RECORD NO. 06-1939

In The
United States Court of Appeals
For The Fourth Circuit

MARK LIVINGSTON,

Plaintiff – Appellant,

v.

WYETH, INCORPORATED;
BRUCE KAYLOS, Wyeth Sanford Managing Director;
DAVID MCCUAIG, Wyeth Sanford Human Resource Director,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT DURHAM

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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No. 06-1939 Caption: Mark Livingston v. Wyeth, Incorporated, *et al.*

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December 20, 2006
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STATEMENT OF INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America (the "Chamber") submits this brief in support of Appellees Wyeth, Inc., Bruce Kaylos, and David McCuaig. The Chamber respectfully requests that this Court affirm the decision of the United States District Court for the Middle District of North Carolina, granting summary judgment on Appellant Mark D. Livingston's claims under § 806 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act").[1]

The Chamber is the world's largest business federation. Representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size throughout the country, the Chamber serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as a party-plaintiff in cases involving issues of national concern to American business. The Chamber recently joined the *amicus* brief filed by the Equal Employment Advisory Council in *Platone v. FLYi, Inc.*,[2] in which the Administrative Review Board of the U.S. Department of Labor addressed the scope of § 806.

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[*] The parties have granted consent to the filing of this *amicus curiae* brief.

[1] 18 U.S.C. § 1514A. This *amicus* brief addresses only the District Court's grant of summary judgment on the ground that the employee had not engaged in protected activity under the Sarbanes-Oxley Act.

[2] 2006 WL 3249910, ARB Case No. 04-154 (ARB Sept. 29, 2006).

This case is of great legal and practical consequence to the Chamber because many of its members are subject to the Sarbanes-Oxley Act, and to date, there has been limited federal case law defining the parameters of § 806, codified at 18 U.S.C. § 1514A (the "whistleblower" provision). Indeed, very few district courts and no courts of appeals have addressed the definition of "protected activity," which is at the core of every Sarbanes-Oxley whistleblower claim.

In light of the increasing number of Sarbanes-Oxley whistleblower complaints, this Court's guidance is needed to clarify that "protected activity" under the Act requires that an employee (1) have a subjective belief reflected in actual communications that the reported conduct definitely and specifically relates to shareholder fraud; and (2) demonstrate a reasonable, objective basis for this belief in the substantive law referenced in § 806. Absent clear guidance, the purposes of the Sarbanes-Oxley whistleblower provision may be thwarted, and this provision exploited to second guess an employer's sound business reasons for terminating or otherwise disciplining an employee.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons set forth below, the Chamber, as *amicus curiae*, respectfully urges this Court to affirm the District Court's grant of summary judgment dismissing Appellant Livingston's Sarbanes-Oxley whistleblower claims. Consistent with the text, purpose, and legislative history of this provision, the District Court correctly held that the Sarbanes-Oxley whistleblower provision protects against retaliation only where the employee subjectively believes at the time that the reported conduct constitutes shareholder fraud, and there is a reasonable, objective basis for suspecting such fraud.

The whistleblower protection found in § 806 is a relatively small part of the comprehensive Sarbanes-Oxley Act, which consists of separate statutes and statutory schemes aimed at achieving the Act's investor-protection goals. Enacted in response to the Enron debacle, the Act's purpose is to restore the trust of investors and pensioners in the nation's stock market by preventing both civil and criminal securities fraud, protecting the victims and preserving evidence of such fraud, and holding wrongdoers accountable for their actions.[3]

Section 806 was included to provide federal protection for "employees of publicly traded companies who blow the whistle on fraud and protect investors."[4]

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[3] S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *2 (May 6, 2002).

[4] *Id.* at * 9.

Properly construed, this provision is important to enforcement of the Act because corporate insiders are often the only people who can testify as first-hand witnesses to crucial issues in complex security fraud investigations. Likewise, it can serve to protect potential victims by encouraging whistleblowers to serve as an "early warning signal," bringing securities fraud issues to the attention of management in time for corrective measures. These important enforcement and protective functions would be seriously diluted, however, if this Court were to adopt the broad and general whistleblower protections not materially related to securities fraud, which are advocated by whistleblower advocacy groups such as the Government Accountability Group ("GAP") in this case.

ARGUMENT

I. SARBANES-OXLEY WHISTLEBLOWER PROTECTION IS LIMITED TO ACTIVITY DIRECTED AT PREVENTING OR EXPOSING SHAREHOLDER FRAUD

Sarbanes-Oxley was enacted to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws."[5] Consistent with this purpose, Congress included the whistleblower provision codified in § 1514A to provide federal protection for "employees of publicly traded companies who blow the whistle on fraud and protect investors."[6] To

[5] PL 107-204, 116 Stat. 745 (July 30, 2002).

[6] S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *9 (May 6, 2002).

demonstrate that a violation occurred, a covered employee[7] must show by a preponderance of the evidence[8] that: (1) he or she engaged in protected activity under the Act; (2) the employer knew of the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.[9] To be protected activity, the Act requires that an employee reasonably believe that the disclosed corporate conduct constitutes shareholder fraud.

A. The District Court Correctly Dismissed Sarbanes-Oxley Claim Because Plaintiff Did Not Engage in "Protected Activity"

Based on the plain language and legislative history of § 806, the District Court correctly determined that to be protected, the whistleblower must subjectively believe that the reported conduct constitutes shareholder fraud, and there must be a reasonable, objective basis for this belief:

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[7] In this case, there is no dispute that Wyeth is a covered employer as set forth in § 1514A(a).

[8] The evidentiary framework for Sarbanes-Oxley applies a different analysis from that of the general body of employment discrimination law, requiring that the plaintiff show by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 18 U.S.C. § 1514A(b)(2)(C) (requiring Sarbanes-Oxley actions be governed by burdens of proof set forth in 49 U.S.C. § 42121(b)). *See Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004).

[9] *See Collins*, 334 F. Supp. 2d at 1375.

> Sarbanes-Oxley was enacted to address corporate fraud on shareholders. One way it does so is by protecting employees who report violations of laws that relate to shareholders. It is clear from the plain language of the statute and its legislative history that fraud is an integral element of a whistleblower cause of action. To be protected, the whistleblower must not only subjectively believe that the reported conduct may constitute fraud on shareholders, there must also be a reasonable, objective basis for suspecting such fraud.[10]

1. Section 806 Defines Protected Activity as Disclosure of Corporate Conduct Reasonably Believed to Constitute Shareholder Fraud

The plain language of the statute itself is, of course, the starting point in any question of statutory construction,[11] and courts must give effect, if possible, to every clause and word of a statute.[12] Indeed, the Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[13]

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[10] JA 56.

[11] *See, e.g.*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 236 (1986).

[12] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

[13] *Arlington Central School District Board of Education v. Murphy*, __ U.S. ___, 126 S. Ct. 2455, 2459 (2006) (citations omitted).

Entitled a "**Civil action to protect retaliation in fraud cases**," § 1514A defines protected activity as:

> (a) … any lawful act done by the employee —
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders*.[14]

In clear terms, this provision limits its whistleblower protection to the disclosure of corporate conduct reasonably believed to constitute a violation of one of the enumerated statutes or regulations. The phrase "relating to fraud against shareholders" in this provision should be read as modifying each item in the series, including "any rule or regulation of the Securities and Exchange Commission,"[15] and all of the statutes referenced in § 1514A(a)(1) concern

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[14] 18 U.S.C. § 1514A(a) (emphasis added).

[15] *See Bishop v. PCS Administration (USA), Inc.*, 2006 WL 1460032 at *9 (N.D. Ill. May 23, 2006) (clause "relating to fraud against shareholders" must be read as modifying each item in the series); *Fraser v. Fiduciary Trust Co., Int'l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) ("activity must implicate the substantive law protected in Sarbanes-Oxley definitively and specifically") (internal quotations and citations omitted).

fraud.[16] The statutory reference to these federal fraud statutes should be read in the context of the Act's overall purpose to protect against shareholder fraud or fraudulent schemes.[17]

The plain language of the statute also refers to information that the employee reasonably believes "constitutes a violation" of these enumerated statutes or regulations. Based on its ordinary meaning, the phrase "constitutes a violation" should be understood to mean that an actual violation has occurred or is being attempted.[18] Thus, speculative concerns of future liability, such as those presented in this case, are too attenuated to satisfy this statutory requirement. For Plaintiff's claims to implicate shareholder fraud: (1) his articulated concern over Wyeth not meeting the FDA training implementation deadline would have to be realized; (2) a proposed legacy plan would have to be found insufficient to satisfy

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[16] Sections 1341, 1343, 1344 and 1348 are all fraud provisions codified in Title 18. Section 1341 prohibits mail fraud and swindles; section 1342 prohibits fraud by wire, radio or television; section 1344 prohibits bank fraud; and section 1348 is a new felony created by Sarbanes-Oxley for defrauding shareholders of publicly traded companies.

[17] S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *19 (May 6, 2002) (explaining that mail, bank, and wire fraud laws codified in §§ 1341, 1343, and 1344 are included in new Sarbanes-Oxley provision codified as 18 U.S.C. § 1348 to provide protection against all types of shareholder frauds or fraudulent schemes that "inventive criminals may devise in the future").

[18] *See Bishop*, 2006 WL 1460032 at *9.

the FDA; (3) the FDA would have to impose sanctions as a result; (4) any such sanctions would have to be material enough to warrant disclosure to Wyeth shareholders and potential investors; and (5) Wyeth would have to conceal or attempt to conceal these sanctions from its shareholders and the investing public. As the District Court found, the Plaintiff's articulated concerns are too speculative to constitute actual or attempted violations of even the FDA requirements, much less of the shareholder fraud rules and regulations enumerated in § 806.

In addition, the plain language of § 806 requires that an employee's belief of shareholder fraud be reasonable. By specifically including this reasonableness requirement, § 806 imposes an objective inquiry into whether the employee's articulated belief of shareholder fraud has a reasonable basis in the applicable law, which may be decided as a matter of law.[19]

Finally, the text of another Sarbanes-Oxley whistleblower provision provides further support that Congress acted intentionally when it limited the whistleblower protection in § 806 to illegal activity that, at its core, involves shareholder fraud. In contrast to § 806, Congress extended the whistleblower

[19] *See Jordan v. Alternative Resources Corporation*, 458 F.3d 332, 338-40 (4th Cir. 2006); *Bishop*, 2006 WL 1460032 at *8 (belief is not objectively reasonable if law itself does not establish that reported conduct is a violation of substantive law referenced in § 806). *See also* S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249, at *18-19 (May 6, 2002).

sanctions in § 1107 beyond illegal activity involving shareholder fraud.[20] Section 1107, which amended 18 U.S.C. § 1513 by adding subsection (e),[21] provides criminal sanctions for retaliation against anyone giving truthful information to a law enforcement officer "relating to the commission or possible commission of *any federal offense*."[22]

Because Congress has included specific language limiting the protections of § 806 to whistleblower activity related to shareholder fraud, but did not include such limitation in the criminal whistleblower provision codified in § 1513(e), Congress is presumed to have acted intentionally and purposefully in this disparate treatment, and the shareholder-fraud limitations of § 806 should be given effect.[23] In *Carnero v. Boston Scientific Corp*.,[24] the First Circuit recently found

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[20] There are other differences between these two sections of the Sarbanes-Oxley Act. For example, § 1107 expressly provides for extraterritorial federal jurisdiction, while § 806 does not; the application of § 1107 is not limited to covered employees; and the whistleblower sanctions of § 1107 only cover truthful information given to law enforcement officials. *Compare* 18 U.S.C. § 1513(e) *with* 18 U.S.C. § 1514A.

[21] It appears that Congress made a drafting error and enacted two subsections (e), the other one of which covers conspiracy. *See Carnero v. Boston Scientific Corp*., 433 F.3d 1, n. 9 (1st Cir. 2006).

[22] 18 U.S.C. § 1513(e) (emphasis added).

[23] *Russello v. United States*, 464 U.S. 16, 23 (1983); *Carnero*, 433 F.3d at 10-11.

[24] 433 F.3d 1 (1st Cir. 2006).

similar differences between these two provisions important to its decision that, in contrast to the criminal whistleblower provision, § 806 should not be given extraterritorial effect.[25]

2. Legislative History Supports Limiting Whistleblower Protection to Disclosures of Shareholder Fraud

Consistent with the statutory language, the Act's legislative history reveals that Congress intended that § 806 protect employees who blow the whistle on shareholder fraud. Section 806 is a relatively small part of the Sarbanes-Oxley Act, which is a comprehensive statutory scheme aimed at restoring the trust of investors and pensioners in the nation's stock market by preventing both civil and criminal securities fraud, protecting the victims and preserving evidence of such fraud, and holding wrongdoers accountable for their actions.[26] The Act's preamble emphasizes that its purpose is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws."[27]

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[25] *Carnero*, 433 F.3d at 9-11 (comparing the extraterritorial reach provided in § 1513(e), but omitted from § 1514A).

[26] S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *2 (May 6, 2002).

[27] PL 107-204, 116 Stat. 745 (July 30, 2002).

The Senate Report states that § 806 was included to provide federal protection for "employees of publicly traded companies who blow the whistle on fraud and protect investors."[28] This Report consistently refers to the congressional purpose of protecting corporate insiders who report shareholder fraud, such as senior Enron employee Sherron Watkins and others at Enron and Arthur Andersen who tried unsuccessfully expose the shareholder fraud that ultimately led to the collapse of both companies.[29] For example, in articulating the background and need for this legislation, Senate Report 107-146 describes how employees who had attempted to "report or 'blow the whistle' on fraud" were "discouraged at every turn:" (1) expressing shock that Enron's reaction to Watkins' attempt to report accounting irregularities was not to fire Andersen but was to seek advice on the legality of firing Watkins; and (2) describing corporate retaliation against a top

[28] S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *9. *See also id.* at *18-19 (provide "protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"); Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), *as reprinted in* 2002 WL 32054527 at *7.

[29] *See, e.g.*, S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *4-5, 10, 20 (May 6, 2002). Even whistleblower advocacy groups like GAP acknowledged on the record the shareholder fraud focus of § 806. *Id.* at *19 (referring to letters from GAP, the National Whistleblower Center, and Taxpayers Against Fraud, calling the bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets").

Enron risk management official, an Andersen partner, and a Houston financial advisor at UBS Paine Webber when they each attempted to blow the whistle on this scheme to defraud Enron investors and shareholders.[30]

Throughout the legislative history, Congress consistently indicated that it intended *not* to create general whistleblower protection against retaliation for employee complaints about any perceived misconduct, *but instead* to provide consistent protection for employees who disclose shareholder fraud and are otherwise left to the vagaries of inconsistent state whistleblower protection:

> "[C]orporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide.… U.S. laws need to encourage and protect those who *report fraudulent activity that can damage innocent investors in publicly traded companies*."[31]

In sum, both the language and legislative history of § 806 establish that the Act's whistleblower protection extends to corporate misconduct reasonably believed to violate the substantive law protected by the Act. Accordingly, the District Court correctly concluded that protected activity under § 806 "must be related to illegal activity that, at its core, involves shareholder fraud."[32]

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[30] *Id.* at *4-5.

[31] *Id.* at *7 (emphasis added).

[32] JA 58.

3. Requiring a Specific Connection to Substantive Law Covered by the Act is Consistent with Canons of Statutory Construction

Requiring that "protected activity" under § 806 relate to corporate misconduct reasonably believed to violate the substantive law protected by the Act is consistent with canons of statutory construction requiring that statutes addressing the same subject matter be read as if they were one law.[33] In addition to the District Court in this case, the Southern District of New York recognized as much in *Fraser v. Fiduciary Trust Co., Int'l.*[34] In *Fraser*, the court held that protected activity under § 806 must definitively and specifically implicate the substantive law protected in the Sarbanes-Oxley Act.[35]

This interpretation of protected activity is consistent with numerous decisions by the Administrative Review Board and Administrative Law Judges, both charged with enforcement of the whistleblower provisions of Sarbanes-Oxley. For example, in *Platone v. FLYi, Inc.*,[36] the Administrative Review Board of the U.S. Department of Labor held that, to be protected under the Act, the

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[33] *See, e.g., Wachovia Bank v. Schmidt*, __ U.S. ___, 126 S. Ct. 941, 950 (2006); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1982) (citations omitted).

[34] 417 F. Supp. 2d 310 (S.D.N.Y. 2006).

[35] *Id.* at 322; *see also Bishop*, 2006 WL 1460032 at *8-9.

[36] 2006 WL 3246910 at *8, ARB Case No. 04-154 (ARB Sept. 29, 2006).

employee's communication must definitely and specifically relate to one of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). Similarly, in *Marshall v. Northrup Gruman Synoptics*,[37] the Administrative Law Judge held that protected activity under the Act requires disclosure of intentional deceit that would impact shareholders or investors.[38]

Requiring this connection between § 806 and the substantive law enforced by Sarbanes-Oxley is also consistent with cases defining the scope of protected activity under other federal whistleblower statutes. Courts have consistently required a specific connection between the whistle being blown and the activity the statute seeks to enforce, holding that an employee's protected communications must relate definitively and specifically to the subject matter of the particular statute under which protection is afforded.

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[37] 2005 WL 4889013, 2005-SOX-0008, at 4 (ALJ June 22, 2005).

[38] *See also Grant v. Dominion East Ohio Gas*, 2004-SOX-00063, at 36 (ALJ Mar. 10, 2005) (protected communications must have a certain degree of specificity; general inquiries do not constitute protected activities); *Tuttle v. Johnson Controls, Battery Division*, 2004-SOX-0076, at 4 (ALJ Jan. 3, 2005) (dismissing complaint for failure to allege disclosure of any securities fraud, intentional deceit, or fraud against shareholders or investors); *Hopkins v. ATK Tactical Sys*., 2004-SOX-00019, at 6 (ALJ May 27, 2004) (statute implicitly requires intentional deceit that would impact shareholders or investors).

For example, protected activity under the Energy Reorganization Act ("ERA"), requires that the plaintiff's acts definitively and specifically implicate the safety concerns covered by the Act.[39] Similarly, to establish a claim under the Whistleblower Protection Act, a plaintiff may not rely on generalized allegations of the agency's misconduct.[40] And to be protected under the whistleblower provision of the Aviation Investment and Reform Act, the employee must provide information or participate in a proceeding relating to violation of Federal air carrier safety laws.[41]

4. Protected Activity Requires Subjective Belief of Shareholder Fraud and Objectively Reasonable Basis for that Belief

The District Court correctly recognized that the reasonableness requirement of § 806 means that the plaintiff must have both a subjective and objective basis for suspecting shareholder fraud.[42] This is consistent with other decisions

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[39] *See, e.g., American Nuclear Resources, Inc. v. United States Depart. Of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (whistleblower provision does not protect every incidental inquiry or superficial suggestion of safety concerns); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003) (protected activity must "definitely and specifically" relate to nuclear safety).

[40] *See, e.g., Chianelli v. Envtl. Prot. Agency*, 8 Fed. Appx. 971 (Fed. Cir. 2001).

[41] *See, e.g., Mehan v. Delta Air Lines*, 2005 WL 489735, ARB No. 03-070, ALJ No. 2003-AIR-4 (ARB Feb. 24, 2005).

[42] JA 56.

interpreting § 806,[43] as well as other anti-retaliation provisions.[44] To demonstrate a subjective basis for suspecting shareholder fraud, the reported information must have a certain degree of specificity, and it must definitely and specifically implicate the substantive law protected under the Act.[45] And this subjective belief must be measured at the time of the alleged protected activity: the proper inquiry is how the complainant articulated concerns at the time of the protected activity, not how those concerns were characterized at some later time.[46]

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[43] *See, e.g., Allen v. Stewart Enters., Inc.*, ARB No. 06-081, at 10 (July 27, 2006) (requiring subjective and objective belief that employer violated securities fraud laws); *Richards v. Lexmark Int'l, Inc*., 2004-SOX-00049 (ALJ June 20, 2006) (same); *Grant v. Dominion East Ohio Gas*, 2004-SOX-00063, at 36 (ALJ Mar. 10, 2005) (same); *Lerbs v. Bucca Di Beppo, Inc*., 2004 WL 5030304, 2004-SOX-8, at 17 (ALJ June 15, 2004).

[44] *See, e.g., Fanslow v. Chicago Manufacturing Center, Inc.*, 384 F.3d 469, 480-81 (7th Cir. 2004) (False Claims Act requires that employee believe, and have a reasonable basis to believe, that employer is committing fraud against the government); *Peters v. Jenney*, 327 F.3d 307, 321 (4th Cir. 2003) (protected activity under Title VI requires both a subjective and objective belief that the alleged practice violated law); *Weeks v. Harden Mfg. Corp*., 291 F.3d 1307, 1312 (11th Cir. 2002) (protected activity under Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans with Disabilities Act (ADA) has both a subjective and an objective component).

[45] *See, e.g., Fraser*, 417 F. Supp. 2d at 322; *Grant v. Dominion East Ohio Gas*, 2004-SOX-00063 (ALJ Mar. 10, 2005) (§ 806 violated only if "retaliation" is in response to employee's reasonable belief and *articulated* belief of fraud related to shareholders). *See also* cases cited in nn. 35-41 *supra.*

[46] *See, e.g., Fraser*, 417 F. Supp. 2d at 322; *Reddy v. Medquist, Inc*., 2005 WL 4889002, ARB Case No. 04-123 (Sept. 30, 2005). *Nixon v. Stewart & Stevenson Services, Inc*., 2005 WL 4889007, 2005-SOX-1 (ALJ Feb. 16, 2005).

In addition, the employee's articulated belief of shareholder fraud must be objectively reasonable. While the employee does not have to demonstrate actual shareholder fraud, the articulated subjective belief of such fraud must have a reasonable basis in the applicable law.[47] The objective inquiry is whether a reasonable person would have concluded that the plaintiff's disclosure involved shareholder fraud.[48] Thus, if the law itself does not provide a reasonable basis to conclude that the corporate misconduct reported by the plaintiff violates the statutes or regulations referenced in § 806, then the plaintiff's subjective belief to the contrary is not objectively reasonable.[49]

Recently in *Burlington Northern & Santa Fe Ry. v. White*, the Supreme Court explained that this objective standard is necessary because it is "judicially administrable," and "avoids the uncertainties and unfair discrepancies that can

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[47] *See, e.g., Bishop*, 2006 WL 1460032 at *8.

[48] *See, e.g., Allen v. Stewart Enters., Inc.*, ARB No. 06-081 (July 27, 2006) (whether an objective reasonable person in same circumstances with same training would believe the conduct fraudulent); *Richards v. Lexmark Int'l, Inc.*, 2004-SOX-00049 (ALJ June 20, 2006) (whether a reasonable person with same training and experience would believe conduct was securities fraud).

[49] *See, e.g., Jordan*, 458 F.3d at 338-40; *Bishop*, 2006 WL 1460032 at *8.

plague a judicial effort to determine a plaintiff's unusual subjective feelings."[50] For these reasons, this Court has consistently recognized the need for objective standards in determining whether activity is protected under Title VII.[51]

In *Jordan v. Alternative Resources Corporation*,[52] this Court reiterated that the question whether an employee reasonably believes a practice is unlawful is an objective determination, and thus may be resolved as a matter of law. In *Jordan*, the plaintiff alleged that he was terminated in retaliation for complaining of racial harassment in violation of Title VII – specifically his complaints about racist comments made by his co-workers regarding the snipers who were terrorizing the adjoining communities in Maryland, Virginia, and the District of Columbia.

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[50] ___ U.S. ___, 126 S. Ct. 2405, 2415 (2006). The issue in *Burlington* was not that of "reasonable belief," but of "reasonable reaction" on the part of the employee. In either case, the need for an objective inquiry is clear. Indeed, the Court has emphasized the need for objective standards in a variety of Title VII contexts. *See, e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (constructive discharge); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (hostile work environment). *See also Clark County School Distr. v. Breeden*, 532 U.S. 268, 269 (2001) (*per curiam*) (no retaliation claim where employee's belief is objectively unreasonable).

[51] *See, e.g.*, *Jordan*, 458 F.3d at 338-43; *EEOC v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 2005) (recognizing that Congress did not write the anti-retaliation provisions in Title VII to protect employees who, with no more than good faith, complain about conduct that no reasonable person would believe amounts to an unlawful employment practice).

[52] 458 F.3d 332 (4th Cir. 2006).

Applying "an objective-reasonableness inquiry," this Court found the activity not protected as a matter of law because, despite plaintiff's alleged good faith belief, no reasonable person would have concluded that these isolated comments constituted a hostile work environment. Accordingly, this Court affirmed the district court's decision granting the defendant's motion to dismiss.[53]

In this case, the Plaintiff's communications detailed in the District Court opinion and party briefs do not satisfy the reasonable belief requirement of § 806. First, they do not definitely and specifically relate to illegal activity that has, at its core, shareholder fraud protected by § 806. Indeed, this case epitomizes why this Court should require that plaintiff's subjective belief be measured at the time of the allegedly protected activity: as Plaintiff's complaint has progressed from the Department of Labor to this Court, his characterization of the nature of his activity has evolved, accumulating connections between (1) his articulated concerns over whether Wyeth could meet the implementation deadline for a training documentation system required by the FDA and (2) what Wyeth might have to disclose to its shareholders if this deadline was not met and Wyeth faced liability as a result. This is more a testament to creative lawyering than it is protection of whistleblowing activity protected by § 806.

[53] *Id*. at 340; *see also Fanslow*, 384 F.3d at 479.

Even assuming Plaintiff had a subjective belief he was reporting corporate misconduct covered by § 806, the District Court correctly held that there was no objectively reasonable basis to conclude that the reported conduct involved shareholder fraud. No substantive law referenced in § 806 is implicated by Plaintiff's reports, even assuming they would be of potential concern to the FDA, because these concerns are not sufficiently material under the securities laws to require disclosure to shareholders and potential investors. As noted on pages 8-9 *supra*, Plaintiff's speculative concerns of potential liability are simply too attenuated to implicate shareholder fraud.

B. Expanding § 806 to Communications not Materially Related to Shareholder Fraud Would Undermine the Act's Whistleblower Protections

The arguments advanced by Appellants would extend the protection of § 806 to employee concerns about virtually any management decision or practice of a publicly traded company, at least where the employee or his lawyer can postulate that such concerns, if eventually realized, might culminate in litigation or regulatory action that could result in company liability. This statutory interpretation not only improperly extends the reach of the Sarbanes-Oxley whistleblower provision beyond that which Congress intended, its adoption could frustrate the Congressional purpose of protecting those employees who come forward with information preventing or exposing shareholder fraud by

overburdening the administrative process with numerous claims unrelated to shareholder fraud.[54] Those with meritorious claims of retaliation for blowing the whistle on shareholder fraud – such as Sherron Watkins and others whom Congress clearly intended to protect – would have to wait in line with other employees claiming employer retaliation for activity not in any material way related to shareholder fraud.

II. DISTRICT COURT GRANT OF SUMMARY JUDGMENT DISMISSING SARBANES-OXLEY CLAIMS SHOULD BE AFFIRMED

In sum, the statutory language and legislative history of § 806 of the Sarbanes-Oxley Act extend its whistleblower protection only to employee activity directed at preventing or exposing shareholder fraud. To be protected, (1) the employee must have a subjective belief, reflected in his or her communication, that the reported conduct definitely and specifically relates to illegal activity that has, at its core, shareholder fraud, and (2) there must be an objectively reasonable basis for this belief in the substantive law referenced in § 806. Based on these standards, the District Court correctly found that Plaintiff did not engage in activity protected by this provision.

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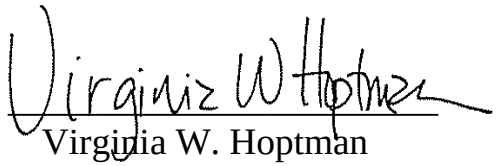
[54] The number of Sarbanes-Oxley whistleblower complaints filed with the Department of Labor has grown from approximately 150 filed in the first year after its enactment (through fiscal year 2003) to almost 900 filed by December 2006. (Filing Statistics provided by Nilgun Tolek, Director, Office of Investigative Assistance, at OSHA).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court affirm the District Court's grant of summary judgment on the ground that Livingston failed to establish that he had engaged in activity protected under § 806 of the Sarbanes-Oxley Act.

Dated: December 20, 2006

Respectfully submitted,

By 
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CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* has been prepared using:

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Times New Roman;

14 Point Type Space.

EXCLUSIVE of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, the Certificate of Filing and Service, and this Certificate of Compliance, this Brief contains 5,197 words.

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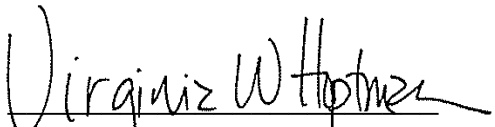

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of December, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Brief of *Amicus Curiae*, and further certify that I served, via United States Mail, postage prepaid, the required copies of said Brief to the following:

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