



**In the Matter of:**

**JOE CUNNINGHAM,**

**ARB CASE NO. 11-047**

**COMPLAINANT,**

**ALJ CASE NO. 2011-SOX-004**

**v.**

**DATE: August 5, 2011**

**LIVEDEAL, INC., RAVASH NAVAR,  
JOHN EVANS, TOM CLARKE, and  
DOES 1 -10,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Paul M. Igasaki, *Chief Administrative Appeals Judge* and Joanne Royce,  
*Administrative Appeals Judge***

**FINAL DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT  
AND DISMISSING PETITION FOR REVIEW**

This case arose when the Complainant, Joe Cunningham, filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or the Act).<sup>1</sup> On April 1, 2011, a Department of Labor Administrative Law Judge (ALJ) issued an Order of Dismissal (O. D.) pursuant to 29 C.F.R. § 18.40(d).<sup>2</sup> The ALJ concluded that

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<sup>1</sup> 18 U.S.C.A. § 1514A (West Supp. 2011). The regulations implementing SOX are found at 29 C.F.R. Part 1980 (2010). During the pendency of this appeal, on July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010). Sections 922(b) and (c), and 929A of the Dodd-Frank Act amended Section 806 of the SOX, but those amendments are not relevant to this case.

<sup>2</sup> O. D. at 5-14.

“an individual who represents himself as an ‘independent director’ for the purpose of satisfying NASDAQ’s corporate governance requirements is subsequently precluded from asserting that he is an ‘employee’ who qualifies for protection under SOX.”<sup>3</sup>

The Secretary of Labor has delegated her authority to issue final administrative decisions in SOX cases to the Administrative Review Board.<sup>4</sup> The Respondents filed a timely petition requesting the Board to review the ALJ’s decision “solely to seek an award of attorneys’ fees because the complaint . . . was frivolous and brought in bad faith.”<sup>5</sup> In response, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule.

On July 6, 2011, the Board received Respondents’ Notice of Dismissal of Petition for Review. The SOX implementing regulations provide that the parties may enter into an adjudicatory settlement of a SOX complaint.<sup>6</sup> But if the parties enter into a settlement, the parties must file a copy of it with the Board for its review and approval before the Board can dismiss the case.<sup>7</sup> Accordingly, we ordered the parties to submit a copy of the settlement agreement signed by both parties, and setting forth all the terms and conditions to which the parties have agreed.

We have received a signed copy of the settlement agreement and have reviewed its terms. Review of the agreement reveals that it may encompass the settlement of matters under laws in addition to the SOX.<sup>8</sup> But the Board’s authority over settlement agreements is limited to the statutes that are within the Board’s jurisdiction as defined by the applicable statute. Thus, our approval is limited to this case, and we approve the agreement only insofar as it pertains to Cunningham’s SOX claim in ARB No. 11-047 (ALJ No. 2011-SOX-004), the case currently before the Board.<sup>9</sup>

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<sup>3</sup> O. D. at 1.

<sup>4</sup> Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

<sup>5</sup> Petition for Review at 1.

<sup>6</sup> 29 C.F.R. § 1980.111(d)(2).

<sup>7</sup> *Teutsch v. Ing Groep N.V.*, ARB No. 07-018, ALJ Nos. 2005-SOX-101, -102, -103 (ARB Nov. 26, 2008); *Ambrose v. U.S. Foodservice, Inc.*, ARB No. 06-096, ALJ No. 2005-SOX-105 (ARB Sept. 28, 2007); *Barker v. Perma-Fix of Dayton*, ARB No. 06-045, ALJ No. 2006-SOX-001 (ARB July 10, 2006). *Accord Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991).

<sup>8</sup> Settlement Agreement and Mutual Release, para. 1.

<sup>9</sup> *See Keough v. Surmodics, Inc.*, ARB No. 09-041, ALJ No. 2008-SOX-065, slip op. at 2 (ARB Aug. 27, 2009).

We also construe paragraph 4 stating that the agreement shall be “governed by and construed in accordance with the laws of the State of Arizona” as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.<sup>10</sup>

The parties have certified that the Settlement Agreement and Mutual Release constitutes the entire settlement with respect to “the issues set forth herein.”<sup>11</sup> The Board finds that the settlement is fair, adequate, and reasonable, and does not contravene the public interest. Accordingly, we **APPROVE** the agreement and **DISMISS** the petition for review with prejudice.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>10</sup> *Id.* at 3.

<sup>11</sup> Settlement Agreement, para. 2.