UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

WILLIAM VILLANUEVA	**ARB Case No. 09-108**
Complainant,	**OALJ Case No. 2009-SOX-006**

against,

CORE LABORATORIES NV,

and

SAYBOLT DE COLOMBIA LIMITADA,

Respondents.

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL WHISTLEBLOWERS CENTER

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INTEREST OF *AMICI CURIAE*

The National Employment Lawyers Association ("NELA") and the National Whistleblowers Center ("NWC") submit this brief in response to Chief Judge Paul M. Igasaki's June 24, 2011, correspondence inviting additional briefing on the impact of the Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), and recent amendments to SOX contained in section 929A of the Dodd-Frank Act on the extraterritorial application of Section 806 of SOX.

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 composed exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its sixty-eight (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. NELA recently submitted an *amicus* brief at the request of the Department of Labor in *Johnson v. Siemens Building Technologies*, ARB No. 08-032, ALJ No. 2005-SOX-0151 (ARB March 31, 2011), which also addressed the implications of the Dodd-

Frank Act and the reach of SOX.

The National Whistleblowers Center ("NWC") is a non-profit tax-exempt public interest organization. Since 1988, NWC has assisted corporate employees who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC was instrumental in urging Congress to enact Section 806 of the Sarbanes-Oxley Act to encourage employees to come forward with information about potential frauds and other violations. S. Rep. 107-146, at 10. The NWC provides assistance to whistleblowers, helps them obtain legal counsel, provides representation for important precedent-setting cases and urges Congress and administrative agencies to enact laws, rules and regulations that will assist in helping employees report fraud within their corporate compliance programs and directly to government agencies. The NWC's programs are set forth on its web site, located at www.whistleblowers.org.

The NWC has participated as *amicus curiae* in numerous court cases, including: *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Vermont Agency Of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *Haddle v. Garrison*, 525 U.S. 121 (1998); *English v. General Electric*, 496 U.S. 72 (1990); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009). The Department of Labor recently asked the NWC and other

groups to submit amicus briefs in two corporate finance whistleblower cases, *Johnson v. Siemens Building Technologies*, ARB No. 08-032, ALJ No. 2005-SOX-0151 (ARB March 31, 2011); *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ NO. 2007-SOX-39, 42 (ARB May 25, 2011).

The NWC has played an important role in working with Congress to ensure that Congress' intent to fully protect whistleblowers was fulfilled. For example, Sen. Patrick Leahy, the principle sponsor of the whistleblower protection provisions contained in the Sarbanes-Oxley Act, recognized the role of the amicus in the enactment of SOX:

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. …
>
> 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 [emphasis added].

SUMMARY OF ARGUMENT

The Administrative Review Board asked for additional briefing on the following issues:

(1) What effect, if any, do *Morrison* and section 929A of the Dodd-Frank Act have on the issue of extraterritoriality as it relates to SOX section 806?

The *Morrison* decision has no effect on Villanueva's appeal. The section of law considered in Morrison is different from SOX's employee protection. The Supreme Court did not consider the public policies implicated by SOX's whistleblower protection. Additionally, facts in *Morrison* are distinguishable from those currently under review. The respondent in *Morrison*, National Australia Bank Limited ("National"), during the relevant time, did not list its stock on any exchange in the U.S. *See Morrison*, 130 S. Ct. at 2875. The discussion in *Morrison* consistently cites to this lack of any nexus to U.S. securities markets as the basis for its dismissal of the petitioner's complaint.

Moreover, *Morrison* restates the current state of case law on the extraterritorial application of U.S. statutes. The Supreme Court confirms that there is only a presumption against extraterritorial application when there is no otherwise clear intent from Congress. That presumption is not self-evidently dispositive. *Id*. at 2884. The transactional test *Morrison* ultimately adopts—whether a purchase or sale is made in the U.S., or involves a security

listed on a domestic exchange— rephrases the "conducts and effects" tests espoused in the Second Circuit. *Id*. at 2886; *see also S.E.C. v. Berger*, 322 F.3d 187, 192-193 (2nd Cir. 2003).

Accordingly, *Morrison* is distinguishable from the facts in Villanueva's complaint. Moreover, the holding in *Morrison* does not propose any substantial change in law relevant to the issues under review here. Furthermore, Villanueva is able to satisfy the new "transactional" test *Morrison* espouses.

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 the Sarbanes–Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A. Instead, it clarifies Congress' original intent in enacting Section 806 of SOX in July 2002. Accordingly, applying section 929A to the instant action does not create an issue of retroactivity. In *Willy v. Administrative Review Bd*. 423 F.3d 483,489, n. i 1 (5th Cir. 2005), the Fifth Circuit gave 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).

Section 929A of the Dodd-Frank Act amended Section 806 of SOX by inserting within subsection (a) the following provision: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." With this clarification, SOX protects employees of any subsidiary of a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("SEA") that the company includes in its consolidated financial statements. *Accord*~~,~~ *Johnson v. Siemens*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). Core Laboratories NV ("Core Labs"), Respondent in this case, is a publicly-traded company with a class of securities registered under Section 12(b) of the SEA. Pursuant to Exhibit 21.1 of Core Labs's Form 10-K filed with the Securities and Exchange Commission ("SEC"), Respondent Saybolt de Colombia Limitada ("Saybolt") is a 95%-owned subsidiary of Core Labs. Core Labs includes Saybolt in its consolidated financial statements. Consequently, SOX applies to both Core Labs and Saybolt and protects Villanueva from retaliation.

(2) Following *Morrison* and section 929A of the Dodd-Frank Act, is the "conduct or effects" test to any extent applicable to cases arising under SOX section 806? If so, what quantum of conduct or effect must arise domestically for the Secretary of Labor to exercise jurisdiction over such a complaint?

Through both the "conduct and effects" tests and the alleged new

"transactional" rule in *Morrison*, Villanueva is able to establish the necessary domestic conduct and effects for the U.S. Department of Labor ("DOL") to exercise jurisdiction over his complaint.

The "conduct test" is less a question of extraterritorial application of a U.S. statute and more a reiteration of the rule that conduct occurring within the territory of the U.S. is *per se* domestic. In such cases, there is no need to determine whether U.S. law applies abroad. When establishing whether an action is domestic, the necessary amount of contacts with the United States in order to satisfy the "conduct" test is minimal. Courts consider a single letter sent or a single phone call made from or to the United States as sufficient conduct to derive jurisdiction. *See, e.g., Robinson v. TCI/US West Tele-communications Inc*., 117 F.3d 900, 904 (5th Cir. 1997); *Continental Grain v. Pac. Oilseeds*, 592 F.2d 409, 420 n.18 (8th Cir. 1979); *Doll v. James Martin Assocs*., 600 F. Supp. 510, 520 (E.D. Mich. 1984). The contacts also need not directly relate to the elements of a cause of action or crime. U.S. courts, therefore, have jurisdiction if "at least some activity designed to further a fraudulent scheme occurs within this country." *S.E.C. v. Kasser*, 548 F.2d 109, 114 (3rd Cir. 1977). As set out in Villanueva's brief (and further reviewed below), all relevant elements of Villanueva's complaint occurred within the U.S., including the fraud about which he complained, the communication of his protected conduct, and the decisionmaking that led to the adverse actions against

him.

The "effects" test provides jurisdiction to U.S. courts when conduct overseas has an effect in the U.S. *See, e.g., McBee v. Delica Co. Ltd.*, 417 F.3d 107, 119 (1st Cir. 2005). If conduct has "intended and actual" or "substantial and foreseeable" effects within the state, then domestic jurisdiction applies. *See U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Even if some or all of the underlying fraud is extraterritorial, such acts by a company publicly-traded in the U.S. can easily affect U.S. shareholders and investors. *See Walters v. Deutsche Bank AG, et al.,* 2008-SOX-00070 (A.L.J. March 23, 2009).

Both the "conduct" and "effects" tests support DOL's jurisdiction to review the merits of Villanueva's complaint. Not only did substantial elements of his complaint occur within the U.S., but also the effects of fraud promulgated by a publicly-traded company's subsidiary easily reach that company's U.S. shareholders and investors.

(3) If any of the requisite elements of Villanueva's whistleblower complaint have occurred in the United States, does the case become territorial such that there is no longer a question of the extraterritorial effect of section 806?

Adverse actions defendants take from within the U.S. do not raise concerns regarding the extraterritorial application of domestic statutes. A state has jurisdiction to prescribe laws with respect to "conduct that, wholly or in substantial part, takes place within its territory" or to "the status of persons, or interest in

things, present within in its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987). In *O'Mahony v. Accenture Ltd*., 537 F. Supp. 2d 506 (S.D.N.Y. 2008), the court confirmed that acts within the U.S. provide sufficient jurisdiction for U.S. courts to review those acts. Courts have subject matter jurisdiction when the alleged wrongful conduct and other material acts occur in the U.S. by persons located in the U.S. There is no need to decide whether SOX applies extraterritorially.

Villanueva has already presented to this Board the necessary evidence and legal support to establish U.S. jurisdiction without the need to question the extraterritorial application of Section 806 of SOX.

ARGUMENT

I. *MORRISON* HAS NO MATERIAL EFFECT ON THE ISSUE OF EXTRATERRITORIALITY UNDER SECTION 806 OF SOX.

Courts have exaggerated the Supreme Court decision in *Morrison* when they say it eliminates the "cause and effects" tests the Second Circuit has established during the past forty-three years. 130 S. Ct. at 2878 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968)). These courts say that *Morrison* "roundly (and derisively) buried the venerable 'conduct or effect' test the Second Circuit devised." *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010); *see also S.E.C. v. Compania Internacional Financiera S.A*., 11 CIV 4904 DLC, 2011 WL 3251813, *6 (S.D.N.Y. July 29, 2011).

The holding in *Morrison*, however, is not so different from the Second Circuit cases it criticizes. While confirming that the presumption against extraterritoriality should apply "in all cases," the Supreme Court admits that the presumption "is not self-evidently dispositive, but…requires further analysis." *Morrison*, 130 S. Ct. at 2881, 2884. After deciding that Section 10(b) of the SEA does not apply extraterritorially, the *Morrison* Court espouses a presumably new "transactional" test to rebut the presumption against extraterritoriality — "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id*. at 2886. Though *Morrison* accuses the Second Circuit of "excis[ing] the presumption against extraterritoriality," the Second Circuit began in 1968 what *Morrison* repeats in 2010—the creation of a test by which a complainant can rebut that presumption. 130 S. Ct. at 2878-79. The difference between the former "conducts and effects" test and the new "transactional" test is more semantics than substance.

In addition to the above, the facts before the Court in *Morrison* are distinguishable from those currently before the ARB. The decision in *Morrison* squarely and specifically relates to Section 10(b) of the SEA, not SOX and particularly not Section 806 of SOX. These two important points further limit *Morrison's* effect of on Villanueva's complaint. Finally, even when applying the new "transactional" test in *Morrison* to the present facts, jurisdiction over the

matter is still satisfied.

A. *Morrison* Does Not Abrogate Existing Case Law Supporting The "Cause And Effects" Tests To The Extraterritorial Application Of U.S. Law.

Morrison does not create any substantial changes to already existing case law. It its discussion, *Morrison* confirms the well-established principle that without clear Congressional intent, the presumption is that U.S. statutes only apply domestically. *See* 130 S. Ct. at 2877. The Court also clarifies that the presumption against extraterritorial application "is not self-evidently dispositive, but…requires further analysis." *Id*. at 2884. A presumption against extraterritoriality is not a *per se* bar against extraterritorial application. It simply requires a complainant to establish that extraterritorial application of a U.S. statute is permissible and necessary. *See E.E.O.C. v. Arabian Am. Oil Co*., 499 U.S. 244, 248 (1991).

The *Morrison* decision provides a lengthy review of the history of the case law regarding the "conduct and effects" tests, focusing especially on decisions within the Second Circuit. Contrary to what other courts have stated, *Morrison* does not provide a clear, unambiguous abrogation of those tests. *Compare Cornwell*, 729 F. Supp. 2d at 622. The "transactional" test *Morrison* ultimately adopts—whether a purchase or sale is made in the United States (i.e., conduct), or involves a security listed on a domestic exchange (i.e., effects) - restates the "conducts or effects" tests espoused in the previous court decisions it criticizes.

See 130 S. Ct. at 2886. Though ostensibly abrogating previous decisions in favor of a new test, *Morrison* only simplifies and renames the "conducts and effects" tests the Second Circuit created.

The Supreme Court in *Morrison* does not explicitly define the phrase "domestic transactions," leaving its meaning open to interpretation. *See In re Vivendi Universal, S.A. Sec. Litig*., 765 F. Supp. 2d 512, 532 (S.D.N.Y. 2011); *see also Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd*., 08-CV-01381-MSK-CBS, 2011 WL 1211511, *6 (D. Colo. Mar. 31, 2011). The only means by which to fill this gap is to review previous holdings, including those of the Second Circuit, as to what transactions are domestic in nature.

Following the two-part test in *Morrison*, the "transaction" at issue in this case is Core Labs's unlawful termination of Villanueva in retaliation for his protected conduct under Section 806 of SOX. Though the effect of the complainant's termination occurred abroad, both the decision to terminate and the communication of that decision took place within the U.S.—specifically in Core Labs's Houston, Texas, headquarters. Second, Respondent Core Labs does list securities on a domestic exchange. As such, Villanueva's protected activity has a direct effect on the filings and market evaluation that occur here in the U.S., and the suppression of protected activity similarly affects the integrity of the SEC filings that is the specific object of SOX to protect. Even if the Board agrees that

Morrison abrogates the Second Circuit case law creating the "cause and effects" tests, the facts at issue satisfy this new "transactional" test.[1]

B. The Facts In *Morrison* Are Distinguishable From Those In Villanueva's Case.

In relevant part, the Supreme Court in *Morrison* held:

> Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves *no securities listed on a domestic exchange*, and *all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States*. Petitioners have therefore failed to state a claim on which relief can be granted. We affirm the dismissal of petitioners' complaint on this ground.

130 S. Ct. at 2888 (emphasis added).

First, the Respondent in *Morrison*, National, did not list its stock on any exchange in the U.S. *See Id.* at 2875. Second, National's annual reports, public documents touting the success of its domestic subsidiary HomeSide Lending, Inc., and the later writing down the value of those same assets took place outside the

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1 The Respondents propose that Villanueva's Colombian citizenship removes any protections of Section 806 of SOX. The *Morrison* court made clear that it did not believe that the American citizenship of the plaintiff was itself sufficient to give rise to Section 10(b) claims. *See* 130 S. Ct at 2884; *see also In re Vivendi Universal, S.A. Sec. Litig.,* 765 F. Supp. 2d at 532-33. If American citizenship is not dispositive of finding jurisdiction, then foreign citizenship cannot be dispositive of denying jurisdiction. Therefore, Villanueva's nationality is irrelevant to the determination of jurisdiction. Discrimination on the basis of citizenship would be rank discrimination on the basis of national origin, which is itself unlawful.

U.S. *See id*. at 2875-76. The ruling in *Morrison* relies solely on these two points as the basis for its dismissal of the petitioner's complaint.

Villanueva's complaint, comparatively, relates to a parent company, Core Labs, that does list securities on the NYSE pursuant to Section 12(b) of the SEA. Therefore, the filings of its financial disclosures occur here. Additionally, the facts at issue—Core Labs's instruction to hide Saybolt revenues; Villanueva's complaints to Core Labs management in Houston, Texas, regarding that fraud; and Core Labs's decision to terminate Villanueva—all occured within the U.S. Because the operative facts in Villanueva's complaint are inapposite to those in *Morrison*, the latter decision is distinguishable and inapplicable to the case at bar. *See Mandell*, S1 09 CR. 0662 PAC, 2011 WL 924891, *5-6; *Compania Internacional Financiera S.A*., 11 CIV 4904 DLC, 2011 WL 3251813, *6-7.

II. ALL REQUISITE ELEMENTS OCCURRED WITHIN THE TERRITORY OF THE U.S., REMOVING THE QUESTION OF THE EXTRATERRITORIAL EFFECT OF SECTION 806 OF SOX.

Jurisdiction is warranted when all material events occur domestically. As Villanueva properly explains, because the facts directly related to his protected conduct and Core Labs's adverse actions took place in the U.S., the question of the extraterritorial application of Section 806 of SOX is moot. This analysis also satisfies the so-called "conduct" test for extraterritorial application of U.S. law.

A state has jurisdiction to prescribe laws with respect to "conduct that,

wholly or in substantial part, takes place within its territory" or to "the status of persons, or interest in things, present within in its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987). Consequently, adverse actions defendants take from within the U.S. do not raise concerns regarding the extraterritorial application of domestic statutes. *See Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) ("Because the decisionmaking processes…take place almost exclusively in this country…, they are uniquely domestic… [T]he presumption against extraterritoriality does not apply to this case."). The rationale is that Congress does not want the U.S. to become a haven for the export of illegal conduct and fraudulent decisions.

Though an employer may employ a whistleblower abroad, if the decision to terminate or otherwise retaliate against him occurs in the U.S., the employee's cause of action is domestic in nature. The decision in *Penesso v. LCC Int'l, Inc*., 2005-SOX-00016 (A.L.J. April 27, 2005), states that because the complainant "alleges that the adverse action taken against him by Respondent…occurred in the United States, it is OSHA's position that the presumption against extraterritoriality is not implicated..." *Letter from the Office of the Solicitor of the Department of Labor to Judge Burke*, December 20, 2004; *see also P & D Int'l v. Halsey Pub. Co*., 672 F. Supp. 1429, 1432 (S.D. Fla. 1987) (establishing jurisdiction if "part of

an 'act' of infringement occurs within this country, although such act be completed in a foreign jurisdiction"). The U.S. Department of Justice ("DOJ"), in its *United States Attorney Bulletin*, Vol. 55 No. 2 (March 2007), confirms that there is no question of extraterritorial application of a statute if some conduct occurs in the United States:

> A statute does not, however, become extraterritorial, so as to require an assessment as to whether Congress intended to override the presumption of territoriality, simply because the legislation reaches activities that occur (or are intended to occur) outside the territorial jurisdiction of the United States. Thus, such an offense can be considered a domestic crime if a portion of the crime occurred in the United States.

In *O'Mahony v. Accenture Ltd*., 537 F. Supp. 2d 506 (S.D.N.Y. 2008), the Court confirmed that acts within the U.S. provide sufficient jurisdiction for U.S. courts to review those acts:

> The Court *need not decide whether Congress intended § 1514A to confer extraterritorial jurisdiction* or whether any extraterritorial application of § 1514A that Congress may have authorized extends to the instant case. It suffices to state that, under the facts in this case, the Court has subject matter jurisdiction over Accenture LLP because *the alleged wrongful conduct and other material acts occurred in the United States* by persons located in the United States, and hence the exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law.

O'Mahony, 537 F. Supp. 2d at 515 (emphasis added).

III. *ARGUENDO*, EVEN IF THE EXTRATERRITORIAL APPLICATION OF SECTION 806 OF SOX IS AT ISSUE, VILLANUEVA IS ABLE TO ESTABLISH JURISDICTION BY MEANS OF THE "CONDUCT" TEST.

Though *Morrison* may suplant the Second Circuit analysis on the "effects" test, the "conduct" test remains as a confirmation that conduct occurring within the territory of the U.S. is *per se* domestic.

The "conduct" test applies regardless of where the effects of the conduct take place. "The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out the alleged fraudulent scheme." *Psimenos v. E.F. Hutton & Co., Inc*., 722 F.2d 1041, 1045 (2d Cir. 1983); *see also Zoelsch v. Arthur Andersen & Co*., 824 F.2d 27, 33 (D.C. Cir. 1987) ("[J]urisdiction is appropriate when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and 'directly cause' the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere."); *see also Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) ("[I]f defendants' fraudulent acts in the United States significantly whetted…interest in acquiring…shares, it would be immaterial…that the damage resulted…from interrelated action…induced in England…"). In *Pasquantino v. United States*, 554 U.S. 349, 371 (2009), the Supreme Court held that a defendants' offense "was

complete the moment they executed the scheme inside the United States;" and "this domestic element" justified the prosecution. *See also United States v. Mandell*, S1 09 CR. 0662 PAC, 2011 WL 924891 (S.D.N.Y. Mar. 16, 2011). Moreover, it is not necessary that the acts within the U.S. themselves are illegal or fraudulent so long as they relate to the misconduct. *See Psimenos*, 722 F.2d at 1046; *Tamari v. Bache Co*., 730 F.2d 1103, 1108 (7th Cir. 1984). The Supreme Court in *Morrison* confirms that it is only "those transactions that the statute seeks to 'regulate'" that must occur domestically in order for jurisdiction to exist. 130 S. Ct. at 2884 (internal citations omitted). The "transactions" that SOX regulates are the adverse actions by employers against its whistleblowing employees.

The necessary amount of contacts with the U.S. to establish territoriality and satisfy the "conduct" test is minimal. Courts consider a single letter sent or a single phone call made from or to the U.S. as sufficient conduct to derive jurisdiction. *See, e.g., Maxwell*, 468 F.2d at 1335 (2d Cir. 1972) ("Beyond this we see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it."); *Robinson v. TCI/US West Tele-communications Inc*., 117 F.3d 900, 907 (5th Cir. 1997) ("[T]the instruction letter sent from U.S. West…to KB [an English merchant bank] was sufficiently significant conduct to support subject matter jurisdiction."); *see also Continental Grain v. Pac. Oilseeds*, 592 F.2d 409,

420 n.18 (8th Cir. 1979); *Doll v. James Martin Assocs*., 600 F. Supp. 510, 520 (E.D. Mich. 1984). U.S. courts have jurisdiction if "at least some activity designed to further a fraudulent scheme occurs within this country." *S.E.C. v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977). It is also not necessary that all respondents engage in this conduct; it is sufficient if only one has. *See Grunenthal v. Hotz*, 712 F.2d 421, 425 (9 Cir. 1983) (jurisdiction over foreign national defendants under conduct test even though not all defendants engaged in United States conduct).[2]

In line with the decisions of *O'Mahony* and *Massey*, and in conformity with the analysis in *Morrison*, the principal acts in question—Villanueva's protected conduct and, more importantly, Core Labs's retaliatory actions against him—occurred within the U.S.[3] Consequently, there is no question of

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2 Even the First Circuit's decision in *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006), to which the Respondents cite heavily, supports this argument. Though Carnero worked in France, if he could have produced evidence that the U.S. parent company of his foreign employer had directed his termination by e-mail or somehow otherwise controlled his employment, the case might have survived. *See Carnero*, 433 F.3d at 2 (noting that the district court found that Carnero "had no contact with the defendant in Massachusetts" and that defendant did not "in any way direct or control" his employment); *see also* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 Harv. J. on Legis. 425, 496 (2009).

3 SOX is an employment statute that protects whistleblowers from retaliation by their employers. Consequently, the singular conduct at issue is the employer's retaliatory conduct. For the sake of argument, Villanueva asserts, quite persuasively, that not only did Core Labs's decision to terminate him take place in

extraterritoriality and no reason DOL cannot exercise jurisdiction over the matter.

IV. *ARGUENDO*, EVEN IF THE EXTRATERRITORIAL APPLICATION OF SECTION 806 OF SOX IS AT ISSUE, VILLANUEVA IS ABLE TO ESTABLISH JURISDICTION BY MEANS OF THE "EFFECTS" TEST.

That all pertinent actions occurred within the U.S. belies the necessity to conduct an inquiry into the extraterritorial application of Section 806 of SOX. Nevertheless, Villanueva is able to satisfy the "effects" test, establishing SOX's extraterritorial reach. Not only did substantial elements of his complaint occur within the U.S., but also the fraud of which he complained promulgated affects a publicly-traded company's U.S. shareholders and investors.

Section 806 of SOX applies to all companies with a class of securities registered under Section 12 of the SEA, or that must file reports under Section 15(d), including subsidiaries and affiliates of such companies. *See* 18 U.S.C. § 1514A(a). This coverage includes so-called "foreign private issuers"—foreign companies who voluntarily submit to U.S. securities regulations in order to gain access to investors in U.S. capital markets. SOX does not distinguish between U.S. and foreign companies listed on domestic securities exchanges.[4] By doing so,

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the U.S., but also the underlying fraud of which he reported and his protected complaints to Core Labs management in Houston, Texas.

4 Enron's use of off-shore subsidiaries to generate false financial statements was central to Congress' motivation for enacting SOX. If the reason for the enactment of SOX had to be distilled to a single word, that word would be "Enron." The

Congress chose to define the statute's scope by using a precise and highly technical specification that unambiguously includes foreign companies. Congress certainly knew that its technical specification of the statute's scope would include foreign companies, since the SEC has regulated such foreign companies for decades.

By choosing to define the statute's scope in this manner, Congress clearly expressed its intent for the statute to apply extraterritorially. Because foreign

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Congressional record is replete with references to Enron being the catalyst for this Act. Ironically, attached to the last 10-K Enron filed with the SEC before it imploded in 2001 was a 56-page list of hundreds of subsidiaries and limited partnerships based throughout the world. The various frauds that caused Enron's downfall occurred at these subsidiaries and limited partnerships. Enron's S-4 registration statement, filed with the SEC on October 9, 1996, states: "Essentially all of Enron's operations are conducted through its subsidiaries and affiliates…" SEC Form S4, Enron Corp., SEC File No. 333-13791 (Oct. 9, 1996), *available at* http://www.sec.gov/Archives/edgar/data/1024401/0000950129-96-002433.txt. When Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what they were doing on this chart. **There is no way we could have known about this without that kind of a whistleblower.** Look at this. They had all these hidden corporations-Jedi, Kenobi, Chewco, Big Doe-I guess they must have had "little doe"-Yosemite, Cactus, Ponderosa, Raptor, Braveheart, Ahluwalia, I think they were probably watching too many old reruns when they put this together. The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.

Congressional Record, S7358, July 25, 2002 (emphasis added.)

subsidiaries' operations contribute significantly to the financial performance of their parent companies listed on U.S. securities exchanges, a restrictive interpretation would frustrate the clear purpose of SOX. Moreover, Congress did not intend to induce companies to delegate more questionable activities from their domestic headquarters to their foreign subsidiaries abroad, which would be the effect if these protections were only afforded to the domestic workforce.

US. courts hold that they have jurisdiction to determine whether a statute generally applies extraterritorially "where the failure to extend the scope of the statute to a foreign setting will have adverse effects within the United States." *Massey*, 986 F.2d at 531; *see also McBee v. Delica Co. Ltd*., 417 F.3d 107, 119 (1st Cir. 2005) ("One can easily imagine a variety of harms to American commerce arising from wholly foreign activities by foreign defendants…[T]here is a risk that absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §403(2)(a); RESTATEMENT (FIRST) OF CONFLICT OF LAW § 65 (1935).

The Second Circuit first adopted this so-called "effects" test in 1945 in *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). The *Alcoa* court found the domestic effects of the foreign conduct, rather than the loci of the

offensive conduct, were controlling when the defendant organized a Canadian corporation through which it joined a Swiss aluminum cartel that controlled, in violation of the Sherman Act, the amount of aluminum delivered to the U.S. *See Id*. at 443-44. The specific test articulated is that if the conduct has "intended and actual" or "substantial and foreseeable" effects within the country, then domestic jurisdiction applies. *Id*. Later, with regard to the SEA, the Second Circuit held that subject matter jurisdiction exists over any case where fraudulent extraterritorial conduct has a substantial impact on the investors or markets of the U.S. *See Schoenbaum*, 405 F.2d 200 (2nd Cir. 1968). The court reasoned that the language of the SEA indicates Congress' intention that it protect both domestic investors and markets from fraudulent foreign transactions. *Id*. at 206. Courts have applied the "effects" test in all areas of law, including antitrust law,[5] the Commodity Exchange Act,[6] the Lanham Act,[7] labor and employment law,[8] RICO,[9] and securities laws.[10]

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5 *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 (1993); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997); *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986).

6 *See, e.g.*, *Tamari v. Bache & Co. (Lebanon) S.A.L.,* 730 F.2d 1103, 1107-08 (7th Cir.1984).

7 *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

8 *See, e.g.*, *Dowd v. Int'l Longshoremen's Ass'n*, 975 F.2d 779, 789 (11th Cir. 1992) (on NLRB application for injunction); *International Longshoremen's Ass'n* 313 NLRB 412, 416 18 (1993); *Local 553, Transport Workers Union v. Eastern Air*

The domestic effect, however, need not be great. Because Section 806 of SOX is "largely a prophylactic…measure," it even applies to "seemingly paltry sums" "insignificant in dollar value." *Morefield v. Exelon Services*, 2004-SOX-00002, 9 (A.L.J. January 28, 2004).

More recently, Administrative Law Judge Stuart A. Levin found for the complainant in the matter of *Walters v. Deutsche Bank AG, et al*., 2008-SOX-00070 (A.L.J. March 23, 2009). In *Walters*, Judge Levin noted that the complainant alleged that the problems abroad had been "misrepresented to American investors by Deutsche Bank officials." *Id*. at 29. "Consequently, while

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Lines, 544 F. Supp. 1315 (E.D.N.Y.); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 Lab. Law. 417 (2002).

9 *See, e.g.*, *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991).

10 *See, e.g., Itoba Ltd. v. Lep Group, Inc.,* 54 F.3d 118, 122 (2d Cir. 1995) (Channel Islands purchaser on London Stock Exchange of shares of U.K. company); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (Greek purchaser of U.S. and foreign securities based on misrepresentations by Greek and French brokers); *Rohrer v. FSI Futures, Inc.*, 981 F. Supp. 270 (S.D.N.Y. 1997)(German purchasers of commodity futures marketed in Germany by three German firms); *Pyrenee, Ltd. v. Wocom Commodities Ltd.*, 984 F. Supp. 1148 (N.D. Ill. 1997) (Liberian purchasers of commodity futures marketed in Hong Kong by various Hong Kong corporations); *Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp.*, 941 F. Supp. 1369 (S.D.N.Y. 1996) (Virgin Islands purchaser of convertible debt securities sold in Europe by Netherlands Antilles corporation); and *Ohman v. Kahn*, 685 F. Supp 1302 (S.D.N.Y. 1988) (Swedish purchasers of shares of Panamanian company on European exchange).

the underlying circumstances in Frankfurt were extraterritorial, Deutsche Bank AG is publicly traded in the U.S.; and the alleged ripple effects were reaching, and potentially misleading, U.S. shareholders and investors." *Id*. Judge Levin also noted that this conveyance of misleading information was "precisely the type of situation Sarbanes-Oxley was intended to address and Section 806 was intended to forestall." *Id*. This administrative decision, again, reiterates that when the effects of actions from abroad reach the U.S., domestic courts have jurisdiction to review and pass judgment on those actions.

Core Labs offers securities for trade by U.S. shareholders and investors through the New York Stock Exchange ("NYSE"). One of Core Labs's controlled subsidiaries, Respondent Saybolt, is accused of fraudulently hiding income and illegally avoiding the payment of taxes. Surely a subsidiary's unlawful activity (and the risk of enforcement action by U.S. Securities and tax authorities) will negatively affect both its publicly-traded parent company and the investors thereof.

V. TO THE EXTENT THAT JURISDICTION DEPENDS ON FINDING CERTAIN FACTS, THE DETERMINATIVE ISSUE IS WHETHER VILLANUEVA HAD A GOOD FAITH BASIS TO BELIEVE THOSE FACTS WERE TRUE.

This Board has recently and exhaustively reviewed the the reasonable basis test for determining protected activity. *See, Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011). Starting at page fourteen, the majority opinion explains the ARB's current analysis of

protected activity and the "reasonable belief" standard. The ARB goes on to reject its prior holdings requiring that protected activity be definite and specific. *See also* pp. 33-40, opinion of J. Brown concurring in part and dissenting in part. The same standards should apply to jurisdictional issues. If an employee has a reasonable basis to believe that SOX covers him or her and protects his or her activities in furtherance of SOX, then reprisals against that protected activity will be just an injurious to the cause of encouraging whistleblowers to come forward as would be reprisals against other employees who are later determined to be covered. Thus, just as protected activity is determined by the "reasonable belief" standard, so too must coverage.

VI. SECTION 929A OF THE DODD-FRANK ACT PROVIDES VILLANUEVA WITH STATUTORY PROTECTION.

A. Section 929A Of The Dodd-Frank Act Does Not Create Retroactive Effects And So Applies to Villanueva's Complaint.

During the pendency of Villanueva's appeal, on July 21, 2010, the President signed into law the Dodd-Frank Act. Section 929A of the Dodd-Frank Act amended Section 806 of SOX by inserting within subsection (a) the following provision: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." Consequently, 18 U.S.C. § 1514A(a), as amended, currently reads in relevant part:

> **(a) Whistleblower protection for employees of publicly traded companies**. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or

> that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company*,…or any officer, employee, contractor, subcontractor, or agent of such company,…may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee…

18 U.S.C. § 1514A(a) (emphasis added).

In its March 31, 2011, decision in *Johnson v. Siemens*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011), the ARB held, after a lengthy discussion, that Section 929A of the Dodd-Frank Act does not create retroactive effects but nevertheless reflected the correct legal outcome under the previous version of SOX.

> We conclude that *Section 929A is a clarification of Section 806 and does not create retroactive effects*. Section 929A's addition of subsidiary coverage merely makes "what was intended all along ever more unmistakably clear." Because the amendment by Section 929A does not create retroactive effects, it applies to Johnson's case on appeal. Accordingly, we hold that, at a minimum, the SOX whistleblower provision covers a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements.

Id. at 16 (emphasis added) (internal citations omitted).

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, and clearly Congress did not intend to delay a provision that removes a loophole that it never intended to exist.

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 (April 30, 2010). Congress' concern that some DOL decisions erroneously construed Section 806 as potentially excluding from the ambit of Section 806 coverage of employees of subsidiaries of publicly-traded companies spurred this clarification. 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). *Accord, Willy v. Administrative Review Bd*. 423 F.3d 483,489, n. i 1 (5th Cir. 2005)(an amendment intended to "make clear" the original intent); *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1512 (10th Cir. 1985) (applying amendment to law as indication of Congress' original intent).

Section 929A of the Dodd-Frank Act does not change the scope of Section 806 coverage under SOX, but instead merely clarifies an area of ambiguity and judicial inconsistency in existing law.

B. Section 929A Of The Dodd-Frank Act Confirms That SOX Protects Villanueva's Employment With Saybolt.

As stated above, Section 929A of the Dodd-Frank Act clarifies that Section 806 of SOX applies to all subsidiaries of domestically--traded companies that the company includes in its consolidated financial statements. Neither the Dodd-Frank Act nor SOX create any limitation on its coverage of companies and related subsidiaries to only those incorporated within the U.S. To do so would release from liability the numerous foreign entities who voluntarily subject themselves to U.S. laws by participating in, and enjoying the benefits of, trading securities in U.S. markets. The reality of the stock exchange and Congress's failure to create any such limitation can be nothing but intentional.

To comply with Sections 12, 13, and 15 of the SEA, Core Labs, like every

other publicly-traded company in the U.S., files annual Form 10-K filings with the SEC.[11] In its February 22, 2011, Form 10-K filing with the SEC for the period ending December 31, 2010, Core Labs lists Saybolt de Colombia Limitada, Respondent, as a 95% owned subsidiary; Saybolt Latin America BV as a 100% owned subsidiary; and Saybolt International BV as a 100% owned subsidiary. *See* Exhibit 21.1 of Core Labs's Form 10-K (August 16, 2011, 09:46 AM), http://www.sec.gov/Archives/edgar/data/1000229/000100022911000015/clb-10k_2010.htm. Core Labs specifically states in its Form 10-K:

> The accompanying Consolidated Financial Statements have been prepared in accordance with generally accepted accounting principles in the U.S. ("U.S. GAAP"), and include the accounts of Core Laboratories *and its subsidiaries for which we have a controlling voting interest and/or a controlling financial interest*. All inter-company transactions and balances have been eliminated in consolidation.

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11 Sections 12, 13, and 15 of the SEA require covered companies to submit registration statements and supplemental periodic statements thereafter. Under Section 12(b)(1), registration statements must contain:

> Such information, in such detail, as to the issuer and any person *directly or indirectly controlling or controlled by*, or under direct or indirect common control with, *the issuer*, and any guarantor of the security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors…

15 U.S.C. § 78l(b)(1) (emphasis added). While Section 13of the SEA requires that every issuer of a security registered pursuant to Section 12 file "such information and documents as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration," Section 15(d) requires each issuer file "supplementary and periodic information, documents, and reports."

Id. at F-7 (emphasis added). Core Labs, like many other companies who trade securities in U.S. markets, include condensed consolidating financial information "so that separate financial statements…are not required to be filed with the U.S. Securities and Exchange Commission." *Id*. at F-26.

Through the clarification in Section 929A of the Dodd-Frank Act, Saybolt is a statutorily covered entity under SOX because Care Labs's includes it and all intermediary subsidiaries within its consolidated financial statements.[12]

CONCLUSION

When all material events occur within the territory of the U.S., as Villanueva has established, jurisdiction automatically arises and there is no need to analyze the

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12 Though Section 929A of the Dodd-Frank Act relieves the necessity of further analysis, Section 20(a) of the SEA also supports the application of Section 806 of SOX to corporate subsidiaries irrespective of nationality. Section 20(a) of SOX expressly imposes joint and several liability on "persons" who directly or indirectly control other "persons" subject to the provisions of the SOX. This provision means that the parent can be held liable for an act of the subsidiary for securities law purposes, and vice versa.

The applicability of Section 20(a) of the SEA to Section 806 of SOX is clear. Section 3(b)(1) of SOX states:

> A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

extraterritorial effect of SOX. Insofar as the parties contest whether conduct took place in the U.S., the question is a factual one that requires further review, rendering the complaint not ripe for dismissal. Even if the issue of the extraterritorial application of Section 806 of SOX is properly before this Board, Villanueva is still able to satisfy both the "conduct" and "effects" tests that permit such application. The recent Supreme Court decision in *Morrison* does not substantially alter that analysis. Finally, Section 929A of the Dodd-Frank Act resolves any question of subsidiary coverage under SOX given Saybolt's inclusion in Core Labs's financial statements to the SEC. Consequently, the Board must find that DOL jurisdiction to review the merits of Villanueva's complaint.

August 23, 2011.

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 23rd day of August, 2011:

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