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Issue Date: 20 November 2009

OALJ CASE №.: 2009-SOX-00029

OSHA Case №.: 8-0740,-08-006

In the Matter of:

John H. Mallory,
Complainant,

vs.

JPMorgan Chase & Co. and
JPMorgan Chase Bank, N.A.,
Respondents.

Order Denying Cross-Motions For Summary Decision

I. Introduction

John Mallory, the Complainant, and JPMorgan Chase Bank, N.A. (Bank) and JPMorgan Chase & Co. (Parent), the Respondents, filed cross-motions for summary decision on a claim for employment protection brought under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, enacted in Title VIII of Sarbanes-Oxley Act of 2002 (SOX or the Act).[1] Respondents argue they are entitled to judgment on two issues, either of which would defeat the Complainant's case: 1) he was not employed by an entity the Act covers, so the law doesn't protect him, and 2) he did nothing the Act protects (RM 3).[2] The motion is denied.

The Complainant initially presented four issues for partial summary adjudication. Each would strengthen his case and simplify the trial, but none would

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[1] Pub. L. 107-204. The employment protection provision is codified at 18 U.S.C. § 1514A (2006).

[2] This Order uses the following abbreviations to indicate the many motions, responses, replies, and exhibits the Complainant and the Respondents filed: Respondents' Motion for Summary Decision (RM), Complainant's Memorandum Brief in Support of Motion for Summary Judgment (CM), Respondents' Response to Complainant's Motion for Summary Decision (RR), Complainant's Response to Respondents' Motion for Summary Decision (CR), Respondents' Reply to Complainant's Response (RRR), Complainant's Reply to Respondents' Response (CRR), Respondents' Exhibits (RX), Complainant's Exhibits (CX).

entitle him to relief without a trial. The Complainant initially asserted: 1) his job at the Bank was covered by the Act and entitled him to its protection (CM 20); 2) he engaged in a protected activity (CM 24); 3) his protected activity contributed to his termination (CM 30); and 4) the Bank's failure to preserve conversation logs and emails constitutes spoliation of material evidence that entitles him to an adverse inference against the Respondents, among other sanctions (CM 32–39).

After reviewing the Response to his motion, the Complainant dropped the third and fourth issues, conceding material issues of fact existed about both causation and spoliation, and narrowed his contention about the second issue dealing with protected activities (CRR 11). In the end he seeks a partial summary decision on two points: 1) the Bank was an employer SOX covers, and he qualifies for relief and 2) the Complainant's actions described in the motion, if proven at trial, would constitute protected activities (CRR 11). His motion for partial summary decision is denied as well.

The Complainant would not have succeeded in his request for an adverse inference due to spoliation. In the Tenth Circuit, a fact-finder may draw adverse inferences only if the Complainant proves bad faith or intentional destruction of evidence.[3] That sort of evidence hasn't been offered.

The facts the parties rely on, the standards for granting a summary decision, the parties' contentions, and the application of the law to the facts that the deposition testimony or documents show are discussed below.

II. Brief Overview of the Claims

On January 8, 2008, the Complainant filed a complaint with the Occupational Health and Safety Administration (OSHA) alleging that "JPMorgan Chase Home Mortgage" discharged him from employment for retaliatory reasons on November 15, 2007 (John H. Mallory, OSHA Complaint 1–3 (Jan. 8, 2008)). The Complainant amended his complaint on March 21, 2008, clarifying that his employer was "JPMorgan Chase & Co. dba JPMorgan Chase Bank, N.A." (John H. Mallory, Amended Complaint of Discrimination Pursuant to the Sarbanes-Oxley

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[3] *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220–21 (10th Cir. 2008) ("An adverse inference is a powerful sanction as it 'brands one party as a bad actor' and 'necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown content of an erased audiotape.' Therefore, courts require evidence of intentional destruction or bad faith before a litigant is entitled to a spoliation instruction." (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900–01 (8th Cir. 2004)) (citing *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)) (citations omitted). While no jury hears a SOX case, the rationale remains the same: the Complainant must show not only that the evidence in question did exist and that it was lost or destroyed, but also that the Respondents acted intentionally or with bad faith when they destroyed it (if they did).

Act 1–2 (Mar. 21, 2008)). OSHA found the complaint had "no merit," and dismissed it. After the Complainant requested a formal hearing, the case was referred here.

The Parent's shares are listed and traded on the New York Stock Exchange; the Bank is its wholly owned subsidiary (CM 1). The Complainant was an Operations Director / Assistant Vice President in the Funding department of the Bank's mortgage division's Denver area office (RX-E 63–67; OSHA Complaint 1).

The Complainant alleges that in early October 2007, he first became aware that one of the construction-to-permanent loans his office funded was out-of-balance between the Bank and their loan management vendor when a loan officer submitted a draw request for approximately $17,000[4] more than was available on the loan (CM 2). The loan officer inveigled the Complainant to fund the full amount of his draw request, even though the funds were insufficient, and threatened to encourage the contractor to file a baseless mechanic's lien on the property to force the Bank or the loan management vendor to cover the extra $17,000 (*id.*). The Complainant refused and wrote to his supervisor, David Wicke, about the loan officer's actions, expressing concern over both the loan officer's attempts to force the transfer of nonexistent funds and the lack of internal procedures at the Bank that led to the situation (*id.*). Instead, Mr. Wicke and his supervisor Amy Marcussen ignored the Complainant's concerns and subsequently terminated him, alleging he had falsified information on out-of-balance reports (*id.* at 3–4).

The Respondents allege that the Complainant knew the loan was out-of-balance for months and did nothing about it, continued to fund draw requests, and failed to bring the situation promptly to the attention of his superiors (RM 2). They claim the Complainant's supervisors at the Bank only learned of the situation in mid-October 2007 when the loan officer finally brought it to their attention (*id.*). Respondents then investigated the Complainant for fraud, to determine whether his failure to disclose the situation earlier and repeatedly signing off on "out-of-balance" reports that identified no out-of-balance loans required them to file a suspicious activity report (*id.* at 13–14). The investigation found no fraud by the Complainant (CM 10; RX-S 27). His managers fired him for "breach of trust" because he failed to remedy the out-of-balance situation right away, and signed inaccurate reports, actions that could have caused the Bank losses (RM 15–16).

III. Analysis

A. The Standard For Summary Dispositions

A presiding administrative law judge grants a summary decision when the pleadings, affidavits, matters officially noticed, or materials obtained through

[4] The exact discrepancy was $17, 297.02. (CX-R 69).

discovery or otherwise frame no genuine issue of material fact.[5] The rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, where "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," but views "all the evidence and factual inferences in the light most favorable to the non-moving party."[6]

The party moving for summary decision has the initial burden to show that there are no genuine issues of material fact. If the motion is properly supported, the nonmoving 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."[7] An issue is "genuine" when there is enough evidence for a reasonable fact-finder to find in the non-moving party's favor. A "material fact" is one that would affect the outcome of the case.[8]

Subsection (B) applies these standards to conclude that the Complainant has offered enough evidence to qualify as an employee who works at a company SOX protects; subsection (C) concludes there is enough proof to create an issue of fact about whether he could reasonably believe the information he reported to his supervisor within the Bank pertained to SOX predicate crimes or other laws.

B. The Complainant Works For an Employer SOX Covers

Both parties moved for summary decision on whether the Complainant is a covered employee and the related question of whether the Bank is a covered employer. If he is not covered, he can receive no employment protection from the Secretary, and his complaint must be dismissed. Both motions are denied. Should the facts currently submitted constitute the totality of the trial evidence, I likely would find the Complainant is protected by SOX.

The cross-motions for summary decision require me to examine the facts from the perspective of both parties. They agree on many facts that will control the outcome on this issue, but disagree about the inferences to draw from them and how to interpret them. The discussion on the coverage issue begins by considering the reach of the statute, the common law of agency, the parties' arguments, and the facts that bear on agency.

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[5] 29 C.F.R. § 18.40(d).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

[7] 29 C.F.R. § 8.40(c); *see also Anderson*, 477 U.S. at 248.

[8] *Anderson*, 477 U.S. at 248–49.

i. When is a Subsidiary of a Publicly Traded Company Covered by SOX?

Section 806 of SOX protects "employees of publicly traded companies who provide evidence of fraud."[9] To qualify for this protection, a worker must be employed by a:

> 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. 78o(d), or any officer, employee, contractor, subcontractor, or *agent* of such company . . .[10]

Adjudicators have struggled to define when a subsidiary of a publicly traded company is covered by SOX and when a subsidiary's employees are likewise covered. In *Morefield v. Exelon Services, Inc.*, the ALJ concluded that essentially all subsidiaries of publicly traded companies should be covered because "[t]he publicly traded entity is not a free-floating apex. When its value and performance is based, in part, on the value and performance of component entities within its organization…. A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units …"[11]

The Administrative Review Board (Board) clarified the standard for determining when employees of subsidiaries are covered in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.* ("*Klopfenstein I*"),[12] adopting a less expansive definition than *Morefeild* suggested. Looking to the statutory text, the Board concluded that employees of a subsidiary are covered when the subsidiary is an agent of the publicly-traded parent.[13] SOX forbids any public company to retaliate against employees for protected activities, and extends the prohibition to any "officer, employee, contractor, subcontractor or agent."[14] Adding a gloss to *Klopfenstein I,* some adjudicators have concluded (wrongly in my view) that "the agency at issue must also relate to employment matters."[15]

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[9] 18 U.S.C. § 1514A.

[10] 18 U.S.C. § 1514A(a) (emphasis added).

[11] *Morefield v. Exelon Services, Inc.*, 2004-SOX-00002, slip op. at 2 (ALJ Jan. 28, 2004).

[12] ARB No. 04-149, ALJ No. 04-SOX-00011, slip op. at 14 (ARB May 31, 2006).

[13] *Id.* at 14.

[14] 18 U.S.C. § 1514A; *Klopfenstein I*, slip op. at 13.

[15] *Rao v. Daimler Chrysler Corp.*, 2007 WL 1424220 at *5 (E.D. Mich., May 14, 2007) (citing *Klopfenstein I*, ARB No. 04-149 at 16).

The Board explained in *Klopfenstein I* that the "general common law of agency" provides the test for determining if a subsidiary is the publicly traded parent's agent.[16] The Board stressed that "[a]lthough it is a *legal concept,* 'agency depends on the existence of required *factual elements*: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control.'"[17] Whether a subsidiary is the parent's agent is a highly fact-specific inquiry. The evidence the Complainant offered and the inferences reasonably drawn from it satisfy this test, as the discussion below explains.

ii. The Restatement's Agency Principles

Determining when a principal is responsible for an agent's actions isn't a one-dimensional inquiry. The Restatement 3d of Agency defines "Agency" as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[18] "A person manifests assent or intention through written or spoken words or other conduct."[19] A principal must manifest his or her assent to the agent, and the content of what the principal manifests helps determine the *scope* of the agency.[20] "Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts."[21]

Principals are most commonly bound by agents who act with actual authority. One with actual authority "holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power.[22] But agency encompasses more; an agent may bind a principal by acting with apparent authority. This occurs when a third party reasonably believes that the principal manifested the agent's right to act on his or her behalf because of

[16] *Klopfenstein I*, ARB No. 04-149 at 14.

[17] *Id.* at 14 (emphasis by the Board) (citing Rest. 2d Agency § 1(1), comment *b*). At the time *Klopfenstein I* was decided, the Restatement 3d of Agency was in approved draft form. *See Klopfenstein I*, ARB No. 04-149, ALJ No. 04-SOX-00011, slip op. at 14 n.16 (ARB May 31, 2006). The Restatement 3d of Agency now has been published.

[18] Rest. 3d Agency § 1.01 (2006).

[19] Rest. 3d Agency § 1.03 (2006).

[20] Rest. 3d Agency § 1.03 comment *a* (2006).

[21] Rest. 3d Agency § 1.01 comment *c* (2006).

[22] *Id.*; *see also* Rest. 3d Agency § 2.01 (2006).

things the principal has done.[23] Additionally, a principal may be estopped to deny agency if the principal behaves in such a way that a third party reasonably believes the purported agent is acting on the principal's behalf *or* if the principal knows a third party actually believes the purported agent is acting on his or her behalf and does nothing to correct the belief:

> A person who has not made a manifestation [to the actor] that an actor has authority as an agent and who is not otherwise liable as a party to a transaction purportedly done by the actor on that person's account is subject to liability to a third party who justifiably is induced to make a detrimental change in position because the transaction is believed to be on the person's account, if
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> (1) the person intentionally or carelessly caused such belief, or
> (2) having notice of such belief and that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts.[24]

The Parent is a publicly-traded company with "a class of securities registered under Section 12 of the Securities Exchange Act of 1934, and it is required to file reports under Section 15(d) of the Securities Exchange Act of 1934" (CM 1; RM 4, 17; RX-A, at ¶ 5); without question, SOX covers the Parent. The Complainant's employer, the Bank, doesn't satisfy the definition itself because the Bank issues no stock (RM 4; RX-A, at ¶¶ 5–6; CM 1); it is a major subsidiary of the Parent. Both the putative agent (the Bank) and putative principal (the Parent) deny any agency relationship.

To decide whether the Bank could be the Parent's agent, I look to how the Parent and the Bank interacted, and what they manifested to third parties. The Complainant's proof supports an inference of agency, as the Administrative Review Board has drawn them on summary judgment.[25]

[23] Rest. 3d Agency § 2.03 (2006).

[24] Rest. 3d Agency § 2.05 (2006).

[25] *See, e.g., Gale v. World Financial Group*, ARB No. 06-083, ALJ No. 2006-SOX-43, at text accompanying n. 15 (ARB May 29, 2008). To oppose summary judgment the complainant submitted a copy of an SEC Form 20-F that showed his direct employer was related to a public company. The public company's filing said it "offer[ed] a wide range of insurance products through agents dedicated to selling [the public company's] products . . ." The Board's decision didn't turn on the public company's choice of the magic word "agents," but on the subsidiary's efforts to sell securities on the public company's behalf.

iii. The Parties' Arguments

The Complainant argues that the Parent holds itself and its subsidiaries out to the public and shareholders as one cohesive, interconnected entity. The Parent takes credit for the achievements of its subsidiaries, reports its subsidiaries earnings (including those of the Bank) as its own, and consistently refers to its own employees and those of its subsidiaries as employees of "the Firm" or "JPMorgan Chase," two collective terms the Parent uses for itself and all subsidiaries. The Parent and the Bank have common benefits plans, and the Bank uses numerous human resources policies printed on paper that bears the collective trade name "JPMorgan Chase," on which the Parent's copyright appears. Parent also promulgates a Code of Conduct (the "Code") that binds employees of the Parent and all its subsidiaries. This universal Code requires all employees to report violations of the Code; the Parent is the ultimate (and often direct) recipient of reports about violations that happen at a subsidiary. As a result of the interconnections, depositions show many of the Bank's employees think their employer of record is the Parent, not the Bank—they don't know the Parent even *has* subsidiaries. The Complainant argues he is an employee of the Parent or that the Bank is clearly the Parent's agent in matters of employment, and either way, he is a covered employee.

The Respondents argue that, despite this evidence and its inferences, they are entitled to summary decision that the Complainant is not a covered employee because the Complainant cannot prove the Parent or any of the Parent's employees fired him. They insist that the Complainant can't show the Parent authored the policies or procedures the Bank follows because the "JPMorgan Chase" name and related trade names refer to subsidiaries as well as the Parent, and instead, these are the Bank's own policies. The Respondents dismiss the common benefits plan the Parent and the Bank share as immaterial, because adjudicators have held that sharing benefits, by itself, isn't enough to find agency for employment purposes.

The evidence about whether the Bank was the Parent's agent is evaluated next.

iv. The Relationship Between the Bank and the Parent

The Respondents insist that the Complainant misunderstands and misconstrues the relationship between the publicly-traded Parent, JPMorgan Chase & Co., and the subsidiary he worked for (RR 2; RX-X 1–5). The Respondents appear to misread *Klopfenstein I,* as though it requires that the subsidiary not only be the parent's agent, but that the parent and subsidiary must be joint employers before SOX protection extends to employees of subsidiaries.

The Complainant was a manager in the funding department of the Bank when he was fired on November 15, 2007 (CM 1, 3; RM 5; RX-E 66; *see also* RX-B). He had been promoted to that position in 2003 (RM 5; RX-E 66) and had taken on

additional responsibilities in July of 2007 (RX-E 90–91). The Bank is a wholly owned subsidiary of the Parent (RX-A ¶ 3; CM 2). The Parent's 2008 *Annual Report*, a document filed with the SEC as part of its 10-K, described the Bank as one of its primary subsidiaries (CX-II 39; RRR 10).[26] Both the Bank and the Parent insist no agency relationship existed between them with regard to employment when the Complainant was fired (RR 5), in part because the Parent doesn't direct the day-to-day operations of the Bank (RM 4; RX-A, at ¶7.)

The Respondents argue that because the Parent wasn't involved in the Bank's operations, and no one from the Parent directly intervened to fire him, the Bank wasn't the Parent's agent, and neither are liable to him under SOX. They believe *Klopfenstein I* stands for the proposition that the Complainant must show the Parent "directed or controlled" the Bank's decision to fire him (RR 5). But the common law of agency—the standard *Klopfenstein I* established—requires no such thing.[27] The Complainant need only show that the Bank was the Parent's agent, not that the Parent fired him.[28] In *Andrews v. ING North America Insurance Corp.*, a case involving employees of a *fourth* level subsidiary of the publicly traded parent company, the Board relied on *Klopfenstein I* when it remanded the case for the ALJ to determine whether that fourth level subsidiary had "acted as [the publicly traded company's] agent."[29] The Board never said the agency had to be "for employment purposes" nor implied that the Parent had to direct or order decisions about the worker's employment for the subsidiary to be an agent.

The Parent and the Bank have blurred their relationship intentionally. The Parent has adopted trade names and trademarks to refer to itself and its subsidiaries to potential customers as a unit (RR 7, 9–11). In its *Annual Report*, the Parent uses the terms "JPMorgan Chase," and "the Firm" to refer to the Parent and its subsidiaries, including the Bank, in the collective (RRR 10; CR 4–5; CX-II 39). The parties agree that the terms "Chase" and the Octagon symbol are registered trademarks of Parent that are often used to refer to Parent, its subsidiaries, or some combination of them (CX-DD; RR 9; RX-Z). Because they present common trade names to the world, it is often impossible to tell when an actor is the Parent, one of its subsidiaries, or even which subsidiary.

The Parties agree, for example, that the Complainant was an employee of "Chase" or "JPMorgan Chase" from 1992 until he was terminated in 2007 (CX-I 64–66). But it isn't clear whether the Complainant worked for the Bank, the Parent, or

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[26] JPMorgan Chase & Co.'s 2008 *Annual Report* states "JPMorgan Chase's principal bank subsidiaries [include] JPMorgan Chase Bank, National Association . . ., a national banking association with branches in 23 states and in the U.S." CX-II 39.

[27] *See* Rest. 3d Agency §§ 1.01, 2.01 (2006).

[28] *Klopfenstein I*, ARB No. 04-149 at 14, 16.

[29] ARB No. 06-071, ALJ Nos. 2005-SOX-00050, 2005-SOX-00051, slip op. at 4 (ARB 29, 2008).

another subsidiary before he began his position with the Bank ten years into his employment, in 2002 (CR 16; RRR 1–2). The Complainant testified at deposition that he was an "operations specialist" in Plainfield, Illinois, before he transferred to the Bank's funding department in Aurora, Colorado in 2002 (CX-I 67; *see also* CX-6, at 63–64). The Complainant pointed out that the Bank doesn't conduct business in the business area where he was employed before 2002 (CR 7, 16; *see also* CX-6, at 63–64);[30] he believes he worked for the Parent at that time (CR 7, 16; CX-6, at 7–8). Respondents counter that even if he did not work for the Bank, the Complainant might have worked for either the Parent or another subsidiary, and there is no evidence as to which it was, and it should not matter, since the relevant question is who the Complainant's employer was at the time he allegedly engaged in protected activity and was terminated (RRR 1–2, 4–5). Not so. The substantive question is whether the Complainant suffered retaliation for protected activity, but how the Parent shuffled the Complainant among subsidiaries throughout his career tends to show the Parent exercised functional control over subsidiaries. Plenary control of subsidiaries gives rise to an inference they are the Parent's agents.

Whether the Complainant worked for the Parent or some other subsidiary within Parent's corporate maze is relevant information. It demonstrates how the Parent, or the Parent and subsidiaries as a collective whole, regarded the Complainant's employment. The Complainant's "JPMorgan Chase Retirement Plan Annual Account Statement for 2007" said he had 15 years and 18 days of "pay credit service" (CX-HH, at MALLORY00012). Whether the Complainant worked for the Bank, the Parent, or another subsidiary between 1992 and 2002,[31] that document does not distinguish between the Bank, the Parent, or any other subsidiaries the Complainant may have worked for during those 15 years.[32] This suggests the Parent draws no distinction between employees of the Parent, the Bank, or other subsidiaries. When it comes to seniority or time credited toward retirement, all the entities to which the name "JPMorgan Chase" refers are one.

The Complainant also argues that an employee of the Parent was involved in firing him (CM 5–6, 22, 23). The Bank emphasizes that three employees of the Bank fired him: his immediate supervisor, Mr. Wicke, second-level supervisor, Ms. Marcussen, and Human Resources Vice President, Mr. Schilling. None were employed by the Parent at the time (RX-A, at ¶ 8; CM 5–6, 22, 23). Mr. Schilling, however, identified himself as the top Human Resources officer in "*Chase's*" Denver

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[30] The Complainant points out that while in Illinois, he "was a trade specialist clerk and worked [his] way up through that group just to be the expert on clearing process of futures and options" (CX-I 63), and the Bank does not deal in futures (CR 7–8). The Complainant also argues that his move from Plainfield, Illinois to Aurora, Colorado was a transfer, and it would be unlikely that the Bank could effect such a transfer without some input from the Parent (*id.*).

[31] *See also* RX-E 66 (discussing employment at "JPMorgan"); RX-E 67 (discussing employment with "Chase").

[32] *See id.*

area office for his "*line of business*" (CX-MM 8–10 (emphasis added)). Mr. Schilling couldn't say which company he worked for—JPMorgan Chase & Co. or one of its subsidiaries, and if so, which one (CX-MM 55). Mr. Schilling also was uncertain who employed Ms. Goldsmith,[33] his supervisor in the Human Resources hierarchy (CX-MM 56). Deposition questions and answers of Ms. Marcussen and Mr. Wicke all used the term "Chase." It was unclear whether the employees themselves knew which "Chase" company they worked for, or if they simply were acknowledging that they worked for one of the "Chase" companies (which would include the Parent and the Bank among others), or whether they understood that the many separate corporate identities that fit under the "Chase" umbrella were all distinct entities (*see* CX-11, at 11 [Marcussen Deposition]; CX-M 5 [Wicke Deposition]). The evidence supports an inference that the Complainant was not aware that the Bank (as a separate and distinct corporate entity and not Parent or some other entity) employed him.[34] He shared the confusion of his immediate superior and of the even more senior managers who fired him.

This information does not prove conclusively that the Bank was the Parent's agent, but it suggests the Parent fosters vagueness both about which corporate entity acts, employs, or fires people. The Complainant and those who fired him seem genuinely confused about who employs them, if they weren't purposefully misled into thinking they are employed directly by the Parent, or a non-existent unified entity that goes by the name of JPMorgan Chase or Chase. The Parent's own terminology created this situation. Furthermore, the use of trademarks and trade names allows the Parent and its subsidiaries to make it difficult, if not impossible, to pinpoint precisely which "Chase" company acts at any given time. All of this reflects the success the Parent has achieved in creating the perception internally (to employees) and externally (to shareholders and the general public) that JPMorgan Chase & Co.—the Parent, the Bank and other subsidiaries—form one cohesive unit. Its success carries legal consequences. For purposes of SOX, it can be inferred under the law of agency that the Parent, the Bank, and other subsidiaries are one.

v. The Bank Relied on the Fraud Investigation Done by the Parent's Employee

Before he was fired, the Complainant learned there was an investigation into how and why the Pablito Garcia loan went out of balance (RX-E 195). The Complainant believed the investigation targeted loan officer Eddie Rogers, the person he had complained about to Mr. Wicke (*see* RX-E 195–96). The Respondents'

[33] Ms. Goldsmith is also the author of the declaration on which the Respondents rely to prove Messrs. Wicke and Schilling and Ms. Marcussen were employees of the Bank. *See* RX-A.

[34] See Complainant's Complaint of Retaliation Pursuant to the Sarbanes-Oxley Act (Jan. 8, 2008) (listing "JPMorgan Chase Home Mortgage" as employer); CX-6 at 7–8 ("My understanding is I worked for JP Morgan Chase And Company").

witnesses agree that their investigation targeted the Complainant (RX-C 37–41; RX-D 110–13; RX-S 15–16; RX-O 7–9), but they can't agree on who initiated it. Mr. Wicke said he was contacted by Mr. Lawler, a senior fraud investigator (RX-D 113–14). Mr. Lawler claims Mr. Wicke initiated the investigation by contacting Mr. Lawler's superior (RX-O 6), and that it was customary for departments to come to his department for investigations (*id.*). Mr. Schilling said he either suggested that Ms. Marcussen contact "global security" and start an investigation or he referred the matter to Mr. Lawler himself (RX-S 15–16).

The Parent, "JPMorgan Chase & Co.," employed Mr. Lawler (RX-O 4). According to Mr. Lawler, his department wouldn't make a decision about "whether or not something was a policy violation" (RX-O 22); he would instead communicate back "the information [an individual] had disclosed . . . to his manager in HR and they would be more familiar with . . . what policy or procedures would be for that particular employee or position" (RX-O 22). Mr. Lawler confirmed that he investigated "certain issues that would fall under the umbrella of code of policy violations and code of conduct violations . . . ." (RX-O 23). Mr. Schilling acknowledged Mr. Lawler's investigation found no evidence of fraud by the Complainant (RX-S 27; *see also* CX-Q 109).

The parties have not suggested Mr. Lawler made the decision to fire the Complainant. It appears that Ms. Marcussen and Messrs. Wicke and Schilling sought out the evaluation and opinions of Mr. Lawler, an employee of the Parent, to assist them in making their decision (*see* CX-Q 109). The use of fraud investigators the Parent employs seems to be a standard procedure for the Bank, and probably for other JPMorgan Chase entities. Because the witnesses' testimony disagrees about who or which company began the investigation, there is a genuine issue of fact of whether the Parent requires the Bank to involve one of the Parent's fraud investigators, or if this was a voluntary action of the Bank. Even if using the fraud investigator was voluntary, the Parent's decision to make its fraud investigators available to subsidiaries suggests further interconnectedness of the Bank and the Parent that itself lends support to an inference of agency.

vi. JPMorgan Chase & Co. Holds Itself and Subsidiaries Out as a Cohesive Unit

As discussed above, the Parent's 2008 *Annual Report* to stockholders uses the terms "the Firm" and "JPMorgan Chase" throughout to refer to both the Parent and its subsidiaries as an interrelated entity, either explicitly or by implication. The *Annual Report* says, for example, "[w]hile some may think of us as a Wall Street firm, we also are very much as part of Main Street: We employ 225,000 people worldwide in 48 U.S. states and more than 60 countries" (CX-II 29). It invites the reader to infer that the Parent employs all those people, or considers them all employees of "the Firm." The numbers used suggests the Parent includes the Bank's employees in that total. As the report's author the Parent creates the impression

that the Parent and employees of its subsidiaries constitute a single entity organized for one goal: to make a profit for Chase shareholders.

The *Annual Report* relates to two interconnected arguments the Complainant raised. First, he believes the Parent's use of the terms "JPMorgan Chase" and "the Firm" to describe employees of the Parent and all subsidiaries indicates the Parent views all subsidiaries' employees, including the Complainant, as its own (CR 5). Second, the Complainant points to *Carnero v. Boston Scientific* to support the argument that if the Bank was an agent of the Parent "for the purpose of operating the mortgage department," it is the Parent's agent for the purpose of SOX protection.[35] The Respondents insist that since the Parent is reporting on behalf of itself *and* all subsidiaries, discussion of employees of subsidiaries in the report doesn't imply they are employees of the Parent (RRR 9–11). The Respondents also insist that *Klopfenstein I* makes it clear that a subsidiary must have employment-related agency, and not just agency for another purpose, and argue the Bank operates its construction loan business on its own and not as the Parent's agent (RRR 8 and n.3). The Respondents arguments are inconsistent with inferences fairly drawn from the proof.

A closer look at the *Annual Report* describes the Bank as "a national banking association with branches in 23 states in the U.S" (CX-II 39). In the "Management's Discussion and Analysis" of the "JPMorgan Chase & Co. ('JPMorgan Chase' or 'the Firm')" stock, the Parent represents that its Retail Financial Services business includes "[m]ore than 21,400 branch salespeople [who] assist customers with checking and savings accounts, mortgages, home equity and business loans, and investments across the 23-state footprint from New York and Florida to California" (CX-II 39–40). Taken in context with the Parent's role and the 23-state "footprint" of the Bank, the *Annual Report* can be read to imply that the Bank's employees are its own. The Parent further describes its Retail Mortgage origination business this way: "Borrowers who are buying or refinancing a home . . . [make] direct contact with a *mortgage banker employed by the Firm* using a branch office, the Internet or by phone" (CX-II 62 [emphasis added]). This is one of the statements that describes the activities that account for the financial performance of the Parent's stock (CX-II 39). The Parent's own language takes credit for the actions of its subsidiaries and their employees, or at the very least communicates to shareholders and the general public that the Parent and subsidiaries are members of one family working on the shareholders' behalf.

This may not be incontrovertible proof that the Parent considers its subsidiaries' employees to be its own, but it certainly implies the Parent draws no distinctions among its and its subsidiaries' employees. The Parent presents the business and accomplishments of its subsidiaries to the general public and

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[35] CR 18, citing *Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir. 2006).

stockholders as the Parent's successes. It bases its projections on those achievements and encourages investors to make financial decisions based on them. The *Annual Report* definitely implies that the Bank conducts its business on the Parent's behalf and for the Parent's benefit, *i.e.,* as its agent. It is not clear from the *Annual Report* that this agency extends to employment decisions, but insofar as the Bank's business directly benefits the Parent, the Parent's discussion of employees invites third parties who deal with both the Bank and the Parent to consider all employees of "JPMorgan Chase" as employees of the single profit-making entity it is. At the very least this suggests the Parent may be estopped from denying the Bank's agency for employment purposes under the § 2.05 of the Restatement 3d of Agency. A third party (whether a borrower or the Complainant) could detrimentally rely on the Parent's public representations and internal actions that appear to treat workers as employees of Chase generally.

vii. The Parent and Bank Shared Common Benefits, Policies, Procedures

The Parent controls enough of what happens at the Bank to support an inference that the Bank is its agent. The Parent controls the Bank's employee benefits plan, the Bank's Open Communication and Corrective Action Policies, and perhaps most importantly, the universal Code of Conduct the Parent has imposed on all subsidiaries to fulfill duties of its own. The dictates of the Parent's Code and Corrective Action policy served as a reason the Complainant's immediate supervisor offered for the firing. Each of the Parent's plans and policies are described below.

1. Common Benefits Plan

After he was terminated, the Complainant received a rollover check for his deferred compensation (CX-HH, at MALLORY00011). The check came from the Parent (*id.*). The Complainant also received a COBRA enrollment notice bearing the names "JP Morgan Chase" and the Chase Octagon symbol (CX-E, at MALLORY00017). The notice directed the Complainant to submit payments to a New York, New York post office box addressed to JPMorgan Chase (*id.*).

The Complainant was also a member of the JPMorgan Chase U.S. Benefits Program (CX-HH, at MALLORY00016). This program "is available to most full-time and part-time U.S. dollar–paid salaried employees who are regularly scheduled to work 20 hours or more a week and who are employed by JPMorgan Chase & Co. or one of its subsidiaries to the extent that such subsidiary has adopted the JPMorgan Chase U.S. Benefits Program" (*id.*). When the Complainant was fired, he received a letter regarding "the distribution options available to [him] regarding [his] balance in the JPMorgan Chase 401(k) Savings Plan" since he had "separated from service from JPMorgan Chase" (CX-HH, at MALLORY00014).

The Respondents argue that terminology suggests subsidiaries may have the option not to participate in the plan (*i.e.*, the Parent does not force the benefits plan upon subsidiaries) (RRR 11), and assert that the presence of the JPMorgan Chase name does not indicate the Complainant was an employee of the Parent, because JPMorgan Chase is a trademarked trade name that refers to the Parent and all its subsidiaries (*id.*). The Parent said in its *Annual Report 2008,* however, that "JPMorgan Chase offers several defined contribution plans in the U.S. and in certain non-U.S. locations . . . . The most significant of these plans is The JPMorgan Chase 401(k) Savings Plan . . ., which covers *substantially all U.S. employees*" (CX-II 162 [emphasis added]). Furthermore, the "Message from JPMorgan Chase," that accompanied the Complainant's "annual JPMorgan Chase 401(k) Savings Plan Statement" indicates that the JPMorgan Chase U.S. Benefits Program is administered by another subsidiary of the Parent, but the *Parent* "reserves the right to amend, modify, reduce, change, or terminate its benefits and plans at any time" (CX-HH, at MALLORY00016 [emphasis added]). One (and only one) 401(k) Savings Plan is available for a subsidiary to offer employees as a deferred compensation benefit. The choice the Respondents argue subsidiaries have is no meaningful choice: take it or leave it. All, apparently, are takers. The terms of the single benefits plan to "choose" from are wholly in the Parent's control. This looks like one company, not many.

Respondents further argue that while the Complainant may have shown the Bank and the Parent had a common benefits plan, ALJs have held that common benefits plans alone do not establish agency for SOX purposes (RRR 12).[36] This is true, but the Complainant doesn't rely solely on the common benefits plan. None of the earlier decisions say a common benefits plan isn't one piece that makes up the mosaic that is agency. If they did, I wouldn't follow their error.

2. Open Communications and Corrective Actions Policies

The Bank adopted and enforced a variety of policies and procedures that bore the trade name "JPMorgan Chase." Among them are the "Open Communication" policy (CX-C, at JPMC0195) and the "Corrective Action" policy (CX-C, at JPMC0191). Both policies bore the copyright of the Parent (*e.g.*, CX-C, at JPMC0193 ("©2008 JPMorgan Chase & Co.")). The "Open Communication" policy directs employees to "contact the Employee Relations Executive directly at 212-270-6080 for further review of the issue" if attempts to resolve issues with their more immediate superiors are unsuccessful (CX-C, at JPMC0196). While this doesn't

[36] *See* RR 11–12 (citing *Andrews v. ING N. Am. Ins. Corp.*, 2005 SOX-00050, slip op. at 13, n.6 (ALJ Jan. 8, 2009) (finding a common benefits plan by itself did not establish agency); *Shrivastava*, *v. Harris Inv. Mgmt., Inc.*, 2007-SOX-00024, slip op. at 6 (ALJ Mar. 28, 2008) (holding a subsidiary's use of parent's trademark on pay stubs and 401(k) was insufficient to establish agency); *Hugart v. Raymond James & Assocs., Inc.*, 2004-SOX-0009, slip op. at 44–45 (ALJ Dec. 17, 2004) (establishing subsidiary's use of parent's logo and address failed to establish agency for employment purposes).

explicitly state the "Employee Relations Executive" is an officer of the Parent company, the Manhattan area code certainly suggests this may be so. On summary judgment, I couldn't exclude the inference. Additionally, the Complainant and other employees at the Bank had an employee handbook for "JPMorgan Chase" that bears the Parent's copyright and states "JPMorgan Chase may alter the terms and conditions of your employment" (CX-4, at JPMC0439).

The Respondents suggest that these policies and forms belong to the Bank using one of the many trade names that can refer collectively to the Parent and its subsidiaries (RRR 12), and that "a determination has been made that all copyright and other intellectual property rights are to be held at the Parent Company, not the subsidiary, level" to explain why these policies bear the Parent's copyright (*id.*). That begs the question why the Parent would tolerate one of its subsidiaries using a name that admittedly refers to the Parent, and all its *other* subsidiaries, on policies that were exclusively those of the Bank, especially if the policy would bear the Parent's copyright. Additionally, these policies and the employee handbook were available through the company intranet,[37] and the URL located on the printouts of the documents includes a website bearing the name of JP Morgan Chase (*see, e.g.*, CX-C, at JPMC0191–96). Furthermore, Mr. Schilling admitted he wasn't certain who could access the corporate intranet, but thought it was "all employees of JPMorgan Chase" (CX-MM 42). He also testified at deposition that he was unaware of any other human resources policies that bear the Bank's name alone (CX-MM 55).

The Complainant relies on the Board's recent revisiting of *Klopfenstein v. PCC Flow Technologies Holdings, Inc.* [*Klopfenstein II*], to support his argument that the Bank was an agent of the Parent. The Board explained in *Klopfenstein II* why, under the substantial evidence test, it agreed with the ALJ's decision that the complainant's employer was the parent's agent.[38] That complainant's direct employer was a third-level subsidiary of the publicly traded company,[39] yet one of the individuals involved in firing him was both an officer of one of the intermediate subsidiaries and of the parent too.[40] The subsidiary in the *Klopfenstein* cases and its relationship with its parent is therefore factually distinguishable from the relationship between the Parent and the Bank.

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[37] The electronic addresses of these documents are on a domain that uses the name "JPMorgan Chase." The trade name in the domain and on the documents makes it unclear which employees can access this intranet, and which employees the policies govern—just employees of the Bank, those of the Parent, those of he Parent and all its subsidiaries, or some other combination. The ambiguity favors the Complainant on this motion.

[38] *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Nos. 07-021, 07-022, ALJ No. 2004-SOX-011, slip op. 7 (Aug. 31, 2009) [hereinafter *Klopfenstein II*].

[39] *Id.* at 2.

[40] *Id.* at 7.

On the other hand, the complainant in *Klopfenstein I* and *II* was fired under a policy the parent imposed on its subsidiaries.[41] Here, Mr. Wicke claimed the Complainant was fired for a "breach of trust" (CX-NN 106–07, 159–60). "Breach of trust" justifies "abbreviated corrective action or termination" under the "JPMorgan Chase Corrective Action" policy (CX-GG, at JPMC0192). The Complainant's termination recommendation was printed on a form that bears the "JPMorgan Chase" name and Chase Octagon logo (CX-H, at JPMC0005).[42] The Complainant asserts this evidence shows he was fired under the Parent's policy, and, as the Board found in *Klopfenstein II*, I should treat this as proof that the Bank is the Parent's agent (CR 17). Taking the evidence in the light most favorable to the Complainant, this confluence of events suggests the Bank's managers may well have framed this reason to fire the Complainant to fit the corrective action policies the Parent promulgated.

3. The JPMorgan Chase *Code of Conduct*

The Complainant also points to the Chase Code of Conduct ("the Code") as further evidence that the Parent controlled important terms of employment at the Bank. "The Code applies to employees and directors of JPMorgan Chase & Co. and its direct and indirect subsidiaries" (CX-KK, at JPMC1467). The Code bears the Parent's trademarked name "JPMorgan Chase," the Octagon logo (CX-KK, at JPMC1462), and states that "'[t]he firm' and 'JPMorgan Chase' as used throughout the Code mean JPMorgan Chase & Co. and all its direct and indirect subsidiaries" (*id.*). Abiding by the "Chase Code of Conduct" was one of his employment objectives (CX-JJ, at JPMC1648). The Code explicitly states that violations of the Code or other policies and procedures could result in corrective action or immediate termination (CX-JJ, at JPMC1468). The Code commands all employees to report "known or suspected" violations "of the Code or any applicable law or regulation" (CX-KK, at JPMC1470). It prescribes a chain of command for reporting these violations, with additional options for all employees to follow if their initial report garners no adequate response (*id.*). All employees are instructed to contact "the firm's General Counsel, any other Executive Committee Member, or the General Auditor" (*id.*). Furthermore, initial reports about "matters involving fraudulent acts" go to offices of the "Fraud Prevention and Investigation Department," offices which are divided by *geographic region*, and not by subsidiary (*id.* at 1470–71).

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[41] *Id.*

[42] While Mr. Wicke stated in deposition that he couldn't recall a particular policy the Complainant had breached (CX-NN 159–60), and while the "Recommendation for Termination" cites falsification of reports pertaining to the Garcia Loan Out-Of-Balance condition as the reason for recommending the termination (CX-H, at JPMC0005), Mr. Wicke also said that the continued Out-Of-Balance situation *was* the "breach of trust" (CX-NN 106–07).

The Complainant raised the Code as one more piece of evidence that tends to show the Parent controls the Bank's employment decisions, and thus the Bank serves as the Parent's agent, in their Reply (CRR 6). As a result, the Respondents haven't addressed this evidence. It is theoretically possible that a subsidiary and not the Parent authored this Code, since "JPMorgan Chase" is listed as the author, but it is highly unlikely that any subsidiary would have the authority to bind employees of the Parent and all other subsidiaries as well as its own, or require employees to report to the Parent's General Counsel or General Auditor. The Code constitutes a comprehensive set of policies and procedures the Parent has imposed on all employees of the Parent, the Bank, and other subsidiaries. This is telling evidence that the Bank is an agent of the Parent on significant employment matters.

The Parent had good reason to exercise the full authority at its disposal to require that every employee report suspicions about fraud. Three bodies insist that the Parent take meaningful steps to ensure ethical conduct by the Parent's directors, officers and all of its employees:

- The SEC;
- The New York Stock Exchange; and
- The U.S. Sentencing Commission.

What each requires of the Parent will be discussed in turn.

a. The SEC

Section 301(4)[43] of SOX requires each audit committee of the board of directors of public companies to create a mechanism to learn about questionable behavior. The committee must establish a procedure for confidential, anonymous reporting of complaints about "accounting, internal accounting controls, or auditing matters" as well as "confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." The SEC explained when it adopted the implementing regulations that because the director's audit committee depends on information provided to it "by management and internal and outside auditors, it is imperative for the committee to cultivate open and effective channels of information," including information from "company employee[s] or other individual[s] [who] may be reticent to report concerns regarding questionable accounting or other matters for fear of management

[43] Amendments to Section 10A of the Securities Exchange Act of 1934, codified as 15 U.S.C. § 78j-1(m)(4).

reprisal."[44] The Parent's Code seems to be exactly that sort of mechanism; it even incorporates language straight out of that section of the SOX statute. The Code instructs employees that:

> If you have a particular concern regarding accounting, internal accounting controls, auditing matters, or financial reporting practices that you wish to bring to the attention of the Audit Committee of the Board of Directors, you may do so by mail sent to JPMorgan Chase & Co., Attn: Audit Committee Chairman, c/o Fraud Prevention and Investigation Department . . . or by calling the Fraud Prevention and Investigation Department . . . .[45]

The Code allows for confidential, anonymous reporting by employees, and "strictly prohibit[s] retaliation against employees for good faith reporting of any actual or suspected violations of the Code" (CX-KK, at JPMC1471). This fulfills the SEC requirement that the employees have a way to communicate to the Audit Committee through "confidential, anonymous submissions."[46] Intentionally including Bank employees among those entitled to unfettered access to the audit committee of the Parent's board of directors under § 301(4) of SOX gives rise to a parallel inference that Bank employees are entitled to whistleblower protection from retaliation under § 806 of SOX.

Section 406 of SOX requires issuers of securities that SOX covers to "disclose whether or not, and if not, the reason therefor, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions."[47] SEC regulations expand the duty on issuers of securities to impose the code of ethics on the company's principal executive officer.[48] The SEC considered, although ultimately declined to adopt, a rule that would compel publicly traded companies to impose a code of ethics on all employees.[49]

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[44] SEC Release Nos. 33-8220; 34-47654, Standards Relating to Listed Company Audit Committees, adopting the final rule codified as 17 C.F.R. § 240.10A-3(b)(3). 68 Fed. Reg. 18788 at 18798, 18818 (Apr. 16, 2003).

[45] CX-KK, at JPMC1471.

[46] 17 C.F.R. § 240.10A-3(b)(3)(ii).

[47] The Sarbanes-Oxley Act of 2002, Pub. L. 107-204, Tit. IV, § 406 (July 30, 2002), codified at 15 U.S.C. § 7264.

[48] 17 C.F.R. § 229.406.

[49] Securities and Exchange Commission, 17 CFR Parts 228, 229, and 249 Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002; Final Rule, 68 Fed. Reg. 5110, 5117–18 (Jan. 31, 2003).

The JPMorgan Chase Code of Conduct appears to fulfill the regulatory requirement of § 406(a) of SOX[50], since the Code explicitly binds "directors of JPMorgan Chase & Co." and establishes that "[a]ny waiver of the provisions of this Code for an executive officer or a director must be made by the Board of Directors and will be promptly disclosed to JPMorgan Chase & Co. stockholders" (CX-KK, at JPMC1467).

Section 406 of SOX and its implementing regulations do not require that the ethics code of a publicly traded company reach down to line employees, but other portions of the SOX Act, push public companies quite hard in that direction. Besides § 301(4) discussed above, those SOX provisions include § 805(a)(4) and (5) related to Sentencing Guidelines applicable to businesses discussed in (c), below. The Parent applied the Code universally, not just to the principal executives the implementing regulations of the SEC mandated.[51] This suggests the Parent's Code also serves to comply with a New York Stock Exchange (NYSE) Corporate Governance Standard found in Section 303A of the NYSE Listed Company Manual. Expanding upon the concepts SOX § 406 embodies, the SEC approved the NYSE's new Corporate Governance Standard (and a similar standard NASDAQ adopted) shortly after SOX became law.[52]

b. New York Stock Exchange Listing Requirements

Both major stock exchanges require listed companies to adopt and enforce a "Code of Business Conduct and Ethics." The NYSE, where the Parent is listed, obliges a company listed on that Exchange to have a code of conduct / ethics that encompasses every employee.[53] Section 303A.10 of the NYSE Listed Company Manual, which was adopted near the time SOX became the law, says:

> Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.

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[50] 15 U.S.C. § 7264(a).

[51] 17 C.F.R. §§ 228.406, 229.406.

[52] *See* NASD and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act Release No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003), *available at* www.sec.gov/rules/sro/34-48745.htm, published at 68 Fed. Reg. 64154-64182 (Nov. 12, 2003).

[53] NYSE, LISTED COMPANY MANUAL, at § 303A.10, nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F (last visited Nov. 12, 2009).

The CEO must certify compliance with these NYSE listing standards annually. The NYSE requires more than a Code; it mandates "compliance standards and procedures that will facilitate effective operation of the Code." In obedience to this NYSE dictate, the Parent binds every employee of all direct and indirect subsidiaries to the Parent's Code (CX-KK, at JPMC1467). This suggests the Parent regards employees of subsidiaries as its own.

c. U.S. Sentencing Commission's Guidelines for Sentencing Organizations

Congress required in SOX that the U.S. Sentencing Commission re-evaluate Sentencing Guidelines that apply to frauds that endanger "the solvency or financial security of a substantial number of victims" and that the Commission ensure that the "guidelines that apply to organizations . . . are sufficient to deter and punish organizational criminal misconduct."[54] After the review SOX prescribed, the Commission amended its Sentencing Guidelines Manual so that a corporation can reduce or even escape criminal liability when it has an "effective" compliance program that includes a code of ethics.[55] Those Guidelines defined an "effective" compliance program as one that includes efforts to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[56] As with the Corporate Governance Standards of the NYSE Listed Company Manual, adopting a code of ethics isn't enough. The organization must "take reasonable steps . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program."[57] The organization must provide and publicize a system that permits employees to report or seek guidance about potential or actual misconduct without fear of retaliation.[58]

The directors of the Parent could be in violation of their fiduciary duties to shareholders if they failed to adopt a compliance program that satisfied the U.S. Sentencing Commission's Guidelines, and qualify for the reduced penalty possibilities the organizational Sentencing Guidelines offer.[59] The Parent included

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[54] Sarbanes Oxley Act§ 805(a)(4) & (5).

[55] U.S. SENTENCING COMM'N., U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2009) on Effective Compliance and Ethics Programs, first added in 2004.

[56] U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2009). See also the related standards federal prosecutors apply in deciding whether to prosecute businesses. Dep't of Justice, U.S. Attorneys' Manual, § 9.800, Principle of Prosecutions of Business Organizations, Corporate Compliance Programs, Comment B.

[57] U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(B) (2009).

[58] *Id.*

[59] *See* U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES at 31-32 (2003), *available at* http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf. The Report relied on comments about the duties of directors the Delaware Court of Chancery, the country's preeminent forum for determining corporate law, had articulated in

language in the introduction to its Code that shows it intends to ensure effective compliance with it, as the Sentencing Guidelines (and the NYSE listing standards) require:

> Our integrity and reputation depend on our ability to do the right thing even when it's not the easy thing . . . The Code is based on our fundamental understanding that no one at JPMorgan Chase should ever sacrifice integrity—or give the impression they have—even if they think it would help the firm's business.
>
> Each of us is accountable for our actions, and each of us is responsible for knowing and abiding by the policies that apply to us. Managers have a special responsibility, through example and communication, to ensure that employees under their supervision understand and comply with the Code and other relevant policies.

CX-KK, at JPMC1464.

All these factors suggest the Parent considers subsidiaries' employees to be its own, or at the very least, subject to it directives, so that it can fulfill its own duties to the SEC, the NYSE, and obtain the advantage of the leniency an effective ethics program will give should it face a federal criminal prosecution. When the Parent anticipated that employees of subsidiaries:

- could have information that should come to the attention of the Audit Committee of JPMorgan Chase & Co. or its General Counsel or General Auditor, or

- might engage in questionable conduct that could affect the Parent as a whole, and

- required all employees of subsidiaries to report breaches of its Code on pain of discipline,

the Parent should not be surprised when employees it required to make reports are covered by the SOX employment protection provisions too.

In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, 968–69 (Del. Ch. 1996). The Delaware Supreme Court later encouraged directors to monitor the reporting, internal controls, and information systems they establish to learn about risks or problems that require their attention. *Stone v. Ritter*, 911 A.2d 362, 365 (Del. 2006).

While I reject the notion that a SOX complainant who works at a subsidiary must show that the subsidiary was the parent's agent "for employment purposes," the proof here would satisfy that test. The Parent bound all direct and indirect subsidiaries to its Code, creating a term or condition of their employment. Control to that degree shows the Bank is the Parent's agent, and carries SOX coverage.

viii. *Smith v. Chase Investment Services Corp.* Is Not Dispositive

Finally, the Respondents point to *Smith v. Chase Investment Services Corp*[60] as a reason I should find the Bank is not an agent of the Parent. In *Smith*, an employee brought a SOX claim against a different JPMorgan Chase subsidiary.[61] The Respondents argue that because the ALJ granted the subsidiary's motion for summary decision in *Smith* and found the subsidiary was not an agent of the Parent, I should do the same, for "[i]n *Smith*, as in this case, '[t]here is no evidence that Respondent's parent company was involved in the decision to terminate Complainant's employment, or that Respondent acted as its parent's agent with respect to Complainant's employment.'"[62] *Smith* doesn't actually support the Respondents' position. The complaint was dismissed in *Smith* because it wasn't timely filed.[63] The employee, who waited almost seven months to file his SOX claim, could not show the limitations period had been tolled during the 90-day window the statute sets to file it.[64] The dismissal for untimeliness makes the judge's comment that Chase Investment Services Corp. was not an agent of the Parent for employment purposes dicta.[65] Even so, the judge said the subsidiary wasn't an agent because the complainant had produced no evidence to support his agency allegations. This Complainant has. As the Complainant pointed out in his Response (CR 18–19), *Smith* is distinguishable on these grounds.

ix. Conclusion About Coverage

Viewing the evidence in the light most favorable to the Complainant, the claim survives the Respondents' motion for summary decision. JPMorgan Chase & Co. represents to shareholders, the SEC, and the public in its *Annual Report* (part of SEC form 10-K) that the activities and accomplishments of the Parent, the Bank, and other subsidiaries contribute to the profitability of a single interconnected business enterprise. JPMorgan Chase & Co. uses trademarks to refer interchangeably to the Parent and subsidiaries on human resources forms,

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[60] *Smith v. Chase Investment Servs. Corp.*, 2009-SOX-00049 (ALJ July 30, 2009).

[61] *Id.* at 1.

[62] RRR 9 (citing *Smith*, 2009-SOX-00049 at 5.

[63] *Smith*, 2009-SOX-00049 at 5.

[64] *Id.* at 4–5.

[65] *See id.* at 5.

substantive benefits packages (such as the Parent's 401(k) Savings Plan), benefits paperwork, the company intranet, and in publications to third parties. The Parent blurs distinctions to the point that a reader can't tell whether the Parent, the Bank, or another subsidiary created, adopted or has enforced programs or policies. The Parent and the subsidiaries are so entwined that their employees don't understand who employs them. The Parent's Code of Conduct binds employees of every subsidiary. The Code fulfills obligations of the Parent that are rooted in at least three sections of the SOX Act[66] and in NYSE listing standards. An employee of the Parent had investigated him for fraud, a potential violation of that Code. The allegation that the Complainant violated the Parent's Code and was disciplined under the Corrective Action policy for a "breach of trust" serves as the non-discriminatory reason the Bank says it fired him. These things all support an inference that the Parent and subsidiaries like the Bank should be treated as a single entity under SOX. If JPMorgan Chase & Co. holds itself and its subsidiaries out to stockholders, regulators, the general public, and even to its own employees, as one profit-making entity, the Bank can be an agent of the Parent under the common law agency principles the Board identified as the legal test in *Klopfenstein I*. The Respondents' motion for summary decision on this ground is denied.

Taking the evidence in the light most favorable to the Respondents, the Respondents have arguably shown a material issue of fact, but based on the current record it is unlikely the Respondents would succeed on this issue at trial. The bones of the Complainant's legal argument that are structured around statements found in the Parent's *Annual Report*, the content and universal reach of the Parent's Code of Conduct, and the testimony that shows employees are confused about who they work for, aren't likely to change much.

Yet drawing all inferences in the Respondents' favor, Respondents have shown that it is possible the policies and procedures cited are just those of the Bank adopted without direction or interference by the Parent. If that were the case, then even if the Complainant was fired under the "Corrective Action" policy, it would be the *Bank's* policy and not the Parents. It is also theoretically possible that the Bank voluntarily enlisted the Parent's employee for the fraud investigation. Additionally, the *Annual Report* is written to lead readers to infer that all or nearly all subsidiaries belong to the common benefits plan. The evidence at trial might show that participation in the plan is purely voluntary on the Bank's part, if the Bank's managers actually chose it from among genuine, competitive alternatives. If that is so, then the Complainant's evidence supporting the Bank's agency becomes somewhat weaker.

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[66] These include obligations on the Parent's Audit Committee to establish a way to learn of questionable practices, obligations on the Parent to enact a Code that binds senior executives, and obligations on the Parent to qualify for leniency under the federal sentencing guidelines that apply to "organizations." See §§ 301(4), 406 and 805(a)(4) & (5) of the SOX Act, which all were discussed already.

The Code of Conduct nonetheless applies to all subsidiaries' employees as it does to the Parent's employees. The Parent has used language in the *Annual Report* that purposefully fosters confusion in the minds of third parties about who the 225,000 employees it touts work for. It is beyond dispute that ultimately all toil to make a profit for the Parent's shareholders. None of the evidence submitted with the motion makes it clear that internal policies and procedures that are key to this dispute were generated and imposed by an entity other than the Parent. While I deny the Complainant's motion for summary decision on whether Mr. Mallory is a covered employee, it is highly likely that if this remains the record after trial, I would conclude that he is qualifies SOX employment protections.

Whether there was employment discrimination that the SOX Act will remedy is another matter. The next threshold issue is whether there is enough proof that the Complainant engaged in protected activity to take to trial. For the reasons below, I find there are many genuine, material disputes about what the Complainant did that only a trial will resolve (CRR 2, 11; RM 3).

C. The Complainant Could Reasonably Believe Bank, Mail, or Wire Fraud Were Afoot

The Complainant and Respondents agree on this: they view the requests for draws on the Pablito Garcia loan differently. The competing motions for summary decision discuss whether, under each party's views of the facts, the Complainant engaged activities that SOX protects (CRR 2, 11; RM 3; RRR 2–3). The Respondents believe they are entitled to summary decision because the proof on this essential element of the claim isn't even minimally adequate (CRR 2, 11; RM 3; RRR2–3). The Complainant, however, has submitted enough proof that he engaged protected activity to avoid summary judgment. The issue turns first on the statute's text.

i. The Applicable Statutory Text of SOX

Section 806 of SOX, codified at 18 U.S.C. § 1514A, describes the elements needed to obtain employment protection. To engage in protected activity is:

> (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, 1342, 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); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged 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.[67]

ii. The Core Facts and Arguments About the "Reasonable Belief" Element of the Claim

The Complainant says he relayed his concern to Mr. Wicke that loan officer Eddie Rogers was scheming to have the Bank disburse more than the amount of the construction loan, and that the Bank's weak internal procedures had fostered the problem. The facts the Complainant has alleged and supported with testimony and exhibits implicate bank, mail, or wire fraud (CR 19–20; *see also* RX-QQ 286, 299–300).

The Complainant asserts that on October 1, 2007, Tresa Bloeman, one of his subordinates, told him the Garcia construction loan was an out-of-balance (CX-I 155–56). Accounting from the Banks' loan management firm showed there was approximately $17,000 more in credit available on the loan than Bank's internal loan tracking system showed (CX-I 153, 156). This was the first inkling the Complainant had that something about the loan wasn't right (CX-I 139, 155–56; CX-6 at 129). A draw request had been submitted for all of what the loan management firm's data showed was available (CX-I 187). The Complainant approved a draw for approximately $17,000 less, based on the funds available under the Bank's internal accounting (CX-6 156). Later, the Complainant learned the discrepancy resulted because the loan was "re-boarded" in the loan management company's accounting management system after the Bank's original contractor pulled out, and the borrowers engaged a new contractor *after* the initial $17,000 draw (RX-G 104–06; RX-H 50, 54; CX-I 180).

The next day (October 2, 2007), at about 8:30 a.m., the Houston-based loan officer (RX-G 21) who originated both the loan and the draw request, demanded to know why the Complainant balked at funding the whole request (CX-I 161). The

[67] 18 U.S.C. § 1514A(a) (2006) (emphasis added).

Complainant explained the loan was out of balance, and expressed surprise that Rogers (the loan officer) didn't know this too (CX-I 161–62). The Complainant knew the loan officer involved himself deeply in draw requests and acted as a sort of clearing house between the Bank and the borrower and borrower's contractor on the loans he originated and managed (CX-I 156–157; 165). Past experience working with the loan officer, and the loan officer's reputation, led the Complainant to believe the loan officer kept meticulous records of all his loans and checked them frequently (CX-162).

During their phone conversation, the loan officer explained that he had confirmed with the loan management firm (which he could do online) (RX-G 46, 58) that the amount requested was available. He hadn't verified what was available on the Bank's system because he didn't feel like waiting on hold to talk to someone (CX-I 162). The Complainant claims they also discussed that the Bank, not the loan management firm, had the official records, so to know the accurate balance, the loan officer would have to contact the Bank (CX-I 162, 168). The loan officer told the Complainant that the borrowers had informed him and the contractors that the loan management firm had the wrong balance, based on the borrowers' invoices and statements. The loan officer nonetheless convinced them and their construction contractor that the higher number in the loan management company's records was right.[68] The loan officer then personally submitted the draw request for the larger amount (CX-I 157, 164–65, 167). He insisted that the Complainant approve the full draw, even after the Complainant explained that $17,000 of what he'd asked for wasn't in the account (CX-I 188). The Complainant's repeated refusals enraged the loan officer, who said he would try to force the loan management firm to cover the additional dollars out of their errors and omissions fund, *and* that he would advise the borrowers' contractor to file a mechanics lien on the property (which would cause problems for the Bank) to force the Bank or loan management group to cover the extra $17,000 (CX-I 162–63).

Based on that conversation, his past experience with the loan officer, and the loan officer's decision to submit the draw request himself, the Complainant inferred that the loan officer wanted to clean out the loan, intentionally requesting the extra $17,000 when he knew those funds had been paid out earlier (CX-I 188; RX-E 158–60). Nothing submitted with the draw request supported the idea that the construction contractors who would get the money had completed work that justified the draw requested (CX-I 184–89). Any mechanics' lien filed based on nonpayment of funds might well be fraudulent, if the builders were not actually owed what the loan officer was requesting (CX-I 184–89). The building contractor for the Garcia loan eventually did file a mechanic's lien (CX-BB).

[68] *See* CX-I 157, 164–65, 167; *see also* RX-G 95–96 (stating at deposition that the Garcias said "[t]here's not enough money").

The Complainant knew he was dealing with one of the Bank's highest-producing construction loan officers in the country.[69] He also knew that on an earlier occasion this loan officer had coached a contractor on a different construction loan to file a mechanic's lien to force the Bank to fund a loan on which a borrower had stopped payment (RX-E 83–84; RX-G 137). The Complainant, his former superior, and a co-worker had investigated that situation (RX-E 83–84). The Complainant believed the loan officer was again trying to manipulate events so the Bank would disburse extra funds (CX-I 184).

The Complainant drafted an email to report this to his immediate superior, Mr. Wicke, who was away from the office (CX-I 176). The Complainant testified at his deposition that he discussed a number of internal management issues in the email (CX-I 177). He complained that there wasn't a process to track out of balance loans, the mess this created with the loan in question, and summarized his phone call with the loan officer, including the efforts to importune him to wire the extra funds and the threats to coerce the Bank to disburse the extra proceeds by filing a baseless mechanic's lien (RX-QQ 286). That email and a copy of a document describing his discussion with the loan officer went into the "conversation log" attached to the loan file (CX-I 225–26). Neither the email nor the summary document have been located in discovery; it is unclear whether the Bank lost or destroyed them, or whether they ever existed (CRR 10). For purposes of this motion the Complainant's version of his efforts to document the problem must be accepted.

The Complainant testified at deposition that he discussed the contents of his email the next day (on October 3) with Mr. Wicke (CX-I 190), who took the Garcia loan's draw file and said he would set up a meeting (*id.*). Sometime during the next week, Mr. Wicke returned the file to Complainant, blew up at him in front of several co-workers, refused to discuss the situation further, said it was all the complainant's fault, and ordered him to keep his mouth shut about the problem (CX-I 190–91).

The Bank controverts the bulk of this proof. The loan officer testified he had had "many, many, many, many" conversations with the Complainant, sometimes speaking to him daily (RX-G 98), which confirmed the hands-on loan management style the Complainant described, and corroborated the reasons the Complainant gave for believing that the loan officer closely followed loans he originated. The loan officer acknowledged that he spoke to the Complainant on October 2, 2007, but denied that he made any threats (RX-G 97–98, 104–05, 108). He confirmed he personally requested the larger draw, although he denied that he knew the loan management firm's figures were unofficial (RX-G 96). All parties agree that the borrowers met with their contractor and the loan officer before the draw request was made; the borrowers believed the larger balance the loan management

[69] RX-E 85; *see also* RX-G 21–22 (loan officer confirming his status as one of highest volume loan officers).

company showed was wrong, but the loan officer convinced them it was correct and got all parties to agree to request to withdraw about $17,000 more than the construction loan's available balance (RX-G 95–96). The Bank and the Parent have denied the Complainant ever told his superior about the loan officer's threats, and insist the superior was not aware of the situation at all until the loan officer approached him two weeks later (RX-D 33–36). These disagreements preclude summary judgment.

The Respondents maintain that even if one accepts the Complainant's version of the facts, he never engaged in a protected activity because three things are undisputed:

- the Complainant lacked a reasonable basis to believe that loan officer Eddie Rogers was engaging in bank, mail, or wire fraud (RM 24–25);
- the "fraud" he relies on wasn't material to the Parent's shareholders (RM 21); and
- his communications didn't "definitively and specifically" relate to the subject matter of SOX (RM 21).

The Respondents believe each of these shortcoming defeats the SOX claim.[70] They also argue that the Complainant's claim that fraud was involved finds no support in any "admissible, non-hearsay, non-speculative evidence," so the belief can't be treated as a reasonable one (RX-VV 7). Each argument is addressed below.

iii. SOX Protects Internal Disclosures About Bank, Mail, and Wire Fraud

What the Complainant communicated to his superiors will be addressed later. First, I will consider whether the Complainant could reasonably believe, on the proof he has submitted, that violations of a predicate statute were underway when he wrote the email to his manager.

Congress expected the "reasonable belief" language to be applied broadly, according to the legislative history of SOX. The author of the whistleblower protection provision, Sen. Leahy, identified on the Senate floor two touchstones to identify "protected activity": (1) did the employer investigate the claim of wrongdoing, or take other action in response to the employee's disclosure, and (2) would the information the employee provided be admissible in a trial for any of the whistleblower provision's predicate offenses. Sen. Leahy said:

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[70] *See* RM 20–21 (citing *Godfrey v. Union. Pac. R.R. Co.*, ARB No. 08-088, ALJ No. 2008-SOX-00005, slip. op. at 4 (ARB July 30, 2009)).

> Certainly, although not exclusively, any type of corporate or agency action taken based on the [employee's] information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support a reasonable belief. The threshold is intended to include [as protected activity] all good faith and reasonable reporting.[71]

The Complainant alleges he believed loan officer Eddie Rogers was attempting to engage in bank fraud (18 U.S.C. § 1344) and mail fraud (18 U.S.C. § 1341) and/or wire fraud (18 U.S.C. § 1343) (CM 24–26). An employee need not show, however, that he understood the elements any one of them require for a successful conviction to obtain employment protection under SOX. For the sake of completeness, those three fraud statutes are set out below. After them I will explain why the facts in the record imply that the Complainant could reasonably believe they had been violated.

A person commits bank fraud when he:

> knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of fraudulent pretenses, representations or promises . . .[72]

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[71] 148 CONG. REC., at S7420, col. 3 (daily ed. July 26, 2002); the first sentence of this quoted language also appears in the Senate Report on the whistleblower protection provision of the Sarbanes-Oxley Act. *See*, S. REP. NO. 146, 107th Cong. 2nd Sess., at 19 (Judiciary Committee May 6, 2002) (commenting on what then had been the Corporate and Criminal Fraud Accountability Act of 2002"), *available at* 2002 WL 32054437 (A&PSAROX), at *13. This committee analysis may be the more persuasive interpretative tool than Sen. Leahy's floor statements. *Garcia v. United States,* 469 U.S. 70, 76 (1984); *In re Kelly,* 841 F.2d 908, 912 & n. 3 (9th Cir. 1988). The Secretary of Labor nonetheless relied on this floor statement by Sen. Leahy when she adopted the final regulations that implement the SOX employment protections. PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 806 OF THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, TITLE VIII OF THE SARBANES-OXLEY ACT OF 2002; *Final Rule*, 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

[72] 18 U.S.C. § 1344.

Mail fraud occurs under section 18 U.S.C. § 1344 when someone:

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious count, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . . [73]

Similarly, under section 1343 a person is guilty of fraud by wire, radio, or television when:

> having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . . .[74]

The Respondents argue this:

> [E]ven taking Mallory's facts as true, his complaint does not relate to suspected mail, wire, or bank fraud, because . . . Mallory does not allege that Rogers [the loan officer] made any false statements to him, that he was

[73] 18 U.S.C. § 1341.

[74] 18 U.S.C. § 1343.

> ignorant of the truth, that he or anyone else relied upon any false statements by [the loan officer], or that there was any realistic threat of injury.

RRR 15.

The things Mr. Rogers did that the Complainant recounted in his email and oral statements to Mr. Wicke satisfy Sen. Leahy's second test—they would be relevant proof in a hypothetical prosecution of the loan officer for bank fraud, mail fraud, or wire fraud.

Because the Complainant does not say Mr. Rogers lied *to him*, and because the Complainant's "purported complaint [does not] even begin to meet the elements of actionable fraud," (RM 27) the Respondents contend he could not have reasonably believed Mr. Rogers was involved in a fraud. But SOX does not require a complainant to establish the elements of an actionable civil fraud.[75] Decisions under two other whistleblower protection statutes illustrate this point. The Sixth Circuit permitted an employee who was fired in retaliation for testimony he gave as a witness in a safety-related proceeding to claim whistleblower protection without requiring him to show that any federal safety standard actually had been violated.[76] The Senate Report[77] on what became § 806 of Title VIII of the SOX Act specifically approved the Third Circuit's decision in a whistleblower protection matter that arose under § 507 of the Clean Water Act, that held that the employee need not prove an underlying statutory violation to enjoy whistleblower protection.[78]

Nor does SOX require proof that the employee was deceived. Seeing through a possible fraud will lead some employees to report it. Those reports qualify for employment protection. The Complainant alleges Mr. Rogers acknowledged the draw sought too much, but wanted the Complainant to approve it anyway. The Complainant could think an attempted bank or wire fraud occurred when the loan officer intentionally requested an excessive draw to close out the construction loan

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[75] *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-00007, slip op. at 6 (ARB Jan. 31, 2006).

[76] *Yellow Freight System, Inc. v Martin*, 954 F.2d 353, 355 and 357 (6th Cir. 1992) (applying the whistleblower protections of the Surface Transportation Assistance Act, then codified at 49 U.S.C. App. § 2305(a), now 49 U.S.C. § 31105).

[77] S. REP. NO. 146, 107th Cong., 2nd Sess., at 19 (Judiciary Committee May 6, 2002) (approving what then had been the "Corporate and Criminal Fraud Accountability Act of 2002"). That Act ultimately became Title VIII of SOX.

[78] *Passaic Valley Sewerage Commrs. v. Dept. of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993), where the court said "[A]n employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection under § 507(a) for the obvious reason that such a standard would chill employee initiatives in bring to light perceived discrepancies in the workings of their agency." Corporate employees enjoy the same protection under SOX the government employee enjoyed under the Clean Water Act in *Passaic Valley*. *See also, Collins v. Beazer Homes USA*, 334 F.Supp.2d 1365, 1376 (N.D. Ga. 2004).

(CX-I 184–89). Had the Complainant complied, Mr. Rogers would have "defraud[ed] a financial institution" or obtained funds under the control of a financial institution through fraudulent pretenses (bank fraud) through a wire transfer (wire fraud).

The Complainant also alleged Mr. Rogers threatened to instruct the contractor to file a mechanic's lien to force the bank to "do something" or get its vendor to pay the extra $17,000 (CX-I 162). If successful, the scheme would have transferred more than the loan amount (*id.*). Since the Complainant had grounds to believe the contractor had no legitimate claim to those funds (CX-I 184–189; RX-E 184–89), the email that recounted Mr. Rogers' threats reported an attempt at bank or wire fraud. If Mr. Rogers mailed anything to carry out the scheme, mail fraud was involved too.

The Respondents concede that an employee needn't cite a statute or regulation when telling managers that fraud may be going on. They say he must show "he reasonably believed the law was being broken and that he communicated this fact" (RRR 15). They suggest the Complainant's "extensive experience in the banking industry" precludes his contention that he reasonably believed any fraud was underway (*id.*). This argument about "reasonable belief" fails, because it requires inferences against the Complainant that can't be made on a motion for summary decision. The Complainant offered enough proof that I could find he had a subjective and an objectively reasonable belief that he was reporting bank, wire, or mail fraud by the loan officer. The Respondents could obtain summary judgment only if they could conclusively demonstrate a negative: that all the proof shows the Complainant disbelieved what he told his superiors. But the evidence supports the opposite inference, one that the summary procedure requires me to use.

iv. SOX Evidentiary Requirements before an Administrative Law Judge

The Respondents also asserted that Complainant's grounds for his reasonable belief are inadequate because his "allegations are unsupported by any admissible, non-hearsay, non-speculative evidence, and, at any rate, they are immaterial for purposes of summary decision" (RX-VV 7).

The Secretary's SOX regulations adopt only subpart A of the OALJ's Rules of Practice and Procedure; the formal evidence rules of subpart B do not apply. In SOX adjudications judges exclude "immaterial, irrelevant, and unduly repetitious" evidence and apply "rules or principles designed to assure the production of the most probative evidence."[79] SOX also incorporates by reference the AIR 21 regulations and procedures.[80] The hearsay admissible in AIR 21 cases[81] may be

[79] 29 C.F.R. § 1980.107(d).

[80] 18 U.S.C. § 1514A(b)(2)(A).

admitted in SOX cases too. The Complainant may use hearsay to explain why he believed Mr. Rogers was engaging in bank, wire, or mail fraud.

The Respondents' attempt to show the Complainant's belief Mr. Rogers was engaging in or attempting to engage in bank, mail, or wire fraud was *unreasonable* because Mr. Rogers would not personally have received the extra funds had the Complainant processed the full draw Rogers had requested (RM 12). The Complainant explained his belief was subjectively reasonable because he knew Mr. Rogers might potentially benefit from future business by ensuring the loan's building contractor got more money, and that he was aware of a prior situation where Mr. Rogers had encouraged a builder to file a mechanic's lien in order to force a loan draw for more than authorized by the borrower (CR 12; CX-6, at 185–86, 265–66). But even that isn't required. All the Complainant need show is a reasonable belief that the Bank was being defrauded, whether the money would be pocketed by Mr. Rogers, the contractor, the borrowers, or someone else.

v. Shareholder Fraud and Materiality Under SOX

According to the Respondents, the Administrative Review Board and the majority of ALJs who have considered the issue have held that reports of suspected bank, mail, or wire fraud qualify for SOX protection only if the scheme would be adverse to the interests of the public company's shareholders (RRR 13). In *Platone v. FLYi*, the Board did say that "when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests."[82] Surely scheming to disburse more money to a borrower than the loan amount is adverse to the interest of a bank's shareholders. A successful scheme of that type intrinsically reduces profit, and exposes vulnerabilities in the bank's internal controls that would cause an investor to question the reliability or trustworthiness of its internal financial reports. If disclosing something adverse to shareholders' interests is needed to qualify for SOX protection, the Complainant's proof satisfies that low bar.

The Bank's argument implies something more is needed: that the employee's disclosure about bank, mail, or wire fraud must involve a material amount of money. To address that contention, the Secretary's regulations that define protected activities will be considered, and the *Platone* decision will be parsed. The starting point is the rulemaking record.

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[81] *Weil v. Planet Airways, Inc.*, ARB No. 04-074, ALJ No. 2003-AIR-00018, slip op. at 4 (ARB Oct. 31, 2005).

[82] *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-00027, slip. op. at 15 (ARB Sept. 29, 2006), *aff'd sub nom. Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008), *cert. denied*, ___ U.S. ___, No. 07-1635 (Nov. 16, 2009).

1. The Secretary Declined to Adopt a Materiality Requirement in the SOX Regulations

When the Secretary of Labor promulgated a regulation that included protected activity as an element of a prima facie case, she explicitly declined to include a materiality requirement. The regulation, set out below, repeats much of the statutory text:

> An employee is protected against discrimination . . . by a company or company representative for any lawful act:
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> (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 18 U.S.C. 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 information or assistance is provided to or the investigation is conducted by—
>
> . . .
>
> (iii) 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) . . .[83]

After the proposed regulation was published, comments submitted to the Secretary urged that SOX employment protections be restricted to disclosures about things that affected public company shareholders in a material way. The Secretary rejected the suggestion when she adopted the final regulation. According to the record, the "HRPA [the Human Resource Policy Association] commented that this section should be clarified to ensure that the description of protected activity covers only disclosures of fraud that harm shareholders or that relate to securities law."[84] Actual harm to shareholders would have to be quantified somehow. The HRPA had suggested that the Secretary alter the proposed regulations to require "a reported

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[83] 29 C.F.R. § 1980.102(b)(1) (2009) (emphasis added). See also 29 C.F.R. § 1980.104(b)(1)(i) where the term "protected activity or conduct" is included as an element of an complainant's *prime facie* case.

[84] PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 806 OF THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, TITLE VIII OF THE SARBANES-OXLEY ACT OF 2002; *Final Rule*, 69 Fed. Reg. 52104, 52106 (discussing comments on final rule codified at 29 C.F.R. § 1980.102).

violation must affect as much as 3% of a company's revenue before it is considered an issue that would implicate the securities laws" (*id.*). The Association wanted to avoid whistleblower complaints "based on ordinary business and employment disputes that the [SOX] statute was not intended to address" (*id.*).

The Secretary rejected those changes to 29 C.F.R. § 1980.102. She pointed out that the description of protected activity came from the statute itself (*id.*). Furthermore, "determinations as to whether employee disclosures concerning alleged corporate fraud are protected under Sarbanes-Oxley will depend on the specific facts of each case. It is not appropriate therefore for these regulations to specify a percentage or formula for use in defining protected activity" (*id.*).

The position the Secretary took when she adopted the definition of protected activity should control. Employees qualify for protection when they disclose things they think may constitute bank, mail, or wire fraud. To the extent *Platone* intimates that what employees disclose also must "interest" investors, no dollar value, percentage rule of thumb, or other materiality measure applies.

The Complainant emphasizes—correctly—that the SEC won't base materiality determinations merely on how much money is involved (CRR 10 [citing *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-00002, slip. op. at 50 (ALJ June 29, 2007)]). "The SEC further provides that magnitude [*i.e.*, dollar amount] alone does not determine materiality. All factors must be considered, as 'misstatements of relatively small amounts . . . could have a material effect on the financial statements.'"[85] SEC Staff Accounting Bulletin No. 99 details why materiality, as the securities laws use the term, is beyond an employee's ken. Materiality may be judged, according to prevailing accounting literature, only by those who know all the facts.[86] Employees qualify for SOX employment protection when they know a lot less: enough to have a reasonable basis to believe a violation of a predicate statute may be going on. The underlying goal is to encourage employees to bring shenanigans to the attention of the audit committee or other responsible parties before they become crises or corporation-felling disasters. That is precisely why the Congress and the SEC required that employees have confidential access to report questionable behavior to the audit committees of the boards of directors for public companies. The SEC explained when it adopted the regulation on employee access to audit committees that one of the benefits of "[i]mproved oversight [by audit committees] may help detect fraudulent financial reporting earlier and perhaps

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[85] *Deremer*, 2006-SOX-00002 at 50 (relying on U.S. Securities and Exchange Commission, Staff Accounting Bulletin No. 99, Release No. SAB 99, at the paragraph accompanying its n.13 (Aug. 12, 1999), *available at* http://www.sec.gov/interps/account/sab99.htm).

[86] "The predominant view is that materiality judgments can properly be made only by those who have all the facts." SEC Staff Accounting Bulletin No. 99, *supra* note 84, at paragraph accompanying n.7, relying on Financial Accounting Standards Board Concepts Statement No. 2, at ¶ 131.

thus deter it or minimize its effects."[87] Employees need not fear retribution when they tell managers they think potential violations of SEC regulations or of SOX predicate statutes are going on.

2. The Board Has Not Required Proof of Materiality

The Board's decision in *Platone* mentioned materiality, but focused primarily on what the complainant communicated to her superior, and concluded she "did not provide[] her employer with specific information regarding 'any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. [§§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud] . . .'"[88] The complainant alleged her protected activity was disclosing what she characterized as securities fraud under Rule 10b-5,[89] in addition to mail fraud and wire fraud. That led the Board to refer to securities, wire, and mail fraud when it said that to qualify for SOX protection, the employee must disclose something "adverse to investor's interests."[90] But the Board mentioned materiality in the context of the complainant's contention that she reported violations of Rule 10b-5.[91] The *Platone* decision never imported a materiality requirement for disclosures about potential bank, mail, or wire fraud when they serve as predicate offenses for a SOX whistleblower protection complaint. Materiality isn't an element of any of those predicate crimes. Besides, the entire materiality discussion is merely dicta, since the Board dismissed the case because the complainant failed to show her disclosures related "definitively and specifically" to securities fraud, not for her failure to prove materiality.[92] The Board's dismissive comment about how little money was misspent carries no legal significance.[93]

The Respondents nonetheless insist that *Platone* imported a materiality requirement into evaluations of all SOX protected activities, including allegations of bank, mail, or wire fraud (RRR 13–14; "Mallory attempts to sidestep this critical lack of materiality by implying that shareholders could have been negatively impacted by a criminal prosecution against the Parent Company." *Id.* at 14.). The Respondents argue that materiality must be determined based on the amount of the alleged fraud alone (*id.*).

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[87] 69 Fed. Reg. 18813.

[88] *Platone*, ARB No. 04-154 at 21.

[89] 17 C.F.R. § 240.10b-5.

[90] *Platone,* ARB No. 04-154 at 21.

[91] *Id.* at 16, 21.

[92] *Id.* at 17.

[93] *Id.* at 21.

Several ALJ decisions seem to adopt this view.[94] Each discuss shareholder fraud, materiality, and *Platone*, but only *Wengender* actually involved a complainant that alleged bank, mail, or wire fraud as the basis for protection. Respondents cite additional trial-level decisions in their Motion for Summary Decision that reached similar conclusions before *Platone* was decided (RM 22–23 and cases cited). I am not persuaded by the Respondents' interpretation of *Platone* and decline to follow this line of cases.

The Board has mentioned materiality in cases after *Platone*, commenting that "[t]he employee must *ordinarily* complain about a material misstatement of fact (or omission) concerning a corporation's financial condition on which an investor would reasonably rely."[95] Neither of these cases involved employment protection claims premised on reports about bank, mail, or wire fraud.

The complainant in *Smith v. Hewlett Packard*[96] based his SOX claim on his reports of something SOX simply doesn't cover: systematic racial discrimination he said his employer practiced.[97] The Board found no protected activity because racial discrimination isn't one of the SOX predicate offenses.[98]

The complainant in *Godfrey* argued three different bases for SOX protection.[99] The first focused on complainant's wife's calls to a company hotline reporting sexual harassment and sex discrimination, which the Board rejected because sex discrimination is not covered by SOX[100]. A second related to "improper parceling" involving vehicles that were purchased but not reported as assets on financial statements.[101] The Board rejected this theory due because it found no evidence that the complainant had communicated to his employer anything relating to "the fraud statutes, SEC rules, or shareholder fraud."[102] The third was based on

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[94] *E.g., Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-00002, slip. op. at 54 (ALJ June 29, 2007); *Mozingo v. The South Fin. Group, Inc.*, 2007-SOX-00002, slip op. at 11–12 (ALJ Dec. 6, 2006); *Wengender v. Robert Half Int'l, Inc.*, 2005-SOX-00059, slip op. at 17 (ALJ Mar. 30, 2006).

[95] *Godfrey v. Union Pac. R.R. Co.*, ARB No. 08-088, ALJ No. 2008-SOX-00005, slip op. at 4 (ARB July 30, 2009) (emphasis added) (citing *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-00088 through 00092, slip op. at 9 (ARB Apr. 29, 2008).

[96] *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-00088 through 00092 (ARB Apr. 29, 2008).

[97] *Id.* at 8.

[98] *Id.* at 10.

[99] *Godfrey*, ARB No. 08-088 at 5.

[100] *Id.* at 5.

[101] *Id.* at 6.

[102] *Id.*

reporting an alleged financial "kickback" scheme.[103] The Board rejected it for procedural reasons—the complainant had failed to raise the alleged kickbacks when the case was before the ALJ.[104]

While the Board may restrict "protected activity" to reports about bank, mail, or wire frauds that would give an investor pause, the Respondents go farther. They effectively collapse the specific statutory bases for protected activity [which are 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud)] into variants of § 1348 securities fraud. That reading disregards the language of the statute, as one district court emphasized in *O'Mahony v. Accenture, Ltd.*:

> [T]he plain language of § 1514a is unambiguous. . . . Section 1514A contains six provisions that enumerate six specific forms of misconduct which, if reported by an employee, protect the whistleblower from retaliation: (1) § 1341 (mail fraud); (2) § 1343 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders. The first four provisions are statutes that, as written by Congress, are not limited to types of fraud related to SOX. By listing certain specific fraud statutes to which § 1514A applies, and then separately, as indicated by the disjunctive "or", extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, § 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to "shareholder" fraud.[105]

O'Mahony isn't binding authority here, but offers persuasive analysis.

The Respondents urge the contrasting view that *Bishop v. PCS Admin. (USA), Inc.*,[106] exemplifies. Those judges believe "[t]he phrase 'relating to fraud against shareholders' in this provision must be read as modifying each item in the series, including 'rule or regulation of the Securities and Exchange Commission.'"[107]

[103] *Id.* at 7.

[104] *Id.*

[105] *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008).

[106] 2006 WL 1460002 (N.D. Ill. May 23, 2006) (unpublished).

[107] *Id. at* *9.

The Board's recent decision in *Lewandowski v. Viacom, Inc.*[108] is consistent with the *O'Mahony* approach. In *Lewandowski*, the Board reiterated its quote from *Godfrey* about what a SOX complaint *ordinarily* must contain[109] before evaluating whether the employee's alleged protected activity "definitively and specifically" related to wire fraud or shareholder fraud.[110] The Board discussed these as two distinct grounds for protected activity, stating that: "[f]or a protected complaint based on wire fraud, [the complainant] must have had a reasonable belief that Burke [the subject of her complaint] was engaged in wire fraud and [the complainant] must have conveyed that complaint 'definitively and specifically' to her employer."[111] In light of the Board's decision in *Lewandowski*, I am persuaded that *O'Mahony* reads the statute correctly, and decline to follow *Bishop*.

vi. Accurate Books, Records and Adequate Internal Controls

A public company owes investors, regulators, creditors and others reliable information about the firm's financial position, results of operations and cash flows. Accurate books and records are essential. The SEC takes a dim view of any effort to falsify, directly or indirectly, any book, record, or account that is the subject to the securities laws,[112] or to circumvent internal controls.[113] A showing of scienter isn't necessary to establish violations of these anti-fraud provisions.[114]

How the Bank dealt with a $17,000 charge on one residential construction loan would be unlikely to affect any investor's decision to buy or sell securities of J.P. Morgan Chase & Co. The Complainant contends that a criminal investigation or conviction could be devastating to the entire company's (Parent and Subsidiaries) good will, reputation, and credibility, and *that* could materially affect shareholders (CR 3). I agree with the Respondents that the Complainant has no basis in the evidence to assert that the loan officer's actions likely would lead to criminal charges actually being filed against him, the Parent or the Bank (*see* CR 10). Still, public disclosure that one of the Bank's most successful loan officers engaged or schemed to engage in bank fraud would be more than a trivial embarrassment. But what the Complainant says he wrote to his manager after his conversation with the loan officer implicated:

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[108] ARB No. 08-026, ALJ No. 2008-SOX-00088 (ARB Oct. 30, 2009).

[109] *Id.* at 8.

[110] *Id.*

[111] *Id.*

[112] "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2-1.

[113] 17 C.F.R. § 240.13a-15(f).

[114] *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998).

- the accuracy of the Bank's books and records—if the plan he disclosed to force the additional disbursement succeeded, and
- the adequacy of the Bank's internal controls for construction loans.

Communications on both topics merit SOX employment protection against retaliation.

The Respondents' version of events turns on the importance of accurate accounts and adequate internal controls. They claim the Complainant was terminated due to a "breach of trust" (*i.e.*, the Bank's trust in him) because he allowed the Garcia loan to remain out-of-balance without promptly bringing the issue to his supervisor (RX-D 106–08). They rely in part on the deposition testimony of Mr. Lawler, a senior fraud investigator who works not for the Bank, but for the Parent (RX-O 4, 7–8). He examined possible fraud by the Complainant with regard to the Pablito Garcia loan (RX-D 113). The Respondents indicated that allowing a loan to remain $17,000 out-of-balance gave rise to a fraud investigation against the Complainant because of the big picture: if one loan is so far out of balance for so long, how many others were too (s*ee* RX-D 92)? Following that rationale, possible bank fraud by one of the Bank's highest-performing loan officers (a type of fraud that also could be potentially repeated) should merit no less attention by the Bank and the Parent. The crucial factors are the dishonesty and inadequate controls to ferret it out, not the size of the fraud.

Obsessing about the amount of money involved, one aspect of materiality in an action for securities fraud under Rule 10b-5, can blind one to other securities law violations. Section 13(b)(2) of the Securities Exchange Act contains two relevant accounting provisions:

- the "books and records" provision of § 13(b)(2)(A)[115] and
- the "internal controls" provision of § 13(b)(2)(B);[116]

neither are limited by materiality thresholds. Section 13(b)(2)(A) requires issuers of securities to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Section 13(b)(2)(B) obliges issuers to create internal accounting controls adequate to give "reasonable assurance" that their financial transactions are recorded accurately, fairly, and in "reasonable detail," so they can prepare financial statements conforming to generally accepted accounting principles. The statute describes "reasonable assurance" and "reasonable detail" as the degree of assurance and the level of detail

[115] 15 U.S.C. § 78m(b)(2)(A).

[116] 15 U.S.C. § 78m(b)(2)(B).

that would satisfy prudent officials in the conduct of their own affairs.[117] The fraud the Complainant alleged could violate both those statutory duties the Parent, and by implication the Bank as its wholly owned agent, owed to the investing public and the SEC. The Complainant was not required to cite these sections of the securities laws in his email to his manager after his troubling conversation with the loan officer, or to the Department of Labor after he was fired, to be protected.

The Parent and the Bank have duties under § 404 of the SOX Act that mesh with their duties to keep accurate books and records under § 13(b)(2) of the Securities and Exchange Act. A public company's principal executive officer and principal financial officer must certify that they have disclosed significant deficiencies in the design or operation of internal control over financial reporting that are reasonably likely to adversely affect the company's ability to record, process, summarize, and report financial information.[118] They must make those disclosures to the external auditor and the audit committee of the board of directors. The requirements are intended to make these senior officers more effective in carrying out their responsibilities for accurate financial reporting. The SEC has rejected the notion that "significant deficiencies" in the design or the operation of internal controls are limited to those so large that they are "material" to the financial statements of public companies.[119]

The Complainant has alleged that he complained about the weakness in the Bank's system to track construction-to-permanent loans so that he would know when a construction loan went out of balance. If he had acceded to the loan officer's request to fund the full draw, he would have been exploiting a weakness in internal controls. What he says he disclosed qualifies for protection as a report about a violation of securities laws that demand that public companies keep accurate books and records and develop and implement adequate internal controls. Employees are free under SOX to report those sorts of shortcomings to managers, without fear of retribution.

vii. "Definitively and Specifically" Related to SOX Subject Matter

In order to demonstrate protected activity under SOX, an employee must show their communications "definitively and specifically" related to one of the six

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[117] 15 U.S.C. § 78m(b)(7).

[118] *See* Section 302(a)(4) of the Sarbanes-Oxley Act (requiring senior corporate officers to certify that they are responsible for establishing and maintaining internal controls and have designed the internal controls to ensure that material information relating to the issuer is made known to the signing officers and have disclosed any significant deficiencies in internal control to the independent auditors and audit committee). The requirement is codified at 15 U.S.C § 7241.

[119] SEC RELEASE NOS. 33-8829, 34-56203, Definition of the Term Significant Deficiency, 72 Fed. Reg. 44923, 44925–26 (Aug. 9, 2007).

categories of fraud or securities violations listed in 18 U.S.C. section 1514A(1).[120] The 10th Circuit has not yet addressed this issue.

The "definitively and specifically" rule focuses on what a complainant actually communicates to his or her employer.[121] But this rule doesn't require an employee to "'cite a code section he believes was violated' to trigger the protections of § 1514A."[122] Nor must an employee's communications include any magic words such as "fraud."[123] All section 1514A requires is that an employee's communication "report[] conduct that definitively and specifically relate[s] to" one of the six SOX predicate categories.[124]

Respondents frame the alleged email to Mr. Wicke and the later oral statements as ones that dealt with "an intra-corporate conflict about the proper resolution of a customer issue and about a co-worker's supposed disregard for company policies and practices—matters which do not fall within the purview of SOX."[125] Had the Complainant only expressed frustration with internal policies he may not have engaged in protected activity, because he would have failed to meet the "definitively and specifically" requirement found in *Platone v. FLYi*. "[U]nder 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(1)."[126] The Board has clarified that the "relevant inquiry is not what [the complainant] alleged in her . . . OSHA complaint, but what she actually communicated to her employer prior to the . . . termination."[127]

If the Complainant did nothing but vent frustration about internal policies, he would not have engaged in protected activity because he would have failed the "definitively and specifically" test. The Complainant raised more than that: he

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[120] *Van Asdale v. International Game Technology*, 577 F.3d 989, 997 (9th Cir. 2009) (citing *Platone v. FLYi, Inc.*, ARB No. 04-154 at 17); *see also Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

[121] *Platone*, ARB No. 04-154 at 17 (The "relevant inquiry is not what [the complainant] alleged in her . . . OSHA complaint, but what she actually communicated to her employer prior to the . . . termination.").

[122] *Van Asdale*, 577 F.3d at 997 (citing *Welch*, 536 F.3d at 276).

[123] *Id.*

[124] *Id.*

[125] RRR 16 (citing *Espinoza v. Sysco Corp.*, 2005-SOX-00025, slip op. at 7 (ALJ Dec. 27, 2006); *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-00008, slip op. at 5 (ALJ June 22, 2005); *Reddy v. Medquest, Inc.*, 2004-SOX-00035, slip op. at 3 (ALJ June 10, 2004), *aff'd* (ARB Sept. 30, 2005)).

[126] *Platone*, ARB No. 04-154 at 17.

[127] *Id.*

disclosed what amounts to SOX predicate fraud(s) by the loan officer and shortcomings in internal controls.

The Complainant testified that his October 2, 2007, email to Mr. Wicke included both the information about the loan's out-of-balance status *and* his concerns about Mr. Rogers behavior, including "Eddie Rogers' conversations with [the Complainant] and Tresa [Bloeman] and the mechanic lien threats [and] the threats to wire funds on a loan that funds weren't available" (RX-QQ 286). Complainant also testified he asked to schedule a meeting with Mr. Wicke to follow up on these concerns (*id.* at 287), but that sometime during the following week, Mr. Wicke yelled at him and refused to discuss the situation (CX-I 190–91). The Complainant said he raised the issue with Mr. Wicke later (again to no avail) when Mr. Wicke gave the Complainant a fraud investigator's phone number (*id.* at 193). At that time, Complainant believed Mr. Lawler was investigating fraud on Mr. Rogers' part (RX-QQ 299). Complainant claims he discussed the content of his email to Mr. Wicke, including Mr. Rogers' behavior, with Mike Lawler, a senior fraud investigator for the Parent, but did not forward the email to him (RX-QQ 299–300; *see also* RX-II 4).

Viewing the evidence in the light most favorable to the Complainant and drawing all inferences in his Complainant's favor, the Complainant has demonstrated that material issues of fact exist regarding whether Complainant's communications "definitively and specifically" related to bank, mail, or wire fraud. The Complainant informed Mr. Wicke about a Bank employee's attempts to intentionally force the transfer of funds that exceeded the loan amount, and a plan to encourage a third party to file a mechanic's lien to achieve this purpose—information from which Mr. Wicke could have inferred the threatened mechanic's lien and attempted draw were fraudulent, and done to unlawfully deprive the Bank of funds.

That the Complainant has not specifically alleged that he mentioned securities, bank, wire, or mail fraud by name makes no difference, for the content of his communication definitively and specifically included information that would be relevant in an investigation of those types of fraud. The report seems to have led the Bank to begin a fraud investigation—but of the Complainant, not of the loan officer. The Complainant's testimony suggests the same information may have been relayed to the fraud investigator. Thus, the Respondents are not entitled to summary judgment on this ground.

viii. Complainant's Motion for Summary Decision on Protected Activity

The Complainant acknowledges genuine issues of material fact exist, but has moved for partial summary decision on a narrow issue: if the Complainant's story is proven at trial, would it encompass protected activity that could serve as the basis

for relief from the Secretary of Labor under SOX? Even if all facts the Complainant has alleged are proven true, the inferences drawn from those facts, if taken in the *Respondent's* favor, suggest the Complainant may not have had reasonable belief Mr. Rogers was engaged in fraud under SOX and the Complainant may not have sufficiently communicated this belief. Therefore the Complainant's motion for summary decision on this issue is also denied.

IV. Conclusion

Both the Complainant's and Respondents' motions for summary decision have been evaluated under the standard sets in 29 C.F.R. § 18.40(d). The Complainant has demonstrated that genuine issues of material fact exist about whether he worked for an employer SOX covered, and whether he engaged in protected activity. The Respondents' motion for summary decision is denied.

The Respondents have shown that genuine issues of fact exist about whether the Complainant was a protected employee as he worked for the Bank and whether the Complainant's behavior, if the alleged facts are proven at a hearing, would qualify as protected activity under section 806 of the Sarbanes-Oxley Act of 2002. Should the facts currently submitted constitute the totality of the trial evidence, I likely would find the Complainant protected by SOX. The Complainant's motion for summary decision is denied.

So Ordered.

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William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California