IN THE MATTER OF:

KENNON MARA, **ARB CASE NO. 12-021**

COMPLAINANT, **ALJ CASE NO. 2009-SOX-018**

v. **DATE: January 31, 2012**

SEMPRA ENERGY TRADING, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Kennon Mara, *pro se*, Northport, New York

***For the Respondent*:**
Kathleen M. McKenna, Esq., and Nathaniel M. Glaser, Esq., *Proskauer Rose, LLP*, New York, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

ORDER DENYING INTERLOCUTORY REVIEW

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson/West 2011)(SOX), and its implementing regulations found at 29 C.F.R. Part 1980 (2011). In the course of the administrative proceeding on the

action brought by the Complainant, Kennon Mara (Mara), against the Respondent, Sempra Energy Trading, LLC (SET), the Administrative Law Judge (ALJ) issued an order on November 25, 2011, that, inter alia, certified three questions for review by this Board. On December 3, 2011, Mara petitioned this Board for review of the questions the ALJ certified, and additional questions that she raises as collateral to the ALJ-certified issues. For the reasons set out below, we decline to grant review of Mara's interlocutory petition.

BACKGROUND

A. Facts

The facts, briefly stated, are drawn from the ARB's Decision and Order of Remand (dated June 28, 2011) (ARB Dec.), and the ALJ's Order Granting Respondent's Motion For Summary Decision (dated Oct. 5, 2009) (ALJ Order).

SET, a limited liability company based in Stamford, Connecticut, is a full-service energy trading company that markets and trades physical and financial energy and metals products. Prior to April 1, 2008, SET was an indirectly, wholly owned subsidiary of Sempra Energy, a public utility holding company traded on the New York Stock Exchange. Beginning April 1, 2008, SET became an indirectly, wholly-owned subsidiary of RBS Sempra Commodities LLP (RBS Sempra Commodities). ARB Dec. at 2 (dated June 28, 2011).

Mara is a principal of her own consulting firm, Kennon Mara Associates. In 2003, SET's controller hired consultant Brian McGowan to draft and implement policies and procedures related to various Financial Accounting Standards (FAS), including FAS 133 that involved "yielding a quarterly hedge ineffectiveness number by calculating the hedge ineffectiveness of all the hedge relationships for that quarter." ARB Dec. at 2, n.1. In 2007, SET hired Mara's firm, and its principal, Mara, to assist in accounting work for the company, specifically to assist McGowan "on the current FAS 133 reporting for the oil group," which involved "fair-value hedging." *Id.* at 2. Mara alleged in an affidavit that she was asked to fill in a backlog on the FAS 133 reporting "running regressions for six months worth of hedges and creating hedge documents for every hedge dating back to December 2005." *Id.* at 3. Mara viewed this filling in request as "cooking the books" to make the records look legitimate. *Id*.

Mara reported her concerns over the inaccuracies to supervisors at SET. ARB Dec. at 3-4. Mara stated in an affidavit that after reporting her concerns to her supervisors in various meetings, negative and personally humiliating rumors began circulating about her among SET employees, including on a website created by a SET employee. *Id.* at 4. Mara reported her concerns to a company attorney, but nothing was done. *Id*. Following further incidents that Mara viewed as harassing, she stopped working for the company on April 7, 2008.

B. Proceedings leading to the petition for interlocutory review

1. Proceedings before the ALJ

Mara filed a complaint with OSHA on June 29, 2008, alleging retaliation in violation of the SOX for reporting inaccurate accounting practices at SET. OSHA dismissed the complaint on November 19, 2008, determining that Mara was not a covered employee under the Act. Mara requested a hearing before an ALJ.

After the ALJ issued a pre-hearing order, SET moved on February 23, 2009, for summary decision, and requested the ALJ to suspend the deadlines set out in the pre-hearing order. Mara moved for additional time to respond to SET's motion and a continuance of the hearing. The ALJ and parties held an "off-the-record telephone conference" on February 27, 2009, to discuss Mara's motion for continuance. Mara's counsel, newly assigned to the matter, requested additional time to prepare and respond to SET's motion. On March 3, 2009, the ALJ issued an order granting Mara an extension to March 20, 2009, to respond to the motion. He cancelled the hearing and suspended the deadlines set out in the pre-hearing order. The ALJ ruled that "[o]n March 12, 2009, Mara filed a waiver pursuant to 18 U.S.C. 1514A(b)(1)(B)." ALJ Order at 2. On March 20, 2009, Mara filed a Response in Opposition to SET's motion for summary decision, and SET filed a Reply on April 7, 2009. *Id.* at 2.

The ALJ granted SET's motion for summary decision on October 5, 2009, and dismissed Mara's complaint. The ALJ determined that SET was not a covered employer under SOX because SET "was not publicly traded and did not act as an agent on employment matters for either Sempra Energy or RBS," and determined that Mara did not engage in protected activity. ALJ Order at 9-14. Mara moved for reconsideration, which the ALJ denied. ALJ Order Denying Motion To Reconsider (dated Jan. 14, 2010).

2. District Court proceedings

On June 22, 2009, Mara filed a complaint in federal district court raising claims stemming from her resignation from SET. *See Mara v. RBS Sempra Commodities*, No. 3:09-cv-00983-SRU (D. Conn.). On December 22, 2009, Mara moved to amend her complaint to include a SOX retaliation claim. SET moved to dismiss her claims, and as to the SOX claim argued that on March 9, 2009, during proceedings before the ALJ, Mara had waived her option to file her SOX complaint in federal district court pursuant to 18 U.S.C. 1514A(b)(1)(B).

On September 7, 2010, the district court held a hearing on SET's motion to dismiss Mara's claims. As to the SOX claim, SET argued that Mara had waived her right to proceed in federal district court pursuant to a letter by her attorney dated March 9, 2009, and that she had elected to pursue her SOX whistle-blowing claim before the Department of Labor. See Transcript (Tr.) at 10. Mara argued that she did not voluntarily waive her option to proceed in federal district court. Tr. at 13. After hearing the parties' arguments, the district court ruled that "there was a clear waiver by [Mara's] counsel of the right to proceed in federal court." Tr. at 17.

The district court stated to Mara: "I strongly recommend if you want to pursue your SOX claim, that you go back to the administrative agency and see whether they will allow you to pursue it [there]." Tr. at 22.

3. Proceedings before the ARB

Following the district court's recommendation, on September 14, 2010, Mara filed a late petition for review with the ARB, which the ARB accepted. After briefing by the parties, we issued a decision on June 28, 2011, reversing the ALJ's order on summary decision, and remanding to the ALJ for findings on whether SET is a "subsidiary or affiliate" company within the meaning of SOX. ARB Dec. at 7. As to protected activity, we held that viewing the evidence in favor of the complainant, Mara's affidavits show that she reported conduct to her supervisor that "she believed related to fraud" that was sufficient to survive summary decision. *Id.* at 9.

4. ALJ's Order denying reconsideration and certifying questions for interlocutory review

In proceedings before the ALJ, Mara filed a motion on September 1, 2011, to "make [the] waiver null and void." Specifically, Mara moved the ALJ to nullify the waiver that her counsel made on March 9, 2010, so that her SOX claim could proceed in federal district court. The ALJ denied the motion on September 28, 2011. On October 6, 2011, Mara moved for reconsideration of that denial.

SET filed an opposition to Mara's motion for reconsideration, and Mara filed a response. Following briefing by the parties, the ALJ held a telephone hearing and decided that Section 922(c) of the Dodd-Frank Act did not apply retroactively to effectively invalidate the waiver and authorize Mara to proceed to a jury trial in district court. The ALJ also denied Mara's motion for stay of administrative proceedings pending appeal. The ALJ granted Mara's motion for interlocutory appeal to the ARB. ALJ Order Denying Complainant's Motion For Reconsideration (dated Nov. 25, 2011). The ALJ certified three questions for our consideration:

1. Does the Dodd-Frank amendment codified at 18 U.S.C. 1514A(b)(2)(E) providing a whistleblower complainant under SOX with the right to a jury trial apply retroactively to claims that were under appeal at the time the legislation was enacted?

2. Is the Complainant's waiver of her 18 U.S.C. 1514A(b)(1)(B) right to remove her SOX whistleblower retaliation claim to federal district court valid when made knowingly by Complainant's counsel of record, but without full understanding of the Complainant herself? And

3. Does the Dodd-Frank amendment codified at 28 U.S.C. 1514A(e)(1) proscribing waivers of SOX whistleblower protections apply to agreements with the court, and if

> so, does it apply retroactively to claims under appeal at the time the legislation was enacted?

ALJ Decision at 11-12 (dated Nov. 25, 2011). The ALJ denied Mara's request to stay proceedings pending appeal. *Id.* at 13. In her petition to the ARB, Mara requests interlocutory review of additional questions under the collateral order doctrine. Mara Petition for Certified Interlocutory Review and Petition for Interlocutory Review Under The Collateral Order Doctrine (dated Dec. 3, 2011).

DISCUSSION

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the Administrative Review Board. See Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924 (Jan. 15, 2010). The "Board's authority includes the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id*. Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996).

Where an ALJ has issued an order of which the party seeks interlocutory review, the ARB has elected to look to the procedures set forth in 28 U.S.C.A. § 1292(b)(Thomson/West 2006) to determine whether to accept for review an interlocutory appeal. *Johnson* v. *US Bancorp*, ARB No. 11-018, ALJ No. 2010-SOX-037 (ARB Mar. 14, 2011). Under these procedures:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C.A. § 1292(b). In this case, we decline to exercise our discretion, as granted to the Board. Given the procedural nature of the case, we are not persuaded that resolution of the issues will "materially advance the ultimate termination of the litigation." *Id*. It is undisputed that after 180 days, Mara sought relief in district court pursuant to 18 U.S.C.A. §

1514A(b)(1)(B). The district court judge stated at the hearing that he would not review Mara's SOX claim because of her waiver. Tr. at 17.

We also deny Mara's petition for interlocutory review of various issues that she raises related to her waiver under the collateral order doctrine. The collateral order doctrine permits immediate appeal under very limited circumstances.[1] We fail to find that immediate appeal of the additional issues that Mara raises is justifiable because these issues would not materially advance the litigation.

CONCLUSION

For the foregoing reasons, we **DENY** Mara's petition for interlocutory review.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

---

[1] The collateral order doctrine, established in *Cohen* v. *Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), permits immediate appeal where a ruling (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the underlying action; and (3) resolves an issue that would be effectively unreviewable on appeal from a final judgment. *Kensington Int'l Ltd. v. Republic of Congo*, 461 F.3d 238, 240 (2d Cir. 2007). The United States Court of Appeals for the Second Circuit adds a fourth requirement to the collateral order doctrine: (4) The district court's ruling must "present serious and unsettled questions of law." *Banque Nordeurope S.A. v. Banker*, 970 F.2d 1129, 1131 (2d Cir. 1992) (per curiam). For reasons already explained, the issues Mara raised for interlocutory review do not satisfy these criteria.