UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON | **ARB Case No. 08-032**

Complainant, | **OALJ Case No. 2005-SOX-00015**

against,

SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG,

Respondents.

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION and NATIONAL WHISTLEBLOWERS CENTER

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INTERESTS OF *AMICI CURIAE*

Amici Curiae, at the invitation of the Chief Judge, previously submitted an *amicus* brief in this case discussing the application of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C § 1514A, to subsidiaries of publicly traded companies. *See* Brief for Government Accountability Project, et al. as *Amici Curiae* Supporting Complainant, *Johnson v. Siemens Blg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Apr. 15, 2010). This brief is submitted in response to Chief Judge Igasaki's July 21, 2010 letter inviting additional briefs on the impact of recent amendments to SOX contained in Section 929A of the Dodd-Frank Act, including any retroactive or clarifying effect.

A. Interest of *Amicus* Government Accountability Project

The Government Accountability Project (GAP) is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP played a role in the passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002

(Sarbanes-Oxley or SOX), 18 U.S.C. §1514A, and is cited in its legislative history. *See* 148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002).

B. Interest of *Amicus* National Employment Lawyers Association

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace, including whistleblowers. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

C. Interest of *Amicus* National Whistleblowers Center

Established in 1988, the National Whistleblowers Center (NWC) assists corporate employees who suffer from illegal retribution for disclosing violations of federal law. In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron

debacle and make similar threats to the nation's financial markets." 148 CONG. REC. S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as GAP). Senator Leahy recognized the role of the NWC in the enactment of SOX:

> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

S. Rep. 107-146 at 10 (2002).

SUMMARY OF THE ARGUMENT

Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (enacted on July 21, 2010) ("Dodd-Frank Act") does not alter the scope of coverage under Section 806 of SOX, but instead merely clarifies Congress's original intent in enacting SOX in July 2002. As this clarification does not change the law as it existed prior to passage, the presumption against retroactive application of a statute does not arise. Alternatively, if this clarification of existing law is construed as an amendment or alteration of Section 806 of SOX, controlling Supreme Court precedent authorizes

retroactive application of this amendment in this action and in other pending SOX retaliation cases because Respondents were on notice that a violation of Section 806 could subject them to liability and they had adequate opportunity to conform their conduct to law. Accordingly, applying Section 929A to the instant action does not create any undue burden upon the Respondent or offend principles of fairness.

ARGUMENT

I. SECTION 929A MERELY CLARIFIES THE ORIGINAL INTENT OF CONGRESS IN ENACTING SECTION 806 OF SOX.

The application of Section 929A of the Dodd-Frank Act to pending cases does not raise an issue of retroactivity because at the time Congress enacted the Dodd-Frank Act, Section 806 of SOX already applied to employees employed directly or indirectly by publicly traded companies. *See, e.g.,* S. Rep. No. 107-146, at 2-11 (2002) (discussing the collapse of Enron as a motivating factor in passing SOX and specifically naming partnership entities used by Enron to "essentially cook the books and trick both the public and federal regulators"); *Malin v. Siemens Med. Solutions Health Servs.*, No. PJM 07-1896, 2009 WL 2500289 (D. Md. Aug. 13, 2009) (finding that subsidiaries of Siemens could be held liable under SOX if complainant could establish agency); *Lawson v. FMR LLC*, __ F. Supp. 2d __, 93 Empl. Prac. Dec. P 43, 854 (D. Mass. 2010) (finding that Section 806 of SOX applies to affiliated entitles of a mutual fund company); *Klopfenstein v. PPC Flow*

Techs. Holdings, Inc., ARB Nos. 07-021, 07-022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (ARB concluded that a non-publicly traded subsidiary was the agent of a publicly traded parent company and therefore properly named as a respondent); *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070 (ALJ Mar. 23, 2009) (ALJ, applying an "effects test" and "conduct test" held that SOX protected an employee working in Switzerland for a Swiss subsidiary of a foreign subsidiary of a foreign publicly traded parent company covered by SOX); *Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140, 2004-SOX-056 (ARB Feb. 27, 2009) (applying SOX to a privately held company contracted to operate the complainant's employer through bankruptcy proceedings).

When Congress enacted Section 806 of SOX in 2002, it intended to protect whistleblowers employed directly or indirectly by publicly traded companies. *See* Brief for Government Accountability Project, et al. as *Amici Curiae* Supporting Complainant, *Johnson v. Siemens Blg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Apr. 15, 2010) at 13-17 (discussing Congress's intent and the application of SOX to subsidiaries). The legislative history of Section 929A expressly states that Congress is merely clarifying the existing scope of SOX whistleblower protection: "[Section 929A] [a]mends Section 806 of the Sarbanes-Oxley Act of 2002 *to make clear* that subsidiaries and affiliates of issuers may not retaliate against whistleblowers." S. Rep. No. 111-176, at 114 (2010) (emphasis

added). *See also* Letter from Stephen M. Kohn and Richard R. Renner, Executive Director and Legal Director, National Whistleblowers Center, to Paul M. Igasaki, Chair & Chief Judge, ARB (July 21, 2010) (discussing S. Rep. 111-176), attached as exhibit A. As stated by the National Whistleblower Center in their July 21, 2010 letter, "the precise phrase ['to make clear'] was used in another leading case interpreting a similar whistleblower law, also administered by the Department of Labor." *Id.* (citing *Wily v. Administrative Review Bd.*, 423 F.3d 483,489 n. 11 (5th Cir. 2005) ("the legislative history of the 1992 Energy Policy Act, too, makes clear that Congress intended the amendments to codify what it thought to be the law already")).

This clarification of the existing scope of coverage under Section 806 was spurred by Congress's concern that some DOL decisions erroneously construed Section 806 as potentially excluding from the ambit of Section 806 coverage employees of subsidiaries of publicly traded companies. For example, the co-cosponsors of Section 806, Senators Grassley and Leahy, sent a letter to Secretary Chao in September 2008 pointing out that the plain meaning and intent of Section 806 Congress cannot reasonably be interpreted to exclude employees of subsidiaries of publicly traded companies:

> We want to point out, as clearly and emphatically as we can, that there is simply no basis to assert, given this broad language, that employees of subsidiaries of the companies identified in this statute were intended to be excluded from its protections. Moreover, as the

> authors of this provision, we can clearly state that it was by no means our intention to restrict these important whistleblower protections to a small minority of corporate employees or to give corporations a loophole to retaliate against those who would report fraud by operating through subsidiaries.

Letter from Patrick Leahy and Charles E. Grassley, U.S. Senators, to Sec'y Chao (Sep. 9, 2008), attached as exhibit B.

As Section 929A of Dodd-Frank does not change the scope of Section 806 coverage, but instead merely clarifies existing law, there is no issue as to whether Section 929A should be applied retroactively.

II. CONTROLLING SUPREME COURT PRECEDENT AUTHORIZES RETROACTIVE APPLICATION OF SECTION 929A

Assuming arguendo that the Board believes that the Dodd-Frank Act did not merely clarify existing law as *amici* assert, the Supreme Court's *Langraf* test compels the conclusion that Section 929A should be applied to pending cases. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

In *Landgraf*, the Supreme Court articulated the rule to determine whether a statute should be applied retroactively, in particular whether the Civil Rights Act of 1991 should be applied to a Title VII sexual harassment case pending on appeal at the time Congress enacted the 1991 Act. *Id.* Landgraf claimed that she was sexually harassed and constructively discharged. The lower court dismissed her case, holding that while she had proved discrimination, she was not constructively discharged and did not suffer any compensable damages. *Id.* at 248. While on

appeal, the Civil Rights Act of 1991 was enacted, expanding the range of actionable discrimination, increasing the monetary relief available, and allowing for a jury trial. *Id.* at 248-50. Landgraf unsuccessfully appealed to the U.S. Court of Appeals for the Fifth Circuit seeking remand of her case for a jury trial pursuant to the 1991 Act. *Id.* at 249. The Supreme Court granted *certiorari* to decide whether the 1991 Act applied to pending cases when it became law. *Id.* at 249-50. The Court assumed for purposes of argument that "if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer" *Id.* at 250. In other words, the *Landgraf* case involved a substantial change to the law which extended to Title VII plaintiffs rights that did not previously exist and created liability for prior conduct.

To answer the question of whether the Civil Rights Act of 1991 should apply to *Landgraf*, the Court developed a two-pronged test. *See Landgraf*, 511 U.S. at 279. If a statute fails both prongs of the test, a presumption against retroactive application may apply. *See Martin v. Hadix*, 527 U.S. 343, 352 (1999) (citing *Landgraf*, 511 U.S. at 280 and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997)). The first prong of *Landgraf* focuses on "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280.

To determine whether Congress has "expressly prescribed" the temporal reach of the statute, the Court first looks to the plain language of the statute. If the plain language does not address whether the statute applies to pending litigation, the Court looks beyond to the structure of the statute and legislative history. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 583 (2006) ("The Government's more general suggestion . . . is belied by the legislative history . . ."); *Landgraf*, 511 U.S. at 262-263 (the Court examines legislative history to discern Congress's intent and quotes testimony from the Congressional Record at n. 15). If the Court finds that Congress authorized retroactive application, then the statute is applied to the prior conduct. If Congress was silent on the reach of the statute, then the second prong of the *Landgraf* test is applied.

The second prong assesses "whether the application of the statute to the conduct at issue would result in a retroactive effect." *Martin*, 527 U.S. at 352 (quoting *Landgraf*, 511 U.S. at 280). Assuming that it is necessary to apply *Landgraf* in this action (*amici* contend that Section 929A is merely a clarification of existing law and therefore the issue of retroactive application does not apply), *Landgraf* authorizes retroactive application of Section 929A.

A. 929A IS A CLARIFICATION OF THE ORIGINAL INTENT OF CONGRESS AND IS INTENDED TO APPLY TO ALL CASES

Application of the first prong of *Landgraf* indicates that Congress intended Section 929A to correct a misinterpretation of SOX and to carry out Congress's

original intent of protecting whistleblowers. Section 929A does not specify an effective date and Section 4 of the Act states that unless otherwise provided, amendments made by the Act shall take effect one day after the date of enactment, which could arguably suggest that Section 929A does not apply to pending litigation. Section 929A, however, does not amend the scope of coverage of Section 806 of SOX and therefore the effective date set forth in Section 4 does not apply. Section 929A only clarifies Congress's intent in enacting SOX in 2002, and clearly Congress did not intend to delay enactment of a provision that merely clarifies existing law.

In applying *Landgraf,* the Court has routinely looked beyond the text of the statute to determine the temporal scope of a statute. *See Martin*, 527 U.S. at 355-358 (stating that the test is whether "Congress has expressly prescribed the statute's temporal reach," yet still looking beyond the text of the statute and performing an analysis of legislative history); *Hamdan*, 548 U.S. at 583 ("The Government's more general suggestion . . . is belied by the legislative history . . ."); *Landgraf,* 511 U.S. at 262-263 (the Court examines legislative history to discern Congress's intent and quotes testimony from the Congressional Record at n. 15). Thus, to determine the temporal scope of Section 929A, the ARB should look beyond the language of the Dodd-Frank Act.

Significantly, the Senate Report for the Dodd-Frank Act expressly indicates that the intent of 929A is to clarify the existing scope of coverage of SOX. According to the Report, Section 929A:

> Amends Section 806 of the Sarbanes-Oxley Act of 2002 *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. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The 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.

S. Rep. No. 111-176, at 114 (2010) (emphasis added). The Report makes it clear that the intent of Section 929A is not to change the reach of SOX, but rather to clarify an area of ambiguity to eliminate judicial inconsistency. Therefore this clarification of existing law should be deemed to apply to pending cases.

B. RESPONDENTS WERE ON NOTICE THAT 18 U.S.C. § 1514A PROTECTS EMPLOYEES OF SUBSIDIARIES AND HAD ADEQUATE OPPORTUNITY TO CONFORM THEIR CONDUCT TO THE LAW.

The second prong of the *Landgraf* test assesses "whether the application of the statute to the conduct at issue would result in a retroactive effect." *Martin*, 527 U.S. at 352 (quoting *Landgraf* 511 U.S. at 280; citing *Hughes*, 520 U.S. at 946). "We ask whether applying the statute to the person objecting would have a

retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (alteration in original) (quoting *Landgraf*, 511 U.S. at 280). Application of new legislation to prior conduct must not run afoul of the "[e]lementary considerations of fairness dictat[ing] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265.

However, "[a] statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law," *Id.* at 269 (internal citation omitted). The Supreme Court cases addressing retroactive application of a statue have dealt with substantive changes in law, not clarifications intended to aid in the proper application of a statute and are therefore distinguishable from the instant case.

In *Landgraf*, the Court held that sections of the Civil Rights Act of 1991, creating a right to recover compensatory and punitive damages for certain violations of Title VII and providing for a jury trial, did not apply to a case that was pending on appeal when the statute was enacted. *Id.* at 249. Although the amendment did "not make unlawful conduct that was lawful when it occurred," *Id.* at 281-82, it did increase the potential monetary liability of the defendants, and its application to cases pending on appeal would have significantly increased

defendants' potential liability for events antedating the enactment of the amendment. Consequently, the Court held, the amendment could not be applied retroactively absent a clear manifestation of intent to do so. *Id.* at 282-83. In this action, Complainant does not seek to apply a new claim or a new remedy retroactively.

In *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, the Court addressed application of a 1986 amendment to the False Claims Act that eliminated an affirmative defense previously available to defendants in *qui tam* cases. *Hughes*, 520 U.S. 939. *Hughes* involved events that took place prior to the enactment of the 1986 amendment. The issue before the Court was whether Hughes could still invoke the affirmative defense, thereby blocking the *qui tam* action, or whether the amendment applied to pending cases. The Court found that the 1986 amendment "permit[ted] actions by an expanded universe of plaintiffs . . . essentially creat[ing] a new cause of action," which would alter the substantive rights of the defendants and increase liability. *Id.* at 950. Therefore, the Court rejected retroactive application of the 1986 amendment.

While similar upon its face, *Hughes* is fundamentally different from this case. *Hughes* addressed an amendment which materially altered a law, changing its wording *and* the reach and scope of the law. The 1986 amendment to the False Claims Act allowed individuals to bring suit in situations where previously the

statute only conferred jurisdiction upon actions brought by the federal government. According to the Court, "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good," *Id.* at 949, and the amendment effectively "subjects Hughes to previously foreclosed *qui tam* litigation." *Id.* at 950. Here, Section 929A does not make a material change to SOX, but instead simply alters the language of the statute to ensure that the original intent of Congress is carried out. As discussed above, SOX has already been applied to subsidiaries. The Complainant is asking the Board construe SOX consistent with Congress's original intent. The Complainant is not seeking to bring a previously barred action or to permit a new class of plaintiff to bring suit.

Additionally, the amendment in *Hughes* removed a codified defense. In contrast, Section 929A removes a judicially-created loophole which, according to the sponsors of SOX, should never have existed. *See* Letter from Patrick Leahy and Charles E. Grassley, U.S. Senators, to Elaine Chao, U.S. Sec'y of Labor (Sep. 9, 2008), attached as exhibit B. Based solely on case law, the ARB or high court could have closed this loophole at anytime with no question as to whether the decision would apply to all pending litigation. This legislative clarification should be treated no differently.

The Court's most recent decisions regarding the application of new legislation to a pending case are also readily distinguishable from this case. *See Hamdan*, 548 U.S. 557; *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009). In *Hamdan*, the Court examined the legislative history and statutory construction of the Detainee Treatment Act of 2005 to determine that Congress did not intend to deprive the Court of the authority to hear a pending application for habeas corpus filed by a Guantanamo Bay detainee. Application of the Detainee Treatment Act would have stripped Hamdan of judicial relief by materially altering an existing statute as opposed to simply inserting clarifying language.

In *Hulteen*, the Court addressed whether the Pregnancy Discrimination Act of 1978 ("PDA"), which prohibited discrimination on the basis of pregnancy, should be applied to "recharacterize [discriminatory benefit accrual calculations] as having been illegal when done" prior to the enactment of the PDA. *Hulteen*, 129 S. Ct. at 1971. The Court dismissed the possibility, holding that there was no clear intent of retroactive application and that Congress did not contemplate the potential unfairness of retroactive application. *Id.* The plaintiff in *Hulteen* sought to create liability for completed conduct where none previously existed. Recharacterizing prior lawful conduct as unlawful violates "[e]lementary considerations of fairness dictat[ing] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265.

Here, as discussed above, prior to passage of the Dodd-Frank Act, SOX already applied to subsidiaries, and thus, Section 929A does not materially alter the law. Further, Congress, both in the legislative history of 929A and in letters from the original sponsors of SOX, has stated that Section 929A is a clarification to SOX and not a change, demonstrating that it has contemplated the effect of 929A and views it as a corrective measure to address erroneous interpretation.

The Respondents were on notice that they may be held liable for retaliating against a whistleblower under SOX. In addition to the several previously cited DOL and federal court decisions holding that SOX applies to employees of subsidiaries, leading defense-side firms have published "client alerts" and articles expressly warning corporations that SOX may apply to subsidiaries. *See, e.g.*, Eric A. Savage, *Employment Law Implications of Corporate Responsibility Legislation*, Littler Mendelson P.C. (Aug. 2002), http://www.littler.com/PressPublications/Lists/ASAPs/DispForm.aspx?ID=896 ("[t]he far-reaching scope of the Act is emphasized by the fact that it covers not only publicly traded companies...[but] would appear to create a claim against companies or organizations which do business with publicly traded companies") (author Savage is a Littler shareholder).[1]

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[1] Other examples of alerts issued by the defense bar include: *Privately Held Subsidiaries of a Public Company and Their Employees May Be Liable Under the Sarbanes-Oxley Act*, Proskauer Rose L.L.P. Client Alert (Jun. 2006),

http://www.proskauer.com/publications/Publications.aspx?KeywordPhrase=privately+held+subsidiaries; Steven J. Pearlman & Frank Kinson, *Passing the Integrated Employer Test*, Law360 (Aug. 31, 2009), *available at* http://www.seyfarth.com/dir_docs/news_item/01c34617-d791-4d26-9e18-4095c8c47c83_documentupload.pdf (authors Pearlman and Kinson were partner and senior associate at Seyfarth Shaw L.L.P. at the time of publication); *Sarbanes-Oxley Whistleblower Complaints against Non-Public Subsidiaries Routinely Dismissed by OSHA*, Martindale (Oct. 16, 2008), http://www.martindale.com/occupational-safety-health-law/article_Squire-Sanders-Dempsey-LLP_528198.htm (warning that "OSHA's trend should not cause any company in a public company's family tree or the public company itself to downplay or treat any less vigilantly any sort of complaint, report or other conduct which could constitute protected activity under SOX") (published by Squire, Sanders & Dempsey L.L.P.); Julie W. Hampton, *Private Companies Beware*, Poyner Spruill L.L.P. (June 29, 2006), http://www.poynerspruill.com/publications/Pages/PrivateCompaniesBeware.aspx ("...private companies that are either owned by a public company, or have strong ties as a contractor or agent of a public company, should be aware of potential liability under the whistleblower claim protections of the Sarbanes-Oxley Act"); Carrie Wofford & Lisa Stephanian Burton, *Lessons From The First SOX Whistleblower Cases*, Compliance Week (Nov. 16, 2004), http://www.complianceweek.com/Article/1327 (authors Wofford and Burton were associate and partner at Wilmer Cutler Pickering Hale and Dorr L.L.P. at the time of publication); *New Litigation Risk: Foreign-Based Employee Permitted to Sue Under Sarbanes-Oxley*, Faegre & Benson L.L.P (Jul. 15, 2008), http://www.faegre.com/showarticle.aspx?Show=6871; *All Employers Should Consider the Impact of the Sarbanes-Oxley Act on Corporate Compliance and Ethics Programs*, Jackson Lewis L.L.P. (Nov. 22, 2005), http://www.jacksonlewis.com/legalupdates/article.cfm?aid=867 ("[b]ecause of its broad scope, all employers -- large and small, for-profit and not for-profit, publicly and privately held -- should be familiar with SOX's requirements"); David B.H. Martin, Barbara Hoffman & Erin F. Casey, *Whistleblower Protection Under the Sarbanes-Oxley Act*, 8 No. 5 Wallstreetlawyer.com: Sec. Elec. Age 1, at n. 4 (Oct. 2004) ("at least one judge has held that Sarbanes-Oxley whistleblower protection also extends to employees of subsidiaries of publicly traded companies, even if the subsidiary itself is not publicly traded") (the authors were partner, of counsel, and associate at Covington & Burlington L.L.P.).

Since the Respondents have had ample notice that retaliation against an employee of a publicly traded company could expose them to liability under SOX, application of Section 929A to this pending case creates no issue of retroactivity. *See Landgraf*, 511 U.S. at 280. Applying 929A to the Respondents does not "'affect substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Fernandez-Vargas*, 548 U.S. at 37 (alteration in original) (quoting *Landgraf*, 511 U.S. at 280). Any expectations that the Respondents may have placed on prior case law is irrelevant. As the Court proclaimed in *Landgraf*, "[a] statue does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . *or upsets expectations based in prior law*." *Landgraf*, 511 U.S. at 269 (emphasis added) (internal citation omitted). Simply put, Section 929A does not change the law and its application to pending litigation does not create a retroactive effect.

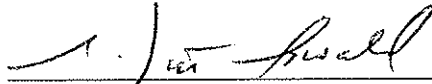
CONCLUSION

Section 929A merely clarifies and confirms existing law on the scope of coverage of under SOX, and therefore, the issue of retroactive application does not arise. However, even if the Supreme Court's *Landgraf* test is applied, Section 929A passes both prongs. Casting SOX to apply to employees of subsidiaries of publicly traded companies would not prejudice Respondents because they were already on notice that retaliation against employees of subsidiaries could give rise

to liability under SOX. In sum, Section 929A further confirms that Congress originally intended for SOX to protect employees of subsidiaries of publicly traded companies.

August 13, 2010

Respectfully submitted,



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I certify that a true copy of the foregoing Brief of *Amici Curiae* was served by regular mail, unless otherwise indicated, on the following persons of the following address on this 13th day of August, 2010:

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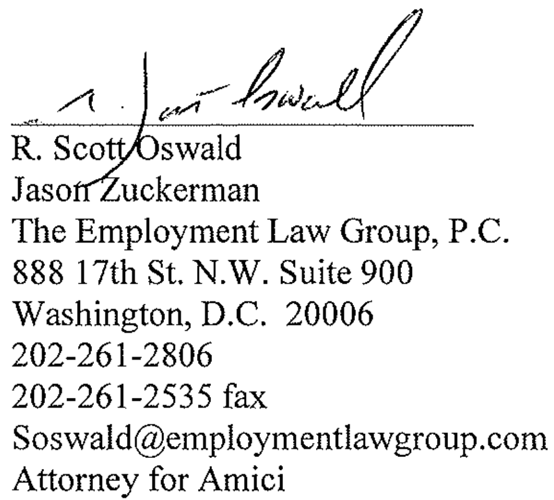

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Via email and First Class Mail

July 21, 2010

Paul M. Igasaki, Chair & Chief Judge
Administrative Review Board
U.S. Department of Labor
2000 Constitution Ave., N.W., N5404
Washington, D.C. 20210

Re: *Johnson v. Siemens Building Technologies, Inc.,*
ARB No. 08-032/ALJ No. 2005-SOX 015

Dear Chair and Chief Judge Igasaki:

We are writing in further regard to the briefing order issued in the above-captioned case on April 15, 2010 and your letter issued today.

As you are aware, today President Obama signed into law the *Dodd-Frank Wall Street Reform Act,* which directly impacts the issue under consideration in this case. The Dodd-Frank Act amends The Sarbanes–Oxley Act of 2002 (SOX) to include liability for subsidiary companies. Based on the text of this amendment and its legislative history the issue of subsidiary coverage under SOX should be readily resolved.

The portion of Dodd-Frank that concerns subsidiary coverage is contained in Section 929A of the Act. The legislative history for this section is set forth on page 114 of Senate Report No. 111-176. A copy of the relevant page of the report is attached.

The Report explains that section 929A amended section 806 of the Sarbanes-Oxley Act of 2002 in order to "*make clear* that subsidiaries and affiliates of issuers may not retaliate against whistleblowers . . . ." The amendment was designed to eliminate the current employer defense that subsidiaries of publicly traded corporations somehow were not covered under SOX, and explicitly *clarified* the original intent of the statute: The "clarification" contained in section 929A "would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute."[1]

Congress' use of the phrase "make clear" in explaining the legislative intent behind the amendment was not an accident. This precise phrase was used in another leading case interpreting a similar whistleblower law, also administered by the Department of Labor. In *Willy v. Administrative Review Bd.* 423 F.3d 483, 489, n. 11 (5th Cir. 2005), the Fifth Circuit gave

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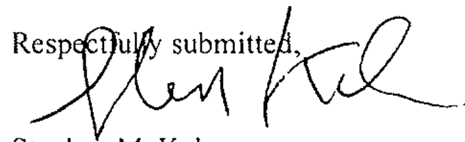
[1] The minority report which accompanied S. Rep. 111-176 did not object to this interpretation of either the original intent behind the SOX or Congress' need to clarify this issue based on the dispute among various courts.

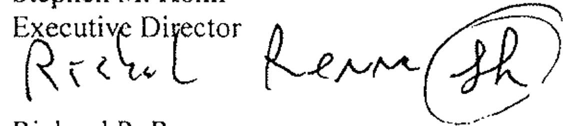
effect to a similar legislative action on the basis that the legislative history and indicated that such an amendment is intended to "make clear" the original intent: "The legislative history of the 1992 Energy Policy Act, too, **makes clear** that Congress intended the amendments to codify what it thought the law to be already." (Emphasis added). *Accord., Kansas Gas & Elec. Co. v. Brock* 780 F.2d 1505, 1512 (10th Cir. 1985) (applying amendment to law as indication of Congress' original intent).

Based on section 929A of the Dodd-Frank Act, and consistent with this section's legislative history and controlling case law, we believe the issue of subsidiary coverage has been resolved by explicitly and clear legislative action. It is now imperative that the Department of Labor effectuate this intent, and ensure that the SOX is fully and properly administered in a manner intended by Congress.

Respectfully submitted,



Stephen M. Kohn
Executive Director



Richard R. Renner
Legal Director

Enclosure: Page 114 from S. Rep. 111-176

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Calendar No. 349

111TH CONGRESS, *2d Session* — SENATE — REPORT 111–176

THE RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010

APRIL 30, 2010.—Ordered to be printed

Mr. DODD, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 3217]

The Committee on Banking, Housing, and Urban Affairs, having considered the original bill (S. 3217) to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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89–010

priate action when . . . [it] finds companies have materially misused the Regulation D exemptions").

Section 927. Equal treatment of self-regulatory organization rules

Section 927 provides equal treatment for the rules of all SROs under Section 29(a), which voids any condition, stipulation, or provision binding any person to waive compliance with any provision of the Exchange Act, any rule or regulation thereunder, or any rule of an exchange.

Section 928. Clarification that Section 205 of the Investment Advisers Act of 1940 does not apply to state-registered advisers

Section 928 clarifies that Sec. 205 of the Advisers Act (performance fees and advisory contracts) does not apply to state-registered investment advisors. This is a clarification from the National Securities Markets Improvement Act that these restrictions on investment adviser contracts do not apply to state-registered advisers.

Section 929. Unlawful margin lending

Under previous law, it was unlawful for any member of a national securities exchange or any broker or dealer to provide margin lending to or for any customer on any non-exempt security unless the loan met margin regulations provided for in Chapter 2B of Title 15 of the U.S. Code and was properly collateralized. Section 929 provides that either of these two infractions is unlawful by itself.

Section 929A. Protection for employees of subsidiaries and affiliates of publicly traded companies

Amends Section 806 of the Sarbanes-Oxley Act of 2002 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. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The 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.

Section 929B. Fair Fund amendments

Amends Section 308 of the Sarbanes-Oxley Act of 2002 to permit the SEC use penalties obtained from a defendant for the benefit of victims even if the SEC does not obtain disgorgement from the defendant (e.g., because defendant did not benefit from its securities law violation that nonetheless harmed investors). Under the Fair Fund provisions of the Sarbanes-Oxley Act, the SEC must obtain disgorgement from a defendant before the SEC can use penalties obtained from the defendant in a Fair Fund for the benefit of victims of the defendant's violation of the securities laws, or a rule or regulation thereunder. This section would revise the Fair Fund provisions to permit the SEC to use penalties obtained from a defendant for the benefit of victims even if the SEC does not obtain an order requiring the defendant to pay disgorgement. In some cases, a defendant may engage in a securities law violation that

EXHIBIT B

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 9, 2008

The Honorable Elaine Chao
Secretary of Labor
United States Department of Labor
200 Constitution Ave, N.W.
Washington, D.C. 20210

Dear Secretary Chao:

We authored the corporate whistleblower provisions of the Corporate and Criminal Fraud Accountability Act, section 806 of the Sarbanes-Oxley Act (SOX). In 2002 and 2003, we corresponded with the Attorney General and the President to express our disagreement with the Administration's overly narrow interpretation of these important whistleblower protections in the corporate accountability legislation.

We are dismayed to learn that the Administration—the Department of Labor in particular—has been using an overly restrictive interpretation of this law to dismiss a majority of the complaints filed by employees of public corporations under this section who assert that they have been fired or treated unfairly because they reported fraud.

The Wall Street Journal reported on September 4 that out of 1,273 complaints filed with the Department of Labor under this whistleblower protection provision since 2002, the government has ruled in favor of the employee only 17 times and has dismissed 841 cases. Many of these cases have apparently been dismissed on the grounds that the employee worked for a corporate subsidiary, because the Department takes the position that subsidiaries are not covered by the statute.

Section 806, now codified as 18 United States Code, Section 1514A, states, "No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company" may discriminate against an employee based on that employee's reporting of fraudulent conduct. We want to point out, as clearly and emphatically as we can, that there is simply no basis to assert, given this broad language, that employees of subsidiaries of the companies identified in the statute were intended to be excluded from its protections.

Moreover, as the authors of this provision, we can clearly state that it was by no means our intention to restrict these important whistleblower protections to a small minority of corporate employees or to give corporations a loophole to retaliate against those who would report corporate fraud by operating through subsidiaries. These protections against abuses were intended as a safety valve, protecting the public, shareholders, and Americans' confidence in the marketplace. Congress enacted SOX as a direct response to the fraud perpetrated by Enron Corporation (now known as Enron Creditors Recovery Corporation)—through the misuse and abuse of its shell corporations and subsidiaries. Consequently, it is unreasonable to argue that subsidiary corporations would not be covered by the whistleblower protection provisions of SOX.

Whistleblowers are vital in promoting accountability and transparency, but they are extremely vulnerable to retaliation. They need and deserve the protection of the law and vigilant application of the law by federal agencies. Accordingly, we request that you explain the basis for taking the position that the SOX whistleblower protection provisions do not apply to employees of subsidiary corporations given our position that the agency's interpretation contradicts the spirit and goals of the statute as well as the intent of Congress. In addition, we request that the Department of Labor temporarily suspend using an interpretation of this provision that exempts employees of subsidiary corporations from the SOX whistleblower protections until we have received your response and supporting documentation.

We look forward to your reply.

Sincerely,

PATRICK LEAHY
Chairman

CHARLES E. GRASSLEY
United States Senator