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Issue Date: 05 March 2008

CASE NO: 2007-SOX-00047

In the Matter of:

THOMAS S. INMAN,
Complainant,

v.

FANNIE MAE,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This proceeding arises from a complaint filed by Thomas S. Inman ("Complainant" or "Inman") alleging violations by Fannie Mae ("Respondent" or "Fannie Mae") of the employee protection provisions of Section 806 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A ("the Act" or "SOX"). The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. § 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by their employer, because the employee provided information to the employer, a federal agency, or Congress relating to alleged violations of certain federal fraud statutes or any rule or regulation of the Securities and Exchange Commission.

On December 7, 2007, Respondent's counsel filed a motion for summary judgment ("Resp. Mot.") pursuant to 29 C.F.R. § 18.40 alleging that Complainant cannot establish a *prima facie* case of discrimination under SOX. Complainant filed an opposition ("Comp. Opp.") to the motion on January 11, 2008. Fannie Mae thereafter filed a reply ("Resp. Rep.") to Complainant's opposition, and Complainant filed a surreply ("Comp. Sur."). On February 11, 2008, the parties offered oral argument in support of, and in opposition to, summary judgment. Pursuant to my direction at the hearing, supplemental briefs were thereafter filed by Respondent and Complainant[1] ("Resp. Supp." and "Comp. Supp.," respectively) on February 20, 2008, and the matter is now ready for decision. For the reasons set forth below, I find Respondent's motion should be granted.

[1] During the course of the motion hearing, the parties agreed that the record should be supplemented with copies of Complainant's resume and two job descriptions provided to him during the course of his employment with Fannie Mae. Those documents, which were previously submitted by Complainant's counsel with his pre-hearing submission in this matter, are admitted for purposes of deciding Respondent's motion, and will be referenced herein as Complainant's exhibits ("CX") 1, 2 and 3, respectively.

Summary Decision

Applicable regulations provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 18.40 is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc., USDOL/OALJ Reporter (HTML)*, ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)). The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. *See Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome the summary judgment motion. He may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 248.

Based on the record before me, and certain facts which have been judicially noticed,[2] I find the facts listed below are both undisputed and material to this litigation:

1. The Federal National Mortgage Association, "Fannie Mae," is a federally-chartered, shareholder-owned corporation with its principal place of business in the District of Columbia. *See* Federal National Mortgage Association Charter Act, 12 U.S.C. § 1717(a)(1) (West 2008), *available at* http://www.fanniemae.com/aboutfm/pdf/charter.pdf (last visited Feb. 19, 2008).

2. Fannie Mae provides funds to mortgage lenders through its purchases of mortgage assets, and it issues and guarantees mortgage-related securities that facilitate the flow of additional funds into the mortgage market. *See* FANNIE MAE, AN INTRODUCTION TO FANNIE MAE at 3-6 (2007), *available at* http://www.fanniemae.com/media/pdf/fannie_mae_introduction.pdf (last visited Feb. 19, 2008).

[2] Certain factual information relating to Fannie Mae and the Office of Federal Housing Enterprise Oversight set forth in this Order has been proffered by the parties as both relevant to summary judgment and undisputed. Other publicly available facts referenced herein were obtained from the websites of these two entities at www.fanniemae.com and www.ofheo.gov, respectively.

3. The Office of Federal Housing Enterprise Oversight ("OFHEO") is an independent entity within the Department of Housing and Urban Development. *See* OFHEO FAQs, *available at* http://www.ofheo.gov/FAQs.aspx (last visited Feb. 19, 2008).

4. OFHEO functions as Fannie Mae's "safety and soundness" regulator, and it has regulatory authority over Fannie Mae. *See* ABOUT OFHEO, *available at* http://www.ofheo.gov/about.aspx?Nav=55 (last visited Feb. 19, 2008).

5. OFEHO's oversight responsibilities include, *inter alia*: conducting broad-based examinations of Fannie Mae; making quarterly findings of capital adequacy based on minimum capital standards and a risk-based standard; prohibiting excessive executive compensation; issuing regulations concerning capital and enforcement standards; and taking necessary enforcement actions. *See* ABOUT OFHEO, *available at* http://www.ofheo.gov/about.aspx?Nav=55 (last visited Feb. 19, 2008).

6. On July 17, 2003, OFHEO informed Congress that it intended to conduct a special review of Fannie Mae's accounting policies. It issued in October of that year a Request for Proposals from accounting firms to assist it in the review and subsequently engaged the accounting firm of Deloitte & Touche for that purpose. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE at 15, 190 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 27, 2008).)

7. At the time OFHEO began its special examination of Fannie Mae, Fannie Mae's Office of Auditing was responsible for the internal audit function at Fannie Mae and the accounting firm of KPMG LLP was responsible for its external audit function. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE at 15, 190 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 27, 2008).)

8. On September 20, 2004, OFHEO delivered to Fannie Mae an interim report raising various questions about Fannie Mae's application of Financial Accounting Standard No. 91, *Accounting for Nonrefundable Fees and Costs Associated with Originating or Acquiring Loans and Initial Direct Costs of Leases* ("FAS 91") and Financial Accounting Standard No. 133, *Accounting for Derivative Instruments and Hedging Activities* ("FAS 133"). (Respondent's exhibit ("RX") 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Dec. 22, 2004 for period ending Dec. 17, 2004); RX 2 to Resp. Mot. – Hisey Aff. at ¶ 4.)

9. After receiving OFHEO's interim report, Fannie Mae's Board of Directors established a Special Review Committee of independent directors to review OFHEO's findings and to oversee an independent investigation of issues raised in the report. The Special Review Committee subsequently engaged the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP to conduct the investigation and to prepare a report of its findings and conclusions. (RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION,

FORM 8-K (Filed Mar. 18, 2005 for period ending Mar. 17, 2005).)

10. On September 27, 2004, Fannie Mae entered into an agreement with OFHEO which required, *inter alia*, that Fannie Mae maintain a capital surplus of 30 percent over its minimum capital level requirement. (RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Mar. 18, 2005 for period ending Mar. 17, 2005); RX 2 to Resp. Mot. – Hisey Aff. at ¶ 6.)

11. Fannie Mae's capital levels were monitored weekly thereafter by OFHEO's examination team. *See* cover letter of James B. Lockhart III, Acting Director, to OFEHO 2006 Report to Congress dated June 15, 2006 at 4, available at http://www.ofheo.gov/media/pdf/annualreport2006.pdf (last visited February 28, 2008); *see also* OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE at 12, 331 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF (last visited Feb. 28, 2008).

12. After receiving OFHEO's interim report, Fannie Mae requested that the SEC's Office of the Chief Accountant ("OCA") review its accounting practices with respect to the two areas identified in OFHEO's interim findings to determine whether Fannie Mae's practices complied with applicable Generally Accepted Accounting Principles ("GAAP"). (RX 2 to Resp. Mot. – Hisey Aff. at ¶ 4.)

13. In a December 15, 2004 statement, OCA advised Fannie Mae that, from 2001 to mid-2004, its accounting practices with respect to FAS 91 and FAS 133 did not comply in material respects with GAAP requirements, and it directed Fannie Mae to restate the financial statements it filed with the SEC for that period. This is known as the "restatement" period. (RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Dec. 22, 2004 for period ending Dec. 17, 2004); RX 2 to Resp. Mot. – Hisey Aff. at ¶ 4; *see also* RX 2 to Resp. Mot. – Hisey Aff. at ¶ 4, Herrick Deposition Transcript at 98.)

14. By late 2004, OFHEO concluded that Fannie Mae's Amortization Integration Modeling System ("AIMS") could not be relied upon to produce accurate information, and OFHEO and Fannie Mae agreed that AIMS would be scrapped and the FAS 91 accounting information would be restated on a new accounting system. (*See, e.g.*, RX 6 to Resp. Mot. – Hisey Aff. at ¶ 5.)

15. In a Form 8-K filed with the SEC in December, 2004, Fannie Mae stated, in relevant part, that:

> [O]n December 17, 2004, the Audit Committee of the Board of Directors of Fannie Mae concluded that Fannie Mae's previously filed interim and audited financial statements and the independent auditors' reports thereon for the periods from January 2001 through the second quarter of 2004 should no longer be relied upon because such financial statements were prepared applying

> accounting practices that did not comply with generally accepted accounting principles, or GAAP.

(RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Dec. 22, 2004 for period ending Dec. 17, 2004).)

16. KPMG LLP, Fannie Mae's independent auditor, was dismissed by Fannie Mae in December, 2004 and replaced in that capacity in January, 2005 by the accounting firm of Deloitte & Touche which, as noted above, had been assisting OFHEO in conducting its special review of Fannie Mae. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE at 17 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 28, 2008).); *see also* RX 3 to Resp. Mot. – Kozich Aff. at ¶¶ 7-8), RX B to Resp. Supp – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 10-K (For fiscal year ended Dec. 31, 2004 at 3).)

17. In a Form 8-K filed with the SEC in March, 2005, Fannie Mae wrote:

> As a result of the SEC's conclusions [reported to Fannie Mae on December 15, 2004], Fannie Mae will restate its financial results from January 1, 2001 through June 30, 2004 to comply fully with the SEC's determination. . . . Fannie Mae has not yet filed its quarterly report on Form 10-Q for the quarter ended September 30, 2004. The financial information regarding the company's anticipated results of operations for the quarter ended September 30, 2004 that was contained in the Form 12b-25 the company filed on November 15, 2004 and in a Form 8-K filed on November 16, 2004 was prepared applying the same policies and practices, and, accordingly, should not be relied upon.

(RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Mar. 18, 2005 for period ending Mar. 17, 2005).)

18. Fannie Mae also noted in its Form 8-K filed with the SEC in March, 2005 that:

> On February 23, 2005, Fannie Mae announced and reported on a Form 8-K that OFHEO notified Fannie Mae's Board of Directors and management of additional accounting and internal control issues and questions the agency identified in its ongoing special examination, and directed that these matters be included in the internal reviews being conducted by Fannie Mae's Board of Directors and management and reviewed by the company's external auditor. OFHEO indicated that it has not completed its review of all aspects of these issues, but has identified policies that it believes appear to be inconsistent with generally accepted accounting principles as well as internal control deficiencies that it believes raise safety and soundness concerns. The issues and questions pertain to the

> following areas: securities accounting, loan accounting, consolidations, accounting for commitments, and practices to smooth certain income and expense amounts. OFHEO also raised concerns regarding journal entry controls, systems limitations, and database modifications, as well as new developments relating to FAS 91. On March 7, 2005, Fannie Mae and OFHEO entered into a supplement to the September 27, 2004 agreement. The supplemental agreement was meant to address issues that arose after September 27, 2004, including concerns at OFHEO with internal controls and resolution of other organizational problems, determinations by the SEC, public filings by Fannie Mae, reclassification of the capital position of Fannie Mae and actions taken by Fannie Mae's Board of Directors. On March 11, 2005, the company filed a current report on Form 8-K with the SEC that includes a copy of the supplemental agreement.

(RX 6 to Resp. Mot. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 8-K (Filed Mar. 18, 2005 for period ending Mar. 17, 2005).)

19. Fannie Mae could not file any reliable financial statements until the restatement was complete, which occurred in December, 2006 when Fannie Mae filed its 2004 10-K. (*See* Comp. Opp. – Attached Kozich Deposition transcript at 10:7-16; *see also* RX B to Resp. Supp. – FEDERAL NATIONAL MORTGAGE ASSOCIATION, FORM 10-K (For fiscal year ended Dec. 31, 2004 at 71, 73).)

20. OFHEO was relying on Deloitte & Touche, Fannie Mae's external auditor, to report to it accurate information regarding Fannie Mae's financial condition during the restatement period. (Comp. Opp. – Attached Hisey Dep. at 56.)

21. In June 2005, Gregory Kozich, Senior Vice President for Accounting Operations,[3] commissioned John Lankenau, a contractor, to prepare a research memo known as the "FAS 91 Amortization White Paper" ("White Paper") to address Fannie Mae's FAS 91 accounting practices for 2001 to 2004, including the errors in relevant methodologies over the restatement period produced by Fannie Mae's AIMS/iPDI amortization system. (RX 3 to Resp. Mot. – Kozich Aff. at ¶ 7.)

22. The White Paper was provided to, among others, Fannie Mae's senior management, OFHEO, and the accounting firm of Deloitte & Touche. (RX 3 to Resp. Mot. – Kozich Aff. at ¶ 8.)

23. The White Paper discussed various known problems with AIMS and concluded that it was likely that there were other unknown errors in the system. (RX 3 to Resp. Mot. – Kozich Aff. at ¶ 9.)

[3] Gregory Kozich has been Fannie Mae's Senior Vice President for Accounting Operations since May 2005. (RX 3 to Resp. Mot. – Kozich Aff. at ¶ 1.)

24. The White Paper explained the reason for its preparation as follows:

> The purpose of this memorandum is to provide background to Fannie Mae's FAS 91 amortization practices from 2001 to 2004, to detail the previous methodology used to estimate amortization and accretion amounts for deferred price adjustments related to mortgage loans and mortgage-backed securities, to identify the errors in those methodologies over the restatement period and to explain the proposed plan for restating amortization expense for 2001 forward using the new amortization engine currently in development.

(Complainant's exhibit ("CX") 23 to Comp. Opp. – FAS 91 AMORTIZATION WHITE PAPER at 4.)

25. The White Paper also "describes numerous errors, which interact with each other" and concludes that "[i]t is not possible to isolate the effect of each individual error." (CX 23 to Comp. Opp. – FAS 91 AMORTIZATION WHITE PAPER at 4, fn 3.)

26. The White Paper further states that "[a]n overall impact will be assessed after fixing the process (via a new [amortization] engine) and re-running the relevant time periods." (CX 23 to Comp. Opp. – FAS 91 AMORTIZATION WHITE PAPER at 4.)

27. According to the "Background" section of the White Paper:

> As Fannie Mae began the process to restate the amortization expense for 2001 forward, it was noted that although the math used for calculations in the amortization engine appeared to be sound, there were deficiencies in the processes, models, and assumptions used. Enhancing the current system to correct these shortcomings would be equivalent to rewriting code and processes of the amortization system. It was determined that the best solution would be to create a new system that would rectify the identified issues in the old amortization engine, and do so in a transparent and auditable fashion. . . . Based on the number and scope of the issues identified, and the fact that many of these issues – caused by fundamental system design limitations and flaws – are misapplications of GAAP, Fannie Mae does not believe the old system should be used for determining amortization expense for the restatement period. Only the new amortization engine will produce GAAP-consistent, reasonable, and auditable results during this timeframe.

(CX 23 to Comp. Opp. – FAS 91 AMORTIZATION WHITE PAPER at 11-12.)

28. According to the "Conclusion" section of the White Paper:

> While Fannie Mae has expended considerable effort to find, understand

> and explain the errors in the old amortization engine, we believe it is likely there are other errors in the system. Fixing the known flaws, a task that would be equivalent to building a new engine, will still leave substantial residual risk. Given all of the above, management cannot support the use of the existing amortization engine.

(CX 23 to Comp. Opp. – FAS 91 AMORTIZATION WHITE PAPER at 59.)

29. AIMS continued to be used to close Fannie Mae's books on a monthly basis during the transition period between September 2004, when OFHEO issued its interim report, and the date a new amortization engine could be constructed to replace AIMS. (RX 3 to Resp. Mot. – Kozich Aff. at ¶¶ 9-10.)

30. Complainant was hired on November 28, 2005 by Respondent to manage Fannie Mae's "FAS 91 Production Team" comprised of three full time employees and two contractors, all of whom worked at Respondent's offices located at 4000 Wisconsin Avenue, N.W., Washington, DC. (RX 4 to Resp. Mot. – Investigations Decision by Leslie Arrington and Fred Rivera at 3 (Dec. 22, 2006); *see, e.g.*, RX 8 to Resp. Mot. – Herrick Aff. at ¶¶ 1, 6; RX 3 to Resp. Mot. – Kozich Aff. at ¶ 2; *see also* RX 5 to Resp. Mot. – Inman Dep. at 43-44.)

31. On November 29, 2005, Complainant met with Alison Herrick and Marcus Lee, at which time Alison Herrick identified to Complainant the five members of the FAS 91 Production Team who were to be his "direct reports" and whose work product would be Complainant's responsibility. (RX 12 – Written Statement of Thomas Inman dated Sept. 11, 2006 at ¶ 9.)

32. At the time he was hired by Fannie Mae, Complainant had graduated cum laude from Duke University in Durham, North Carolina in 1974 with a Bachelor of Arts degree in Management Science and had received a Master of Business Administration degree from The Darden School at the University of Virginia in Charlottesville, Virginia in 1977. (CX 2 – Resume of Thomas S. Inman.)

33. At the time he was hired by Fannie Mae, Complainant had worked as a "Senior Finance Professional" for over 25 years in officer-level positions for various financial and securities firms including Wachovia Bank, GE Capital Structured Finance Group, Scott & Stringfellow, Inc., Wheat, First Securities, Inc., and Merrill Lynch & Co. (CX 2 – Resume of Thomas S. Inman.)

34. During his 25-year career as a "Senior Finance Professional," Complainant gained extensive experience in such areas as: "Financial Analysis & Modeling;" "Pro Forma Projections;" "Options Pricing & Hedging Strategies;" "Derivative & Structured Finance;" "Corporate Tax Law Issues;" "SFAS 133 Accounting Issues;" and "Regulatory Issues." (CX 2 – Resume of Thomas S. Inman)

35. When hired by Fannie Mae, Complainant held current Series 7 and Series 66 securities

registrations which required, *inter alia*, that he possess a demonstrated knowledge and understanding of state and federal securities laws. (RX 12 to Resp. Mot. – Sept. 11, 2006 Written Statement of Thomas S. Inman provided to OSHA at ¶13.)

36. When he was hired by Fannie Mae, Complainant was familiar with the securities disclosure requirements of the SEC's rules and regulations, the Securities Act of 1933, the Securities Exchange Act of 1934, securities fraud, and the provisions of the Sarbanes-Oxley Act. (RX 12 to Resp. Mot. – Sept. 11, 2006 Written Statement of Thomas S. Inman provided to OSHA at ¶¶ 12-13; CX 2 – Resume of Thomas S. Inman.)

37. At the time he was hired by Fannie Mae, Complainant was familiar with OFHEO's investigation of Fannie Mae, and he believed that: the financial statements of Fannie Mae for 2003 and 2004 had been misstated; Respondent's prior management had altered amortization adjustments to obtain a specific financial result, including manipulation of the AIMS system; and OFHEO had characterized that activity as fraud. (RX 5 to Resp. Mot. – Inman Deposition at 26-29, 35-36, 42, 95-96.)

38. At the time he was hired by Fannie Mae, Complainant was provided with a copy of the White Paper prepared by John Lankenau. (Attachment to Comp. Opp. – Inman Aff. at 1; *see also* RX 3 to Resp. Mot. – Kozich Aff. ¶ 8.)

39. Complainant knew during the period of his employment with Fannie Mae that Deloitte & Touche was functioning as Fannie Mae's external auditor and that the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP had been retained to conduct an independent investigation of Fannie Mae in response to OFHEO's findings. (*See, e.g.*, RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 286 ("Deloitte & Touche was clearly functioning in that capacity . . . ."); *Id*. at 26-27 ("Fannie Mae's board of directors retained Paul Weiss Rifkind Wharton & Garrison to conduct an investigation of the allegations contained within the OFHEO report and to deliver a report to the board.")

40. Within the first few days after he was hired at Fannie Mae, Inman read, understood, and accepted Fannie Mae's Code of Business Conduct which required, *inter alia*, that Fannie Mae employees "[n]ever make false or fictitious statements . . . for any purpose in [its] . . . records." (RX 12 to Resp. Mot. – Sept. 1, 2006 Written Statement of Thomas S. Inman provided to OSHA at ¶¶ 11 and 14.)

41. Fannie Mae's Code of Business Conduct further provided that an employee who suspects or knows that wrongdoing has occurred, or would occur, is expected and encouraged to raise the concern with his or her supervisor, with Human Resources, or the Office of Investigations.[4] (*See, e.g.*, RX 2 to Resp. Mot. – Hisey Aff. at ¶ 8, RX 3 to Resp. Mot. –

[4] Fannie Mae's Office of Investigations was previously designated as the Office of Corporate Justice. In May 2006, the Office of Corporate Justice was reorganized and became the Office of Investigations under a newly created division known as Compliance & Ethics. At various times material to this litigation, Complainant and others interacted with the Office of Investigations and its predecessor, the Office of Corporate Justice. The current title of the office will be used throughout this decision despite the fact that the office may have, at the time of a particular contact, been designated as the Office of Corporate Justice.

Kozich Aff. at ¶ 5, RX 4 to Resp. Mot. – Arrington Aff. at ¶ 3, RX 8 to Resp. Mot. – Herrick Aff. at ¶ 11.)

42. The position description given to Complainant by Fannie Mae at or about the time he was hired provided, *inter alia*, that: the incumbent "[m]anage all activities related to the accounting and reporting for Fannie Mae's FAS 91 Accounting;" he or she "[e]stablish and maintain appropriate internal controls with SOX team . . . ;" he or she possess knowledge of accounting principles related to FAS 91 and of the internal control framework/testing requirements of Sarbanes Oxley; and he or she have a degree in accounting or finance with "CPA or MBA a plus." (CX 3 – "Senior Manager FAS91" position description.)

43. During his employment with Fannie Mae, Complainant knew that Deloitte & Touche was auditing Fannie Mae's accounts and believed that those auditors had a responsibility under *Statement on Auditing Standards No. 99* ("SAS 99") to presume fraud when reviewing financial records and the circumstances failed to exclude fraud. (*See, e.g.*, RX 12 to Resp. Mot. – Sept. 11, 2006 Written Statement of Thomas S. Inman provided to OSHA at 1-2; RX 5 to Resp. Mot. – Inman Deposition at 285-90.)

44. SAS 99 is expressly applicable to "Independent Auditors." *See, e.g., AU Section 316A – Consideration of Fraud in Financial Statement Audit*, "Introduction and Overview" (referencing *"Responsibilities and Functions of Independent Auditor*," noting that auditors have a responsibility to exercise professional skepticism so as to assure that financial statements are free of material misstatements, and describing fraud and its characteristics) *available at* http://www.aicpa.org/download/members/div/auditstd/AU-00316A.pdf (last visited February 19, 2008.)

45. Internal auditors working in Fannie Mae's Office of Auditing are expected to comply with the Code of Conduct of the Institute of Internal Auditors' International Standards for the Professional Practice of Internal Auditing. When appropriate, Fannie Mae's internal auditors are also bound by the American Institute of Certified Public Accountants' Generally Accepted Auditing Standards. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE 187-188 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 19, 2008).)

46. At the time Complainant was hired, the FAS 91 group was divided into two teams – a production team and a restatement team. (RX 4 to Resp. Mot. – Investigations Decision by Leslie Arrington and Fred Rivera at 3 (Dec. 22, 2006).)

47. The FAS 91 Restatement Team was responsible for developing a methodology to properly account for premium and discount amortization pursuant to GAAP, and then correctly restating Fannie Mae's FAS 91 results for the prior years. (RX 4 to Resp. Mot. – Investigations Decision by Leslie Arrington and Fred Rivera at 3 (Dec. 22, 2006).)

48. The FAS 91 Production Team was responsible for supervising the provision of FAS 91

data sufficient to close Fannie Mae's books at month-end, analyzing that data, and preparing related reports for Fannie Mae's senior management and OFHEO. (RX 4 to Resp. Mot. – Investigations Decision by Leslie Arrington and Fred Rivera at 3 (Dec. 22, 2006).)

49. The FAS 91 Production Team, including Complainant, was supervised by Hak "Marcus" Lee and Alison Herrick. (RX 3 to Resp. Mot. – Kozich Aff. at ¶ 2.)

50. In December 2005, shortly after being hired by Fannie Mae, Complainant completed a Fannie Mae internet course covering the Sarbanes-Oxley Act. (RX 12 to Resp. Mot. – Sept. 11, 2006 Written Statement of Thomas S. Inman provided to OSHA at ¶ 12, fn xxi.)

51. On December 20, 2005, Complainant informed Fannie Mae's Human Resources office that a subordinate employee had "petted" his arm during a meeting in her cubical but further stated that he did not consider the incident "harassment" and did not wish the Office of Investigations to address the matter. (*See, e.g.*, RX 4 to Resp. Mot. – Investigations Decision by Leslie Arrington and Fred Rivera at 7.)

52. During 2005 and 2006, while the prior periods were being re-audited and restated and the new accounting system was being built, AIMS continued to produce the type of errors that OFHEO had brought to Fannie Mae's attention. (RX 2 to Resp. Mot. – Hisey Aff. at ¶ 5.)

53. In January, 2006 Complainant concluded that AIMS produced an error that overstated an amortization expense by approximately $52.4 million. (*See, e.g.*, CX 24 to Comp. Opp. at FM002410; Attachment to Comp. Opp. – Inman Aff. at ¶ 4.)

54. Complainant reported the $52.4 million error to Fannie Mae management. (*See* Attachment to Comp. Opp. – Inman Aff. at ¶ 6-8; CX 24 to Comp. Opp. at FM002411; CX 25 to Comp. Opp. at FM009300)

55. Complainant stated that the $52.4 million error should have been booked as a $500,000 income item rather than a $52.4 million expense item. (*Id.*; Comp. Opp. at 13; Resp. Rep. at 17.)

56. In response to Complainant's report to management of the $52.4 million error, management instructed Complainant to halt any further analysis of this item or similar unreconciled balances. (Attachment to Comp. Opp. – Inman Aff. at ¶ 13; *see* RX 8 to Resp. Mot. – Herrick Opp. at ¶ 5.)

57. Management subsequently determined that the $52.4 million item would be recorded in the general ledger as an expense item. (Comp. Opp. –Attached Inman Aff. at ¶ 15.; Herrick Dep. at 118-119; RX 12 to Resp. Mot. – Sept. 11, 2006 Statement of Thomas Inman to DOL at TI000044.)

58. On January 5, 2006, Complainant contacted the Office of Investigation's "hotline" and spoke with Shadey Brown regarding his concern that one of his subordinates, Patricia Wells, had transmitted an email to someone with an attached spreadsheet which contained various errors. (*See, e.g.*, RX 4 to Resp. Mot. – Arrington Affidavit at ¶ 6(b).)

59. After discussing his concern with Ms. Brown, Complainant agreed to treat the incident as a performance issue. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 239; *see also* RX 10 to Resp. Mot. – Attachment to Brown Aff. at 2.)

60. Paul Weiss issued a report dated February 23, 2006 setting forth its findings and conclusions regarding the investigation requested by Fannie Mae's Special Review Committee. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE at 18, n.10 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 28, 2008).)

61. In or around March, 2006 Complainant concluded that AIMS had produced a $2.4 billion anomalous income result. (Comp. Opp. – Attached Inman Aff. at ¶ 20; *see* Comp. Opp. – Attached Herrick Dep. at 150:19-21, 153:19-154:7; Comp. Opp. – Attached Kozich Dep. at 127-128.)

62. Complainant provided an estimate and explanation of the $2.4 billion error to Alison Herrick and Marcus Lee. (Comp. Opp. – Attached Inman Aff. at ¶ 20-22; *see also* Comp. Opp. – Attached Herrick Dep. at 153-154; Comp. Opp. – Attached Kozich Dep. at 127-128.)

63. Complainant also reported the $2.4 billion error to John Lankenau, the individual who had prepared the White Paper. (Attachment to Comp. Opp. – Inman Aff. at ¶ 23.)

64. In response to Complainant's report of the $2.4 billion overstatement of income, Fannie Mae management "zeroed out" the error, consistent with Inman's recommendation, so that it would not be reflected as income in Fannie Mae's financial records. (*See* Resp. Supp. at 16; RX 12 to Resp. Mot. – Sept. 11, 2006 Statement of Thomas Inman to DOL at TI000044; *see also* Comp. Opp. – Attached Kozich Dep. at 127-128.)

65. On March 7, 2006, Complainant reported to one of his supervisors that Patricia Wells had made the statement "all men are babies when they are sick." (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 6(c).)

66. On April 7, 2006, Complainant met with Leslie Arrington, the Director of Fannie Mae's Office of Investigations, after he received a negative "probationary period" mid-point performance review from his supervisors, Alison Herrick and Marcus Lee. (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 6(d).)

67. On May 12, 2006, Complainant reported to the Office of Investigations that he believed Alison Herrick and Marcus Lee were retaliating against him because he reported Patricia

Wells' comment that "all men are babies," and because he also reported that Alison Herrick discriminated against African Americans because she intended to terminate the temporary assignment of an African American contractor. (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 6(e).)

68. Complainant's employment with Fannie Mae was terminated on May 16, 2006. (*See, e.g.*, RX 4 to Resp. Mot. – Arrington Aff. at ¶ 7.)

69. On May 16, 2006, after being informed that he was being terminated, Complainant alleged that his termination was retaliatory and he planned to sue Fannie Mae based upon, *inter alia*, "SOX issues." (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 7.)

70. During the period from late 2005 through mid-2006, *i.e.*, the period of Inman's employment with Respondent, Fannie Mae disclosed in its monthly compulsory Minimum Capital Reports to OFHEO that the impact of FAS 91 premium and discount amortization accounting issues could not be estimated and that they could therefore have an adverse or undeterminable expected impact on Fannie Mae's capital. (RX 2 to Resp. Mot. – Hisey Aff. at ¶ 7.)

71. On May 23, 2006, OFHEO released its "Final Report of the Special Examination of Fannie Mae," the summary of which notes, *inter alia*, that OFHEO's investigation disclosed that, between 1998 and mid-2004, Fannie Mae's senior management utilized inappropriate accounting and improper earnings management to deliberately and systematically create the illusion that Fannie Mae maintained a smooth profit growth and hit announced targets for earnings per share each quarter. Nothing in the report indicates that any wrongdoing was uncovered beyond that period. (OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL EXAMINATION OF FANNIE MAE 3 (May 2006) *available at* http://www.ofheo.gov/media/pdf/FNMSPECIALEXAM.PDF last visited Feb. 19, 2008).)

72. On May 23, 2006, Fannie Mae signed settlement agreements with OFHEO and the SEC that included a $400 million fine, growth limits, and top-to-bottom remedial actions to enhance the safe and sound operation of Fannie Mae. (*See* cover letter of James B. Lockhart III, Acting Director, to OFEHO 2006 Report to Congress dated June 15, 2006 at 3, available at http://www.ofheo.gov/media/pdf/annualreport2006.pdf. (last visited February 19, 2008).)

73. On June 19, 2006, Complainant sent a letter to Fannie Mae summarizing his allegations for purposes of initiating an investigation by Fannie Mae's Office of Investigations. (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 8.)

74. Fannie Mae's Office of Investigations subsequently engaged the accounting firm of Grant Thornton to conduct an independent review of various accounting issues Complainant raised in his June 19, 2006 letter. (RX 4 to Resp. Mot. – Arrington Aff. at ¶ 9; CX 8 to Comp. Opp. – Nov. 3, 2006 Draft Report of Grant Thornton.)

75. Based on its review, Grant Thornton determined that the accounting issues identified in Complainant's June 19, 2006 letter were already known to Fannie Mae and were being fully addressed through the company's restatement and catch up phases, which included a full audit by Fannie Mae's outside auditor, Deloitte & Touche. (*See* CX 8 to Comp. Opp. – Nov. 3, 2006 Draft Report of Grant Thornton at 6; RX 4 to Resp. Mot. – Arrington Aff. at ¶ 9; *see also* RX 3 to Resp. Mot. – Kozich Aff. at ¶ 7.)

76. On August 14, 2006, Complainant filed a SOX complaint with the Office of the Assistant Secretary, Department of Labor, in Washington, D.C. (RX 1 – Final Investigation Report of Susan B. Owen at 1 (Feb. 22, 2007).

77. Complainant was deposed on November 30, 2007 by Fannie Mae's counsel with respect to his allegations that he had been fired by Fannie Mae in retaliation for having engaged in activity protected by SOX. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman.)

78. During his deposition, Complainant testified, *inter alia*:

- He understood the concept of amortization prior to November 2005, he had read accounting literature during the prior 20 years, he knew he would be working with Fannie Mae in an area involving FAS 91, and he had thoroughly analyzed that accounting standard prior to being hired by Fannie Mae. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 37.)
- He knew that his responsibilities included FAS 91 production, knew that Fannie Mae used output from the FAS 91 group and other accounting groups to provide its capital computation to OFHEO, and knew that Fannie Mae's books had to be closed every month using information that everyone knew contained errors "[b]ecause you had to close the books on all the various areas within the controller's department so that the capital computation could be compiled and reported to OFHEO." (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 66-67, 200.)
- He understood that the 30 percent additional capital requirement imposed on Fannie Mae by OFHEO had been established because there were problems relating to the accuracy of the capital figures reported by Fannie Mae. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 69.)
- On January 5, 2006, he contacted Shadey Brown in the Office of Investigations about Pat Wells' conduct but "never mentioned Pat Wells' name, nor did [he] make any specific allegations of fraud or otherwise." (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 212.)
- SAS 99 is an accounting standard which requires auditors to consider whether unreconciled differences in accounting data are a result of fraud. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 285.)
- Allison Herrick was not auditing Fannie Mae's financial statement. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 286.)
- Deloitte & Touch was clearly functioning as an auditor of Fannie Mae. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 286.)
- He never told anyone at Fannie Mae or Deloitte & Touche in or about the time he

was dealing with Deloitte & Touche that he believed there was fraud. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 285-86.)

- Members of his "FAS 91 team" came to him regarding an error that occurred in the computation of the fourth quarter 2005 cumulative adjustment which they were unable to analyze "because there was a glitch in the system." (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 263-64.)
- He never told anyone at Fannie Mae during his employment that he believed the company was engaged in conduct that would amount to fraud on shareholders. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 306-08).
- He had a "fully formed" belief by May 11, 2006 that there was fraud, but he did not inform anyone at Fannie Mae of his concern, or refer to "SOX," until after he was terminated. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 308-09, 310-11).
- He had no reason to believe that anyone at Fannie Mae knew what was in his mind on or about May 11, 2006 regarding the existence of fraud. (RX 5 to Resp. Mot. – Deposition of Thomas S. Inman at 311-12).

Discussion

The Elements of a Whistleblower Claim under Sarbanes-Oxley.

The whistleblower provision of SOX states in relevant part:

> 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 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--
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

18 U.S.C. § 1514A (a); *see also* 29 C.F.R. § 1980.102 (a), (b)(1).

The legal burdens of proof set forth in AIR21, 49 U.S.C.A. § 42121(b), govern SOX actions. Accordingly, to prevail, a SOX complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Reddy v. Medquist, Inc.*., ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

In order to prevail on its motion for a summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. As noted above, if Respondent succeeds, Complainant may rebut this showing by setting forth specific material facts establishing that there is a genuine issue for trial. *See Anderson, supra.*, 477 U.S. at 248.

Arguments of the Parties

Respondent argues that summary judgment is appropriate in the instant case because Complainant never engaged in any protected activity during his employment with Fannie Mae. (Resp. Mot. at 23.) It contends that Complainant's first suggestion of any SOX-related allegation was made after he was fired, argues that Complainant approved the accounting treatment of the irregularities about which he now seeks to "blow the whistle," and asserts that Inman could not reasonably believe the company was engaged in fraud or other wrongdoing. (Resp. Mot. at 23, 28; Resp. Rep. at 16-17.) According to Fannie Mae, if Complainant ever did harbor such a belief, he had ample time and opportunity to raise his concerns while he was employed by Respondent but failed to do so. (*See, e.g.*, Resp. Rep. at 25.)

Complainant opposes summary judgment, argues that there are numerous material facts in dispute, and alleges that he was terminated from Fannie Mae because he engaged in certain protected activity, *i.e.*, reporting to Fannie Mae management in January, 2006 a $52.4 million expense overstatement error and in March, 2006 a $2.4 billion overstatement of income error. According to Inman, these errors represented evidence of violations by Fannie Mae of § 13(b)(2) of the Securities Exchange Act[5]and an SEC regulation.[6] (Comp. Opp. at 6.) He further argues that his reports to Fannie Mae management of these errors implicated fraud because his managers were all certified public accountants who were knowledgeable of SAS 99. (Comp. Opp. at 6-8.) According to Complainant:

> Pursuant to SAS 99, all CPAs, including Herrick, Kozich, Lee and Lankenau knew or reasonably should have known that Mr. Inman's identification of unreconciled balances represented a concern that fraud may have occurred and that the proper mindset of Fannie Mae management should have been one of professional skepticism that fraud may have occurred, particularly after OFHEO

[5] That section of the statute mandates, *inter alia*, that "issuers" such as Fannie Mae shall "(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; . . ." 15 U.S.C. § 78m(b)(2).

[6] 15 C.F.R. § 240.13(b)(2)(1), the regulation upon which Inman relies, provides that "no person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject of section 13(b)(2)(A) of the Securities Exchange Act."

> altered [sic] Fannie Mae to deliberate and intentional manipulation of accounting in order to hit targets.

(Comp. Opp. at 9.) Inman similarly contends that the accounting firm of Deloitte & Touche, as Fannie Mae's outside auditors, was also bound by SAS 99. (RX 12 to Rep. Mot. – Sept. 11, 2006 Written Statement of Thomas S. Inman provided to OSHA at 1-2.)

Aside from his substantive arguments for denying Fannie Mae's motion, Complainant also alleges that summary judgment in this matter is inappropriate because he has not obtained certain discovery from Respondent. (Comp. Opp. at 26.) According to Inman, the information sought by him in his pending motion to compel discovery is material to the issue of protected activity and it would be unfair to grant summary judgment before he has had the opportunity to obtain and review the materials he seeks. (Comp. Opp. at 27.)

Whether Complainant Engaged in Activities Protected by Sarbanes-Oxley?

"Protected activity," as defined under the Act and relevant regulations, includes, *inter alia*, providing (or causing to be provided) to an employer or to the Federal Government information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of Title 18 of the U.S. Code (§§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 19 U.S.C. § 1514A(a)(1); *see also* 29 C.F.R. § 1980.102(a),(b)(1). This statutory language makes it clear that the employee is not required to show the reported conduct actually constituted a violation of the law.

The complainant must, however, show that he reasonably believed the respondent violated one of the laws and regulations enumerated in the Act. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 193-ERA-6 (ARB July 14, 2000) (citing *Oliver v. Hydro-Vac Servs., Inc.* Case No. 91-SWD-1, Sec'y Dec., Nov. 1, 1995, slip op. at 9-13). The complainant's belief "must be scrutinized under both subjective and objective standards, *i.e.*, he must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." *Id*. at 20. The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Melendez*, ARB No. 96-051 (quoting *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 7, n.5); *see also Allen v. Administrative Review Board*, USDOL, No. 06-60849 (5th Cir. Jan. 22, 2008) (Case below ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62), slip op. at 11.

In *Welch*, a recently-decided SOX case involving a whistleblower who expressed concerns that his company had improperly inflated its income and therefore could have materially misled investors, the Board held:

> The "reasonable belief" standard requires Welch to prove both that he actually believed that the SEC report overstated income and that a person with his expertise and knowledge would have reasonably believed that as well.

> Furthermore, "[b]ecause the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law."

Welch v. Cardinal Bankshares Corp., ARB No. 05 064, ALJ No. 2003-SOX-15 (ARB May 31, 2007).

Along with the reasonable belief requirement, a certain level of specificity is also required when raising a SOX-based complaint. Recently, in *Platone*, the ARB stated:

> In defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded. The Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act.

Platone v. FLYi, Inc., ARB No. 04 154 (Sept. 29, 2006) (citing to Kester v. Carolina Power & Light Co., ARB No. 01-007, ALJ No. 2000-ERA-31, slip op. at 9 (ARB Sept. 30, 2003)).

Based on the undisputed facts of record in this case, it is clear that Inman's complaint must fail because he never complained "definitively and specifically" to anyone at Fannie Mae or elsewhere about conduct covered by any of the six enumerated categories set forth in 18 U.S.C. § 1541A. Inman expressly acknowledged as much in his sworn deposition testimony, although he now claims that he had a "fully formed belief" prior to being fired that the incidents he reported constituted fraud. The undisputed material facts set forth below, viewed in the light most favorable to Inman, simply do not support his claim.

First, it is undisputed that, before he was hired by Fannie Mae in November 2005, Inman was a *cum laude* graduate of Duke University, he held an advanced business degree from The Darden School of Business at UVA, and he had worked as a "Senior Finance Professional" for more than 25 years in officer-level positions for various financial and securities firms including Wachovia Bank, GE Capital Structured Finance Group, Scott & Stringfellow, Inc., Wheat, First Securities, Inc., and Merrill Lynch & Co.

Second, it is also undisputed, as Inman expressly notes in his resume, that he gained extensive experience during his 25-year career as a "Senior Finance Professional" in such areas as: "Financial Analysis & Modeling;" "Pro Forma Projections;" "Options Pricing & Hedging Strategies;" "Derivative & Structured Finance;" "Corporate Tax Law Issues;" "SFAS 133 Accounting Issues;" and "Regulatory Issues."

Third, it is undisputed that, by the time he was hired at Fannie Mae, Inman knew what "fraud" was, he was expressly familiar with the provisions of the Sarbanes-Oxley Act, and he had obtained Series 7 and Series 66 securities registrations which required, *inter alia*, that he possess a knowledge and understanding of state and federal securities laws.

Fourth, it is also undisputed that, by the time Inman was hired at Fannie Mae, Fannie Mae's safety and soundness regulator, OFHEO, had uncovered serious problems in Fannie Mae's internal accounting controls and financial reporting activities, OFHEO's investigation was ongoing, OFHEO monitored Fannie Mae's financial status, accounting activities, and capital situation on a weekly basis, and OFHEO was relying on Deloitte & Touche, Fannie Mae's independent auditor, to report accurate information regarding Fannie Mae's financial condition during the restatement period.

Fifth, it is further undisputed that the SEC had been fully apprised of OFHEO's findings, that the SEC had conducted its own investigation of Fannie Mae confirming OFHEO's findings, and that Fannie Mae had publicly disclosed through reports filed with the SEC that its previously filed financial statements were flawed and could not be relied upon by the SEC or the investing public.

Sixth, Inman knew of OFHEO's and the SEC's investigations and findings, was clearly aware that Fannie Mae's financial activities were then being audited and investigated by OFHEO and the accounting firm of Deloitte & Touche, and knew that the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP had, prior to the time Inman was fired, completed its investigation of Fannie Mae and issued a report with respect to its findings and conclusions.

Seventh, also well known to Inman was the fact that Fannie Mae's Code of Business Conduct required employees to report fraud or other wrongdoing to Fannie Mae's Office of Investigations whenever they became aware of such. Indeed, it is undisputed that Inman had several contacts with that office and that on May 12, 2006, the day after he says he had a "fully formed belief" that fraud may have occurred, Complainant contacted the Office of Investigations, never once made any statement that could even remotely be construed as disclosing his belief that fraud may have occurred, and instead simply told the person with whom he spoke that he believed Alison Herrick and Marcus Lee were retaliating against him because he reported Patricia Wells' comment that "all men are babies" and that Alison Herrick discriminated against African Americans.

Finally, it is undisputed that the accounting system then in place at Fannie Mae was seriously flawed, a new accounting system was being developed for the purpose of replacing the old system and restating Fannie Mae's financial condition from 2001 forward, Fannie Mae could not file any reliable financial statements with the SEC until after the restatement effort was completed, and the flawed system was being used in the interim to generate accounting data that was inherently unreliable and known to be so by OFHEO, Fannie Mae, the SEC and various other entities and individuals.

As clearly stated by the Fifth Circuit in *Allen* with respect to determining whether certain conduct amounts to protected activity: "The objective reasonableness of a belief [in a Sarbanes-Oxley claim] is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Allen v. Administrative Review Board*, *supra*, slip op. at 11; *see also Platone v. FLYi, Inc.*, *supra*., slip op. at 9. Despite Inman's well-documented knowledge and familiarity with SEC regulations and the provisions of the Sarbanes-Oxley Act, and despite his extensive financial training and experience, he never once "definitively and specifically" told anyone at Fannie Mae or elsewhere that the events he was reporting constituted evidence of fraud or that they could adversely affect in any way a member of the investing public. Indeed, he acknowledged during his deposition that he first raised the specter of "SOX violations" *after* he was informed that he was being terminated.

Based on the undisputed facts presented in the record before me, I thus find that none of the events described by Inman amount to "protected activity" since no reasonable person with Inman's knowledge, training, and experience could reasonably believe that these events amounted to wrongdoing covered by one or more of the six enumerated categories set forth in § 1514A(a).

As noted above, Complainant also asserts that the Fannie Mae managers to whom he reported "unreconciled differences" were under a responsibility, in their capacity as Certified Public Accountants, to presume fraud based on those reports pursuant to the SAS 99 accounting standard. He further asserts that Deloitte & Touche, in their capacity as Fannie Mae's auditors, were under the same obligation. With respect to the first assertion, it is clear that SAS 99 applies only to *external* auditors. Thus, none of Inman's managers, or even Fannie Mae's internal auditors in the Office of Auditing, were under any such requirement based on Inman's reporting of "unreconciled differences." With respect to the second assertion, although SAS 99 indisputably applies to external auditors such as Deloitte & Touche, Complainant has expressly acknowledged that he had only limited contact with Deloitte & Touche and that he had no reason to believe that Deloitte & Touche did not respond appropriately to any concerns he raised about "unreconciled differences." Indeed, Complainant has never alleged that Deloitte & Touche reported any evidence of fraud or other wrongdoing during the period of Complainant's employment with Fannie Mae despite its undeniable obligations under SAS 99 to do so if it reasonably suspected fraud. On the contrary, the undisputed facts show that Deloitte & Touche had a long-standing relationship with OFHEO and Fannie Mae, it was thoroughly familiar with the problems uncovered during OFHEO's special examination, and it was fully informed of the steps being taken by Fannie Mae to correct those problems. As noted above, Deloitte & Touche was selected by OFHEO in October, 2003 to assist OFHEO in conducting its special review of Fannie Mae. In January, 2005, Deloitte & Touche replaced KPMG LLP as Fannie Mae's external auditor, and OFHEO thereafter continued to rely on Deloitte & Touche to report accurate information concerning Fannie Mae's financial situation throughout the restatement period. There is simply no evidence cited by Complainant that Deloitte & Touche (or anyone else) ever concluded, or even suspected, that fraud or other wrongdoing had occurred after mid-2004.

Whether Complainant Has Been Denied Discovery Necessary to Defend Against Respondent's Motion for Summary Judgment?

Finally, Complainant has also alleged, as noted above, that summary judgment is inappropriate in this case because Respondent has denied him access to certain discovery he has requested. (Comp. Opp. at 26.) Complainant notes, in this regard, that his motion to compel discovery, filed in November, 2007, remains pending, and he states that "some of the information sought . . . is material to the issue of protected activity raised by respondent's motion, including all of the revised versions of the White Paper and electronic data and spreadsheets sought by Complainant." (Comp. Opp. at 27.) He further argues that access to the electronic data and spreadsheets would enable him to more accurately demonstrate the breadth and magnitude of the errors he uncovered while employed at Fannie Mae. (*See* Comp. Opp. at 9, fn 10; 12 fn 19.) This argument, like his others, does not support a denial of summary judgment.

First, I note that the formal hearing in this case was originally scheduled for September 10, 2007 with discovery to be concluded by August 10, 2007. However, at Complainant's request, the hearing was continued, and the discovery deadline was extended until December 7, 2007. Neither party thereafter sought an extension of that deadline, or raised any concerns regarding the discovery process, until Complainant filed his motion to compel discovery on November 29, 2007.

Second, the pleadings relating to this matter reveal that Complainant's counsel served interrogatories and document requests on Fannie Mae on June 4, 2007. Thereafter, Fannie Mae responded on July 5, 2007, objecting to certain aspects of Complainant's discovery requests based, *inter alia*, on its concern that various confidential information sought by Inman might be disclosed. A protective order was then entered by me on August 8, 2007, and Respondent subsequently delivered its document production to Complainant on August 13, 2007. Complainant then waited until approximately one week before discovery was to close to seek an order compelling Respondent to provide additional discovery. Moreover, not satisfied with the breadth of his November 29, 2007 request, Complainant then filed on December 7, 2007 a motion requesting an extension of the discovery deadline and the issuance of a subpoena so he could depose the author of the Grant Thornton report generated after Complainant's termination in response to the allegations set forth in Inman's letter to Fannie Mae dated June 19, 2006.

Based on the foregoing sequence of events, I find that Complainant has had more than ample time to conduct and complete discovery in this matter. Indeed, I note that he has in fact engaged in substantial discovery, conducting several depositions of the individuals who, based on a fair reading of his complaint, are the key witnesses in this case. I also note that, after having sought and obtained an extension of the original discovery deadline, Complainant waited nearly five months from the date the case was originally scheduled to proceed to trial before expressing any concern over his inability to obtain evidence which he now asserts is necessary to prosecute his complaint in this case. Complainant's motions to compel and to extend the discovery deadline thus can reasonably and appropriately be denied on this basis alone. However, there exists an equally compelling reason for rejecting this aspect of Complainant's opposition to summary judgment.

Even if Complainant could, through the belated discovery he now seeks, identify the hundreds of additional errors which he says existed in Fannie Mae's accounting records, the outcome in this matter would remain unchanged. As noted above, Complainant unequivocally testified during his deposition that he never told anyone prior to his termination that he believed there was possible fraud on Fannie Mae's shareholders. Similarly, he has acknowledged that, despite his various interactions with the Office of Investigations, he never once during the course of his employment expressly told anyone at Fannie Mae or elsewhere that he had uncovered fraud or other wrongdoing. Furthermore, as discussed above, Fannie Mae, OFHEO, the SEC, and Deloitte & Touche, among others, knew during all relevant times that: Fannie Mae's accounting practices from 2001 to mid-2004 did not comply in material respects with GAAP; the amortization engine Fannie Mae utilized during that period was seriously flawed; that same amortization engine was being used during Inman's period of employment and was generating inaccurate information that could not reasonably be relied upon by OFHEO, the SEC, or the investing public; and the restatement of Fannie Mae's financial data could not be accomplished until a new amortization engine had been developed and deployed. Indeed, OFHEO's final report does not disclose any evidence of wrongdoing after mid-2004, including the entire period of time that Inman was employed by Fannie Mae. Thus, Inman's discovery of *additional* errors of the same type he previously reported to his superiors, coupled with his acknowledged failure to report activity that could reasonably be interpreted by anyone as evidence of wrongdoing, simply would not support his claim that Fannie Mae retaliated against him for having engaged in activity protected by SOX. Granting his request for further discovery thus could not aid him in defending against the instant motion for summary judgment.

Conclusion

Since engaging in protected activity is an essential element of Inman's SOX complaint, and the undisputed material facts set forth herein fail to demonstrate that Inman engaged in such activity, Fannie Mae is entitled to judgment as a matter of law.

Order

IT IS HEREBY ORDERED that Fannie Mae's Motion for Summary Judgment is GRANTED, and the SOX complaint of Thomas S. Inman is hereby DISMISSED.

A

STEPHEN L. PURCELL
Associate Chief Judge

Washington, D.C.