No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JACKIE HOSANG LAWSON,
Appellee,
v.
FMR LLC, dba FIDELITY INVESTMENTS, ET AL.,
Appellants.

JONATHAN M. ZANG,
Appellee,
v.
FIDELITY MANAGEMENT & RESEARCH CO., ET AL.,
Appellants.

On Petition for Interlocutory Review from the United States District Court for the District of Massachusetts
Case Nos. 1:08-cv-10466-DPW; 1:08-cv-10758-DPW

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS' PETITION FOR INTERLOCUTORY REVIEW AND FOR REVERSAL OF THE DISTRICT COURT DECISION

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[Lawson v. FMR LLC & Zang v. Fidelity Management Research Co.]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus curiae* the Chamber of Commerce of the United States of America states as follows:

The Chamber of Commerce of the United States of America has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

All parties have consented to the filing of this brief.

ARGUMENT

I. THIS COURT SHOULD REVIEW AND REVERSE THE DISTRICT COURT'S DECISION

The district court's decision to dramatically expand the coverage of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") to privately held companies that contract with public companies raises a "new legal question" that is of "special consequence" not just to the parties to this litigation, but to employers across the country. As such, it is particularly worthy of interlocutory appeal. *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009).

Prior to the district court's decision, most privately held companies had no reason to concern themselves with SOX or its whistleblower provision; after all, the language and legislative history, as well as judicial precedent, firmly establish that privately held companies are not covered by SOX's whistleblower provision. The district court's decision, if allowed to stand, will unsettle these reasonable expectations by opening the door to costly litigation for countless private companies in a way that will do little to advance the purposes behind Section 806. Accordingly, this Court should grant interlocutory review of and reverse the district court's order.

A. The District Court Decision Exposes Small, Privately Held Businesses To Costly and Frivolous Litigation.

The district court's decision expands coverage under Section 806 to all private contractors and subcontractors of publicly held companies, thus creating litigation exposure for a range of privately-held companies, without regard to industry, number of employees or revenue. Although the district court's decision focuses on a narrow set of facts, the list of privately held companies potentially affected by the decision is truly expansive. Publicly held companies increasingly look to third party service providers, whether by way of outsourcing relationships or one-time engagements, to handle both core and non-core functions. As a result, private contractors perform an endless range of services for public companies – from information technology services to marketing, to human resources and back

office functions. Many of these private contractors have limited revenue, too much of which is already allocated to defending employment-related litigation. In fact, surveys show that employment-related litigation is one of the largest areas of litigation for many companies of all sizes. Fulbright & Jaworski L.L.P., Fulbright's 6th Annual Litigation Trends Survey Report, (2009), http://www.fulbright.com/litigationtrends07. Small, privately held businesses can ill afford to add to the list of employment related matters they are required to defend.

B. The District Court's Decision Unsettles Reasonable Expectations of Private Employers.

The district court's decision is at odds with reasonable employer expectations that have developed around the language, legislative history and judicial interpretations of the statute. Given SOX's emphasis on publicly held companies, private employers have no expectation of being covered by SOX's whistleblower provision. The reasonableness of this expectation has been confirmed by a number of judicial decisions in which courts and administrative law judges have rejected the proposition that Section 806 covers private employers. *See, e.g.*, *Brady v. Calyon Securities, Inc.*, 406 F. Supp. 2d 307, 317-318 (S.D.N.Y. 2005); *Zang v. Fidelity Management & Research Co.*, 2007-SOX-27, 2008 WL 7835900, at *7-8 (ALJ Mar. 27, 2007).

In these decisions, judicial authorities, based on a thoughtful review of the statutory language and legislative history, have reach the sound conclusion that

private employers are not covered. For instance, in *Brady*, Judge Lynch, before his recent elevation to the Second Circuit, examined the precise phrase at issue – i.e., Section 806's reference to any "officer, employee, contractor, subcontractor or agent" – and determined that it "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of" public companies. 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005). In other words, the "Act makes plain that neither publicly traded companies nor anyone acting on their behalf, may retaliate against qualifying whistleblower employees." *Id.* Judge Lynch further concluded that "[n]othing in the Act suggests that it is intended to provide general whistleblower protection" to any employee of "any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company ...." *Id.*

In *Zang*, the ALJ reached a similar conclusion after engaging in careful analysis of the statutory language of Section 806, "other provisions of [SOX], the legislative history and [] decisions construing and applying the statutory provision." 2007-SOX-27, 2008 WL 7835900, at *7 (ALJ Mar. 27, 2007). As to Section 806's plain language, the ALJ found that if Congress had "intended [] an expansive application" such that it would apply to "any privately owned company having a contract or having any type of agency relationship with a publicly traded company," "it would have plainly said as much." *Id.* Moreover, employing the

"basic rule of statutory construction [] that words and phrases should not be parsed in isolation," the judge examined other provisions of SOX, finding that they "explicitly apply to individuals who may not be employees of publicly traded companies, suggesting that Congress understood the parameters of Section 806." *Id.* As well, the ALJ noted that "when enacting Sarbanes-Oxley, Congress was certainly aware of investment advisers and investment companies, and the way in which the majority of the mutual fund industry operates, yet it did not specifically refer to these entities in Section 806," although it did "make specific reference to [these entities] in other provisions" of SOX. *Id.* at 8.

After concluding that the statutory language resolved the issue, the ALJ nonetheless explored SOX's legislative history, finding it too supported the same conclusion. Namely, not only did the "Congressional Record state[] that the purpose of Section 806 of the Act is to 'provide whistleblower protection to employees of publicly traded companies'," but also SOX's key sponsor specifically stated that "he wanted to 'make very clear that SOX applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the private companies, who make up the vast majority of companies across the country'." *Id.* (internal citations omitted).

In sum, prior to the district court's decision, private employers had no basis to conclude that SOX imposed burdensome new requirements on them. If, contrary to this reasonable expectation, the district court's decision stands, private employers will be forced to implement costly litigation avoidance measures, and despite such measures, will inevitably incur additional costs defending Section 806 whistleblower litigation, much of which is likely to be frivolous.

C. The District Court's Decision Will Not Advance The Purposes of SOX.

After erroneously concluding that the scope of coverage was not resolved by the statute's language or legislative history, the district court grounded its holding on its view that the overall purpose of SOX – namely, to "target[] … fraud involving *public* companies" – would be advanced by extending coverage to *private* contractors and subcontractors of public companies. *See* Memorandum and Order, dated March 31, 2010 (the "March Order") at 36) (emphasis added). In this regard, the district court's analysis is deeply flawed, as it incorrectly assumes that employees of privately held contractors will play a useful role in detecting fraud at public companies, and that extending coverage to such employees outweighs counterveiling concerns, such as the imposition of unwarranted litigation and compliance costs on their privately held employers.

Importantly, the district court conceded that extending coverage to private contractors in general would undermine the purposes of SOX, since SOX targets

fraud in public, not private companies. *Id.* However, the district court opined that the expansive reach of its holding would be limited by the requirement that covered complaints relate to "shareholder fraud." *Id.* at 40.

While the requirement that whistleblower complaints relate to "shareholder fraud" may provide private employers with an additional defense, it will not insulate such employers from frivolous and costly litigation. Employees of publicly held companies have brought Section 806 litigation based on complaints regarding matters that have little, if any, discernable connection to shareholder fraud. *See, e.g., Reed* v. *MCI, Inc.*, 2006-SOX-71, 2008 WL 7835840, at *2-3 (ALJ Apr. 30, 2008) (software systems engineer complains about misuse of unlicensed computer software); *Harvey v. Safeway, Inc.*, 2004-SOX-21, 2005 WL 4889073, at *28 (ALJ Feb. 11, 2005) (grocery store clerk complains of discrepancies in his paychecks); *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8, 2004 WL 5030304, at *12-13 (ALJ June 15, 2004) (cash manager for restaurant chain complains about inflated sales, conflict of interest in hirings and improper general ledger entries).

Although such alleged whistleblower complaints should be and often are dismissed based on pre-trial motions, it can be costly for employers to obtain such dismissals, particularly in Section 806 cases, which often require expensive discovery regarding potentially fact-intensive issues, such as whether the alleged

whistleblower had a "reasonable belief" that shareholder fraud had occurred. *See Richards v. Lexmark Int'l, Inc.*, 2004-SOX-49, 2006 WL 3246874, at *26 (ALJ June 20, 2006) ("Under the Act, it is only necessary for the complainant to establish that he 'reasonably believed' there was a securities violation....The test does not measure the accuracy or falsity of a Complainant's allegations").

Indeed, relying on the reasonable belief requirement, some courts, again addressing public company employees, have held that a whistleblower need not have an accounting background or any training on securities fraud. *See* e.g., *Sequiera v. KB Home*, No. H-07-cv-03036, 2009 WL 6567043, at *9-13 (S.D. Tex. Jan. 12, 2009) (marketing manager without "any formalized training in accounting or Sarbanes-Oxley compliance," could have reasonable belief of shareholder fraud based on company's acceptance of false vendor invoices, improper transfer of inventory, and direction for him to destroy budget data; summary judgment denied); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376-78 (N.D. Ga. 2004) ("if Congress had intended to limit the protection of Sarbanes-Oxley to accountants ... it could have done so. It did not"; denying summary judgment of director of marketing's complaints about overpayment of advertising agency, improper break-down of marketing costs, and suspected kickbacks on lumber purchases).

As such, just about any employee working in any area of corporate activity, can raise a claim to whistleblower status. And, although claims that are unrelated to shareholder fraud should be dismissed early in the proceedings, courts often construe the "reasonable belief" standard as requiring expensive discovery, even in the most frivolous of claims. *e.g.*, *Ciavarra v. BMC Software, Inc.*, No. H-07-0413, 2008 WL 352273, at *3-4 (S.D. Tex. Feb. 7, 2008) (account representative "reasonably believed that the improper recognition of the amount reflected in the invoice was a violation of Sarbanes-Oxley and other federal laws relating to fraud against shareholders"; summary judgment denied); *Mahoney v. Keyspan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at *1-6 (E.D.N.Y. Mar. 12, 2007) (strategic planning director with "neither personal knowledge of the fraud nor the educational background to discover the fraud on his own," could reasonably believe that improperly reported "post-employment benefits" and severance payments constituted shareholder fraud; summary judgment denied).

The connection of alleged whistleblower complaints to shareholder fraud is likely to be even more tenuous (or non-existent) when such complaints are raised by employees of privately held companies. Employees of privately held companies are less likely than employees of the publicly-held client company to accurately identify true shareholder fraud. This is because such employees generally lack access to the full range of facts necessary to accurately assess

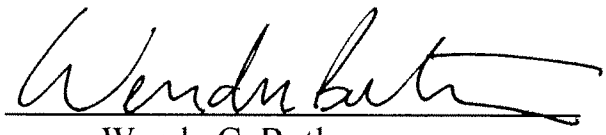
whether actions at the publicly held company rise to the level of fraud and whether such fraud would be material to shareholders.

In sum, there is no basis to believe that any general, overarching purpose of SOX will be served by subjecting privately held companies to frivolous and costly litigation. Nor was it necessary for the district court to resolve the coverage issue by resorting to nebulous statements of SOX's general purposes, when the language and legislative history provide clear indication that employees of privately held companies are not covered.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Chamber of Commerce of the United States of America respectfully requests that this Court grant interlocutory review and reverse the district court's decision.

Respectfully submitted,



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Dated: August 9, 2010

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CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2010, I caused copies of the foregoing BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS' PETITION FOR INTERLOCUTORY REVIEW AND FOR REVERSAL OF THE DISTRICT COURT DECISION to be served by Federal Express, overnight delivery on the following counsel:

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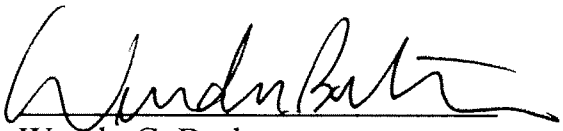

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