of an agreement, company officials would not know the company's obligations. Tr. at 709-712. However, such agreements would be subject to disclosure requirements only if they were material to the Company's financial statements. Tr. at 722. She did not believe that consulting fees and commissions were subject to separate disclosure. Tr. at 723-725. There is no specific numerical rule for determining materiality, which is determined by evaluating qualitative and quantitative factors. Tr. at 722.

The procedure for the disclosure committee members' review of draft reports was changed sometime before Complainant's termination in that members were instructed to submit their concerns in writing to Ms. Wendschuh. Tr. at 681-682. In addition, individuals who were required to sign the fraud certification letter could annotate exceptions that they believed applied to the disclosure statement. Tr. at 755. Ms. Wendschuh recalled writing an exception about the classification of certain individuals as consultants vs. employees. Tr. at 756-757.

As of July 31, 2003, Respondent was required to disclose to the SEC its plans to stay afloat because the company was not able to make "a going concern assertion". Tr. at 683. In anticipation of the report, cash flow projections to December, 2004 were prepared, and plans to reduce costs were documented, including plans to terminate some employees, extend payable timeframes, and to negotiate a reduction in rent. Tr. at 683-685. Costs related to Complainant's employment included his salary, payroll taxes, medical and other group benefits, Respondent's contribution to a 401(k) plan, and bonus accrual. Tr. at 693-694. In October, 2003, Ms. Wendschuh prepared a plan based upon actual information regarding Respondent's revenues, expenses and cash flow, and projected that information into the future. EX 76 through EX 80. Respondent's projected expenses "were nearing $6 million annually, and the company needed $4.5 million of revenue just to break even". Tr. at 691-692.

Ms. Wendschuh acknowledged that in January, 2004, CTT converted some consultants to employees. Tr. at 741-743. She recalled other times when Respondent let people go because of the financial situation of the company, and then hired additional personnel when business increased. Tr. at 760-762.

Ms. Wendschuh denied having access to records that identify individuals who bought or sold CTT stock, although she annually reviewed lists of registered shareholders. Tr. at 700. She did not recall being asked to review such information. Tr. at 701.

Ms. Wendschuh was not involved in the decision to terminate Complainant, but by May or June, 2003, she fully expected that people would be let go. Tr. at 763. She provided personnel files for every employee, including Mr. Nano, to counsel Paul Levitsky. Id. She knew that she could have been terminated, but was kept on because Mr. McPike left the company, and Respondent needed a financial expert. Id.

Ms. Wendschuh also testified by deposition on April 21, 2005. B-CX 147. Her testimony there supplemented her testimony at the hearing in that Ms. Wendschuh described in detail the filings required by the SEC, and how the disclosure committee worked to assure that all disclosures were properly reported. Id at 21-22; 92-114; 118-124. Ms. Wendschuh also explained that the company's audit committee reviewed financial statements. Id at 115-117. Ms. Wendschuh described in more detail how she prepared cost savings projections in June, 2003. Id. at 128-130; 162-166.

John Nano

Mr. Nano has been Respondent's Chief Executive Officer since June 17, 2002. Tr. at 775. Before joining CTT, he had extensive experience in the field of technology commercialization, and worked for many large public companies. Tr. at 775-776. Mr. Nano explained that inventions needed to be developed for commercial use in order to be considered successful, and that commercialization of technology involved marketing the technology for licensing for commercial use. Tr. at 776-777. In Mr. Nano's opinion, to be successful in this field requires an understanding of marketing in addition to understanding the technology. Id. When he began working for CTT, the company employed eleven or twelve people and was "losing substantial sums of money" and had "revenues of only $2.6 million". Tr. at 778. The company had lost $4 million and was declining, and "the Board was concerned about the company going into bankruptcy." Id. When he was hired, Mr. Nano was charged by the Board to determine if the company could be saved. Tr. at 778. The company's expenses were greater than its revenues, and Mr. Nano "needed to put a program in place to grow the revenues. $2.6 million does not support a public company." Tr. at 779.

Mr. Nano observed that Complainant and Mr. Jacques were the employees who had the primary responsibility to generate revenue. Id. Mr. Nano explained to Mr. Bechtel that the company "needed to refocus the business in terms of looking at marketing and licensing and selling …technologies…The main thing for the business to survive was to grow the revenue. Revenue, revenue, revenue. A simple message." Tr. at 779-780. Mr. Nano held weekly staff meetings where he focused the staff's attention on generating revenue. Tr. at 780.

Mr. Nano concluded that the compensation plan in place at CTT did not motivate employees to license and sell technologies, as it was based on a share of the company's profit, so Mr. Nano proposed a change in that plan. Tr. at 781. His proposal was that individuals who generated revenue should receive 10% of the revenue, which he thought would motivate the

creation of new business. Tr. at 782. Mr. Nano discussed his proposed change to the compensation plan with the employees of CTT, including Complainant, who "reacted negatively". Tr. at 782. Mr. Nano believed that Complainant's objection to a change in the plan was based upon his misconception that employees would receive a percentage of proceeds from litigation that the company expected to receive. Tr. at 782-783; EX 117. The plan called for "a payment of 10 percent of the operating income" and allows "the compensation committee of the Board of Directors, in its discretion…to eliminate the effect of material non-recurring items of operating income or loss. So here you have a case that went on for eleven years…That's a material non-recurring item." Tr. at 785. Mr. Nano would not have recommended to the Board to approve compensation to employees who did not contribute to the outcome of an extraordinary event such as litigation that spanned eleven years. Tr. at 783. Mr. Nano "was not going to do that to the shareholders of the Company", many of whom are elderly individuals who had been invested in CTT for many years. Tr. at 783-764.

Mr. Nano recalled explaining his interpretation of the plan's language to Complainant, who was negative because he "wanted to get a piece of the Materna award". Mr. Nano denied telling Complainant that he knew "how to cook the books" so that Complainant would never get a penny of that money, and stated that as a public company, all of their records are audited and reviewed by attorneys and reported in publicly documented reports. Tr. at 786. Mr. Nano further denied offering to give Complainant 10% of the gross revenue of any new technology that he brought into CTT. Tr. at 787. Mr. Nano denied entering into such an agreement with any employee or consultant working for Respondent. Tr. at 788. Agreements with consultants were based on a percentage of the revenue retained by Respondent, and not the gross revenue realized. Id.

An agreement with consultant Aris Despo was used as an example of the type of agreement that Respondent made with consultants, whereby they would receive a commission on retained revenue, after meeting a certain threshold dollar figure. Tr. at 789-791; EX 118. The sample agreement involved a homocysteine technology that also was the subject of litigation. Tr. at 792. Mr. Nano denied that Mr. Despo received a portion of the award that resulted from litigation, and stated that in order to get a commission, "he had to generate new licenses of that technology". Tr. at 792. He noted that although Respondent had already won in the litigation involving the technology, the company had done nothing to market it. Id. Mr. Despo identified potential markets for the technology that had not been previously approached by Respondent. Tr. at 795.

Mr. Nano described his procedure for drafting press releases in advance of expected news, so that they would be "in the can" and ready for release when the event occurred. Tr. at 796. It was his practice to issue press releases within hours of an event, in part because SEC rules require disclosure of such circumstances to the public and investors simultaneously. Tr. at 801-802. He undertook this process with respect to the LabCorp litigation, which he understood was expected to yield an outcome favorable to Respondent. Tr. at 796-797; EX 6, 7. Mr. Nano worked on the LabCorp press release with Johnny Johnson, who is with an investor relations firm that develops press releases on Respondent's behalf. Tr. at 798. He recalled working on at least four drafts of this particular press release. Id.

He did not have any communication with the court regarding this litigation, but was aware of the favorable court rulings from a year earlier when he completed his updated draft in October, 2002. Tr. at 799. Mr. Nano had no knowledge that any official of CTT or its Board solicited information from the court regarding how the presiding judge would finally rule, and recalled that in October, 2002, he asked the attorney involved in the case whether a ruling had been issued. Tr. at 800. No ruling was issued until November, 2002, and he learned about it when everyone else did, because a member of the company's clerical staff interrupted a meeting to announce that the case had been decided in Respondent's favor. Tr. at 800-801.

Mr. Nano denied purchasing CTT stock on October 18, 2002, but admitted buying 5,000 shares of CTT stock in April of 2003. Tr. at 798-799. He reported the purchase to the SEC, as he was required because of his position as an officer of the company. Id.

Complainant was responsible for the commercialization of the Aerielle bug, the Rufulo technology, the Bobby Kim box and the Carlson brake light and rollover technology. Tr. at 802. Mr. Nano expected Mr. Bechtel to get the technologies to produce revenue. Id. He recalled that Complainant made a representation in a press release that the Aerielle project was exceeding expectations. Tr. at 802. Complainant also represented to Mr. Nano in September, 2002 that manufactured product would be available for retail by Christmas of that year. Tr. 803. Mr. Nano offered Complainant a consultant to help with marketing issues but Complainant rejected the offer, assuring Mr. Nano that the product would be in stores by Christmas. Tr. at 803-804. In December, Complainant advised Mr. Nano that there were problems getting the product shipped from Asia because of the terms of the licensing agreement. Tr. at 804-805.

Mr. Nano reviewed the Aerielle bug agreement and understood that its terms presented an impediment to manufacturing the technology. Tr. at 805. He admitted that the agreement did not require that manufactured Aerielle bugs would be available for sale for the Christmas season. Tr. at 856. However, Mr. Nano explained that he discussed the penalty payments required under the agreement with Mr. Bechtel and suggested a way to avoid the penalty. Tr. at 892. Mr. Nano acknowledged that Mr. Bechtel was not totally responsible for the problems involved in getting the Aerielle bugs to market. Tr. at 894.

In December, 2002, Mr. Nano denied Complainant's request for money to purchase brochures describing the Aerielle bug for distribution at a consumer electronics show, and instead authorized the purchase of manufactured product for demonstration at the show, which was held in January, 2003. Tr. at 805-806. Mr. Nano authorized Complainant to attend the show, which he did. Tr. at 807.

At a meeting of CTT's board of Directors in September, 2002, Complainant had represented that the Aerielle bug technology would "generate the highest net present value in the history of the Company in the near term", although no units had been available for sale at that time. Tr. at 807. The technology was manufactured under a license to Fujikon, which Complainant had negotiated. Tr. at 894. Although Respondent realized approximately $10,000 in retained earnings from the Aerielle Bug project in 2004, the technology was returned to Aerielle because the receipts were not enough to offset the costs of the program, which Mr. Nano estimated at over $500,000.00. Tr. at 807; 894-895.

In the fall of 2002, Mr. Nano agreed that CTT would purchase the rights to market the Carlson technology for $50,000.00, on Complainant's representation that the company could immediately license the technology to another company. Tr. at 808. Complainant was unable to sell the technology to that company or any other user, and the Carlson technology did not generate any revenue. Tr. at 808-809. Respondent has since dropped efforts to license this technology. Tr. at 895.

Complainant was responsible for finding customers who wanted to license the Rufulo technology. Tr. at 809. Although Complainant identified potential licensees, none of the entities purchased the rights. Tr. at 810. Complainant suggested suing entities that used the rights, and Mr. Nano authorized him to find a law firm that would undertake litigation on a contingency basis because Respondent could not afford a major lawsuit. Id. Nano was reluctant to initiate a lawsuit because of the costs of litigation, and also because the developer of the technology had already lost lawsuits relating to the use of the technology. Tr. at 812. No attorney agreed to initiate a suit on a contingency basis, and CTT returned the technology to Mr. Rufulo in 2003. Tr. at 812-813.

Although Complainant had told Mr. Nano that he could market the Kim Box technology to large shipping companies, he was not successful in selling the technology, and did not develop any revenue from that source. Tr. at 813. Mr. Nano explained that although Mr. Kim had limited the pool of potential licensees of his technology, he might have been open to an expansion of the pool. Tr. at 839. Nano did not believe that Mr. Kim was approached with this option. Id.

As of December 31, 2002, CTT's financial condition had not improved, and Mr. Nano looked for assets to sell to bring in money, and investigated raising money through debt or equity. Tr. at 814. Respondent expected to receive gross revenue in May 2003 from the Materna litigation, which produced a $56 million award, but Respondent's net was $6 million. Tr. at 814-815. In order to bring immediate revenue to the company, Mr. Nano sold part of the award for $600,000, or "about $.50 on a $1." Tr. at 815. He did not succeed in raising funds through debt equity financing, or by selling a technology called Ethyol Stream. Tr. at 815. At a meeting before the company's Board of Directors on March 28, 2003, Chief Financial Officer Frank McPike reported that Respondent had lost $1.2 million in the previous six months, which was less than expected, but still showed no increase in revenue. Tr. at 817.

At the March 28, 2003 Board meeting, the Board voted to adopt the changes to the compensation plan that Mr. Nano had proposed. Tr. at 818-819; EX 19. Mr. Nano had previously discussed with Respondent's general counsel and the Chairman of CTT's audit committee whether the proposed plan needed to be published and reported because the issue had been raised at a SOX disclosure meeting. Tr. at 819-820. He was assured that the plan did not have to be disclosed unless it was adopted, and it was disclosed once it was adopted. Tr. at 820-822.

Mr. Nano recalled that on the afternoon of March 14, 203, he was working with Mr. Johnson on a press release involving Respondent's earnings statements. Tr. at 822. He had several communications with Mr. Johnson by telephone between the hours of 4:24 p.m. and 6:25

p.m. Tr. at 823-825; EX 127. Mr. Nano admitted that he possibly met with Complainant and Mr. Jacques on the afternoon of March 14, 2003, but denied bringing them the SOX disclosure letter to sign. Tr. at 828. Mr. Nano denied meeting with Complainant and Mr. Jacques from 5:00 o'clock p.m. until 7:00 o'clock p.m. that night, and said he would have met with them for ten to twenty minutes. Tr. at 896. Mr. Nano denied that on that afternoon Complainant told him that he intended to report Mr. Nano to the SEC for insider trading. Tr. at 828. Mr. Nano asserted that the only time Complainant raised such an issue was "during his…exit interview, when he was being let go by myself and Mr. Levitsky, on June 30, 2003, he made a lot of accusations at that point in time." Tr. at 828. Mr. Nano denied telling Complainant that if he went to the SEC he would be "out of here". Tr. at 829.

Mr. Nano recalled a Board meeting and retreat held at the end of May, 2003, when "the Company was months away from bankruptcy". Tr. at 829. Mr. Nano proposed three options to the Board to try to save the Company. Tr. at 830, 858-859; EX 109; B-CX 76. He estimated that if Respondent continued operating on the status quo, it would run out of cash within five months, which was option 1. Id. As an alternative, he proposed that Respondent "would get rid of almost all the people in the Company and basically almost close the Company down except for just continually to take in any checks that may come in, including letting myself go…". Tr. at 830-831. Another alternative was to cut some expenses by letting some people go and cutting costs so that the company could stay alive until the proceeds from the Materna litigation were realized. Tr. at 831-832. This third option called for reductions in operating expenses of approximately $100,000 per month, which would be achieved in part through payroll savings and elimination of cash bonuses. Tr. at 859-860. The Board selected the third option, and Complainant was identified as an individual to let go because Mr. Nano believed his contribution to the company "was extremely limited". Tr. at 833.

In the afternoon of June 30, 2003, Complainant was asked to join Mr. Nano and Mr. Levitsky in Mr. Nano's office. Tr. at 836. Mr. Nano "explained to Mr. Bechtel that the Company was in severe financial difficulty and…had to take actions to reduce costs in order for the Company to try to survive." Tr. at 836. Mr. Nano offered Complainant one month's pay as severance, which Complainant refused. Mr. Nano testified that Complainant made "accusatory comments towards both myself and Mr. Levitsky. He claimed Mr. Levitsky was involved in a company called Emanus outside of the corporate standard of conduct. He accused, you know, me of SEC violations and made a number of accusations in that exit interview". Tr. at 837.

Mr. Nano asserted that his plan was successful in that he was able to cut enough expenses for the company to last "until the money came in from the Materna award, and I continued to try to find additional sources of funding. So I was able to keep the Company alive until we could turn the business around." Tr. at 861. Respondent did not pay cash bonuses until litigation proceeds were realized in May, 2004. Tr. at 863; 867. The company eliminated the employment costs for three employees, reduced rent, reduced consultant costs and reduced other operating costs. Id. However, Mr. Nano admitted that he did not achieve the reductions in expenses by line item that he had estimated in his presentation to the Board in May, 2003. Tr. at 861-862.

In the December after Complainant was fired, Respondent hired several individuals who had been consultants. Tr. at 901-902; B-CX 124, 120, 121, 122, 123, 125. By the time the offers

were extended, CTT had secured some funding by selling portions of the Materna litigation award and had received a line of equity totaling $10 million, and the company ramped up its selling efforts. Tr. at 908-909. The consultants succeeded in producing revenue, and Respondent "went from a Company that had lost $4 million and then 1.9 million…to a company that the first year, when we brought the consultants in after, we went to a year of making $3 million, the most in the Company's 30 year history, and now already in the first 6 months of this year…we made $4.9 million…". Tr. at 909.

Mr. Nano denied ever having oral agreements and asserted that all agreements were in writing. Tr. at 910. Mr. Nano did not believe that agreements with consultants need to be disclosed as part of SOX disclosure requirements. Tr. at 912. Mr. Nano familiarized himself with SOX disclosure requirements and was required to sign disclosure statements. Tr. at 913-914. Mr. Nano recalled people raising concerns about things that required disclosure at meetings where SOX disclosure was discussed, but did not recall Complainant raising disclosure issues. Tr. at 915-916.

Mr. Nano's deposition testimony of April 19, 2005 is similar to his testimony at the hearing. B-CX 147.

John Sabin

Mr. Sabin has been a member of Respondent's Board of Directors since 1996, and has served on the compensation committee, investment committee, as well as acting as chairman of the audit committee and chairman of the Board. Tr. at 941-942. Mr. Sabin holds the position of Chief Financial Officer and general counsel of Phoenix Health Systems. Tr. at 943. Mr. Sabin is familiar with consultants who perform services for Respondent and was aware that some consultants worked under written agreements, and some did not. Tr. at 943-944. Mr. Sabin "presumed that there were [consultant agreements] that were not written [if] a consultant would only be used for a day or two." Tr. at 956. Mr. Sabin would not expect such agreements to be disclosed in a SOX report because they are immaterial. Tr. at 966.

Mr. Sabin is also familiar with CTT's standards of conduct, and is aware that complaints of violations of those standards, as well as violations of SOX requirements, should be directed to the chairman of the audit committee. Tr. at 945-946. Mr. Sabin was the chairman of the audit committee during the period from July 2002 and June 2003, and he did not receive any complaints involving SOX from Complainant during that period. Tr. at 947. Mr. Sabin recalled that Complainant telephoned him at his home on more than one occasion and complained about the management of the company. Id. Complainant "was concerned with the new consultants that had been retained by the new CEO…what they were doing and the oversight they had been receiving." Tr. at 948.

The audit committee received minutes from meetings of Respondent's SOX disclosure committee. Tr. at 954. Mr. Sabin recalled that Complainant raised some concerns about disclosure that "were deemed to be addressed". Tr. at 955. The audit committee reviewed management's recommendations about disclosures to SEC, along with an independent accounting firm. Tr. at 955. Mr. Sabin knew that Complainant "and others had complained

about potentially changing some of the incentive compensation programs" but he did not recall that unwritten agreements were brought up as a potential disclosure item in an audit committee meeting. Tr. at 957. Mr. Sabin recalled hearing that some individuals, including Complainant, made exceptions to the proposed disclosure reports, but could not remember any specific exceptions. Tr. at 959-961. Mr. Sabin could not recall whether he was aware that Complainant refused to sign the disclosure reports, but he equated refusal to sign with raising a disclosure issue. Tr. at 961.

Mr. Sabin was familiar with Respondent's financial condition in May, 2003, and was present at a Board meeting and company retreat held at that time in Rhode Island. Tr. at 948. He described how the company was losing money and had received a notice that it would be delisted from its stock exchange. Tr. at 949. The delisting occurred because of a combination of losses and a lack of shareholder's equity. Id. Respondent did not regain compliance with stock exchange listing requirements until the Materna litigation money was received. Tr. at 962.

Mr. Sabin recalled that at the meeting in May, 2003, Mr. Nano presented alternative recommendations to address the financial condition of the company. Tr. at 949. The Board adopted the recommendation to reduce overhead, including eliminating some people. Tr. at 950. Every employee's name was mentioned, in addition to Complainant's. Tr. at 950-951; 964. Mr. Sabin was familiar with Mr. Bechtel's performance, and concluded that Complainant "was very effective in making presentations but very ineffective in terms of bringing revenue into the Company." Tr. at 952.

2. *Documentary Evidence*[6]

At the hearing, I admitted into the record Complainant's exhibits, which are identified as B-CX 1 through B-CX 160. B-CX 151, which is a transcript of a deposition of Richard Carver, and B-CX 150, which is the transcript of the deposition of Todd Robinson, are excluded as evidence that relates to allegations outside of my jurisdiction.

Respondent's evidence was admitted as EX 1 through EX 126, except that Exhibits EX 19.5 through 19.7 were withdrawn and EX 1 and EX 2 were excluded upon objection by Complainant.

C. Statement of the Law

The employee protection provisions of Public Law 107-204, 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. section 1514A ("the Act" or "SOX" herein) provide the right to bring a "civil action to protect against retaliation in fraud cases". The procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. section 42121(b), codified at 18 U.S.C. 1514A(b)(2)(B), apply to whistleblowing actions under the Act. Section 42121 (b) of AIR 21 establishes the procedure for filing complaints of discrimination under AIR 21 with the U.S. Department of Labor [OSHA]:

[6] Throughout this Decision and Order, Complainant's exhibits are identified as "B-CX" and Respondents as "EX".

> **In general**-Not later than 60 days after the date of receipt of a complaint filed under [section 42121(b)(1)] and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the periods alleged to have committed a violation of [discrimination] of the Secretary's findings with a preliminary order providing relief prescribed by [AIR 21]. Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

On August 24, 2004, OSHA published final regulations prescribing the procedures for handling complaints of discrimination under the Act. 69 Fed. Reg. 52104. The regulations are found at 29 C.F.R. Part 1980, and mirror those applicable to AIR 21 discrimination complaints.

The Act specifically provides protection against retaliation to employees who

> 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 [certain provisions of the Act], 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 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, discover, or terminate misconduct)…

18 U.S.C. section 1514A(a)(1).

The Act extends such protection to employees of companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. section 78l)["SEA of 1934"] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 78o(d))". 18 U.S.C. section 1514A(a).

To receive protection under the Act, a complainant must establish by a preponderance of the evidence that he engaged in activity protected under the Act; that his employer was aware of the protected activity; that he suffered an adverse employment action; and that circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1980.104(b), 1980.109(a). *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999). If the complainant proves all four of these elements, then he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. 29 C.F.R. § 1980.109. If that burden is met, then the inference of discrimination is rebutted, and to prevail, the complainant would need to show that the employer's rationale for the adverse action was pretextual. *Overall v. Tennessee Valley Auth*., 1997-ERA-53 (ARB April 30, 2001).

In instances where a full hearing has been held, there is usually no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 709, 713-14 (1983). An examination of whether Complainant established the elements of a prima facie case is not useful where Respondent establishes a legitimate, nondiscriminatory reason for the adverse action taken against a Complainant. *White v. Maverick Transportation, Inc*., 94-STA-11 (ARB February 21, 1996). "When a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.,* ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

However, in the case before me, it is necessary to determine whether certain of Complainant's allegations constitute protected activity under the Act, and, therefore, I have examined whether the underpinnings of a *prima facie* case have been established.

D. Analysis

1. Allegations Relating to Post Employment Conduct

Alleged Defamatory Statements by Richard Carver and Alleged Post-Employment Disparaging Comments and Negative References

Complainant asserted that the President of the Board of Directors, Mr. Richard Carver, made disparaging remarks that damaged his professional reputation and that constitute retaliation. Complainant also alleged that Respondent's employees and agents retaliated against him after his termination by making disparaging remarks about him and by giving negative references about his performance. Complainant alleges that this conduct constitutes a continuation of the adverse action at issue in the matter before me. As it has been alleged that these events occurred after Complainant's discharge, I find that that the allegations involve discrete acts that would constitute separate alleged violations of retaliation. As such, Complainant is required to file a timely complaint that specifically addresses each retaliatory allegation. *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002).

The record reflects that Complainant attempted to amend his complaint before OSHA to include these allegations. However, OSHA did not address the allegations in its Investigative Findings, nor did OSHA amend its Findings on Complainant's original complaint to address these allegations. Tr. at 250-251. There is nothing of record to indicate that OSHA's investigation considered these allegations.

The regulations provide:

> Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1980.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error…

29 C.F.R. § 1980.109(a).

Accordingly, as it is apparent that OSHA did not conduct an investigation into these allegations, I am without authority to remand the matter to OSHA for investigation. Accordingly, I find that they are not timely and I decline to consider whether any consequences resulting from the alleged post employment conduct constitute adverse action against Complainant under the Act.

The allegations regarding post employment conduct are DISMISSED. All evidence regarding these allegations has been disregarded, except that evidence necessary to my determination that I have no jurisdiction over these allegations.

2. <u>Allegations Regarding Insider Trading</u>

Complainant's Allegation of Threatened Discharge Does not Constitute Hostile Work Environment, and is Barred for Lack of Jurisdiction

In his complaint of September 23, 2003 filed with OSHA, Complainant did not identify as a protected activity the allegation that his discharge was threatened after he vocalized his intent to report Mr. Nano's alleged insider trading to the SEC. Although Complainant amended his complaint to make additional allegations of retaliation, he did not include the circumstances involving the alleged insider trading and the threat to his employment. Nor did Complainant identify this alleged protected activity as one of the "discrete acts performed by Employer" when responding to my Order to provide the basis for subject matter jurisdiction under the Act. OSHA did not address this issue in its February 2, 2005, Findings, nor did the agency issue amended Findings that address the issue. From that, I infer that Complainant did not raise the issue during the investigation into his complaint, an investigation that spanned more than fourteen (14) months.

Complainant's complaint to OSHA included a general allegation regarding how "individuals…improperly handled substantive information that might materially impact the

company's financial future". However, I find this language too broad in scope to encompass an allegation as specific as the alleged threat of discharge relating to the disclosure of alleged insider trading. I decline to find that this allegation was implied by Complainant's broad assertion.

Because Complainant has asserted that he was subjected to a hostile work environment, the alleged threat for his reported suspicion of insider trading could be construed as a continuing violation. See, *National Railroad Passenger Corporation*, supra. Accordingly, I declined to dismiss the allegation as untimely filed and the record was developed on this issue.

Upon consideration of all the evidence, I conclude that Complainant's allegations of hostile work environment are without merit. A hostile work environment constitutes an adverse action if a complainant can show harassing conduct that was sufficiently severe or pervasive so as to alter the conditions of employment, that the conduct detrimentally affected the complainant, and that the conduct would have detrimentally affected a reasonable person. *Pickett v. Tennessee Valley Auth.*, 2000 CAA 9 (ARB Apr. 23, 2003). In determining whether a hostile work environment exists, I must look to the frequency and severity of the discriminatory conduct, whether it was physically threatening or humiliating, and whether it interfered with Complainant's ability to perform his job. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Complainant alleged that Nano's refusal to fund brochures of one of his technologies supports his assertion that Respondent subjected him to a hostile environment. Complainant did not explain how the lack of brochures negatively impacted his ability to do his job, or otherwise impacted his employment status. Instead of paying for brochures to distribute at a trade show, Respondent authorized the manufacture of samples of the technology for distribution at the show. In addition, despite his perception of Nano's disfavor, Nano authorized Complainant to represent the company at the show, and later at meetings with a client in Korea. I decline to find that Respondent's decision not to fund brochures created a hostile work environment.

Complainant has asserted that Mr. Nano's behavior toward him was generally hostile, and he testified about several incidents that involved arguments with Nano, and perceived threats to his employment status. When Complainant asked to be alleviated of responsibility for signing disclosure statements, he felt threatened by Nano's reaction. Nano obliquely threatened to fire Complainant if he reported insider trading to the SEC. Complainant observed that the CEO was publicly critical of the opinions and perspectives that Complainant expressed at project status meetings.

Despite the hostility that Complainant perceived from Nano, Respondent continued to fund Complainant's projects and accept his recommendations. He was sent to Korea to represent the company, and was involved in the selection of the technologies presented during that trip, which occurred just weeks before his termination. Rather incredulously, considering his assertion of hostile environment, Complainant maintained that he was able to engage in amicable discussions with Nano and believed he had a good relationship with him. He lost no salary or other benefits because of the alleged hostility. I find no evidence that Complainant's employment conditions were tangibly affected by the alleged hostile environment. He lost no pay, continued to receive assignments and was given a bonus and stock options. In consideration

of the evidence as a whole, I find it unreasonable for Complainant to believe that he was detrimentally affected by Respondent's conduct.

I do not find that Respondent created a hostile work environment. Accordingly, Complainant's allegation involving the alleged insider trading threat cannot be construed as a continuing violation under the Act. I find that this allegation should have been identified as a discrete act in Complainant's initial complaint, or at the very least, in a properly executed amendment thereto. I find that it is untimely filed. For reasons already discussed, I am without authority to alter OSHA's findings or decisions regarding its investigation into complaints, and consequently, lack jurisdiction with respect to this allegation.

However, assuming arguendo that the allegation involving insider trading may be construed as part of a hostile work environment, I nevertheless find that it is not an adverse action under the Act because Complainant's belief that he was involved in protected activity with respect to this incident is unreasonable.

Complainant's Report of Potential Insider Trading by Mr. Nano is Not Protected Activity

A complainant is not required to show that the reported conduct actually violated the law, but only that he reasonably believed that the Respondent violated one of the standards specified in the Act. 18 U.S.C. § 1514A. However, the standard for determining whether a complainant's belief involves an objective assessment of the reasonableness of his belief. The objective evidence fails to demonstrate that Complainant's belief that Mr. Nano engaged in insider trading was reasonable.

Complainant testified that late in the day on March 14, 2003, he and Mr. Jacques were discussing their concerns about certifying a draft disclosure statement when Mr. Nano joined them and urged them to sign the statement. Both Mr. Jacques and Mr. Bechtel recalled that Complainant told Mr. Nano that he was considering reporting to the SEC that he believed that Nano had engaged in insider trading. Bechtel believed that Nano bought stock after learning from an inside source that Respondent would soon realize revenue as the result of successful litigation. Both Complainant and Mr. Jacques recalled Mr. Nano responding that if Complainant went to the SEC, he was "definitely going to be out of here".

Mr. Nano conceded that he may have met with Bechtel and Jacques on that day, but denied having this conversation with them. Respondent contends that Mr. Nano's denial is supported by phone records that reveal that he was engaged in conversations with a publicist during the time that the meeting was said to occur. Mr. Bechtel believed the meeting started at about 5:00 p.m. and lasted for two hours while Mr. Jacques estimated that the meeting started at about 4:30 p.m. and lasted about an hour. Both Bechtel and Jacques testified that Mr. Nano did not leave the office to take or to place telephone calls.

I decline to find that the telephone call log demonstrates that no meeting took place between Nano, Bechtel and Jacques on March 14, 2003. Rather, the telephone call log establishes that the meeting described by Bechtel and Jacques did not span the period of time that they estimated. It is possible that it occurred between the documented phone calls. Both Bechtel

and Jacques had been talking before Nano joined them, and may have remained to talk after Nano left them. It is also possible that the meeting did not occur on March 14, 2003, despite Mr. Bechtel's recollection that it took place on that date. Mr. Jacques could not say with certainty that the meeting occurred on that day. However, Jacques' memory corroborated Bechtel's in that he recalled that the meeting occurred late one evening after the SOX disclosure committee met in March, 2003. Tr. at 520-531. His recollection of details of the meeting was substantiated by Mr. Bechtel's in other ways as well. Both recalled that the meeting took place later in the work day, that Mr. Nano joined them, that Mr. Bechtel threatened to contact the SEC about what he believed was Mr. Nano's insider trading, that Mr. Nano told Mr. Bechtel that if he did, he'd "be out", that the volume of the conversation grew loud, that they all calmed down and discussed their differences rationally, and that the meeting ended late in the day. The accounts of the meeting that both Complainant and Mr. Jacques gave are similar in detail and emotion and override any inconsistencies involving the time of the day. Consequently, I am persuaded that a meeting occurred at which Complainant and Mr. Jacques told Mr. Nano that they had concerns about disclosures, and at which the Complainant raised insider trading.

I find that Mr. Nano's blanket denial of the discussion with Complainant and Jacques lacks credibility. Nano conceded that he may have participated in a meeting with Jacques and Bechtel, but denied that he had been accused of insider trading. Nano also could not recall Complainant raising disclosure issues at meetings, and did not recall other matters that Complainant testified about. I find it reasonable to conclude that Complainant's recollection of the incidents described would be sharper because he considered himself personally impacted by the issues. In contrast, the record consistently establishes that the focus of Mr. Nano's discussions with employees was their financial contributions to the company. Mr. Nano also testified that he has trouble hearing. However, I decline to find that Mr. Nano's denial constitutes mendacity. I do accord more weight to the testimony of Bechtel and Jacques and find that Complainant raised concerns regarding potential insider trading in March, 2003, and considered his job was threatened.

Although I believe that Complainant reported suspected insider trading to Nano, I do not find that Complainant's threat to report the activity to the SEC constitutes protected activity because I do not find Complainant's belief was reasonably founded. Complainant's suspicions that Mr. Nano bought company stock after receiving advance knowledge of the favorable outcome of litigation rest on very thin evidence. On October 18, 2002, Complainant found in the trash a draft press release that referred to the company's success in the LabCorp litigation. He then overheard Mr. Nano on the phone asking "how can I buy 10,000 shares without". He also heard a rumor that Mr. Sabin had advance knowledge that the LabCorp litigation had been resolved in Respondent's favor. Complainant concluded from these circumstances that Mr. Nano bought company stock and then did not report his purchase. Complainant did not consider that Nano could have been talking about anything other than CTT stock because he believed that Nano only invested in CTT stock. Tr. at 198.

Complainant was aware that Respondent's Corporate Standards of Conduct prohibit individuals with material information relating to the company, such as major litigation, from buying or selling company stock. B-CX 8.14-16; Tr. at 199. He was aware of leaks of information about the company on an internet message board as well. Tr. at 201. Complainant

further knew that the results of the LabCorp litigation were not made public until sometime in November, 2002. Tr. at 202. Complainant contends that George Yahwak told him that one of the company's director's, John Sabin, had obtained information on the ruling in advance. Tr. at 194-196.

Complainant attempted to confirm his suspicions by reviewing the company's daily reports of stock transactions, and saw that more than 10,000 shares of company stock were purchased n October 18, 2002. B-CX 14; EX 36. He also attempted to confirm with Ms. Wendschuh and through an acquaintance whether Mr. Nano had filed the form required by the SEC for officers who purchase company stock. Tr. at 366. Complainant consulted his own attorney for an opinion about whether the circumstances he had surmised constituted insider trading. Tr. at 207-212. He asked an acquaintance associated with law enforcement to investigate whether Nano purchased shares on October 18, 2002, but the information was not confirmed. Tr. at 368-369.

Complainant shared his suspicions with Jacques. Complainant directly confronted Mr. Levitsky with his suspicion at a meeting in March, 2003, and was advised that Mr. Nano wrote news releases in advance. Tr. at 209; 618. He accused Mr. Nano of the activity in March, 2003, and again on the day he was fired.

The circumstances underlying Complainant's allegations about insider trading are distinguishable from those where a Complainant's belief is ultimately proved wrong. Cf., *Halloum v. Intel Corp*., 2003-SOX-7 at 15 (ALJ Mar. 4, 2004). In the instant matter, Complainant had little basis to make such a serious allegation against Respondent's CEO from the outset. As Complainant himself acknowledged, the outcome of the litigation in question was reasonably expected to be in favor of Respondent. The records of stock transactions that Complainant reviewed reflect a wide variation in the number of shares that were purchased from day to day, and there were many days when more than 10,000 shares were bought. The snippet of conversation that Mr. Bechtel overheard is too vague to make a reasonable guess at Mr. Nano's intentions, never mind to reach the serious conclusion that Complainant drew.

Complainant interrogated the company's publicists about how press releases were drafted and was not satisfied with their explanation. Complainant acknowledged that the draft press release at issue was the fourth draft, which supports Nano's explanation that he frequently rewrites draft press releases. Complainant offered no explanation why the first three drafts of this press release would not have raised the alarm about insider trading earlier.

Although Mr. Bechtel contends that his suspicions were heightened when Mr. Yahwak told him that Mr. Sabin had obtained information on the litigation ruling before the Court issued its Order, Mr. Bechtel did not ask Mr. Sabin to confirm the veracity of this allegation. Mr. Sabin testified that Complainant had contacted him at home by telephone to discuss his disagreement with the management of the company, but Mr. Sabin was not asked at the hearing whether he knew of the results of the LabCorp litigation in advance. Tr. at 940-967. There is no evidence of record that suggests that Mr. Sabin knew of the LabCorp results and passed that knowledge to Mr. Nano. Complainant's conclusions are not objectively supported.

The potential reasonableness of Complainant's belief is further diminished by his own conduct. Despite the seriousness of his allegation, Complainant did not report it to any authority other than to discuss his suspicions with Mr. Levitsky and Mr. Nano. The evidence fails to establish that Complainant fully discussed his concerns about Mr. Nano's alleged conduct with Mr. Yahwak when he asked about the timing of the litigation outcome at a meeting in March, 2003. Although he stated that he asked Ms. Wendschuh[7] about stock purchase information, he did not follow up on his inquiry. Neither did he make inquiries of the Board of Directors. Complainant raised the issue at a SOX disclosure meeting in March, 2003, in the form of a hypothetical situation. Mr. Levitsky asked Complainant to provide evidence that there was insider trading, but Complainant did not.

Complainant did not follow the company's standards of conduct, which provide the procedure for making allegations regarding insider trading. He did not relate his suspicions to Mr. Sabin, who, as head of CTT's audit committee, was responsible for investigating complaints of violations of SOX and other accounting standards. Tr. at 945-948. It is understandable that he might not have questioned Mr. Sabin if Complainant believed that he was involved in disseminating the insider information, but Complainant did not alert any other Board member either. The Board would be jeopardized if Mr. Sabin and Mr. Nano were involved in activity that led to insider trading, given their positions with the company. Complainant's failure to bring such a serious allegation to anyone's attention is inconsistent with his expressed concerns for how disclosures would affect shareholders and the company's compliance with SOX disclosure rules. It is unreasonable that he did not report the activity to the company authorities who had the resources to investigate the allegation if in fact he reasonably believed it had occurred.

The reasonableness of Complainant's belief about Nano's purported insider trading is further undermined by his failure to identify these incidents in his initial complaint to OSHA. He again failed to include this allegation when he amended his complaint to make additional allegations of retaliation. Nor did Complainant identify this alleged protected activity as one of the "discrete acts performed by Employer" when responding to my Order to provide the basis for subject matter jurisdiction under the Act. Complainant's failure to include the allegation among his enumerated protected activities, demonstrates that Complainant himself was uncertain about whether Mr. Nano engaged in insider trading.

I find that Complainant's belief that Mr. Nano engaged in insider trading is not reasonable and is not a protected activity under the Act.

3. Protected Activities and Respondent's Knowledge

Complainant's Refusal to Sign Disclosure Reports

In its written brief, Respondent argued that Complainant's allegation of protected activity involving his refusal to sign the December, 2002 disclosure report should not be considered, because Complainant had not included this action in his original complaint to OSHA.

[7] I accord little weight to Ms. Wendschuh's testimony that she had no recollection that Complainant asked for information about stock purchases, as her testimony relied heavily upon records of meetings.

Respondent's contention is contradicted by Complainant's filing with OSHA of September 22, 2003, which specifically states:

> The management, legal department, accounting department, and auditors of [CTT] required that I participate in the financial statement review process and sign off procedure…During this process, I had reasonable causes [sic] to suspect fraud and on occasion found it necessary to question the company's need to properly disclose certain oral agreements as material to the shareholders…The company failed to address or remedy these reasonable concerns to my full satisfaction, instead creating a hostile and discriminatory work environment, including treats [sic] to fire me if I did not sign without the needed changes.

See, initial complaint of Complainant. I find this sufficient to put Respondent on notice about all of the times that Complainant refused to sign disclosure reports, and conclude that this allegation was timely filed. I place little weight on OSHA's failure to address the December, 2002 refusal in my de novo review of the complaint.

I find nothing in the record to contradict Complainant's assertion that he refused to sign disclosure reports because he did not believe that they were complete. Respondent's Comptroller was aware of this, and I accord credibility to accounts of a meeting between Complainant, Mr. Jacques and Mr. Nano at which their reluctance to sign disclosure reports was discussed. Accordingly, Complainant's refusal to sign disclosure reports is protected activity under the Act.

Respondent maintains that because Respondent's Chief Executive Officer was not present at the disclosure committee meeting of December 9, 2002, Complainant has failed to establish that Respondent had knowledge of his alleged protected activity on that occasion. See, Respondent's Closing Argument at pages 7-8. I find that Complainant has established that Respondent was aware that he believed certain information needed to be disclosed, even if he did not directly make his report to Respondent's CEO. The Act protects employees who provide information to persons "with authority to investigate, discover, or terminate misconduct". 18 U.S.C. section 1514A(a)(1). The disclosure committee was comprised of individuals charged with assuring compliance with SEC rules, and thereby, authorized to discover and terminate misconduct. In addition, the Comptroller of the company and its legal counsel were aware that Complainant had concerns involving the company's need to disclose information to be compliant with SEC rules. There is no evidence to contradict Complainant's contention that Respondent's Chief Financial Officer, Frank McPike, demanded that he sign the disclosure report. Tr. at 153-154. Complainant also specifically discussed the matter with CTT's chief counsel George Yahwak, who proposed removing him as an officer of the company, thereby relieving him of the responsibility to sign disclosure statements. Tr. at 156-160.

In addition, regardless of his presence at the December disclosure committee meeting, the record discloses that CEO John Nano had knowledge that Complainant refused to sign disclosure reports. Mr. Nano signed a letter that absolved Complainant of the obligation to sign disclosure statements. Tr. at 158; B-CX 160. I find that Respondent had knowledge that in December, 2002, Complainant raised issues regarding information that he believed should be disclosed in

reports to the SEC, and also knew that Complainant refused to sign disclosure reports.

Respondent admits that Mr. Nano was present at the March, 2003, disclosure committee meeting. The record establishes that Complainant reported his belief that certain information needed to be disclosed on reports that the company was preparing for the SEC. Complainant also refused to sign the disclosure statements following the March, 2003, meeting, and engaged in subsequent discussions with Mr. Nano about his reluctance to sign the disclosure reports. I find that Respondent had knowledge of Complainant's reports that he believed disclosures must be included in reports to the SEC.

Complainant's Report to the Disclosure Committee that the New Compensation Plan and Oral Agreements Should be Included in Disclosure Reports

Complainant undisputedly advised the SOX disclosure committee that he believed that oral agreements should be disclosed in reports prepared for the SEC. At the disclosure meetings, Jeanne Wendschuh and Frank McPike concluded that such agreements were not material. However, the record reveals that McPike agreed that certain agreements were disclosable. B-CX 31.2 Furthermore, I find that Mr. Nano's testimony denying that Respondent had oral agreements with consultants for commissions is contradicted by the record as a whole. See, B-CX 133.23; Tr. 711, 787, 542. Complainant's concerns were reasonable and he has met his burden of proving that this conduct is protected activity under the Act.

I find it unnecessary to address in any detail the many controversies surrounding the change in Respondent's incentive compensation plan. It is clear that Respondent's employees were unhappy with the change, as it affected their expectations of compensation. It is not the purpose of this adjudication to examine the validity of a contractual agreement between an employer and employees with respect to compensation. My inquiry is limited to whether Complainant had a reasonable belief that a change in compensation to employees might affect the company's shareholders and thus be subject to disclosure, and whether he experienced an adverse employment action for reporting his concerns.

The record indisputably establishes that Complainant inquired about the need to disclose the compensation plan. His belief that it should be disclosed was supported by the fact that it was disclosed in reports to the SEC after Respondent's board of directors approved it in March, 2003. In addition, Mr. Levitsky noted an exception to his disclosure checklist form that the change to the compensation plan had been proposed and would be considered by the board. B-CX 59; Tr. at 616. Accordingly, Complainant has met his burden of proof, and his inquiries about whether the compensation plan should be disclosed constitute protected activity under the Act.

Complainant's Report to the Disclosure Committee that Potential Litigation Should be Disclosed On SEC Reports

Respondent's client Lehigh University had alleged that Respondent's general counsel George Yahwak had engaged in malpractice in his conduct representing the University's intellectual property. Complainant raised the potential of litigation over this issue at the December, 2002 SOX disclosure meeting. At that meeting, Complainant also inquired into

whether Respondent needed to initiate litigation to enforce patent rights involving the Rufulo technology, and suggested that such litigation needed to be reported to the SEC.

I find it reasonable that Complainant would raise such sources of future potential risks and revenue as subject to disclosure. His discussions involving these topics constitute protected activity.

Respondent's Purported Lack of Authority to License Technologies

Respondent has contended that in his initial complaint, Complainant did not include as a protected activity his alleged protests about Respondent's conduct in representing clients and in handling certain technologies. Specifically, at the March 2003, disclosure committee meeting and at staff meetings in the spring of 2003, Complainant expressed his concern that CTT did not have rights to several technologies that the company hoped to present to a potential client at a meeting in Korea. Tr. at 234-242; B-CX 50.1; B-65.4; 72.3 73.2; 74.1; 78.1; 51.1. Complainant was concerned about Mr. Nano's representation that an oral agreement had been reached with client NTRU to represent that entity. Tr. at 235-237.

I find that this activity is encompassed in Complainant's broad assertions regarding the propriety of side and oral agreements, and his general allegation regarding how "individuals…improperly handled substantive information that might materially impact the company's financial future". See, Complainant's complaint of September 22, 2003. I note that Respondent engaged in extensive discovery, and mounted a defense at the hearing to these allegations. Accordingly, I find that this allegation was timely filed and Respondent received proper notice regarding its substance.

The record demonstrates that Complainant directed his concern about this issue to the attention of the disclosure committee. I find Complainant's reported concerns about this issue were reasonable and constitute protected activity.

4. <u>Adverse Action</u>

Officer Status

Complainant has argued that his removal as an officer of the company constitutes an adverse action. I find no basis for this contention. An employment action must produce some tangible job consequence to be considered an "adverse action" within the context of the Act. *Shelton v. Oak Ridge Nat'l Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001); *Dolan v. EMC Corp*., 2004 SOX 1 (ALJ Mar. 24, 2004); *Haywood v. Lucent Technologies, Inc.*, 323 F. 3d 524 (7th Cir. 2003). The United States Supreme Court has defined a tangible job consequence as one that creates a significant change in employment status. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

I find little merit in Complainant's argument that he was deprived of the ability to fully represent the company by losing his status as officer. Complainant testified that he was not aware that he was considered an officer of the company until he asked to be relieved of the

obligation to sign SOX disclosure statements. Although Complainant testified that he was concerned about his ability to do his job without that status, there is nothing in the record that demonstrates that he was hampered in the performance of his job duties. There is no evidence that Complainant lost salary or other privileges, or was otherwise adversely impacted in his employment. Indeed, despite his expectation that he would not be involved in the company's disclosure process, he was remained obliged to sign disclosure reports in March, 2003. Respondent sent Complainant to Korea as its representative in June, 2003. Accordingly, I find that the change in Complainant's status as officer of the company is not an adverse action under the Act.

Performance Review

I find no adverse action is implied by Respondent's failure to conduct a review of Complainant's performance. The record fails to establish that this omission resulted in a loss of pay, raises, bonus, benefits, or negatively impacted Complainant's employment conditions in any way.

Termination

It is undisputed that Respondent terminated Complainant's employment. At a meeting held the morning of the day that Complainant was fired, Nano demanded that he secure a licensing fee for a technology and made other demands regarding future performance. He was fired by Nano later that day. I find that Respondent took adverse action against Complainant as defined by the Act and controlling regulations. 29 C.F.R. § 1980.102 (a).

5. Protected Activities as Contributing Factors in Adverse Action

The record is clear that Complainant refused to sign disclosure reports, and repeatedly raised issues that he believed needed to be disclosed to the SEC. Complainant's refusal to sign the reports posed an obstacle to Respondent, which needed his signature. Despite Complainant's efforts to insulate himself from the obligation to sign disclosure reports and participate in disclosure meetings, Respondent continued to require him to do so.

Complainant also repeatedly raised issues concerning the need to report potential litigation, the need to disclose a change in the compensation plan, and the propriety of Respondent representing technologies without proper authorization. The evidence reflects that when he returned from his trip to Korea in June, 2003, Complainant made a presentation to CTT's Board concerning technologies that he did not believe the company had the rights to represent. Complainant told Ms. Wendschuh that he was uncomfortable that the Board did not know of CTT's status with respect to certain technologies. Tr. at 238-243. Complainant had earlier expressed his discomfort to Mr. Nano and other staff members at a staff meeting. Tr. at 235-242.

Respondent contends that none of Complainant's activities contributed in any way to his discharge. I disagree. Considering Mr. Nano's expression of admiration for loyalty, his denial of conversations involving serious accusations concerning his character, and the fact that he

brought people of his choice to the company after Complainant was terminated, I find that Complainant's vocal objections to Respondent's lack of authority to represent technology, and his continued concerns regarding disclosure of information, sufficient to establish the inference of a causal nexus. *Platone v. Atlantic Coast Airlines Holdings, Inc*., 2003-SOX 27 (ALJ Apr. 30, 2004); *Marano v. Department of Justice*, 2 F.3d 1137 at 1140 (Fed. Cir. 1993). The burden shifts to Respondent to present clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision, and to show that it would have taken the same unfavorable action in the absence of his protected activity.

I find no nexus between Complainant's perception that of a threat from McPike in December 2002, when he refused to sign the disclosure statement and his discharge in June, 2003. At the time of his discharge, McPike was no longer with the company. In a conversation with Mr. Levitsky on the issue of insider trading, Complainant asserted that he could not be fired or threatened for investigating this issue, and Mr. Levitsky purportedly responded that he could be fired for another reason. I find no causal connection between this conversation and Complainant's discharge months later. In addition, Mr. Nano advised him that he would be out if he reported insider trading to the SEC. Again, this conversation occurred months before his discharge, and I find no nexus. Despite these threats, Respondent continued to assign Complainant work, authorized him to represent the company, and expected him to review SEC disclosures. There is no evidence that the threats are related in any way to his eventual discharge.

6. Respondent's Clear and Convincing Evidence of Legitimate Motive for Adverse Action

Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Id*. If Respondent is able to meet this burden, the inference of discrimination is rebutted. To prevail, Complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation. *Overall v. Tennessee Valley Auth.,* Case No. 1997-ERA-53 at 13. The U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995) observed:

> But once the employer meets this burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256. At that point, the fact that a Complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him for engaging in a protected activity.

Carroll, supra. at 356.

As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See, also, *Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

Respondent maintains that Complainant's discharge was totally unrelated to any protected activity and was purely a response to its financial condition. It is undisputed that Respondent's financial condition was poor, and Mr. Nano credibly testified that he was hired with the primary responsibility to generate income. From the time he assumed his position as Respondent's CEO, his focus was on bringing revenue to CTT. He proposed changes in the compensation plan in order to provide greater incentives to individuals who generated revenue. He urged employees to concentrate on producing sources of immediate revenue, rather than long range sources. He sought financing, and sold assets at discount to bring immediate revenue to the company.

The company employed about one dozen people, and Respondent used consultants for specific projects that were designed to produce revenue. Mr. Nano considered it Complainant's primary responsibility to generate revenue, and recalled one technology that Complainant had assured him would be manufactured and marketed to produce revenue before the end of calendar year 2002. Although Complainant had represented that the technology would generate a high level of income, Respondent realized a total of approximately $10,000 in retained earnings against costs of about $500,000.00.

Mr. Nano agreed that he was critical of some of Complainant's ideas, including his suggestion that the company enforce patent rights. The legal costs associated with patent enforcement were high, and CTT was in debt to litigation counsel for patent actions that did not produce income in excess of the costs. Mr. Nano also found fault with Complainant for failing to secure customers to license technologies for which he was responsible.

By the end of May, 2003, Respondent's financial circumstances had not significantly improved, and Mr. Nano forecast CTT's imminent bankruptcy. At a meeting before CTT's Board of Directors, Nano proposed three options for the company's financial future. One of the options focused on reducing costs to keep the company afloat long enough to realize an influx of revenue expected from the resolution of the Materna litigation. This option called for reductions in operating expenses of approximately $100,000 per month, which the company hoped to achieve through payroll savings and the elimination of cash bonuses, plus other cost savings. The Board adopted that option.

Nano targeted Complainant for discharge because he considered his contribution to the company limited, and Complainant's employment was terminated on June 30, 2003. Will Jacques was also terminated on that date, and Frank McPike was taken off the payroll. Although Respondent had intended to discharge Jeanne Wendschuh, she was kept because the company needed a financial officer. McPike was originally designated to fill that role as CFO, but he was

placed on unpaid leave when Respondent was informed by the SEC in June, 2003 that some of his actions were under review. Tr. at 835.

To save costs, the company negotiated a reduction in its rent and reduced consulting costs. Meanwhile, in order to generate revenue, Nano sold the future value of some of the expected Materna litigation proceeds at a discount. The company relied upon consultants to produce revenue, which they successfully did. The company survived with these cutbacks until the Materna award proceeds were received in May, 2004. In the following year, Respondent recorded the highest amount of revenue in its history.

Company Director John Sabin recalled Mr. Nano's presentation to the Board, and confirmed that the Board had adopted a program designed to reduce overhead. The potential discharge of every employee was discussed. Mr. Sabin was familiar with Complainant's performance, and considered him ineffective at bringing revenue to the company.

Complainant admitted that Respondent had been advised by the SEC that its status as a publicly traded company was in jeopardy. He admitted that he did not deliver promised returns on technologies that he represented, and did not know if he produced any revenue on his projects during the period from September, 2002 until his discharge on June 30, 2003. Tr. at 582.

I find that the actions taken by Nano were designed to bring revenue to the company. The desperate need for cash is demonstrated by Nano's discounted sale of litigation proceeds that he knew Respondent would receive less than a year later. Although Complainant could not say whether he produced revenue during the time he worked under Nano, he admitted that he had not produced any new revenue as of December, 2002. Tr. at 371.

I find that Respondent has established by clear and convincing evidence that it had legitimate business reasons for discharging Complainant. The record establishes that Respondent would have discharged Complainant for reasons related to its financial condition, regardless of Complainant's participation in protected activity.

7. Complainant's Burden to Show that Respondent's Legitimate Reasons are Pretextual

Complainant argues that Respondent offered shifting rationales for its decision to terminate him, thereby demonstrating that its stated reason for his discharge is pretextual. Respondent initially cited Complainant's performance as its primary reason for his discharge. Subsequently, Respondent claimed that its decision was financially motivated. Complainant additionally argues that inconsistency between Respondent's demand for immediate revenue and the nature of its business supports finding pretext in its stated reasons for its adverse action. Respondent's own financial statements acknowledge its dependence on royalties from licensees over whom it has no control, and its involvement with technologies that produce long-term revenues. B-CX 99; 134.

As proof of pretext, Complainant contends that his job performance was good, as demonstrated by a $10,000.00 bonus authorized by Mr. Nano that was accompanied by a

complimentary note from the CEO. He received positive feedback from Nano regarding the Fujikon license, and in December, 2002, shares of stock valued from $700.00 to $800.00 were placed in his retirement account in recognition of his contributions to CTT's success. Tr. at 118. A presentation made by Mr. Nano at the annual meeting of shareholders included slides that depicted a ceremony that took place in Korea, where the Aerielle Bug licensee and Complainant were acknowledged. Tr. at 119-120.

Complainant further asserts that pretext is demonstrated by Respondent's failure to follow its proposed "austerity plan", as Respondent did not realize the dollar for dollar savings that it projected by eliminating him. Complainant points to Respondent's addition of consultants who were then made employees within six (6) months of the adverse action as an indication that Respondent increased expenses in contradiction of its rationale for his termination. In addition, administrative employees were paid raises, which is inconsistent with a plan to cut operating costs. Complainant further argued that the projected savings that CTT would realize through his termination were not consistently stated in the company's written projections. Complainant also has inferred that Nano's failure to keep his promise to conduct a review of Complainant's performance demonstrates that his termination for poor performance was pretextual.

I put little weight on the failure of Nano to conduct a performance review. There is no evidence that Complainant's salary or raises were contingent on such a review, and in fact, he received a bonus during the time he worked under Nano. Complainant has not alleged that he was denied promotion or that his salary was tied to such a review. I do not find the lack of a performance review of probative value in determining whether Respondent's action was pretextual.

I agree with Complainant that the record reflects that Respondent was committed to the development of Complainant's Aerielle technology, in which Respondent had heavily invested, and which Complainant had projected would produce a steady stream of income. However, I decline to infer that Nano's continued support of Complainant's efforts to bring this technology to market demonstrates that Nano approved of his efforts. Nano was undeniably disappointed that the technology was not manufactured and shipped for retail sale in time for the Christmas shopping season in late December 2002. The evidence of contemporaneously written emails shows that Nano expected to realize revenue from the product. Although he did not hold Complainant totally responsible for the manufacturing failure, his expectations of revenue were based in part upon Complainant's representations. Because Complainant had a relationship with the manufacturer and licensee, it is logical that Nano would have continued to support Complainant's work. However, Nano demonstrated his lack of full confidence in Complainant by assigning a marketing consultant to the project.

I also decline to find that because Complainant received a bonus and compliments about his performance, his subsequent dismissal was for pretextual reasons. Respondent's awards to Complainant for performance on specific projects is not indicative of the company's assessment of his overall performance. These actions are not inconsistent with Respondent's rationale for Complainant's discharge, and is consistent with Nano's philosophy of incentivizing performance. Complainant's employment was not terminated because of "poor performance" in the classic sense, but rather, Respondent concluded that his

performance was not producing the short-term revenue that the company needed. The evidence is clear that the decision to discharge Complainant was effected in direct reaction to the company's de-listed status, the potential for bankruptcy, and the Board's vote on cost-cutting measures.

I do not find that Mr. Nano's emphasis on the generation of short-term revenue inconsistent with the purpose and general business goal stated by Respondent in its SEC reports. Respondent's business model also called for the company to seek new sources of revenue, while recognizing that development of new products involves risks. The record is undisputed that Nano continually urged Complainant and others to produce revenue, and it was not until the company was a few months away from bankruptcy that Complainant's employment was terminated. In the meantime, Respondent gave Complainant every opportunity to generate revenue, as demonstrated by its authorizing Complainant to represent the company in Korea just weeks before his discharge. Respondent also purchased a technology on Complainant's recommendation, spending $50,000.00 at a time when the company was short of cash. Mr. Nano expected Complainant to quickly recover the costs through licensing fees from this technology, but Complainant was unable to license the technology. B-CX 158.

Complainant testified that when he first came to CTT, Mr. Nano advised the employees that certain business models, such as investing in other companies, were not effective, and directed the employees "to focus primarily on licensing, patents, finding technologies, identifying market needs, and finding technologies that would match those". Tr. at 114. Complainant admitted that securing licenses was "a viable way to make money." Tr. at 114-115. Complainant was aware that Mr. Nano was focused on the company producing revenue, but his testimony demonstrates that he did not adapt to Mr. Nano's shift of emphasis on generating revenue as quickly as possible. Instead Complainant continued to implement his regular method of doing business. With respect to the technology that Respondent bought upon his recommendation, Complainant testified:

Q: Did you convince Mr. Nano to expend $50,000 to purchase the rights to the Carlson technology?

A: Convince is an interesting word. I encouraged him. It was a property that was available because of the [omitted] bankruptcy and I encouraged him to take advantage of the opportunity and to make that investment.

Q: Did you tell Mr. Nano that you would be able to flip that opportunity quickly and produce licenses from companies like [omitted]?

A: No, I did not say that. I would not use the word flip like that.

Q: Did you tell Mr. Nano that you would be able to turn that investment around quickly and record licensing fees for CTT from the Carlson technology?

A: Can you define quickly in calendar terms or did you want me to try to do that. I am not sure what you mean by quickly.

Q: Within two to three months.

A: No.

Q: You never represented that to him?

A: No.

Q: You were aware that Mr. Nano was looking for short-term revenue production in the fall of 2002, were you not?

A: Define short-term.

Q: As quickly as it could come in the door.

A: In the fall of 2002, Mr. Nano was telling us that he was going to get investment and that he knew how to do that and that he was going to get investment capital in the company.

Q: Did he not also tell you that he needed you as the vice president of technology commercialization to produce revenue as quickly as possible?

A: Within two to three months in the fall, no I don't recall it being an issue.

Q: Did he tell you to produce it as quickly as possible?

A: As quickly as possible?

Q: I think that he wanted us to produce revenue as quickly as our business model would allow us to produce revenue.

B-CX 158. at pages 153-155.

The evidence on the whole demonstrates that Complainant disagreed with the direction that Mr. Nano was taking the company. He complained to Mr. Jacques about Mr. Nano's management decisions. He called Mr. Sabin and complained to him. Complainant did not agree with the CEO's decision not to spend money on patent enforcement litigation. B-CX 158, page 159-161. The evidence portrays Mr. Bechtel as an individual who was unwilling or unable to adapt to Mr. Nano's management style or decisions. I find that the record on the whole does not contradict Respondent's rationale for Complainant's termination, which is that Complainant's performance had not contributed to Respondent's need for short-term revenue. Complainant has failed to demonstrate that Respondent's rationale is pretextual.

I find that Respondent has established that its plan to cut immediate costs was designed to save money. Although Mr. McPike reported that the company was not losing money at the rate that had been projected, the evidence establishes that the company continued to lose money. Complainant recalled that Nano had advised employees that restructuring of the company might be necessary. Tr. at 567. It was de-listed from the stock exchange. The fact that Respondent's plan was more effective than anticipated does not demonstrate that it was pretextual. At its inception, the plan was designed to keep the company alive and out of bankruptcy until revenue could be realized. Because of cost cutting measures, including the immediate savings related to the salaries and personnel costs of three highly paid individuals, reduction of payables, the discounted sale of assets, an influx of financing, and the success of its consultants in generating short-term revenue, Respondent's financial situation improved more quickly than was first projected. As a result, the company was able to hire consultants as employees by December 2003.

This scenario is consistent with other periods when CTT experienced financial setbacks that required the layoff of employees, only to experience a rebound in fortune that allowed for additional personnel. I also accept as rational Mr. Nano's explanation that the raises Respondent gave to administrative staff boosted morale, and had little impact on the company's operating expenses. I do not find pretext in the Company's success in bringing in additional revenue and avoiding bankruptcy. Complainant was targeted for discharge because he was a highly paid individual who produced little immediate revenue for a company that desperately needed it. His failure to meet Respondent's expectations is fully supported by the record. Respondent's articulated rationale that Complainant's performance and the company's need for money are inter-related and reflect a legitimate business purpose.

The record reflects that Respondent would have terminated Complainant's employment regardless of his protected activities. Complainant repeatedly raised issues regarding SEC disclosures, and Respondent continued to solicit his opinions without terminating him. Respondent continued to give him work assignments and fostered his projects. Complainant has failed to demonstrate that Respondent's rationale is pretextual, and that he was discharged in retaliation for his protected activity.

I find that Complainant has not established that Respondent terminated his employment in violation of the Act.

E. Damages

Since Complainant has not carried his burden of proof, the issue of damages is not relevant.

V. CONCLUSION

Complainant's assertions regarding post-employment conduct by Respondent are discrete acts and do not constitute a continuation of the adverse action that underlies this adjudication. Accordingly, I have no jurisdiction over those assertions and they are dismissed.

Complainant's allegation that he was threatened with discharge for raising concerns over insider trading are untimely and I therefore lack jurisdiction over that allegation. Moreover, Complainant did not cure the jurisdictional bar by showing that Respondent created a hostile work environment, thereby converting the complaint to one involving a continuing violation. Accordingly, allegations regarding insider trading are dismissed.

Complainant established that he engaged in other protected activity. However, Complainant failed to establish that Respondent's rationale for his discharge was a pretext for any of Complainant's reports to Respondent's management. In addition, the record does not establish disparate treatment of Complainant.

ORDER

The relief sought by SCOTT BECHTEL is DENIED, and the complaint filed herein is DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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, Room S-4309, 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).