05-2404

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN SCOTT BECHTEL,
WILLIE JACQUES, JR.,

Plaintiffs-Appellees,

UNITED STATES DEPARTMENT OF LABOR,

Intervenor-Plaintiff-Appellee,

v.

COMPETITIVE TECHNOLOGIES, INC.,

Defendant-Appellant

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

PAGE

Miscellaneous:

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STATEMENT OF JURISDICTION

This case arises under section 806, the whistleblower protection provisions, of the Sarbanes-Oxley Corporate and Criminal Fraud Accountability Act of 2002 ("Sarbanes-Oxley" or "the Act"), Pub. L. 107-204, 116 Stat. 802 (July 30, 2002). Section 806, codified at 18 U.S.C. 1514A, authorizes the Secretary of Labor ("the Secretary") to investigate whistleblower complaints and, if she finds reasonable cause to believe that a violation has occurred, to issue findings and an

order requiring preliminary reinstatement. See 18 U.S.C. 1514A(b)(2)(A) (incorporating 49 U.S.C. 42121(b)(2)(A)). Section 806 also authorizes enforcement of the Secretary's preliminary reinstatement order in district court by either the Secretary or the person on whose behalf the order was issued. See 18 U.S.C. 1514A(b)(2)(A) (incorporating 49 U.S.C. 42121(b)(5) and (b)(6)). On February 2, 2005, the Secretary issued a preliminary reinstatement order under section 806 requiring Defendant Competitive Technologies, Inc. ("CTI") to immediately reinstate Plaintiffs John Scott Bechtel and Willie Jacques, Jr. J.A. 129-31.

On May 13, 2005, the United States District Court for the District of Connecticut granted Plaintiffs Bechtel and Jacques, and Intervenor-Plaintiff, the United States Department of Labor, a preliminary injunction requiring CTI to comply with the Secretary's preliminary reinstatement order. See J.A. 174-82; Bechtel v. Competitive Technologies, Inc., 369 F. Supp. 2d 233, 237 (D. Conn. 2005). CTI filed a timely appeal. This Court has jurisdiction under 28 U.S.C. 1292(a)(1), which allows interlocutory appeals from district court orders granting injunctions.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that it has jurisdiction under section 806 of Sarbanes-Oxley to enforce a preliminary reinstatement order issued by the Secretary.

2. Whether the district court abused its discretion in granting a preliminary injunction requiring CTI to comply with the Secretary's preliminary reinstatement order issued under section 806 of Sarbanes-Oxley.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Sarbanes-Oxley Act was enacted in the wake of the Enron and WorldCom scandals to restore investor confidence in the nation's financial markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. See Procedures for Handling Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act; Final Rule, 69 Fed. Reg. 52104 (Aug. 24, 2004). To further these purposes, section 806 of the Act provides whistleblower protection to employees of publicly traded companies who report corporate fraud.[1] See 148

[1] Section 806 prohibits publicly traded companies from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing] or in any other manner discriminat[ing] against an employee in the terms and conditions of employment" because of

Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies").

Section 806 of the Act, together with the Secretary's implementing regulations, provide that an employee who believes that he or she has been subject to retaliation for lawful whistleblowing may file a complaint with the Secretary. See 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. Proceedings under section 806 are governed by the rules and procedures, as well as the burdens of proof, of the aviation safety whistleblower provisions contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121. See 18 U.S.C. 1514A(b)(2)(A) and (b)(2)(C).[2]

Upon the filing of a complaint, the Secretary, through the Occupational Safety and Health Administration ("OSHA"), will notify the employer of the allegations contained in the

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any protected whistleblowing activity. 18 U.S.C. 1514A(a). Activities protected under the Act include providing to "a person with supervisory authority over the employee" (among others) information that an employee reasonably believes constitutes a violation of federal mail, wire, bank or securities fraud statutes (18 U.S.C. 1341, 1343, 1344 and 1348), or a violation of any securities rule or other provision of federal law relating to fraud against shareholders. See 18 U.S.C. 1514A(a)(1) and (a)(2).

[2] For ease of reference and to eliminate recurrent cross-referencing, we refer throughout this brief to 49 U.S.C. 42121, although this is a Sarbanes-Oxley case.

complaint and the substance of the evidence supporting the complaint. See 49 U.S.C. 42121(b)(1); 29 C.F.R. 1980.104(a).[3] OSHA then conducts an investigation to determine whether reasonable cause exists to believe that a violation has occurred. See 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.104(e). If, on the basis of the information gathered, OSHA has reason to believe that a violation has occurred, it will issue findings and a preliminary order providing the relief prescribed under the statute, including reinstatement of the employee. See 49 U.S.C. 42121(b)(2)(A); 18 U.S.C. 1514A(c)(2)(A); and 29 C.F.R. 1980.105(a).

Either the employer or the complainant may file objections to OSHA's findings and preliminary order within 30 days and request a hearing before a Department of Labor administrative law judge ("ALJ"). See 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106(b)(1). However, the filing of such objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. 42121(b)(1)(A). Section 806's implementing regulations similarly provide that "[t]he portion of the preliminary order requiring reinstatement will be

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[3] The Secretary has delegated responsibility for receiving and investigating whistleblower complaints under Sarbanes-Oxley to the Assistant Secretary for Occupational Safety and Health ("OSHA"). See Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002). References to the Secretary or Assistant Secretary for OSHA are used interchangeably throughout this brief.

effective immediately upon the [employer's] receipt of the findings and preliminary order, regardless of any objections to the order." 29 C.F.R. 1980.106(b)(1).

B. Procedural History and Statement of Facts

Defendant CTI is covered under the whistleblower provisions of Sarbanes-Oxley because it is a company with "a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))." 18 U.S.C. 1514A(a). Plaintiffs Bechtel and Jacques were vice presidents of CTI employed to obtain licenses for the company. In September 2003, after they were fired by John Nano, CTI's Chief Executive Officer, they filed complaints with the Secretary under section 806 of Sarbanes-Oxley alleging that their discharges were in retaliation for making internal complaints that certain oral agreements between CTI and themselves, as well as between CTI and a number of consultants, should be included in reports to the Securities and Exchange Commission ("SEC"). See J.A. 129-30. Specifically, Bechtel and Jacques alleged that these internal complaints were raised at three quarterly disclosure meetings held to review the company's Form 10-Q reports that had to be filed with the SEC. Expressing concern that without the information about the oral agreements, the 10-Q reports would be

inaccurate, Bechtel and Jacques initially refused to sign the reports. Although they agreed to sign the reports after Nano explained that their concerns would be addressed by the next disclosure meeting, relations with Nano deteriorated and they were fired soon thereafter. See Id.

On June 24, 2004, pursuant to 29 C.F.R. 1980.104(e), OSHA informed CTI that an initial investigation had found that reasonable cause existed to believe that CTI violated Sarbanes-Oxley when it discharged Bechtel and Jacques.[4] CTI was offered the opportunity to present additional contrary evidence. J.A. 130. In response, CTI submitted documentary evidence to OSHA on July 14, 2004 and November 15, 2004. Id.

On February 2, 2005, after reviewing additional information from CTI, OSHA issued the Secretary's findings that reasonable cause existed to believe that CTI had violated the Act. J.A. 129-31. The Secretary rejected as pretextual CTI's contentions that Bechtel and Jacques were fired for poor performance and

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[4] 29 C.F.R. 1980.104(e) provides in pertinent part:

> Prior to the issuance of findings and a preliminary order . . ., if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the [employer] has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the [employer] to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation.

economic reasons. J.A. 130. CTI was ordered to reinstate Bechtel and Jacques and to pay them back wages and compensatory damages. J.A. 131.

On February 11, 2005, CTI objected to the Secretary's findings and requested a hearing before an ALJ. J.A. 133; see 29 C.F.R. 1980.106(a). Approximately three weeks later, CTI moved the ALJ for a stay of the Secretary's preliminary reinstatement order. J.A. 133.[5] On March 29, 2005, the ALJ denied the motion and ordered CTI to immediately reinstate Bechtel and Jacques. J.A. 141. Two weeks later, on April 11, 2005, instead of reinstating Bechtel and Jacques, CTI moved the ALJ to reconsider her order. J.A. 43. The ALJ denied CTI's motion to reconsider on April 25, 2005. Id.

The ALJ held a hearing on the merits from May 17 through May 20, 2005. At the close of the evidence, CTI moved for judgment in its favor. Before the ALJ rendered a decision on the motion, CTI and Jacques informed the ALJ that they had

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[5] The regulations permit the employer to move "the Office of Administrative Law Judges for a stay of [the Secretary's] preliminary order of reinstatement." 29 C.F.R. 1980.106(b)(1). The preamble to the regulations explains that a stay of a preliminary reinstatement order is appropriate only in the exceptional case. See 69 Fed. Reg. 52104, 52109 (Aug. 24, 2004).

entered into a "Memorandum of Understanding" to comprehensively settle Jacques claims against the company.[6]

With respect to Bechtel, on June 10, 2005, the ALJ denied CTI's motion for judgment in its favor having found "sufficient evidence to conclude that Complainant engaged in protected activity, and experienced an adverse employment action, giving rise to the jurisdiction of the Act." Bechtel v. Competitive Technologies, Inc., 2005-SOX-33 (June 10, 2005)(attached as Addendum). Although the ALJ also found that CTI had articulated non-discriminatory, legitimate reasons for terminating Bechtel's employment, she determined that she could not render a judgment in CTI's favor because of "inconsistencies in the record regarding management's knowledge of [Bechtel's] protected activity." Id. In the interest of expediting her consideration of the case, the ALJ informed the parties that the information in the record was sufficient to enable her to render a decision without the submission of post-hearing briefs. Id. CTI and Bechtel nevertheless both indicated a desire to submit briefs, which they filed on July 15, 2005.

In the meantime, on April 18, 2005, while CTI's motion for reconsideration of its stay request was pending before the ALJ,

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[6] On June 14, 2005, the ALJ approved this settlement and dismissed Jacques's claims with prejudice. See Jacques v. Competitive Technologies, Inc., 2005-SOX-34, available at http://www.oalj.dol.gov/.

Bechtel and Jacques brought an action in district court seeking to enforce the Secretary's preliminary reinstatement order. J.A. 8-12. The Secretary, also seeking enforcement of her order, intervened on April 26, 2005. J.A. 124-128.

On May 13, 2005, the district court granted the preliminary injunction and ordered CTI to immediately reinstate Bechtel and Jacques to their former positions and to pay them back wages due from the date of the Secretary's February 2, 2005 preliminary reinstatement order. J.A. 182; Bechtel, 369 F. Supp. 2d at 237. On May 16, 2005, CTI appealed the preliminary injunction to this Court and simultaneously moved for reconsideration in district court. CTI also moved the district court for a stay of its order or, alternatively, for a modification of its ruling to allow "economic" rather than actual reinstatement. J.A. 225-26. On May 23, 2005, the court reconsidered its decision and issued an order denying all of CTI's requested relief. J.A. 264.[7]

C. The District Court's Decision

In granting the preliminary injunction, the district court concluded that it had jurisdiction to enforce the Secretary's preliminary reinstatement order issued under section 806. Rejecting CTI's argument that it lacked authority to enforce the

[7] After the district court issued its decision on reconsideration, CTI moved this Court for a stay pending its appeal of the preliminary injunction. This Court denied the stay on July 13, 2005.

Secretary's order because the order was not final, the court stated that "the statute explicitly authorizes jurisdiction in this court to enforce a preliminary order as if it were a final order," and that any contrary conclusion "would negate the plain words of the statute that preliminary orders of reinstatement may not be stayed pending an appeal of the Secretary's order." J.A. 180; Bechtel, 369 F. Supp. 2d at 236.

The court also rejected CTI's contention that Bechtel, Jacques, and the Secretary had failed to establish the necessary elements for injunctive relief. The court concluded that, under section 806, "the Secretary of Labor and not the court makes the determination of whether an order of reinstatement is appropriate" and that Bechtel and Jacques were entitled to an injunction "based exclusively on the Secretary's findings." J.A. 180-81; Bechtel, 369 F. Supp. 2d at 236.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that it had authority to enforce the Secretary's preliminary reinstatement order issued under section 806, the whistleblower provisions, of Sarbanes-Oxley. The plain language of AIR21 section 42121(b), incorporated by reference into Sarbanes-Oxley, grants district courts jurisdiction to enforce preliminary reinstatement orders. Moreover, the structure and legislative history of 49 U.S.C. 42121(b) demonstrate that Congress modeled the whistleblower

provisions of AIR21 on those of the Surface Transportation Assistance Act ("STAA"), which grants district courts jurisdiction to enforce preliminary reinstatement orders. See 49 U.S.C. 31105. A contrary reading of the statute would negate Congress's intent that preliminary reinstatement orders issued under AIR21 and Sarbanes-Oxley not be stayed during the administrative adjudication process.

The court also correctly found that CTI received due process during OSHA's investigation and the subsequent post-deprivation review process. In Brock v. Roadway Express, 481 U.S. 252, 264 (1987) (plurality opinion), the Supreme Court held, under STAA's similar reinstatement scheme, that due process is satisfied if prior to ordering preliminary reinstatement, the Secretary provides the employer with "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." The Secretary complied with Roadway Express's requirements in this case.

Finally, the district court correctly concluded that the Secretary and Bechtel were entitled to an injunction without establishing the traditional injunction factors. The district court correctly interpreted Roadway Express as allowing enforcement of the Secretary's order so long as it complied with

due process standards. Sarbanes-Oxley's and AIR21's requirements that orders of preliminary reinstatement be issued upon OSHA's finding of "reasonable cause," and not be stayed during the administrative process, support enforcement of the Secretary's preliminary reinstatement order without a searching inquiry into the merits of the underlying whistleblower claim. The statutes provide instead for adjudication of the merits of the whistleblower claim in administrative proceedings appealable to this Court. Cf. Commodity Futures Trading Commission v. British American Commodity Options, 560 F.2d 135 (2d Cir. 1977).

STATEMENT OF THE STANDARD OF REVIEW

The issue of whether the district court has jurisdiction to enforce the Secretary's preliminary reinstatement order under the whistleblower provisions of Sarbanes-Oxley presents a question of statutory interpretation subject to de novo review. See United States v. Gayle, 342 F.3d 89, 91 (2d Cir. 2004). The district court's decision to grant a preliminary injunction should be reviewed under the abuse of discretion standard, which includes de novo review of legal issues. See Green Party of New York State v. New York State Board of Elections, 389 F.3d 411, 418 (2d Cir. 2004) ("[W]e review a district court's grant of a preliminary injunction for abuse of discretion, overturning its decision only if it rested on an error of law or on a clearly erroneous factual finding.").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT HAD JURISDICTION UNDER SECTION 806 OF SARBANES-OXLEY TO ENFORCE THE SECRETARY'S PRELIMINARY REINSTATEMENT ORDER

A. The Plain Language of the Statute Grants the District Court Jurisdiction to Enforce Preliminary Reinstatement Orders.

The language of 49 U.S.C. 42121(b) plainly provides the court with jurisdiction to enforce the Secretary's preliminary reinstatement order issued under Sarbanes-Oxley's whistleblower provisions. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 236 (1986) ("The starting point in statutory construction is, of course, the language of the statute itself.") (citation omitted). As the district court stated, "the statute explicitly authorizes jurisdiction in this court to enforce a preliminary [reinstatement] order as if it were a final order. See 49 U.S.C. § 42121(b)(2) ('the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B) [i.e., the section governing final orders.]')." Bechtel, 396 F. Supp. 2d at 236. See also 49 U.S.C. 42121(b)(5) and (b)(6).[8]

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[8] 49 U.S.C. 42121(b)(5) states:

> Whenever any person has failed to comply with an order issued under paragraph [b](3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to

Specifically, subsection (b)(3)(B)(ii) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. See 49 U.S.C. 42121(b)(3)(B)(ii). Subsection (b)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed under subsection (b)(3), including reinstatement.[9] This subsection also declares that any (b)(3)(B) relief of reinstatement contained in a preliminary order is not

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> grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

Subsection (b)(6) similarly states:

> A person on whose behalf an order was issued under paragraph [b](3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

[9] 49 U.S.C. 42121(b)(2)(A) (emphases added) states, in pertinent part:

> If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). 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.

stayed upon the filing of objections. See 49 U.S.C. 42121(b)(2)(A). Thus, under the statute, enforceable orders issued under subsection (b)(3) include preliminary orders that contain the relief of reinstatement prescribed by subsection (b)(3)(B).

B. Any Other Interpretation of AIR21 and Sarbanes-Oxley Would Undermine the Goals of the Statutes and Negate Congressional Intent.

Notwithstanding this plain reading of the statute, CTI contends that district courts only have jurisdiction under 49 U.S.C. 42121(b) to enforce final orders issued by the Secretary. CTI's Brief ("Br.") 13-21. This argument lacks merit. Contrary to CTI's contentions, reading 49 U.S.C. 42121(b) as providing district courts with authority to enforce preliminary reinstatement orders comports with long-settled cannons of statutory construction and fulfills Congress's intent that preliminary reinstatement not be stayed during the pendency of an administrative appeal.

CTI focuses only on the references in subsections (b)(5) and (b)(6) to orders issued under "paragraph [b](3)." In doing so, CTI ignores the rule of statutory construction that exhorts courts "to read a section of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy.'" United State v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000); see Gayle, 342 F.3d

at 93, citing Saks v. Franklin Covey, 316 F.3d 337, 345 (2d Cir. 2003)("The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute"); United States v. Kennedy, 233 F.3d 157, 162 (2d Cir. 2000)(in interpreting a statute, courts are called upon to "construct an interpretation that comports with its primary purpose. . ."). In addition, courts must "give effect, if possible, to every clause and word of a statute." Williams v. Taylor, 529 U.S. 362, 404 (2000); see Nicolau v. Horizon Media, Inc., 402 F.3d 325, 329 (2d Cir. 2005). A reading of section 42121(b) that does not allow for the enforcement of preliminary reinstatement orders in district court is inconsistent with the legislative intent that these orders be effective immediately upon issuance and, as the district court found, would negate the plain words of the statute that preliminary orders of reinstatement are not automatically stayed pending an appeal of the Secretary's order. See J.A. 180; Bechtel, 369 F. Supp. 2d at 236.

This Court came to the same conclusion in interpreting a similar whistleblower provision under the Surface Transportation Assistance Act ("STAA"). Martin v. Yellow Freight Systems, Inc., 983 F.2d 1201, 1203 (2d Cir. 1993), involved an interim order of reinstatement issued by an ALJ after an evidentiary hearing. Yellow Freight argued that the Secretary could not enforce the

interim reinstatement order in district court because the STAA section providing the district court jurisdiction only referred to preliminary orders (those issued after an investigation) and final orders (those reviewed by the Secretary on appeal from an ALJ). Id.; see 49 U.S.C. 31105(b) and (d).[10] This Court held, however, that the ALJ's order was enforceable, finding it reasonable and anticipated under the statute that an ALJ vested with the authority of the Secretary would issue orders of reinstatement. See Id. Moreover, the Court noted "enforcement

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[10] Using language strikingly similar to that found in AIR21, 49 U.S.C. 42121(b)(2)(A), the Surface Transportation Assistance Act ("STAA") provides in pertinent part:

> [T]he Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection [which includes reinstatement].

49 U.S.C. 31105(b)(2)(A).

STAA also provides that the complainant, the employer, or both may file objections to the Secretary's findings and preliminary order within 30 days, but, as in AIR21, "The filing of objections does not stay a reinstatement ordered in the preliminary order." 49 U.S.C. 31105(b)(2)(B) (emphasis added). Under 49 U.S.C. 31105(d):

> If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

of an ALJ's reinstatement order is consistent with congressional intent to protect whistle-blowers, and . . . failure to enforce such an order undermines the goal of the legislation." Id. Similarly, here, it is reasonable and anticipated that, facing an employer's refusal to comply with a preliminary reinstatement order under AIR21 or Sarbanes-Oxley, the Secretary or the complainant can seek to enforce the preliminary reinstatement order in district court pursuant to 49 U.S.C. 42121(b)(5) or (b)(6). A contrary interpretation of the whistleblower provisions in AIR21 and Sarbanes-Oxley would undermine the statutes' goals and negate congressional intent that preliminary reinstatement not be stayed simply by the filing of objections.

That Congress intended preliminary reinstatement orders issued under AIR21's whistleblower provisions to be enforceable also is evident from AIR21's legislative history, which reveals that 49 U.S.C. 42121(b) was modeled on the whistleblower provisions of STAA:

> There are currently over a dozen Federal laws protecting whistleblowers including laws protecting nuclear plant workers, miners, truckers, and farm laborers when acting as whistleblowers. For example, section 2305 of the Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2305, prohibits retaliation for filing a complaint or instituting any proceeding relating to violations of motor vehicle safety rules or refusing to operate an unsafe vehicle. There are no laws specifically designed to protect airline employee whistleblowers.

H.R. Rep. 106-167(I), 106th Cong., 1st Sess. 1999, 1999 WL 355951, *85 (1999) (emphasis added).

CTI contends (Br. 21-22) that because this language refers to several of the whistleblower statutes administered and enforced by the Secretary, not all of which contain preliminary reinstatement authority, the legislative history does not illustrate congressional intent to provide district courts with jurisdiction to enforce preliminary reinstatement orders. This argument fails to acknowledge, however, that, when AIR21 was passed, Congress specifically referred to STAA as an example of an existing whisleblower protection statute. Congress undoubtedly was aware that STAA alone, among the many whistleblower statutes administered by the Department of Labor, authorized the Secretary to issue orders of preliminary reinstatement upon a finding of reasonable cause that are not stayed by the filing of objections. The inclusion of the very similar preliminary reinstatement provisions in AIR21 indicates that Congress intended AIR21 to provide aviation employees with the same protections that it previously had provided to employees operating motor vehicles in STAA.

Based on the plain language of 49 U.S.C. 42121(b) and its legislative history, the Secretary has interpreted section 42121(b) as providing district courts with the authority to

enforce preliminary reinstatement orders. The regulations implementing section 806 provide:

> Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

29 C.F.R. 1980.113. The regulation reflects the Secretary's careful consideration of the language and context of the statute. As Congress chose to vest the Secretary with authority to administer the whistleblower provisions under 49 U.S.C. 42121(b), the Secretary's interpretation of those provisions is entitled to deference. See United States v. Mead Corp., 533 U.S. 218, 234-35 (2001); Skidmore v. Swift & Co., 323 U.S. 140 (1944). See also Yellow Freight, 983 F.2d at 1203 (upholding the district court's authority to enforce an ALJ's reinstatement order as provided for in the regulations).

Finally, CTI relies (Br. 17) on the provision in section 806 of Sarbanes-Oxley that permits a complainant to bring a de novo action in district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and the delay is not due to the bad faith of the complainant. See 18 U.S.C. 1514A(b)(1)(B). CTI alleges that this provision establishes that Congress did not intend preliminary reinstatement orders issued under Sarbanes-Oxley to be

enforceable in district court, but rather intended complainants to bring de novo actions in district court as a remedy for an employer's failure to comply with a preliminary reinstatement order.

CTI's reliance on this provision is entirely misplaced. CTI ignores the fact that the procedural provisions of AIR21, which are adopted wholesale by section 806 of Sarbanes-Oxley, do not include a provision allowing complainants to file de novo actions in district court. Thus, when enacting the enforcement provisions of AIR21, which are at issue here, Congress could not have intended complainants to bring de novo actions in district court in lieu of seeking enforcement of a preliminary reinstatement order. Indeed, Congress most likely included this provision in Sarbanes-Oxley to provide whistleblowers who report corporate fraud with an additional remedy.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN COMPELLING CTI'S COMPLIANCE WITH THE SECRETARY'S PRELIMINARY REINSTATEMENT ORDER

CTI argues (Br. 24-36) that in granting a preliminary injunction to enforce the Secretary's reinstatement order, the district court abused its discretion by not determining that CTI was denied due process during both OSHA's investigation and the post-deprivation review process, and by not requiring Plaintiffs to meet the necessary elements for injunctive relief. As discussed below, neither argument is persuasive.

A. The Secretary's Investigative and Adjudicatory Proceedings Afforded CTI its Full Due Process Rights.

The district court correctly rejected CTI's argument that it was denied due process during OSHA's investigation. See J.A. 264; Bechtel, 369 F. Supp. 2d at 237. CTI's allegation in this regard rests on its assertion (Br. 26-28) that it received summaries of Bechtel's and Jacques's statements provided to OSHA during the investigation rather than the complete and unredacted copies that it requested. However, due process does not require that the Secretary provide CTI with actual copies of witness statements. As the Supreme Court held in Brock v. Roadway Express, 481 U.S. 252, 264 (1987) (plurality opinion), involving STAA's similar preliminary reinstatement provisions, due process only requires "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses."[11] Here, CTI received the process that it was due.

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[11] In so holding, the Supreme Court recognized that:

> The statute reflects a careful balancing of the relative interests of Government, employee, and employer. It evidences a legislative determination that the preliminary investigation and finding of reasonable cause by the Secretary, if followed "expeditiously" by a hearing on the record at the employer's request, provide effective protection to the employee and ensure fair consideration of the employer's interest . . . .

OSHA notified CTI about Bechtel's and Jacques's allegations when it received their complaints. On June 24, 2004, OSHA provided CTI with the substance of the evidence that it had collected and informed the company that, based on its initial investigation, there was reasonable cause to believe that CTI had violated section 806 when it terminated the employment of Bechtel and Jacques. J.A. 130. OSHA offered CTI an opportunity to present additional contrary evidence and to meet with the OSHA investigator.[12] Id. CTI submitted additional evidence in response to OSHA's June 24, 2004 letter and in response to another letter from OSHA dated November 3, 2004. Id. OSHA considered this evidence and found it unpersuasive, as explained in its February 2, 2005 findings. Id. Accordingly, CTI's argument that it was denied due process as a result of OSHA's investigation has no merit and was properly rejected by the district court.

Id. at 259.

[12] CTI does not contest that even before providing CTI with this notice and opportunity to present additional evidence, the OSHA investigator went to CTI's offices for planned interviews with management officials. At that time, the investigator was informed that John Nano, CTI's CEO and the individual responsible for firing Bechtel and Jacques, was not going to be available for an interview. After CTI received OSHA's initial findings and was given an opportunity to respond further, Nano still did not make himself available for an interview, but instead submitted an affidavit that the investigator did not find persuasive. (See J.A. 130). Only then did OSHA issue findings and an order of preliminary reinstatement.

CTI also makes much of the Secretary's regulation at 29 C.F.R. 1980.104(e), which expresses a preference that during an investigation OSHA provide employers with actual witness statements, rather than summaries of those statements. Br. 27-29. The preamble to 29 C.F.R. 1980.104 clarifies, however, that the purpose of this regulation is to ensure that employers are provided the procedural protections they are due under Roadway Express, i.e., the right to be notified of the substance of the evidence. See 69 Fed. Reg. 52108. Because OSHA provided CTI with the the substance of Bechtel's and Jacques's statements, it was provided with the necessary procedural protections. See Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 10 (1st Cir. 2003) (Due Process Clause does not incorporate the particular procedural structures promulgated by state and local government agencies); cf. New Albany Concrete Serv., Inc. v. Herman, 2000 WL 33975408, *6 (W.D.Ky. 2000)(in action to enforce a STAA preliminary reinstatement order, employer does not show constitutional denial of due process by Secretary's failure to follow statutory time limits for administrative review).

In addition to arguing that it was denied due process during OSHA's investigation, CTI contends that the Secretary's procedures for assuring that it obtains an expeditious post-deprivation review are insufficient. Br. 29-33. In this regard, CTI cites to the Supreme Court's statement in Roadway

Express that "[a]t some point, delay in holding postreinstatement evidentiary hearings may become a constitutional violation." 481 U.S. at 267. The facts establish, however, that to the extent that CTI has suffered any deprivation, the Secretary's procedures have provided CTI with a prompt, post-deprivation evidentiary hearing.

Had CTI immediately complied with the Secretary's preliminary reinstatement order, the company would have become subject to a temporary deprivation on February 2, 2005, when the Secretary ordered it to reinstate Bechtel.[13] Without complying with the Secretary's order, CTI objected to the Secretary's findings on February 11, 2005, and moved to stay the reinstatement order on March 3, 2005. J.A. 133. The ALJ considered CTI's concerns but nevertheless denied CTI's stay request on March 29, 2005. J.A. 132. On April 11, 2005, without having reinstated Bechtel and Jacques, CTI requested

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[13] However, CTI did not reinstate Bechtel for approximately five months after the Secretary ordered preliminary reinstatement. Thus, CTI suffered no temporary deprivation during those months. By the time CTI did reinstate Bechtel (after this Court denied its stay request) a hearing already had been held. See Roadway Express, 481 U.S. at 268 (declining to consider post-deprivation delay claim because, inter alia, due to the district court's injunction, the preliminary reinstatement order never became effective).

Moreover, in complaining about the length of the post-deprivation review process, CTI curiously includes the length of the Secretary's investigation. However, under Roadway Express, CTI clearly was not deprived of any property interest before the Secretary ordered the company to reinstate Bechtel.

reconsideration of the ALJ's order, this time presenting the ALJ with excerpts of deposition testimony taken during the on-going discovery proceedings. Two weeks later, the ALJ again denied CTI's stay request. J.A. 43.

From May 17 through May 20, 2005, the ALJ held an evidentiary hearing. This hearing took place only 95 days after CTI filed its objections to the Secretary's findings and preliminary reinstatement order. At the close of the evidence, CTI moved for judgment in its favor. On June 10, 2005, or in less than 30 days, the ALJ issued a decision denying CTI's motion, having found "sufficient evidence to conclude that [Bechtel] engaged in protected activity, and experienced an adverse employment action, giving rise to the jurisdiction of the Act." Bechtel v. Competitive Technologies, Inc., 2005-SOX-33 (June 10, 2005). Although the ALJ also found that CTI had articulated non-discriminatory, legitimate reasons for terminating Bechtel's employment, she determined that she could not render a judgment in CTI's favor because of "inconsistencies in the record regarding management's knowledge of [Bechtel's] protected activity." Id. The ALJ further stated that she had enough information to render a final ruling on the merits of Bechtel's whistleblower claim and suggested that, in the interest of expediting the resolution of the case, the parties forego filing post-hearing briefs. CTI nevertheless opted to

file a post-hearing brief (as did Bechtel), which it submitted on July 15, 2005. The ALJ's final decision on the merits is likely to be issued in the near future.

In sum, the facts illustrate that CTI's due process rights have not been violated by any delay in the Secretary's post-deprivation review process. To the contrary, CTI has been afforded expeditious review. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985) (holding a nine-month delay in adjudicating plaintiff's termination did not violate due process); Isaacs v. Bowen, 865 F.2d 468, 477 (2d Cir. 1989) (giving examples of delays ranging from nine months to two years that did not violate due process). See also Kraebel v. New York City Dep't of Housing Preservation and Dev., 959 F.2d 395, 405 (2d Cir. 1992) ("[N]o bright-line rule exists for determining when a delay is so burdensome as to become unconstitutional").

B. The District Court Correctly Determined That Plaintiffs Were Entitled to Injunctive Relief Without Demonstrating the Traditional Elements for Such Relief.

The Secretary is entitled to enforcement of her preliminary reinstatement order without establishing the traditional factors for preliminary injunctive relief. Generally, a plaintiff seeking a preliminary injunction must show "(1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them

a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Federal Express Corp. v. Federal Espresso Corp., 201 F.3d 168, 173 (2d Cir. 2000). The district court correctly held here, however, that the Secretary is entitled to enforcement of her reinstatement order without meeting these factors because "[t]he Sarbanes-Oxley Act makes clear that the Secretary of Labor and not the court makes the determination of whether an order of reinstatement is appropriate." J.A. 181; Bechtel, 369 F. Supp. 2d at 236.

The district court relied on Roadway Express, 481 U.S. at 259, in which "the Supreme Court observed that Congress could invest the Secretary of Labor with the authority to order reinstatement on the basis of an investigation, provided that the investigation met minimum due process standards that are not at issue in this case." See J.A. 181; Bechtel, 369 F. Supp. 2d at 237. Thus, in deciding whether to enforce the preliminary reinstatement order, the district court correctly examined whether the Secretary had issued a preliminary reinstatement order, whether the reinstatement order comported with the requirements of due process, and whether the employer had complied with the reinstatement order.[14]

[14] CTI alleges (Br. 35-36) that the district court did not review the Secretary's preliminary reinstatement order for

The district court's decision is in keeping with this Court's precedent. In Commodity Futures Trading Commission v. British American Commodity Options, 560 F.2d 135 (2d Cir. 1977), the Court held that the Commodities Futures Trading Commission did not need to establish the traditional injunction factors prior to enjoining British American, a "commodities trading advisor," from operating without a registration pending administrative review of the agency's decision denying British American's registration application. The fact that the statute vested the Commission with authority to rule on registration applications played a key role in the Court's decision:

> As we see it, the material question to be answered in this case is not whether the Commission was justified in challenging British American's fitness for registration, or whether it had adequate grounds for denying registration altogether. Adjudication of those issues is clearly vested in the Commission. §§ 6n(7) and 12a(2). The material question here is simply whether the Commission made a prima facie showing that British American was violating, and likely to continue violating, the registration requirements of § 6m by using the mails or other means or instrumentalities of interstate commerce in connection with its business as a commodity trading advisor while unregistered.

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compliance with due process. We believe that the district court appropriately reviewed the Secretary's preliminary reinstatement order for compliance with due process in this case and concluded that CTI received the process it was due. See J.A. 181; Bechtel, 369 F. Supp. 2d at 237 (stating that minimum due process standards "are not at issue in this case"); see also J.A. 264 (the district court granted reconsideration in response to CTI's arguments that the court had not sufficiently evaluated the Secretary's compliance with due process, but ultimately denied relief).

British American Commodity Options, 560 F.2d at 142.

This Court also affirmed the district court's decision in Martin v. Yellow Freight Sys., Inc., 793 F. Supp. 461 (S.D.N.Y. 1992), aff'd, 983 F.2d 1201 (2d Cir. 1993). As discussed above, Yellow Freight was an action brought by the Secretary to enforce an ALJ's interim reinstatement order issued under STAA. The district court held that stringent review of the facts of the whistleblower claim was not appropriate because "this court may not undertake the review of the record that Congress assigned to the circuit courts." 793 F. Supp. at 473. The district court therefore concluded "that the task of this court is not to review the evidence but to simply ascertain whether the procedures followed by the Secretary in issuing the ALJ order satisfied due process." Id.

As in Yellow Freight, the whistleblower provisions of AIR21, incorporated into section 806 of Sarbanes-Oxley, support the conclusion that the district court should enforce the Secretary's order without a searching review of the underlying whistleblower claim. 49 U.S.C. 42121(b)(2)(A) provides that preliminary reinstatement orders shall be issued upon OSHA's finding of "reasonable cause" and shall not be stayed during the administrative process. In addition, like the similar reinstatement scheme under STAA at issue in Yellow Freight, AIR21 clearly contemplates that the Secretary will resolve the

merits of a whistleblower's claim after a hearing, with ultimate review by the courts of appeals. See 49 U.S.C. 42121(b)(4)(A). Thus, in this action to enforce OSHA's preliminary reinstatement order that the employer has flouted, the district court properly recognized that its role was limited. See 49 U.S.C. 42121(b)(4)(B) ("An order of the Secretary of Labor with respect to which review could have been obtained [by the court of appeals] shall not be subject to judicial review in any criminal or other civil proceeding.").

CTI argues (Br. 35-36) that Yellow Freight is distinguishable from this case because it involved an ALJ's reinstatement order issued after an evidentiary hearing, as opposed to an order issued by the Secretary based on a reasonable cause finding. But, the Yellow Freight district court did not rely on the fact that an evidentiary hearing had been held. Rather, it expressly analogized an ALJ's authority to issue a reinstatement order after a hearing to the Secretary's authority to issue such an order "after merely a preliminary investigation." 793 F. Supp. at 469, quoted in Yellow Freight, 983 F.2d at 1203.

CTI also contends that the district court's reliance on Roadway Express was misplaced, because in Roadway Express v. Donovan, 603 F. Supp. 249 (N.D. Ga. 1985), aff'd in part and rev'd sub. nom. Brock v. Roadway Express, 481 U.S. 252 (1987),

the district court required the plaintiff to meet the necessary factors for injunctive relief. Br. 34-35.[15] This argument misconstrues Roadway Express because, unlike the current case, where the Secretary is seeking to enforce a preliminary reinstatement order, the employer in Roadway Express was seeking to enjoin the Secretary from enforcing a preliminary reinstatement order. This different procedural posture accounts for the district court's more searching inquiry in Roadway Express. In sum, CTI can find no support for its position in either Roadway Express or Yellow Freight. Rather, both decisions and other precedent in this Circuit support the

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[15] Additionally, the traditional injunction factors are met here. In particular, the Secretary and Bechtel would not need to demonstrate irreparable injury. Congress already balanced the equities and determined that an injunction is necessary. See In re Sac & Fox Tribe of Mississippi in Iowa/Meskawi Casino Litigation, 340 F.3d 749, 759 (8th Cir. 2003); British American Options Corp., 560 F.2d at 141; cf. Molloy v. Metropolitan Trasp. Auth., 94 F.3d 808, 811 (2d. Cir. 1996)(stating that government action taken pursuant to statutory authority is presumed to be in the public interest).

CTI also errs in suggesting (Br. 33-34) that because an injunction to compel compliance with the Secretary's preliminary reinstatement order alters the status quo, the Secretary's burden of establishing likelihood of success on the merits would be heightened if she were required to show the traditional injunction factors. An injunction requiring preliminary reinstatement does not alter the status quo. Rather, it serves to preserve the status quo as it was before the employer illegally retaliated against the employee for his protected conduct. See Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360, 369 (2d Cir. 2001) (involving section 10(j) of the National Labor Relations Act, under which the NLRB seeks preliminary reinstatement of employees discharged in violation of the Act).

district court's enforcement of the Secretary's preliminary reinstatement order.[16]

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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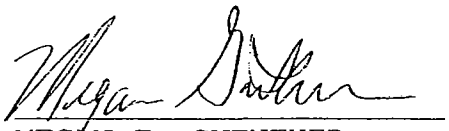

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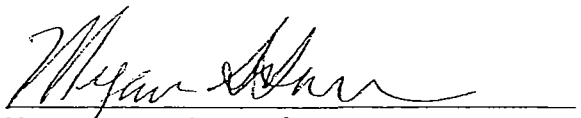
[16] CTI's final argument (Br. 36-38) that the district court's preliminary injunction must be reversed as infirm because the order did not require a payment of security is specious. Federal Rule of Civil Procedure 65(c) exempts the United States from the requirement to pay security. Moreover, where the federal government is co-plaintiff with a private party, courts generally do not require the private party to pay security. See United States v. State of Washington, 459 F. Supp. 1020, 1106 (D. Wash. 1978).

CERTIFICATE OF COMPLIANCE

I hereby certify that:

- This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2003 with fewer than 10.5 characters per inch in courier new font.

August 25, 2005



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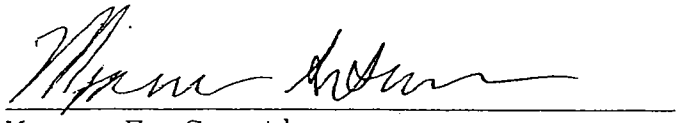

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ADDENDUM

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Issue Date: 10 June 2005

CASE NO.: 2005-SOX-00033

In the Matter of

SCOTT BECHTEL,
Complainant,

v.

COMPETITIVE TECHNOLOGIES, INC.,
Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR JUDGMENT IN ITS FAVOR

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, ("the Act") enacted on July 30, 2002.

A hearing in this matter commenced on May 17, 2005 in New Haven, Connecticut. Respondent Competitive Technologies, Inc., ("Respondent", hereinafter) orally moved for directed verdict dismissing the complaint on the grounds that Complainant Scott Bechtel ("Complainant", hereinafter) had failed to establish a prima facie case of protected activity. Tr.[1] at 917. I denied Respondent's motion at the hearing, finding that sufficient evidence exists to establish that Complainant had a reasonable belief that certain information was subject to disclosure under the Act, and that he advised individuals in management about his concerns.

Respondent moved in the alternative for a judgment in its favor, and I deferred my ruling on that motion until I could examine the transcript and other evidence of record. Tr. at 917-935. The transcript of the hearing was provided to me on June 6, 2005, and I have had the opportunity to review the record with regard to Respondent's motion. I find sufficient evidence to conclude that Complainant engaged in protected activity, and experienced an adverse employment action, giving rise to the jurisdiction of the Act. I further find that Respondent has articulated non-discriminatory legitimate reasons for terminating Complainant's employment. However, the inconsistencies in the record regarding management's knowledge of Complainant's protected activity prevent me from finding in favor of Respondent on summary judgment. Accordingly, I must DENY Respondent's motion.

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[1] The transcript of the hearing shall be referred to as "Tr." throughout this Order.

In consideration of Respondent's concerns about the financial burden that this litigation has imposed, and in the interest of expediting a full Decision and Order on the record in this matter, I am willing to relieve the parties of the obligation to file briefs in this matter. Considering the length of the hearing, and the volume of pre-hearing pleadings, the positions of the parties are clearly stated. Accordingly, the parties have ten (10) days from the date of this Order to advise in writing of their intention to file a brief. Briefs, if filed, are due July 15, 2005.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **BECHTEL SCOTT v. COMPETITIVE TECHNOLOGIES, INC.**

Case Number: **2005SOX00033**

Document Title: **ORDER DENYING RESPONDENT'S MOTION FOR JUDGMENT IN ITS FAVOR**

I hereby certify that a copy of the above-referenced document was sent to the following this 10th day of June, 2005:

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