ADMINISTRATIVE REVIEW BOARD
DEPARTMENT OF LABOR

Case No. 08-032

In the matter of
CARRI S. JOHNSON,

Complainant,

v.

SIEMENS BUILDING TECHNOLOGIES, INC. and
SIEMENS AG,

Respondents.

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 2

ARGUMENT 3

I. Congress Has Enacted a Clarifying Amendment That Makes Clear That the Interpretation Urged by the Commission Is the Correct Reading of the Statute. 3

II. In Order to Effectuate the Congressional Intention to Prevent Fraud by Improving the Accuracy of Financial Statements in the Exchange Act Filings of Reporting Companies, Section 806 Should Be Interpreted to Extend Whistleblower Protection to the Employees of Subsidiaries Whose Results Are Consolidated with the Parent's Financial Statements. 6

A. The Financial Results of Consolidated Subsidiaries Are an Integral Part of the Reports Filed by Reporting Companies Because, for Accounting Purposes, the Parent and the Consolidated Subsidiaries Are Considered to Be a Single Economic Entity. 6

B. Section 806 Is Most Reasonably Interpreted as Extending Whistleblower Protection to Employees of Consolidated Subsidiaries. 10

C. The Legislative History Shows That a Basic Objective of SOX Was to Protect Whistle-blowers in Order to Foster Disclosure of Fraud, Including Fraud Involving Subsidiaries, an Objective That Will Be Frustrated If Employees of Consolidated Subsidiaries Are Not Protected. 12

TABLE OF CONTENTS (Continued)

Page

D. Textual Arguments to the Contrary Are Not Persuasive. 14

III. Other Interpretations of Section 806 That Have Been Followed in Some Decisions Do Not Effectuate Congressional Intentions as Well as the Interpretation We Endorse. 17

A. Decisions Suggesting That Subsidiaries Can Never Be Covered Are Incorrect. 18

B. Interpreting the Section as Only Applying to Subsidiaries When They Are Acting as Agents of the Parent, and Relying on Traditional Principles of Agency and State Corporate Law to Determine the Liability of the Parent, Does Not Give Full Effect to Congress's Intent. 20

C. The Use of the "Integrated Enterprise Test" to Determine Liability of Public Parent Corporations to Employees of Non-Public Subsidiaries s erroneous. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **Page**

Abkco v. Music, Inc., 217 F.3d 684 (9th Cir. 2000) 5

Ark. Dairy Coop. Assoc., Inc. v. Depart. of Agric.,
573 F.3d 815 (D.C. Cir. 2009) 10

In re Bascom Food Products Corp., 715 F. Supp. 616 (D.N.J. 1989) 12

Bechtel v. Competitive Technology, Inc., 448 F.3d 469 (2d Cir. 2006) 13

Bell Atlantic Business Systems Service v. Hitachi Data System Corp.,
849 F. Supp. 702 (N.D. Cal. 1994) 12

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.,
331 U.S. 519 (1947) 15

Brady v. Calyon Sec. (USA), 406 F. Supp. 2d 307 (S.D.N.Y. 2005) 22

Brown v. Thompson, 374 F.3d 253 (4th Cir. 2004) 4, 5

Cefalu v. East Baton Rouge Parish School, 117 F.3d 231
(5th Cir. 1997) 5

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 11

Kang v. U. Lim America, Inc., 296 F.3d 810 (9th Cir. 2002) 24

Malin v. Siemens Medical Solutions Health Services,
638 F. Supp. 2d 492 (D. Md. 2008) 15

Piambra Cortes v. American Airlines, Inc., 177 F.3d 1272
(11th Cir. 1999) 5

Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761 (5th Cir. 1997) 24

Page

Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990 (6th Cir. 1997) 24

United States v. Montgomery County, 761, 998 1003 (4th Cir. 1985) 4

United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) 4

Whitman v. America Trucking Association, 531 U.S. 457 (2001) 15

ADMINISTRATIVE CASES

Brothwell v. Am. Income Life, 2005-SOX-57 (Sept. 19, 2005) 19

Carciero v. Sodexho Alliance, SA, ALJ No. 2008-SOX-12 (Oct. 5, 2009) 23

Dawkins v. Shell Chemical, LP, 2005-SOX-41 (May 16, 2005) 22

Grant v. Dominion East Ohio Gas, 2004-SOX-63 (March 10, 2005) 19

Kalkunte v. DVI Fin. Services, Inc., 2004-SOX-56 (July 18, 2005), *aff'd*, ARB No. 05-139 and 05-140 (Feb. 27, 2009) 22

Klopfenstein v. Administrative Review Board, Case No. 10-60144 (5th Cir.) 23

Klopfenstein v. PCC Flow Technology Holdings, Inc., ARB No. 04-149 (May 31, 2006) 20, 21, 22

Lowe v. Terminix Int'l Company, LP, 2006-SOX-89 (Sept. 15, 2006) 15, 19

Mann v. United Space Alliance, LLC, 2004-SOX-15 (Feb. 18, 2005) 22

Page

Merten v. Berkshire Hathaway, Inc., ALJ No. 2008-SOX-040
(Oct. 21, 2008) 23

Minkina v. Affiliated Physicians Group, 2005-SOX-19
(Feb. 22, 2005) 19

Morefield v. Exelon Services, Inc., 2004-SOX-2, (Jan. 28, 2004) 2, 10, 17

Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27
(April 30, 2004) 22

Rao v. Daimler Chrysler Corp., 89 Empl. Prac. Dec. ¶42,814,
2007 WL 1414220 (E.D. Mich. 2007) 15, 22

Savastano v. WPP Group, PLC, 2007-SOX-34 (July 18, 2007) 22

Teutsch v. ING G, N.V., 2005 -SOX-101, 102, 103
(Sept. 25, 2006) 15, 18, 19

Walters v. Deutsche Bank AG, 2008-SOX-70 (Mar. 23, 2009) 2, 10, 19

STATUTES AND RULE

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.

Section 10A(m), 15 U.S.C. 78j-1(m) 15, 16, 17
Section 12, 15 U.S.C. 78l 6, 7,15
Section 13, 15 U.S.C. 78m 6, 7, 8
Section 15(d), 15 U.S.C. 78o(d) 6, 7, 8
passim

Section 302(a)(4)(B), 15 U.S.C. 7241(a)(4)(B) 15, 16

Page

Section 806 of the Sarbanes-Oxley Act of 2002,
18 U.S.C. 1514A .... 1, 3, 6 passim

Section 929A Dodd-Frank Wall Street Reform and
Consumer Protection Act of 2010 .... 3, 4

Rule 3A-02 of Reg. S-X, 17 C.F.R. 210.3A-02 .... 8, 9

LEGISLATIVE MATERIAL

Senate Legislative History, Vol. III 1632 .... 13, 14

Senate Legislative History Vol. II 1074 20

148 Cong. Rec. S7351 (daily ed. July 25, 2002) 18

H.R. 4173, 111th Cong. 4

S. Rep. No. 107-146 (2002) 13

S. Rep. No. 107-205 (2002) 12

S. Rep. No. 111-176 (April 30, 2010) 3-4

The Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and other Public Companies,
Hearings, Senate Committee on Banking, Housing,
and Urban Affairs, 107th Cong., Vol. III 1632 (GPO 2003) 13

The Enron Collapse: Impact on Investors and Financial Markets -- Joint Hearing before the H. Subcomm. on Capital Markets and the Subcommittee, 107th Cong. 57, 2001 WL
34078734 (2001) 14

Page

MISCELLANEOUS

FASB 2008 9

Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae*, *Johnson v. Siemens Building Technologies, Ins., and Siemens AG.*, ARB Case No. 08-032 (Mar. 14, 2008) 25

FASB Accounting Standards Codification at Topic 810 Consolidation (FASB 2008) 9

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

The Securities and Exchange Commission submits this brief in response to the order of the Administrative Review Board ("Board"), dated April 15, 2010, asking for the Commission's interpretation of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. 1514A, as it pertains to non-public subsidiaries of public companies.

The Commission believes that the whistleblower protections of Section 806 apply not only to employees of parent companies that file financial reports with the Commission, but also to employees of their non-public subsidiaries whose results

are required to be included in their parent's consolidated financial statements. Thus, the Commission agrees with the ALJ decisions in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2, (Jan. 28, 2004) and *Walters v. Deutsche Bank AG*, 2008-SOX-70 (Mar. 23, 2009). This interpretation is also consistent with the clarifying amendment recently adopted by Congress as Section 929A of the Dodd-Frank Act of 2010.

STATEMENT OF THE ISSUE

The Board requests the Commission's view as to "whether an employee of a subsidiary of a publicly held company may bring an action against a non-public subsidiary under section 806" while "taking into consideration the various approaches, tests, and interpretations that the courts, ALJs, and the Board have applied." Specifically, the Board requests that the Commission respond to the following questions:

(1) Is a subsidiary categorically covered under Section 806? If so, does the level of ownership of the subsidiary play a factor in that coverage?

(2) Under SOX's whistleblower protection provision, must a non-publicly held subsidiary respondent be an agent of a publicly held company? What are the factors under a Section 806 agency test?

(3) Is the integrated enterprise test applicable to section 806? If so, should the Board consider the "centralized control of labor relations" the most appropriate factor?

(4) Is there any other theory under which you contend that subsidiaries would be covered under Section 806? If so, explain.

ARGUMENT

I. Congress has enacted a clarifying amendment that makes clear that the interpretation urged by the Commission is the correct reading of the statute.

Congress has passed and sent to the President the Dodd-Frank Wall Street Reform and Consumer Protection Act to be signed into law. Included in the Dodd-Frank Act is an amendment to Section 806 of SOX that is dispositive of the issue presented in this appeal. Section 929A of the Dodd-Frank Act amends Section 806 to expressly include within its coverage "any *subsidiary* or affiliate whose financial information is included in the *consolidated* financial statement of [a public] company" (emphasis added). The Senate Report accompanying the Senate bill (S. 3217, which was incorporated into the previously passed House bill and passed by the Senate on May 20, 2010) explains that the amendment is intended as a "clarification" made necessary by the often asserted defense that non-public subsidiaries are not covered by Section 806. The Senate Report states that the purpose of Section 929A is "to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers." S. Rep. No. 111-176 (April 30,

2010).1/ Currently, "[t]he language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This *clarification* would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute." *Id.* (emphasis added)

Since Section 929A is merely a clarifying amendment, it does not constitute a substantive change of the law. To the contrary, such an amendment is intended only "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases," *United States v. Sepulveda,* 115 F.3d 882, 885 n.5 (11th Cir. 1997), by "mak[ing] what was intended all along even more unmistakably clear." *United States v. Montgomery County,* 761 F.3d 998 1003 (4th Cir. 1985) (quoted in *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004)). Since the amendment merely restates what the law has been all along, Section 929A can be relied on by

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1/ The original House bill that was passed by the House on December 2, 2009 also amended Section 806. *See* H.R. 4173, 111th Cong. §7607. The House bill was referred to the Senate. The Senate amended the House bill by incorporating the provisions from a Senate bill, S. 3217, and passed the House bill on May 20, 2010. The Senate-passed version of the House bill contained a different version of the amendment to Section 806, which became Section 929A, described above. The Conference Committee adopted the version contained in the Senate-passed bill. The Conference Report does not separately discuss Section 929A. The Act and its legislative history may be found at website of the Library of Congress - - http://www.thomas.loc.gov.

complainants in pending administrative cases. 2/

That the amendment merely clarifies existing law is confirmed by the fact that the statute as originally enacted should be read to cover employees of consolidated subsidiaries of public companies. Below we explain why.

2/ *See, e.g., Brown v. Thompson*, 374 F.3d at 258-59 (holding that clarifying amendments merely clarify existing law and do not implicate constitutional concerns about retroactivity); *Abkco v. Music, Inc.*, 217 F.3d 684, 679 (9th Cir. 2000) ("Normally when an amendment is deemed clarifying, rather than substantive, it is applied retroactively"); *Piambra Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that "concerns about retroactivity are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law"); *Cefalu v. East Baton Rouge Parish School*, 117 F.3d 231, 232-33 (5th Cir. 1997) (granting a petition for rehearing and withdrawing an earlier decision in light of a statutory amendment in which Congress clarified its intent).

II. In Order to Effectuate Congressional Intent to Prevent Fraud by Improving the Accuracy of Financial Statements in the Exchange Act Filings of Reporting Companies, Section 806 Should Be Interpreted to Extend Whistleblower Protection to the Employees of Subsidiaries Whose Results Are Consolidated with the Parent's Financial Statements.

A. The Financial Results of Consolidated Subsidiaries Are an Integral Part of the Reports Filed by Reporting Companies Because, for Accounting Purposes, the Parent and the Consolidated Subsidiaries Are Considered to Be a Single Economic Entity.

The coverage of the whistleblower protections in Section 806 is expressly linked to the Exchange Act provisions that require companies to file reports that contain financial statements. These financial statements, in turn, treat a reporting company's consolidated subsidiary as a part of the reporting company–like an unincorporated division of the company. It follows that, in order to prevent the whistleblower protections from being frustrated with respect to a subsidiary's employees who disclose the falsity of the financial statements, Section 806 must likewise treat the consolidated subsidiary as a part of the reporting company.

Section 806 prohibits "any company with a class of securities registered under section 12 of" the Exchange Act, or "that is required to file reports under section 15(d)" of the Exchange Act, "or any officer, employee, contractor, subcontractor, or agent of such company" from discriminating against an employee for engaging in protected whistleblowing activity such as reporting securities fraud

to a supervisor or to the Commission. Sections 12 and 15(d) of the Exchange Act, in turn - - together with Exchange Act Section 13 and Commission regulations - - require the financial results of subsidiaries that are controlled by a reporting company to be consolidated with the reporting company's results in Commission filings.

Specifically, Sections 12(a) and (b) of the Exchange Act require that, before a security may be sold on a national securities exchange, an issuer must register the securities by filing an application with the Commission. Section 12(g) of the Exchange Act provides that an issuer of securities sold through interstate commerce must file a registration statement, regardless of whether or not the securities are sold over a national securities exchange, if the issuer meets certain size and ownership standards. The application and registration statement must contain detailed information regarding the issuer and "any person directly or indirectly controlling or controlled" by the issuer, including audited balance sheets, profit and loss statements, and other information as the Commission may require by rule or regulation. *See* Section 12(b)(1). Section 15(d) of the Exchange Act requires periodic financial reports to be filed by a company that has registered an offering of securities under the Securities Act of 1933.

Every issuer of securities registered under Section 12 or required to report under Section 15(d) must file the reports required by Section 13 of the Exchange Act. Under Section 13, the Commission may prescribe the manner in which financial information is to be reported, including "where the Commission deems it necessary or desirable" the filing of "separate and/or *consolidated* balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer," a requirement that includes subsidiaries (emphasis added).

In accordance with the authority granted to it by Sections 12, 13, and 15(d), the Commission promulgated Rule 3A-02 of Regulation S-X, 17 C.F.R. 210.3A-02. Under Rule 3A-02 an issuer generally "shall consolidate entities that are majority owned and shall not consolidate entities that are not majority owned."3/ The rule

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3/ Rule 3A-02 further provides:

> The determination of majority ownership requires a careful analysis of the facts and circumstances of a particular relationship among the entities. In rare situations, consolidation of a majority owned subsidiary may not result in a fair presentation, because the registrant, in substance, does not have a controlling financial interest (for example, when the subsidiary is in legal reorganization or in bankruptcy, or when control is likely to be temporary). In other situations, consolidation of an entity, notwithstanding the lack of technical majority ownership, is necessary to present fairly the financial position and results of the operations of the registrant, because of the existence of a parent-subsidiary relationship by means other than record ownership of voting stock.

explains that consolidated financial statements are required because "[t]here is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has a controlling financial interest in another."

When applying Rule 3A-02 of Regulation S-X, preparers of financial statements look for guidance to *FASB Accounting Standards Codification* at *Topic 810 Consolidation* (FASB 2008) ("*Topic 810 Consolidation*"), issued by the Financial Accounting Standards Board ("FASB"), which provides further elaboration concerning the need for consolidation. In essence, *Topic 810 Consolidation* advises that, when one business organization controls another, their financial statements should be consolidated because the financial statements represent the financial condition of a single company, such that separate statements make little sense. *Topic 810 Consolidation* advises that "[i]n the preparation of consolidated financial statements, *intercompany* balances and transactions shall be eliminated." (emphasis added). *Topic 810 Consolidation* goes on to explain:

In all cases, the company "should clearly explain the accounting policies followed" including "any departure from the normal practice of consolidating majority owned subsidiaries and not consolidating entities that are less than majority owned."

As consolidated financial statements are based on the assumption that they represent the financial position and operating results of a *single economic entity*, such statements shall not include gain or loss on transactions among the entities in the consolidated group (emphasis added.).

B. Section 806 Is Most Reasonably Interpreted as Extending Whistleblower Protection to Employees of Consolidated Subsidiaries.

The Commission agrees with the decisions in *Morefield* and *Walters* that, despite the fact that subsidiaries are not expressly listed as covered entities, the language, purpose and structure of the statute indicate that they should be viewed as part of the same "company," that is a reporting company parent. 4/ First of all, in covering reporting companies, Congress wished to encourage whistleblowing concerning violations that could render the financial statements of those companies inaccurate or misleading. It is clear from the Commission's requirements concerning consolidated subsidiaries that misconduct at a consolidated subsidiary could lead to defects in the parent's financials filed with the Commission, so it is reasonable to conclude that Congress intended the protections to extend to employees of the subsidiaries.

Second, a statute should be construed to avoid absurd results. *See Ark. Dairy*

4/ An issue that is not raised by the parties in this case, in which the complainant named both parent and subsidiary, is whether the parent or the subsidiary or both are the proper respondent in a proceeding under Section 806.

Coop. Assoc., Inc. v. Dept. of Agric., 573 F.3d 815, 829 (D.C. Cir. 2009). Interpreting Section 806 not to cover consolidated subsidiaries would mean that whether a whistleblower was protected would turn on whether he worked for the parent or an unincorporated division rather than for a subsidiary, even though the consequences of his reporting misconduct would be exactly the same in both situations. It seems quite unlikely that Congress intended that outcome. Nor would it make sense to exclude from whistleblower protection the employees most likely to know of misstatements in consolidated financial statements, such as misstatements concerning inventory and sales at subsidiaries where inventory is maintained and sales staff is actually located.

Next, Section 806 explicitly covers contractors and subcontractors, entities that are less under the control of the parent than a consolidated subsidiary and that would seem less likely to be the source of misreporting with respect to the parent's financials than would a subsidiary. If Congress wanted these more attenuated entities to be covered, we believe it is logical to conclude that it wanted subsidiaries to be covered, as well.

The Supreme Court has adopted a similar approach in interpreting Section 1 of the Sherman Act, which prohibits any "contract," "combination" or "conspiracy" in restraint of trade. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S.

752 (1984), the Court held that a parent and its wholly-owned subsidiary were incapable of conspiring together for purposes of Section 1, even though under corporate law the subsidiary was a separate entity. The Court reasoned that, to effectuate the purposes of the Act, the parent and the subsidiary should be treated as a single entity with a single set of interests, and that the analysis should not turn on whether the parent had chosen to organize a part of its business as a division or a subsidiary. Subsequent decisions have held that the same rule applies with respect to a subsidiary that is not wholly-owned when the parent has legal control of the subsidiary or a unity of interests between parent and subsidiary exists. *See, e.g.*, *Bell Atlantic Business Systems Service v. Hitachi Data System Corp.*, 849 F. Supp. 702, 706 (N.D. Cal. 1994) (legal control); *In re Bascom Food Products Corp.*, 715 F. Supp. 616, 629 n.19 (D.N.J. 1989) (unity of interests).

C. The Legislative History Shows That a Basic Objective of SOX Was to Protect Whistleblowers in Order to Foster Disclosure of Fraud, Including Fraud Involving Subsidiaries, an Objective That Will Be Frustrated If Employees of Consolidated Subsidiaries Are Not Protected.

SOX was enacted "to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures of auditing effectiveness and corporate financial and broker-dealer responsibility in recent months and years." S. Rep. No. 107-205, at 2. As the Second Circuit further

explained:

> Revelations of mass corporate fraud, most vividly in connection with the Enron Corporation, threatened to destroy investors' faith in the American financial markets and, in so doing, to jeopardize those markets and the American economy. Congress recognized that the problem was an intractable one, and that a number of strong enforcement tools would be necessary - - from new regulations and reporting requirements, to expanded oversight, to new criminal provisions.

Bechtel v. Competitive Tech., Inc., 448 F.3d 469, 484 (2d Cir. 2006). The court explained that the legislative history concluded that "for *any* of these new tools to work, the law had to protect whistleblowers from retaliation, because 'often, in complex fraud prosecutions . . . . [I]nsiders are the only firsthand witnesses to the fraud.'" *Id.* (emphasis in original) (quoting S. Rep. No. 107-146, at 10 (2002)). "Congress therefore made whistleblower protection central to the Act." *Id.*

During the legislative process that led to the passage of SOX, the whistleblower Congress most had in mind was Sherron Watkins, an employee of Enron Corporation who attempted to bring to light financial reporting irregularities at the company. As reported by Senator Leahy, "[w]e learned from Sherron Watkins that these corporate insiders are key witnesses that need to be encouraged to report fraud and help prove it in court." *The Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and other Public Companies*, Hearings, Senate Committee on Banking,

Housing, and Urban Affairs, 107th Cong., Vol. III 1632 (GPO 2003) ("Senate Legislative History"). During the hearing, it was often noted that Enron had an extremely complex corporate structure, including as many as 3,000 subsidiaries and other off-balance sheet entities capable of concealing important financial information. 5/

With this legislative history, it would make little sense to conclude that the employees of non-public subsidiaries are not protected by SOX's whistleblower protections. Indeed, a brief review reveals that, on average, the companies that comprise the Dow Jones 30 have well over 100 subsidiaries each, excluding one company that has thousands of subsidiaries. Thus, the purposes of SOX's whistleblower protection provision will be stymied if it is construed to mean that the employees of non-public subsidiaries are not covered by Section 806.

D. Textual arguments to the contrary are not persuasive.

It has been argued that the use of the phrase "publicly traded companies" in the title of Section 806 indicates that the scope of the provision does not include privately held subsidiaries. However, this phrase is *not* found in the text of Section

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5/ *See, e.g., The Enron Collapse: Impact on Investors and Financial Markets -- Joint Hearing before the H. Subcomm. on Capital Markets and the Subcommittee*, 107th Cong. 57, 2001 WL 34078734, at 57 (2001); *Senate Legislative History*, Vol. III 1632.

806 itself, but only in the title. Titles "are not meant to take the place of the detailed provisions of the text." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528 (1947); *see also Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 483 (2001). In this case, moreover, the phrase "publicly traded companies" sheds no light on what Congress intended with respect to subsidiaries, and it should not be used as a basis to frustrate the operation of the statute. The obvious reason for using the term "publicly traded companies" in the title is to refer in a concise way to the statute's requirement that a Section 12 or Section 15(d) company - - in this case Siemens AG - - be involved and not to exclude non-public subsidiaries.

Decisions holding that employees of non-public subsidiaries are not covered under Section 806 often reason that, if Congress had intended to cover such employees, it could easily have stated that subsidiaries are covered, as it did with regard to internal controls in SOX Section 301, which created Section 10A(m) of the Exchange Act, 15 U.S.C. 78j-1(m), and SOX Section 302(a)(4)(B), 15 U.S.C. 7241(a)(4)(B). *See, e.g., Malin v. Siemens Medical Solutions Health Services*, 638 F. Supp. 2d 492, 500 (D. Md. 2008); *Rao v. Daimler Chrysler Corp.*, 2007 WL 1424220, at *4, 2005 O.S.H.D. (CCH) ¶32,891 (E.D. Mich. 2007); *Lowe v. Terminix Intern. Co., LP*, 2006-SOX-89, slip. op. at 7 (Sept. 15, 2006); *see also Teutsch v. ING G, N.V.*, 2005 -SOX-101, 102, 103, slip. op. at 4 (Sept. 25, 2006).

It may be argued, however, that these provisions actually support *our* interpretation, because the inclusion of subsidiaries in Section 10A(m) and SOX 302 supports the argument that the drafters of Section 806 similarly intended employees of non-public subsidiaries to be covered by the whistleblower protections.

In SOX Section 302(a)(4)(B), Congress directed the Commission to adopt rules requiring specified corporate officers who sign annual and quarterly reports to certify that they "have designed such internal controls to ensure that material information relating to the issuer *and its consolidated subsidiaries* is made known to such officers by others within those entities" (emphasis added). Section 10A(m)(4) requires the Commission to direct the self regulatory agencies to have listing requirements that cover the items set forth in Sections 10A(m)(2)-(6). Among these required items is that the audit committee of each listed issuer establish procedures for "[t]he receipt, retention, and treatment of complaints received by the issuer regarding accounting internal controls." Section 10A(m)(4)(A) (emphasis added). As just explained, SOX Section 302's certification requirements with respect to internal controls extend to public companies' non-public "consolidated subsidiaries."

Section 10A(m) further suggests not only that subsidiaries be included in internal controls, but that employees of subsidiaries are among those that Congress anticipated might file complaints concerning deficiencies in internal controls. Notably, under Section 10A(m)(4)(B), the new system Congress required audit committees to establish for receiving complaints by listed companies must include provisions for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." It would make little sense for Congress to require the establishment of a procedure for the treatment of complaints concerning, among other things, the internal controls of subsidiaries unless it contemplated that employees of subsidiaries would be among those filing such complaints. *See Morefield*, slip. op. at 3.

III. Other Interpretations of Section 806 that have been followed in some decisions do not effectuate Congressional intentions as well as the interpretation we endorse.

What most stands out about the decisions that conclude that employees of subsidiaries are not covered, or that they are covered only in limited circumstances, is the meager consideration given in these decisions to the auditing and financial disclosure requirements in force at the time SOX was enacted and to the requirements of SOX. Given that Congress expressly stated in Section 806 that it is applicable to companies that have a class of securities registered under Section

12 or file reports under Section 15(d), the lack of attention to those provisions is a significant oversight. These decisions also fail to demonstrate an appreciation of the legislative history of SOX, discussed above.

A. Decisions Suggesting That Subsidiaries Can Never Be Covered Are Incorrect.

Some decisions have indicated that employees of subsidiaries can *never* be covered by Section 806. *See, e.g., Teutsch v. ING Groep, N.V.*, 2005 -SOX-101, 102, 103 (Sept. 25, 2006). We believe these decisions are incorrect for the reasons we have given above. What is more, they ignore the fact that the statute includes "agents" of reporting companies, which we discuss immediately below, so it should at least be clear that a subsidiary acting as an agent is covered.

A number of these decisions have focused on a small piece of legislative history, taken out of context, to support the conclusion that subsidiaries are not covered. For example, in *Teutsch,* the ALJ reasoned that "[t]he legislative history of the Act indicates that Congress did not intend for the Act to view subsidiaries and parent companies as one entity" because Senator Sarbanes had stated, while discussing the legislation before the Senate, that he wished to "make it clear that [the Act] applies exclusively to public companies registered with the Securities and Exchange Commission." Slip op. at 4 (citing 148 Cong. Rec. S7351 (daily ed. July

25, 2002) (statement of Senator Sarbanes)). "Therefore," the ALJ continued, "[t]o include non-publicly traded subsidiaries as a 'company' merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress." Slip op. at 4. 6/

As pointed out by the ALJ in *Walters*, however, Senator Sarbanes was not addressing whether Section 806 extended to subsidiaries of reporting companies. Slip op. at 18. Rather, he was differentiating between situations where no reporting company was involved and situations like that here, where there is a reporting company present - - Siemens AG. 7/

6/ *Accord Brothwell v. Am. Income Life*, 2005-SOX-57, slip. op. at 6 (Sept. 19, 2005) (same reasoning as *Teutsch*); *see also, e.g., Lowe v. Terminix Int'l Company, LP,* 2006-SOX-89, slip. op. at 13-14 (Sept. 15, 2006) (holding that Section 806 does not encompass non-reporting subsidiaries); *Grant v. Dominion East Ohio Gas,* 2004-SOX-63, slip. op. at 33 (March 10, 2005) (holding that "the plain language of the statute provides no cause of action against a non-public subsidiary standing alone"); *Minkina v. Affiliated Physicians Group*, 2005-SOX-19, slip. op. at 6 (Feb. 22, 2005) (holding that "there is nothing in the language of [SOX] or its legislative history that suggests Congress intended to bring the employees of non-public contractors, subcontractors, and agents under the protective aegis of section 806").

7/ Specifically, Senator Sarbanes was addressing concerns that small accounting firms would be required to comply with some provisions of the Act - - the so-called "cascading-down" argument. Senator Sarbanes again stressed: "We are talking here about public companies because that is where the investor protection issue comes in * * *. So that the nonpublic companies - - none of the limitations would apply in that circumstance." He

B. Interpreting the Section as Only Applying to Subsidiaries When They Are Acting as Agents of the Parent, and Relying on Traditional Principles of Agency and State Corporate Law to Determine the Liability of the Parent, Does Not Give Full Effect to Congress's Intent.

Section 806 prohibits discrimination by "agents" of reporting companies, and a number of decisions hold that a subsidiary that acts as an agent of the parent under common law principles is covered by the statute. For example, in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149 (May 31, 2006) - - the Board decision that was relied upon by the ALJ in deciding the case now under review - - the complainant named a subsidiary of a reporting company and an officer of the subsidiary, alleging retaliation for whistleblowing activity. The Board held that a subsidiary of a parent company may be sued as an agent under

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further explained:

> I just want to address the cascading-down argument that we are hearing that says, I am a small accounting firm in a small town and I represent *small businesses, none of which are publicly listed*. They view this with a sense of horror because they think, what is going to happen to the publicly-listed company is going to reach them. * * *
>
> Obviously, it is clear all companies and those who audit them, *once they list*, have different responsibilities because you are drawing a line in the *public market* and the investors. So it is a different arena in which we are dealing.

Senate Legislative History Vol. II 1074 (emphasis added).

Section 806. The Board reasoned that "nothing" in "the common meaning of the term 'agent' gives us reason to conclude that a subsidiary, or an employee of a subsidiary, cannot *ever* be a parent's agent for purposes of the employee protection provision." Slip op. at 13-14 (emphasis in original). The Board explained:

> Whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency. * * * Although it is a *legal concept*, 'agency' depends upon the existence of required *factual elements*: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and understanding of the parties that the principal is to be in control.

Id. (*citing* Rest. (Second) Agency §1(1), comment (b) (emphasis in original Board decision)). 8/ Other cases have found the parent may be held liable under alter-ego

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8/ Several decisions have approved the use of principles of agency to decide when a parent may be liable under the whistleblower protection provision of SOX. *See, e.g., Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005) (stating that a parent may be held liable under circumstances where the subsidiary acts as an agent of the parent); *Rao v. Daimler Chrysler Corp.*, 89 Empl. Prac. Dec. ¶ 42,814, 2005 O.S.H.D. (CCH) ¶ 32,891, 2007 WL 1414220 (E.D. Mich. 2007) (holding that "common law agency principles should apply in determining whether [the subsidiary] was acting as an agent [of the parent] in its actions toward plaintiff"); *Savastano v. WPP Group, PLC*, 2007-SOX-34 (July 18, 2007) (holding that "for an employee of a non-public subsidiary to be covered under Section 806, the non-public subsidiary must act as an agent of its publicly held parent, and the agency must relate to employment matters"); *Kalkunte v. DVI Fin. Services, Inc.*, 2004-SOX-56 (July 18, 2005) (holding the public parent liable under *respondeat superior* liability), *aff'd*, ARB No. 05-139 and 05-140 (Feb. 27, 2009); *Mann v. United Space Alliance, LLC*, 2004-SOX-15 (Feb. 18, 2005) (holding the parent firms not liable under Section 806, in part, becausethe employer, a non-public subsidiary, was not

theory or when the corporate veil may be pierced. 9/

We believe that Section 806 embodies a Congressional determination that employees of both parents and consolidated subsidiaries should be protected regardless of whether the requirements of agency happen to be met by the subsidiary in a particular case, or whether there is some other basis for holding the parent liable. We therefore believe that the agency cases rest on an underinclusive reading of the statute.10/

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an agent of the parent firms).

9/ *Dawkins v. Shell Chemical, LP*, 2005-SOX-41, slip. op. at 4-5 (May 16, 2005) (holding the public parent not liable to an employee of a non-public subsidiary because the complainant did not justify piercing the corporate veil); *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27, slip. op. at 60-61 (April 30, 2004) (holding the public parent liable under Section 806 under the alter ego theory).

10/ If the position that reporting company includes any consolidated subsidiary is rejected by the Board, the agency theory would be available to impose liability. In that even, the Board should look to the Commission's *amicus* brief in the Fifth Circuit in *Klopfenstein v. Administrative Review Board*, Case No. 10-60144 (5th Cir.). In that brief the Commission emphasized that Section 806 is not limited to agents who act on behalf of the public company in retaliating against a whistleblower.

C. The Use of the "Integrated Enterprise Test" to Determine Liability of Public Parent Corporations to Employees of Non-Public Subsidiaries is Erroneous.

Still other decisions have used an "integrated enterprise test" in determining when the employees of a subsidiary are covered by Section 806. *See Carciero v. Sodexho Alliance, SA*, ALJ No. 2008-SOX-12 (Oct. 5, 2009); *Merten v. Berkshire Hathaway, Inc.*, ALJ No. 2008-SOX-040 (Oct. 21, 2008). The integrated enterprise test, which was developed by the National Labor Relations Board, is widely used in federal employment law cases to determine when two or more entities are integrated enterprises such that they should be considered one enterprise for the purpose of meeting the minimum threshold requirements of various labor laws, including the minimum dollar amount in interstate commerce for application of the National Labor Relations Act and the minimum number of employees for application of Title VII, the Americans with Disabilities Act ("ADA"), and the Medical Leave Act.

Under the integrated enterprise test, an employee of a subsidiary would only be covered by the whistleblower protection provision after the application of a four-factor test to determine whether the subsidiary and its parent should be viewed as one integrated enterprise. The four factors considered under the integrated enterprise test are: (1) the interrelation of operations; (2) common management; (3)

centralized control of labor relations; and (4) common ownership or financial control. *Swallows v. Barnes & Noble Book Stores, Inc.,* 128 F.3d 990, 994 (6th Cir. 1997); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997). Thus, in *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 816 (9th Cir. 2002), a parent corporation with six employees was held to be an integrated enterprise with a subsidiary such that the parent corporation met the fifty employee minimum threshold for application of Title VII.

In an *amicus* brief previously filed before the Board in this case, the Solicitor of the Department of Labor, on behalf of the Assistant Secretary of Labor for Occupational Safety and Health, urged the Board to apply the integrated enterprize test to determine whether employees of the subsidiaries of reporting companies are protected under Section 806. *See* Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae, Johnson v. Siemens Building Technologies, Ins., and Siemens AG.*, ARB Case No. 08-032 (Mar. 14, 2008).

The Commission agrees with one of the underlying premises of the cases applying the integrated enterprise test to Section 806, namely that the scope of coverage of the statute should be determined based on the language, structure and purposes of the particular provision, not on the mechanical application of corporate law principles. However, the integrated enterprise test was developed to solve

problems arising under labor law, not in the context of securities regulation and the rules governing consolidated financial reporting, and it consequently does not address the factors relevant to determining whether a reporting company includes its consolidated subsidiaries. The interpretation offered above more accurately reflects Congress's intent with respect to SOX.

CONCLUSION

For the forgoing reasons, the Commission urges the Board to hold that reporting companies under Section 806 include not only the parent, but also consolidated subsidiaries, so that employees of those subsidiaries are covered by the protections extended to whistleblowers under Section 806 of SOX.

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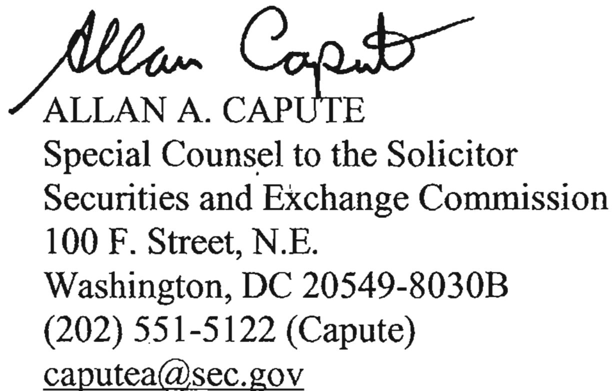

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ADMINISTRATIVE REVIEW BOARD
DEPARTMENT OF LABOR

No. 08-032

In the matter of
CARRI S. JOHNSON,

Complainant,

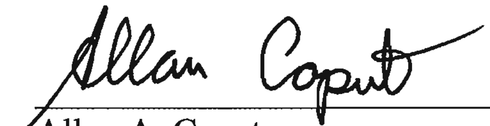
v.

SIEMENS BUILDING TECHNOLOGIES, INC. and
SIEMENS AG,

Respondents.

CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on the 16th day of July, 2010, I caused to be served 2 copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, to be mailed by United Parcel Service air mail to each of the parties, counsel, and corporate representatives listed on the attached Service List supplied by the Administrative Review Board.



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