ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

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In the Matter of:	*	
JOHN AMBROSE,	*	
Complainant,	*	
v.	*	ARB Case No. 06-096
U.S. FOODSERVICE, INC. and ROYAL AHOLD, NV,	*	
Respondents.	*	

* *

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

Pursuant to 29 C.F.R. 1980.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving an issue of first impression arising under section 806, the whistleblower protection provisions, of Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"), 18 U.S.C. 1514A. Specifically, the Board must establish the proper standard for determining subsidiary coverage of publicly traded companies under section 806 of the Act. The Assistant Secretary, who enforces section 806 and has a significant interest in how the statute is interpreted, urges the Board to adopt the "integrated employer" test -- long applied by the

federal courts in various employment contexts -- to determine whether employees of subsidiaries of publicly traded companies are protected under SOX. Applying that test to the facts of this case, the Board should affirm the ALJ's ruling that the complainant was not protected by the SOX whistleblower provisions.

STATEMENT OF THE ISSUE

Whether the "integrated employer" test should apply to determine whether employees of subsidiaries of publicly traded companies are protected under the whistleblower provisions of the Sarbanes-Oxley Act.

STATEMENT OF THE CASE

1. Procedural history

U.S. Foodservice, Inc. ("USF"), which was purchased by Royal Ahold, N.V. in 2000, is an indirect, wholly-owned subsidiary of Royal Ahold, a Dutch company that trades on the New York Stock Exchange. On February 2, 2005, John Ambrose, a territory sales manager employed by USF in Pennsylvania, filed a complaint with OSHA alleging that USF terminated his employment in retaliation for his complaints to management officials about insider trading and for his testimony before the Securities and Exchange Commission ("SEC") about his allegations. Specifically, Ambrose claimed that he informed his managers and the SEC about conversations that he had overheard in 2000 indicating that USF's then chief executive officer ("CEO") had

advised his son to move his 401(k) holdings into USF stock due to the company's pending sale. OSHA dismissed Ambrose's complaint on May 3, 2005, based on a determination that USF was not a covered company under section 806, and that OSHA therefore lacked jurisdiction to investigate.

Ambrose requested a hearing before an administrative law judge ("ALJ"). He argued, inter alia, that USF is covered under section 806 because it is a subsidiary of Royal Ahold. Specifically, Ambrose argued that the plain language of Sarbanes-Oxley and its purpose extend whistleblower coverage to employees of subsidiaries of publicly traded companies.

Both USF and Royal Ahold moved to dismiss, arguing that section 806 does not automatically protect the employees of a covered company's subsidiaries. They further argued that Royal Ahold has no involvement in USF's employment actions and does not share sufficient commonality of management with USF to be liable for its subsidiary's alleged SOX violations.

On April 17, 2006, ALJ Richard T. Stansell-Gamm dismissed Ambrose's complaint He concluded that USF was not a publicly traded company under section 806 of SOX, and that Royal Ahold could not be held liable for the violations of its subsidiary. (ALJ's decision "Dec." at 12).

Ambrose filed a petition for review with the ARB, and the case was accepted for review.

2. Statement of facts[1]

a. USF is one of the largest food distributors in the United States which, at the time of Ambrose's termination, employed over 29,000 workers (Jt. Opp. Ex. 37). In 2000, Royal Ahold, through a series of intermediary corporations, acquired the outstanding shares of stock of USF, which until then was publicly traded; as a result, USF became an indirect, wholly-owned, and non-publicly traded subsidiary of Royal Ahold (Fishbune Aff. ¶ 3 (Ex. B); Whelan Aff. ¶ 3 (Ex. C); Interr. Resp. #4).

In 2003, several governmental agencies, including the SEC and the Department of Justice, initiated investigations into certain accounting irregularities and financial fraud at USF and Royal Ahold (Alfieri Decl. ¶ 3 (Ex. M)). See also SEC Litigation Release No. 18929, 2004 WL 2297417 (Oct. 13, 2004). In May 2003, the CEO of USF resigned (Interr. Resp. #5); and in

[1] This statement is based on facts of record, which consists of several volumes of documents, depositions, and other submissions to the ALJ concerning the business relationship between USF and Royal Ahold. Citations to the record include the following: "Jt. Opp. Ex." refers to exhibits attached to Complainant's Joint Opposition to the Motions for Summary Decision; Deposition testimony ("Dep.") is indicated by deponent's last name followed by the relevant page number, and is located in the Deposition Testimony Volume submitted with the Jt. Opp.; "RA Ans." refers to Respondent Royal Ahold's Answer to Complainant's First Amended Complaint; all affidavit ("Aff.") and declaration ("Decl.") citations are to those attached as exhibits to RA Ans.; "Interr. Resp." refers to Royal Ahold's Objections and Responses to Complainant's First Set of Interrogatories, attached as Ex. D to Royal Ahold's Memorandum in Support of Respondent's Motion for Summary Decision.

the fall of that year, Royal Ahold's corporate executive board appointed a new CEO (Benjamin Dep. 25; Weiser Aff. ¶ 8 (Ex. G); RA Ans. ¶ 16). Based on recommendations from USF's new CEO, Royal Ahold also approved members of the CEO's executive team (Benjamin Dep. 21, 25). When the events at issue in this case occurred, there were no common officers or directors at Royal Ahold and USF (Interr. Resp. #5).

As a parent company subject to SOX, Royal Ahold developed certain policies and procedures that each of its subsidiaries, including USF, was required to implement (RA Ans. ¶ 19). Also, as part of its overall strategy to help USF recover from previous, and to prevent further, fraudulent activity (Whelan Aff. ¶ 3), Royal Ahold required USF to submit extensive financial reports, which were incorporated into SEC filings by Royal Ahold (RA Ans. ¶ 19), and imposed upon USF stringent standards for complying with the financial integrity requirements under SOX (id. at ¶ 17).

Among the SOX-related reforms that Royal Ahold established at USF were (1) a procedure where employees anonymously could call in complaints and report irregularities in company operations (Hallberlin Dep. 25-27); (2) an informal advisory board, consisting of Royal Ahold corporate officers and one outside member, designed primarily to provide input on strategic issues related to USF's fraud-prevention controls (Benjamin Dep. 27); (3) an audit committee with the specific responsibility for

reviewing USF's financial controls (id. at 44); and (4) a requirement that all USF employees attend a mandatory ethics course and that high-level employees take courses dealing with financial integrity and conflicts of interest (Interr. Resp. #8).

Royal Ahold also required USF to create a steering committee with responsibility for overseeing the implementation of SOX-related Royal Ahold policies (Benjamin Dep. 38). The committee consisted of high-level USF employees, including the chief financial officer, the chief accounting officer, and an IT representative (id. at 39). USF also created an Office of Ethics and Compliance ("OEC"). The OEC provided updates to the Royal Ahold advisory board on USF's compliance with a full spectrum of regulatory requirements, but primarily with Royal Ahold's accounting policies (Benjamin Dep. 28). USF maintained a separate accounting policy manual and was solely responsible for the development and implementation of its accounting policies (Whelan Aff. ¶ 3).

USF's chief OEC officer developed and implemented an ethics training program for USF employees (Hallberlin Dep. 41-43). No one at Royal Ahold approved the training or made any modifications to the content of the program (id. at 41; Interr. Resp. #8). The ethics training is conducted entirely by USF employees and paid for by USF (Hallberlin Aff. ¶ 4 (Ex. K)).

Neither Royal Ahold nor any of its other subsidiaries uses the training program (id.).

USF is insured through Royal Ahold's wholly-owned insurance subsidiary, Molly Ana Company, for certain losses related to USF's self-insurance and high deductible programs for general liability, workers' compensation, and commercial automobile liability (Whelan Aff. ¶ 6). Royal Ahold also provides IT services to USF through its company, Royal Ahold Information Services (id.). USF pays a fee to Royal Ahold for its insurance and IT services (id.).

USF has its own Human Resources Department and maintains its own payroll system and bank accounts separate and distinct from that of Royal Ahold (Weiser Aff. ¶ 6; Whelan Aff. ¶¶ 4, 5). USF paid Ambrose's salary and other compensation, and provided him with health, welfare, and retirement benefits (Weiser Aff. ¶¶ 3, 6). Ambrose was subject to the personnel policies developed and implemented by USF and set forth in USF's Associate Handbook (id. at 6).

USF is solely responsible for issuing disciplinary actions against any of its employees who violate its Code of Conduct or engage in financial improprieties or fraudulent activities. There is no evidence that Royal Ahold had any involvement in the employment decisions at issue in this case or in any of the personnel actions relating to Ambrose (Weiser Aff. 4; Alianiello Aff. ¶ 4 (Ex. L)).

b. Ambrose made an insider trading allegation in July 2004 (Jt. Opp. Ex. 12), which USF's general counsel forwarded to Royal Ahold officials and its outside counsel, Paul Alfieri, who was representing Royal Ahold, USF, and Royal Ahold's affiliates in connection with the government's various fraud investigations (id. Ex.'s 10, 11; Alfieri Decl. ¶¶ 2, 3). Alfieri referred the allegation to the SEC (Jt. Opp. Ex. 12). The next month, Ambrose made a similar allegation in an email to USF's CEO (id. Ex. 14) who immediately forwarded the email to USF's corporate officers (Benjamin Dep. 114-15; Jt. Opp. Ex. 15). USF's general counsel forwarded the email to Royal Ahold officials (id. Ex. 16) who, in turn, forwarded the email to the SEC (id. Ex.17,18).

Upon receipt of Ambrose's complaints, the SEC contacted Alfieri seeking Ambrose's appearance at an SEC hearing (Alfieri Decl. ¶¶ 4, 5). Alfieri made arrangements for an independent law firm to represent Ambrose in connection with his appearance before the SEC (id. at 5). Royal Ahold paid Ambrose's attorney's fees (Interr. Resp. #11).

In early November 2004, after his testimony before the SEC, USF initiated termination proceedings against Ambrose (Alianiello Aff. ¶ 5). Ambrose was terminated one month later (Id. at ¶ 6).

3. The ALJ's decision

In granting summary judgment in favor of USF and Royal Ahold, the ALJ concluded that Congress did not intend section

806 to cover the employees of subsidiaries of publicly traded companies (Dec. at 11). Relying on United States v. Bestfoods, 524 U.S. 51, 61 (1998), which held that the normal attributes of a parent-subsidiary relationship will not render the parent liable for its subsidiary's environmental violations, the ALJ concluded that USF and Royal Ahold were not so intertwined as to represent one entity for liability purposes (id. at 11-12). Rather, the ALJ stated that "in an employment discrimination case, the parent company will only be held liable where it controlled or influenced the work environment of, or termination decision concerning, an employee of its subsidiary company." Id. at 12. The ALJ then determined that under this test, Ambrose could not proceed with his complaint because Royal Ahold "exerted no control or influence over the terms, conditions, and eventual termination of [Ambrose's] employment," and "all the individuals who played an active role in [Ambrose's] employment and supervision were employed by USF and not Royal Ahold." Id.

ARGUMENT

THE "INTEGRATED EMPLOYER" TEST SHOULD BE APPLIED TO DETERMINE WHETHER EMPLOYEES OF SUBSIDIARIES OF PUBLICLY TRADED COMPANIES ARE PROTECTED UNDER THE WHISTLEBLOWER PROVISIONS OF THE SARBANES-OXLEY ACT.

SOX was enacted to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. The Act's whistleblower provision furthers this statutory

purpose by encouraging employees of publicly traded companies to disclose information that they reasonably believe constitute federal securities violations or fraud against shareholders. See 18 U.S.C. 1514A(a). Section 806 prohibits retaliation against employees for such disclosures by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company . . . ." 18 U.S.C. 1514A(a); see also 29 C.F.R. 1980.101. Section 806 does not expressly include subsidiaries of publicly traded companies within its coverage.

By its terms, section 806 does not expressly include subsidiaries of publicly traded companies within its coverage, although it does include "any officer, employee, contractor, subcontractor, or agent of such company . . . ." 18 U.S.C. 1514A(a). Construing this provision, the ALJs have provided differing views as to the coverage of subsidiaries under SOX. Compare, e.g., Morefield v. Exelon Servs., Inc., 2004-SOX-2 (Jan. 28, 2004) (subsidiaries covered based on coverage of publicly traded parent); with Bothwell v. American Life Income, 2005-SOX-57 (Sept. 19, 2005) (subsidiaries of publicly traded companies not covered as employers). In Morefield, the ALJ concluded that subsidiaries of publicly traded companies are

covered based on the covered status of their parent companies. The ALJ reasoned that "[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries." By contrast, the ALJ in Bothwell, relying on Bestfoods, 524 U.S. at 61, held that subsidiaries only can be covered by virtue of their parent companies when the "corporate veil" is pierced. See also Platone v. FLYi, Inc. (formerly Atlantic Coast Airlines Holdings, Inc.), 2003-SOX-27 (ALJ Apr. 30, 2004) (relying on veil piercing factors to find coverage) (petition for review pending, ARB No. 04-154).

1. There is no legal basis to conclude that subsidiaries of publicly traded companies are automatically covered under section 806

A basic tenet of corporate law is that a parent corporation is not liable for the acts of its subsidiary merely because it owns the subsidiary's stock. See Bestfoods, 524 U.S. at 61, 63 (holding that the normal attributes of a parent-subsidiary relationship will not render the subsidiary and parent one legal entity);[2] see also Pearson v. Component Tech. Corp., 247 F.3d

[2] At issue in Bestfoods was whether, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), "a parent corporation that actively participated in, and exercised control over, the operations of a [wholly-owned] subsidiary, may without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." 524

471, 484 (3d Cir. 2001) ("[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent."). Consequently, courts have routinely required specific authorization from Congress before abrogating well-established principles of corporate law. See Bestfoods, 524 U.S. at 63; see also Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003) ("The text of the [Foreign Sovereign Immunities Act] gives no indication that Congress intended us to depart from the general rules regarding corporate formalities. Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). Cf. Int'l Bhd. of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1550 (D.C. Cir. 1988) ("Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history.").

Well-established principles of statutory construction also support the conclusion that subsidiaries are not automatically covered under section 806. SOX's whistleblower provision omits any reference to subsidiaries, even though other sections of the

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U.S. at 55. The Supreme Court held that more than ownership and control were required to find a parent corporation derivatively liable. The Court reasoned that "the failure of [CERCLA] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." Id. at 63.

Act expressly include subsidiaries within the class of regulated entities. See, e.g., section 302(a)(4)(B) (15 U.S.C. 7241(a)(4)(B)); section 402 (15 U.S.C. 78m(k)(1)).[3] It is well settled that "where Congress includes particular language in one section of the statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." Burlington Northern and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2412 (2006) (citing Russello v. United States, 464 U.S. 16, 23 (1983)); see also Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 174 (3d Cir. 2005).[4]

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[3] Section 302(a)(4)(B) requires corporate officers who sign periodic reports submitted to the SEC to design "internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to those officers by others within those entities, particularly during the period in which the reports are being prepared." 15 U.S.C. 7241(a)(4)(B) (emphasis added). Section 402 prohibits a publicly traded company "directly or indirectly, including through any subsidiary" from extending credit in the form of a personal loan to any director or executive officer of the company. See 15 U.S.C. 78m(k)(1).

[4] The inclusion of the term "agent" within the definition of SOX-covered companies does not reflect congressional intent to cover subsidiaries of publicly traded companies because, under common law principles, a subsidiary is not considered an "agent" of its parent corporation absent evidence that the subsidiary was conferred actual or apparent authority to act on behalf of the parent. See Fletcher v. Atex, Inc., 68 F.3d 1451, 1460-61 (2d Cir. 1995); Manchester Equip. Co. v. American Way and Moving Co., 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999); see also Restatement (Second) of Agency §14M (2003). A subsidiary nevertheless may be covered under an agency analysis based on the facts of a particular case. See, e.g., Klopfenstein v. PCC Flow Techs. Holdings, Inc., No. 04-149, 2006 WL 1516650 (ARB May 31, 2006)

2. The integrated employer test is commonly applied under other employment statutes

The integrated employer test is routinely used by federal courts in cases under labor and employment statutes in determining whether a parent corporation and its subsidiary are both liable for statutory violations.[5] The test, which was first developed by the National Labor Relations Board and endorsed by the Supreme Court in Radio and Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965), to determine whether two firms were sufficiently related to meet the jurisdictional minimum amount of business volume, focuses on labor relations and economic realities rather than on

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(remanding to ALJ to consider whether facts justify coverage of subsidiaries and their officers under an agency analysis).

[5] Although "veil piercing" is another test that courts use to determine whether to impose liability upon two or more affiliated corporations when circumstances dictate that corporate formalities should not control, see Pearson, 247 F.3d at 484, its use generally arises outside of labor and employment law. Veil piercing has been criticized "for employing the same formulations of the test across different contexts in which plaintiffs seek to impose liability." Id. at 485 (citations omitted). The specific factors used to determine whether to pierce the corporate veil vary from jurisdiction to jurisdiction. See Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co., 210 F.3d 18, 26 (1st Cir. 2000) (federal standard for piercing corporate veil is notably imprecise and fact intensive; no litmus test in federal courts governing when to disregard corporate form). Moreover, a party seeking to pierce the corporate veil bears a heavy burden, with the inquiry generally involving whether the corporate form to be disregarded is merely a legal fiction. See Pearson, 247 F.3d at 485 (citation omitted).

corporate formalities. See Pearson, 247 F.3d at 486; Murray v. Miner, 74 F.3d 402, 405 (2d Cir. 1996).

Under the integrated employer test, two or more companies may be considered so interrelated that they constitute a single employer subject to liability or coverage under the particular statute. In determining whether to treat entities as a single employer, courts examine the following four factors: (1) the interrelation of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. See Pearson, 247 F.3d at 486; Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999); see also, e.g., Sandoval v. The City of Boulder, Colorado, 388 F.3d 1312, 1322 (10th Cir. 2004); Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993-94 (6th Cir. 1997). None of these factors is conclusive, and all four need not be met in every case. See Armbruster v. Quinn, 711 F.2d 1332, 1337-38 (6th Cir. 1983). Instead, a single employer determination "ultimately depends on all the circumstances of the case." Pearson, 247 F.3d at 486. Nevertheless, the centralized control of labor operations is the most important of the four factors. See Bristol v. Bd. of Cy. Comm'rs of Cy of Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002); Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000).

Use of the integrated employer test, also known as the "single employer" test, generally arises in two circumstances.

First, the test is used to impose liability on a parent corporation when its subsidiary corporation is insolvent. See Pearson, 247 F.3d at 483. Second, the integrated employer test is used in employment cases to determine when affiliated corporations of a covered employer should be viewed as one enterprise for statutory coverage purposes. Id. It is this latter use of the integrated employer test that is applicable here.

Courts began applying the integrated employer test in employment discrimination cases in the 1970s. See Baker v. Stuart Broad. Co., 560 F.2d 389 (8th Cir. 1977) (applying test to Title VII, which covers employers with 15 or more employees, 42 U.S.C. 2000e(b)). Its application to determine when the employees of two or more corporations should be aggregated to meet the coverage threshold under numerous employment laws has found wide acceptance in the federal courts. See, e.g., Morrison v. Magic Carpet Aviation, 383 F.3d 1253, 1257 (11th Cir. 2004) (applying test under Family and Medical Leave Act ("FMLA"), which covers employers that have at least 50 employees within a 75 mile radius of the worksite, 29 U.S.C. 2611(2)(B)(ii)); Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-06 (9th Cir. 2004) (applying test under Worker Adjustment and Retraining Notification Act ("WARN Act"), which defines an employer as "any business enterprise" that employs 100 or more employees, 29 U.S.C. 2101(a)); Haulbrook v. Michelin North

America, Inc., 252 F.3d 696, 703 n.1 (D.C. Cir. 2001) (Americans with Disabilities Act ("ADA"), which, like Title VII, limits coverage to employers that have 15 or more employees, 42 U.S.C. 12111(5)(A)); Pearson, 247 F.3d at 494-95 (WARN Act); U-Haul Int'l, 233 F.3d at 665 (Title VII); Hollowell v. Orleans Regional Hosp. LLC 217 F.3d 379, 388-89 (5th Cir. 2000) (WARN Act); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999) (Title VII); Hukill, 192 F.3d at 442 (FMLA); Swallows, 128 F.3d at 993-94 (ADA; Age Discrimination in Employment Act ("ADEA"), which covers employers employing 20 or more employees, 29 U.S.C. 630(b)); and Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995) (Title VII).[6] But see Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 86-87 (3d Cir. 2003) ("substantive consolidation" test found under bankruptcy law is appropriate test under Title VII to determine whether entities may be considered consolidated); Papa v. Katy Indus., Inc., 166 F.3d 937, 940-44 (7th Cir.), cert. denied, 528 U.S. 1019 (1999) (applying integrated employer test to Title

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[6] The Second Circuit recently stated:

> There is well-established authority under this theory that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.

Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (citing Arrowsmith Shelbourne).

VII, ADA, and ADEA conflicts with Congress' specific intent to shield small companies from liability under those statutes).[7]

The integrated employer test also has been applied in cases that do not involve statutory small employer exemptions. See, e.g., Beverly Enters. v. Herman, 130 F. Supp. 2d 1, 22 (D.D.C. 2000) (arising under the non-discrimination and affirmative action provisions applicable to government contractors under Executive Order 11,246 (30 Fed. Reg. 12319 (1965)), section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793), and section 402 of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212), enforced by the Office of Federal Contract Compliance Programs). In Beverly, the court used the OFCCP's guidelines for determining whether a parent and a subsidiary are to be treated as a single entity for the purpose of imposing sanctions for violations. The OFCCP's guidelines require the agency to consider whether: (1) the parent and subsidiaries have common ownership; (2) the parent and subsidiaries have the same

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[7] Ambrose's assigned offices were located in Pennsylvania, but he lived in Maryland at the time of his termination. Thus, an appeal presumably could be brought in either the Third of Fourth Circuit. See 18 U.S.C. 1514A(b)(2)(A), incorporating 49 U.S.C. 42121(b)(4)(A). The Third Circuit has applied varying tests in employment cases for determining when corporations may be considered a single employer. In Pearson, 247 F.3d at 485-90, the court applied the traditional integrated employer test. On the other hand, in Nesbit, 347 F.3d at 86-87, the court applied a "consolidated subsidiary" test derived from bankruptcy law, acknowledging as it did so that the test varies from circuit to circuit. The Fourth Circuit has adopted the integrated employer test. See Haulbrook, 252 F.3d at 703 n.1; Hukill, 192 F.3d at 442-44.

directors and/or officers; (3) the parent has de facto control of the subsidiary; (4) the personnel policies of the parent and the subsidiaries emanate from a common source; and, (5) the operations of the parent and the subsidiaries are dependent on each other. See 1972 WL 8708, 52 Comp. Gen. 145, 146 (1972) (Opinion letter of Comptroller General reciting the guidelines taken from a letter dated Feb. 26, 1971 of the Solicitor of Labor). As the court acknowledged, these guidelines are analogous to the integrated employer test. 130 F. Supp. 2d at 22.

3. The Board should adopt the integrated employer test for determining subsidiary coverage under section 806 of SOX

The Assistant Secretary urges the Board to adopt the integrated employer test for determining subsidiary coverage under section 806. Application of the integrated employer test to subsidiary coverage under section 806 would serve several significant purposes.

First, as discussed above, the integrated employer test is routinely used in employment discrimination cases to determine when affiliated corporations should be considered one entity for liability and coverage purposes.[8] Its use also is appropriate here because whistleblower provisions like the one in SOX are

[8] Use of the integrated employer test in SOX whistleblower cases thus will promote the congressional goal of consistency. See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy) (section 806 "sets a national floor for employee protections in the context of publicly traded companies").

traditionally regarded as employment related. See English v. General Elec. Co., 496 U.S. 72, 83 and n.6 (1990). In English, the Supreme Court noted that enforcement of the Energy Reorganization Act's ("ERA") whistleblower provision was entrusted by Congress to the Department of Labor and not to the Nuclear Regulatory Commission. 496 U.S. at 83 n.6. Similarly, here, enforcement of Sarbanes-Oxley's whistleblower provision was entrusted to the Department and not to the SEC, the primary agency responsible for administering Sarbanes-Oxley.

Indeed, the language of section 806, limiting coverage to companies with a class of securities registered under section 12 or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934, is analogous to that of other employment statutes limiting coverage in which the integrated employer test is used. For instance, the WARN Act defines an employer as "any business enterprise" that "employs 100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. 2101(a)(1). Similarly, Title VII prohibits an employer from discriminating against an employee with respect to race, color, religion, sex, or national origin, 42 U.S.C. 2000e-2(a)(1), and defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or

preceding calendar year." Id. at 2000e(b). Under Executive Order 11,246, the Secretary is responsible for ensuring that "all Government contractors" not discriminate against employees or applicants for employment because of race, color, religion, sex, and national origin. In all these situations, courts have used the integrated employer test to determine whether two or more entities (typically, parent and subsidiary corporations) have integrated functions to such an extent that they are acting as a "single employer" and thus satisfy the statutory (or Executive Order) limits on coverage. Congress presumably was aware of how courts have interpreted these coverage provisions when it enacted section 806. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379-80 (1982); see also Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). Accordingly, nothing in section 806 justifies the use of a different approach to determine when two or more corporations will be considered a single enterprise than is used under these other enactments.[9]

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[9] Despite the widespread acceptance of the integrated employer test in a variety of employment-related contexts, the Seventh Circuit rejected the test in Papa, 166 F.3d at 940-44. The court determined that applying the integrated employer test conflicted with Congress' specific intent to shield small companies from liability under those statutes. Further, the court viewed the test as too vague to be applied consistently in the context of anti-discrimination laws. Id. at 940-42. No

A second reason for this Board to adopt the integrated employer test is that it would further the purposes of the statute. Although it is clear from the language of section 806 that Congress did not intend to automatically cover subsidiaries, adoption of the integrated employer test recognizes that where two companies are "integrated," employees of both companies should be protected if they engage in whistleblower activity. The test properly focuses on "labor relations . . . and economic realities as opposed to corporate formalities." Pearson, 247 F.3d at 486. In so doing, it reflects the "fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." Id. (internal quotation omitted). As we have noted, SOX was designed to ensure the accuracy and integrity of financial reporting at all levels of the corporate structure. See Sections 302(a)(4)(B) and 402 (15

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other circuit has adopted the Papa test for determining whether two corporate entities should be consolidated. Moreover, the court's concern in Papa does not apply to SOX whistleblower cases because, unlike Title VII, ADA, and ADEA, section 806 does not contain a small employer exemption. The Third Circuit has applied varying tests in employment cases. In Pearson, 247 F.3d at 485-90, the court applied the integrated employer test. In Nesbit, 347 F.3d at 86-87, the Third Circuit stated that the appropriate inquiry to determine whether entities may be considered consolidated for statutory purposes is the "substantive consolidation" test found under bankruptcy law, the factors for which, the court acknowledged, themselves vary from circuit to circuit. The "substantive consolidation" test, which has not been adopted by another circuit, appears to be slightly more restrictive than the integrated employer test and does not have labor relations as its primary focus.

U.S.C. 78j-1(m)(3)(B)(ii); 15 U.S.C. 7241(a)(4)(B); and 15 U.S.C. 78m(k)(1), respectively).

Finally, not only would adopting the integrated employer test create consistency in cases brought under SOX's whistleblower program, it also would promote uniformity among other programs administered by the Department of Labor. Such uniformity enhances compliance by employers regulated by the Department. Regulations implementing several of the Department's enforcement statutes adopt a form of the "integrated employer" test. See, e.g., the FMLA regulations at 29 C.F.R. 825.104(c)(2); the WARN Act regulations at 20 C.F.R. 639.3(a)(2); see also the OFCCP Guidelines, supra.

4. USF and Royal Ahold are not integrated employers under the four-factor test

Although the ALJ correctly concluded that a subsidiary is not covered under section 806 based solely on the covered status of its parent, the ALJ used an overly restrictive test. Specifically, to find coverage, the ALJ required a showing that the publicly traded company controlled the employment conditions of the particular employee bringing the discrimination complaint. Nevertheless, the ALJ's conclusion should be upheld because, as explained below, USF and Royal Ahold are not integrated employers.

a. Interrelation of operations. The focus of the interrelation element is whether the parent corporation

"excessively influenced or interfered with the business operations of its subsidiary . . . beyond that found in the typical parent-subsidiary relationship." See Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997). The ALJ determined that some "indicia of interrelatedness" was present in this case, noting that: (1) during the SEC proceedings, both Royal Ahold and USF were the subjects of the investigation; (2) both companies were represented by the same attorney before the SEC; (3) Ambrose's insider trading complaints were forwarded to Royal Ahold by USF's general counsel; (4) Royal Ahold paid Ambrose's legal fees when he participated in the SEC proceedings; and (5) prior to his appointment, USF's CEO was vetted by Royal Ahold's executives. Dec. at 11-12.

Notwithstanding these indicia of interrelatedness, the ALJ correctly concluded that the facts do not establish a business interrelation sufficient to treat two entities as a single employer. Compare, e.g., Armbruster, 711 F.2d at 1338 (finding interrelation of operations where parent company "handled" subsidiary's accounts receivable and its payroll and cash accounting, provided it with administrative backup, monitored its sales shipments, allowed subsidiary's managerial employees to use its company credit cards, and housed subsidiary's bank accounts at its headquarters); McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933-34 (11th Cir. 1987) (parent and subsidiary companies were marketed as "twins in service," and

parent kept subsidiary's books and records, issued its payroll checks and paid its bills). In other words, Royal Ahold did not excessively influence or interfere with USF's business operations.

Nor is it particularly significant, contrary to Ambrose's contention (Br. at 25-26), that USF required several members of its executive team to report directly to Royal Ahold senior executives. Courts have recognized that imputing liability to a parent corporation for the subsidiary's actions cannot be justified simply because senior executives of a subsidiary have dual reporting relationships to the subsidiary and parent corporations. See, e.g., Pearson, 247 F.3d at 501 (fact that the subsidiary's chain-of-command ultimately results in the top officers of the subsidiary reporting to the parent corporation does not establish an interrelation of operations).

b. Common management. The record indicates that Royal Ahold and USF did not share common officers or board members. While Royal Ahold selected USF's new CEO and approved the CEO's executive staff, there is no evidence that once these officers were selected, Royal Ahold retained the ability to influence USF's management. See Armbruster, 711 F.2d at 1339 (finding common management where president of one company was also director and officer of the other); McKenzie, 834 F.2d at 934 (companies shared common president).

c. Centralized control of employment decisions. The circuit courts applying the integrated employer test are nearly unanimous in their view that control over employment decisions is the most important of the four factors in evaluating employer status. See, e.g., Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998) (control of employment decisions is crucial under the integrated-enterprise test). Nevertheless, courts differ as to the amount of control needed to satisfy this element. See, e.g., Lockhard v. Pizza Hut, Inc., 162 F.3d 1062, 1071 (10th Cir. 1998) (parent's broad policy statements regarding employment matters not sufficient to establish centralized control over labor relations; rather, parent must control day-to-day employment decisions of subsidiary); Swallows, 128 F.3d at 995 (control is authority to hire and fire, or make final decisions with regard to employment); Lusk, 129 F.3d at 777 (control depends on whether parent was the final decision-maker in connection with the employment matters underlying litigation); Hukill, 192 F.3d at 444 (control involves power to hire, fire, and supervise, as well as to control work schedules); U-Haul Int'l, 233 F.3d at 666 (control focuses on extent to which parent "exerts an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions").[10] Regardless of the amount of

[10] Pearson suggests that the differences in how courts view

control necessary, the record establishes that Royal Ahold exercised insufficient control over labor relations at USF.

As noted above, Royal Ahold selected USF's CEO and had a voice in determining USF's upper level management. The two companies, however, maintained separate employment policies, and USF consistently maintained a separate workforce, with separate personnel and payroll operations. Nor is there evidence that Royal Ahold exerted any influence or control over Ambrose's (or any other employee's) working conditions. Finally, as the ALJ found, Royal Ahold did not approve, recommend, or suggest to USF that Ambrose be suspended or discharged. Thus, Royal Ahold did not exercise the type of control over USF's employment decisions required to establish that the companies were a single employer. Compare, e.g., Armbruster, 711 F.2d at 1338-39 (parent controlled labor relations of subsidiary where parent hired subsidiary president and plant manager, approved plaintiff's hiring and was involved in her termination); Arrowsmith Shelburne, 69 F.3d at 1241 (parent approved subsidiary's personnel status reports and all its major employment decisions, and employee of parent hired and fired plaintiff, an employee of subsidiary).

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the "control of labor" prong may result from a sliding scale, such that "if the parent has sufficiently overwhelmed its subsidiary in taking the challenged action, such a showing is sufficient to create liability; if the parent was involved to a lesser degree, there must be some demonstration of the presence of the other aspects of the integrated employer test." 247 F.3d at 487.

Ambrose suggests that Royal Ahold exercised significant management control as part of its SOX compliance efforts. For instance, Royal Ahold requires USF to submit extensive financial reports to be incorporated into SEC filings and requires USF's top officials to report to an oversight board comprised of Royal Ahold executive officers; Royal Ahold also has an audit committee with responsibility for reviewing financial controls at USF and it requires USF employees to comply with special ethics codes and attend mandatory ethics training, and initiated a company-wide financial integrity program for key personnel. See Stmnt. of Facts, supra at 5-7. While these facts indicate that Royal Ahold had some influence over the SOX compliance activities of USF's managers, Royal Ahold did not control the employment decisions at USF. Rather, these are measures necessitated by SOX's statutory requirements, see, e.g., 15 U.S.C. 78j-1(m)(4)(A) and (B); 7201(3)(A); 7241(a)(4)(B) and, thus, are the type of control typically exerted over a subsidiary by a publicly traded parent. Cf. Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. 11734, 11745 (Mar. 12, 1997) (Preamble to Final Rule) ("[W]here agricultural employers/associations undertake responsibilities solely as a result of a legal obligation unrelated to an employment relationship, those undertakings will not be considered in the joint employment analysis.").

d. Common ownership or financial control. It is undisputed that the "common ownership" factor is met in this case; USF is a wholly-owned subsidiary of Royal Ahold. Although common ownership can be evidence of an integrated employer relationship, it is "the least important factor" to consider, see, e.g., Int'l Bhd. of Teamsters v. American Delivery Serv., 50 F.3d 770, 775 (9th Cir. 1995), because common ownership is an ordinary aspect of a parent-subsidiary relationship. There is no legal authority for the "imposition of liability merely as a result of the control ordinarily exercised by a parent corporation over a subsidiary by virtue of its ownership." Pearson, 247 F.3d at 490.

In sum, examining the four factors together, USF and Royal Ahold cannot be considered a single employer under the integrated employer test. Common ownership/financial control appears to be the only prong of the integrated employer test that is met here. The operations of USF and Royal Ahold are not significantly interrelated. There is no common management between the two companies, nor does Royal Ahold control labor relations at USF. With regard to control of labor relations, USF consistently maintained a separate workforce, with separate payroll and personnel systems. Although the evidence demonstrates that Royal Ahold had a voice in the determination of USF's upper level management, there is no evidence that Royal Ahold had any additional authority over employment conditions

involving USF's employees. Accordingly, the ALJ properly dismissed Ambrose's complaint for lack of coverage under section 806.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board apply the integrated employer analysis -- the proper standard for determining subsidiary liability -- to the facts of this case, and affirm the ALJ's coverage determination.

Respectfully submitted,

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