CASE NO. 11-9524

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LOCKHEED MARTIN CORPORATION,)
)
Petitioner,)
)
v.)
)
DEPARTMENT OF LABOR and)
ANDREA BROWN,)
)
Respondents.)

On Petition for Review from the Administrative Review Board
of the United States Department of Labor

ARB Case No. 10-050 (Igasaki, C.J., Corchado and Royce, JJ.)
ALJ Case No. 2008-SOX-00049 (Pulver, J.)

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* The Chamber of Commerce of the United States of America states that it has no parent corporations or stock of which a publicly held corporation can hold.

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The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief in support of Petitioner Lockheed Martin Corporation ("Lockheed"). No party's counsel has authored this brief in whole or in part and no party or person other than the *amicus curiae* has contributed money that was intended to fund preparing or submitting this brief. In addition, the parties to this appeal have consented to the Chamber's filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents three hundred thousand 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. Many of the Chamber's members are employers subject to the "whistleblower" provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX," or "the Act"), 18 U.S.C. § 1514A. For almost a century, the Chamber has played a key role in advocating on behalf of its membership. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing Sarbanes-Oxley.

The Chamber's members have a strong interest in the fair and efficient enforcement of SOX's whistleblower provision in a fashion consistent with the

essential goals of SOX.[1] Purported SOX whistleblower claims premised on complaints or concerns having nothing to do with the purpose of SOX should not be countenanced by the courts or, for that matter, the Department of Labor. Meritless claims and expanding litigation costs have a direct impact on the viability, growth and survival of businesses nationwide. In light of the large number of Sarbanes-Oxley whistleblower complaints, it is especially important that this Court hold that the Act's whistleblower protection extends only to those employee communications that implicate the overriding purpose of SOX, *i.e.*, those aimed at preventing or exposing material shareholder fraud.

INTRODUCTION

As stated in Sarbanes-Oxley's preamble, Congress passed the Act in the wake of spectacular, highly-publicized frauds at Enron, WorldCom, and Tyco "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." 18 U.S.C. § 1514A. Congress set out to accomplish this objective by enacting a wide-ranging statute, comprising eleven separate titles establishing an extensive regulatory regime. For example, the Act

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[1] The Chamber also supports Petitioner's position as to the other issues it has presented for review by this Court (*i.e.* the Board's application of the wrong legal standard to establish constructive discharge, the lack of substantial evidence to support a causal link between Brown's purported protected activity and adverse action, and that the relief awarded by the Board is unsupported). Nevertheless, the Chamber believes that the scope of potential protected activity under SOX is an issue that will have a substantial effect on its members, transcending the particular concerns of the parties to the dispute below.

mandated the establishment of a Public Company Accounting Oversight Board, which is overseen and enforced by the Securities and Exchange Commission ("SEC"), to establish quality control, ethics, independence, and other standards for accounting firms. The Act also allocated nearly a billion dollars to fund the SEC and mandated the addition of at least 200 new government positions for oversight of auditors. One discrete component of the legislation enacted for this purpose protects employees of publicly-traded companies who provide information about fraud against company shareholders. Specifically, Section 1514A of the Act prohibits employers from discharging or otherwise retaliating against any employee because the employee provided information to the employer or the federal government relating to alleged mail fraud, wire fraud, bank fraud, securities fraud, SEC rule violations, or violations of any provision of Federal law "relating to fraud against shareholders." In passing Section 1514A, Congress did not purport to enact some sort of general whistleblower provision designed to protect employees from retaliation for reporting fraud bereft of any connection to shareholder interests.

In this case, Respondent Andrea Brown ("Brown") worked as Communications Director for Petitioner Lockheed beginning in June 2000. *Brown v. Lockheed Martin Corp.*, ARB Case No. 10-050, slip op. at 2 (ARB Feb. 28, 2011). Brown reported to the Vice President of Communications, Wendy Owen

("Owen"). *Id.* In approximately May 2006, Brown learned from a co-worker that Owen had developed sexual relationships with several soldiers who were participating in a Lockheed Pen Pal program, purchased a laptop computer for one soldier, sent inappropriate e-mails and items to soldiers in Iraq, and had traveled to welcome-home ceremonies to visit soldiers on the pretext of business when she actually took soldiers in limousines to expensive hotels for intimate relations rather than for work-related purposes. *Id.* After learning this information, Brown told her manager, Ken Asbury, the president of Lockheed Martin Technical Operations and Jan Moncallo ("Moncallo"), a Vice President of Human Resources, about her concerns. *Id.* at 3.

On May 25, 2006, Moncallo sent an e-mail based on her discussion with Brown to Jean Pleasant, a company Ethics Director, relaying a series of allegations regarding Owen:

- misuse of company funds, misuse of company time;
- violating the Project 900 and 0507 Pen Pal Agreements;
- tarnishing Lockheed's image when it is her job to improve it;
- Purchasing a laptop with company funds for one of Wendy's numerous Project 900 and 0507 Pen Pals;
- Using company funds to rent limos to transport Pen Pals;
- Using company funds for lodging liaisons with Pen Pals;
- Using company funds to purchase thousands of giveaway items so that her Pen Pal could win an award;
- Communicating in activity reports and with staff that she is traveling to meet with Project 900 and 0507 Generals when instead she is meeting with Pen Pals;

- Not responding to calls from staff during paid working hours because she is in non-business related meetings with Pen Pals;
- Having affairs with multiple Pen Pals in violation of Project 900 and 0507 agreements;
- Sending pornographic material to Pen Pals in Iraq;
- Using her position to influence her staff and have them "cover" for her causing a fear of retribution and retaliation; and
- Tarnishing Lockheed's image in the army community as some of the Army Generals associated with Project 900 and 0507 are aware of some of these incidents.

Id. at 3-4.

After resigning her employment with Lockheed in or about February 2008, Brown filed an administrative complaint with the U.S. Department of Labor Occupational Safety and Health Administration ("OSHA") under the employee protection provisions of Sarbanes-Oxley alleging that she has been constructively discharged. *Id.* at 5. OSHA dismissed Brown's complaint on May 27, 2008 on the ground that she had not engaged in activity protected by the statute. *Id.* at 6. After Brown requested a hearing before the Office of Administrative Law Judges, on January 15, 2010, the ALJ issued his recommended decision that Brown be reinstated and awarded compensatory damages. The ALJ concluded that Brown's various concerns somehow related to mail fraud and wire fraud, although neither Brown nor her counsel had ever taken that position. *Brown v. Lockheed Martin Corp.*, ALJ Case No. 2008-S0X-00049, slip op. at 42-44 (ALJ Jan. 15, 2010). The ALJ further concluded that Brown "fail[ed] to establish protected activity under a general shareholder fraud theory on the basis of loss of shareholder value," because

her "speculation that LMC's share value would decline as a result of Owen's conduct, were it to become public knowledge, to be 'too attenuated'". *Id.* at 44 (internal citation omitted).

By Decision and Order dated February 28, 2011, the U.S. Department of Labor's Administrative Review Board (the "Board") affirmed the ALJ's decision and incorrectly sustained the ALJ's legal conclusion that Brown had engaged in SOX-protected activity simply because she "reasonably believed that Owen engaged in mail and wire fraud." *Brown v. Lockheed Martin Corp.*, ARB Case No. 10-050, slip op. at 9 (ARB Feb. 28, 2011). In so doing, the Board also held that SOX "does not require that the mail fraud or wire fraud pertain to a fraud against the shareholders." *Id.* The Board's ruling in *Brown* ignored its numerous decisions over the course of four and a half years requiring a complainant to disclose concerns of material shareholder fraud to establish protected activity.

SUMMARY OF ARGUMENT

The Board erred in ruling that Brown engaged in protected activity. As an initial matter, the Board's decision is not entitled to any deference because in reaching its conclusion that Brown engaged in protected activity, the Board simply ignored years of its own precedent interpreting SOX to require that employees express concerns of material shareholder fraud before receiving the Act's protections.

SOX's legislative history, statutory text and practical considerations all reinforce the conclusion that the Board's prior established precedent reflected the correct interpretation of the statute. Congress enacted SOX to prevent the massive accounting frauds that besieged American investors in the early 2000's and to protect investors in public companies. The statute's whistleblower protection was therefore designed to protect employees who disclose concerns of fraud potentially relevant to shareholders and the investing public. Any contrary interpretation of the statute would give protection to complainants who raised concerns with no relation to the conduct the Act sought to prevent. Brown's belief that her supervisor improperly charged Lockheed's client (the U.S. government) for personal items is precisely the type of concern that should not be protected by the Act because it bears no relation to the interests of shareholders and the investing public.

ARGUMENT

I. The Board's Decision Is Not Entitled To Deference Because It Has Rendered Conflicting Interpretations Of The Act.

Although ordinarily afforded deference regarding its interpretation of an ambiguous statute it is tasked with administering, the Department of Labor is entitled to no such deference here. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Because the Department of Labor has inconsistently interpreted the scope of protected activity under SOX, the persuasive power of its interpretations

is "diminished." *Salazar v. Butterball, Inc.*, No. 10-1154, 2011 U.S. App. LEXIS 13653 at *17 (10th Cir. July 5, 2011). *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1205 n.3 (10th Cir. 2004) ("[a]n agency interpretation that conflicts with the agency's earlier interpretation is … entitled to considerably less deference than a consistently held position"); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1372-73 (Fed. Cir. 2011) (holding that in the absence of sufficient reasons for interpreting the same statutory provision inconsistently, the agency's action is arbitrary and should not be afforded deference).

In reaching its conclusion that Brown engaged in protected activity, the Board simply ignored years of precedent (its own as well as that of administrative law judges). Specifically, the Board has long held, through a series of decisions, that employees must complain of material shareholder fraud to avail themselves of the SOX whistleblower protections. In *Harvey v. Home Depot U.S.A., Inc.*, ARB Case No. 04-114, slip op. at 15 (ARB June 2, 2006), the Board held that the complainant failed to engage in protected activity because his disclosure "does not express his reasonable believe that Home Depot was defrauding shareholders or violating security regulations." The Board noted that in establishing protected activity under SOX, "[a] mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not

enough." *Id*. Shortly thereafter, in an oft-cited decision, *Platone v. FLYi, Inc*., ARB Case No. 04-154, slip op. at 17 (ARB Sept. 29, 2006) the Board held that to constitute protected activity under the Act, an employee's communications must "definitively and specifically" relate to one of the violations enumerated in Section 1514A. The Board also held that because the Act's stated purpose was to protect investors, "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." *Id.* at 15.

The Board later expanded upon its holding in *Platone* and stated that "[p]roviding information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other laws standing alone, is not protected conduct under the SOX." *Neuer v. Bessellieu*, ARB Case No. 07-036, slip op. at -6 (ARB Aug. 31, 2009). Rather, an "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." *Id*. at 5.

Relying on this established precedent, the Board has repeatedly dismissed SOX claims where the complainant disclosures were immaterial to shareholders and/or the investing public's interests. *See Giurovici v. Equinix Inc.*, ARB Case

No. 07-027, slip op. at 7 (ARB Sept. 30, 2008) (dismissing SOX claim for failure to establish protected activity because "the record contains no evidence showing that Giurovici had a reasonable belief, or indeed any belief at all, that the information in the 2005 report would have an adverse effect on Equinix's shareholders or its financial condition"); *Smith v. Hewlett Packard*, ARB Case No. 06-064, slip op. at 9 (ARB Apr. 29, 2008) (noting that the basic elements of a SOX claim are "a material, misstatement of fact (or omission) about a corporation's financial condition on which an investor would reasonably rely"). Most recently, in *Fredrickson v. Home Depot U.S.A., Inc.*, ARB Case No. 07-100, slip op. at 7 (ARB May 27, 2010), the Board noted that to engage in protected activity an 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." *See also*, *Godfrey v. Union Pac. R.R. Co.*, ARB Case No. 8-088, slip op. at 4 (ARB July 30, 2009) (same).

Significantly, prior to *Brown*, the Board never once issued a decision directly contrary to its clear precedent in *Harvey*, *Platone*, *Smith*, *Giurovici*, *Neuer*, *Godfrey* and *Fredrickson* establishing the requirement that shareholder fraud be alleged to constitute protected activity under SOX. The Board thus issued *Brown* in direct contradiction of its own established unwavering precedent.

Relying on the Board's interpretation of the Act, many courts have required complainants to plead and prove that their concerns implicated investors' interests even when an employee characterizes her complaint as pursuant to one of the enumerated statutes, rules or regulations in the Act. *See Livingston v. Wyeth Inc.*, 520 F.3d 344, 352-353 (4th Cir. 2008) (applying the phrase "relating to fraud against shareholders" to the fifth category of violations, "any rule or regulation of the Securities and Exchange Commission"); *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 159 (D. Mass. 2010) ("a relation to shareholder fraud is imperative for each of the six categories of violations listed"); *Portes v. Wyeth Pharms*., Inc., No. 06-Civ-2689, 2007 WL 2363356 at *4 (S.D.N.Y. Aug. 20, 2007) ("[w]here a communication is barren of any allegations of conduct that would alert a defendant that the plaintiff believed that the company was violating any federal rule or law related to fraud against shareholders, the reporting is not protected by SOX") (internal quotations and citation omitted).

Administrative laws judges have similarly followed the Board's prior precedent in this regard. *See Zinn v. American Commercial Lines*, ALJ Case No. 2009-SOX-25, slip op. at 49 (ALJ Nov. 5, 2009) ("an allegation of 'shareholder fraud' is an essential element of a cause of action under SOX"); *Joy v. Robbins & Meyers, Inc*., ALJ Case No. 2007-SOX-74, slip op. at 7-9 (ALJ Jan. 30, 2008) (dismissing complaint for failure to engaged in protected activity under the

standards articulated by the Board in *Harvey* and *Platone*); *Deremer v. Gulfmark Offshore Inc.*, ALJ Case No. 2006-SOX-2, slip op. at 49 (ALJ June 29, 2007) (holding that an allegation of shareholder fraud "is an essential element of a cause of action under SOX" and therefore only conduct complained of involving "potential dissemination of false information to the investing public … may support a cause of action under SOX").

In reaching its conclusion that Brown had engaged in protected activity, the Board chose to ignore nearly half a decade of precedent that developed in the wake of *Platone*. Here, without even acknowledging its substantial prior contrary precedent, the Board instead states that SOX "does not require that the mail fraud or wire fraud [as the asserted bases for protected activity] pertain to a fraud against shareholders."[2] *Brown v. Lockheed Martin Corp.*, ARB Case No. 10-050, slip op. at 9 (ARB Feb. 28, 2011). Then, in May 2011, the Board went even further in abandoning its prior precedent, holding that: (i) "a complaint of shareholder or investor fraud is not required to establish SOX-protected activity" and (ii) while acknowledging that "the Board has, in prior rulings, held that to be protected, an

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[2] Instead of acknowledging its multiple, prior contrary decisions, the Board attempted to support its about-face by reference to its decision in *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Case No. 04-149 (ARB May 31, 2006). In fact, the Board in *Klopfenstein* did not decide whether the complainant there engaged in protected activity, "[b]ecause of our decision to remand, we need not determine now whether Klopfenstein engaged in protected activity." *Id.* at 17. Moreover, even in *dicta*, *Klopfenstein* did not expressly reject a requirement that an employee raise material shareholder fraud in order to engage in protected activity. Indeed, it would have been odd for the Board to have done so, given its ruling in *Harvey* a few days later.

employee's communication must relate to a 'material' violation of the laws listed under SOX," the Board declined to impose a "materiality requirement" on the complainant to establish protected activity. *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123, slip op. at 19, 22 (ARB May 25, 2011).

In light of the Board's conflicting interpretations of the "protected activity" provision in the Act, the Board's decisions in *Brown* and *Parexel* should not be afforded *Chevron* deference.[3] Furthermore, as discussed in greater detail below, this Court should adopt the reasoning in the Board's line of cases including *Harvey*, *Platone*, *Smith*, *Giurovici*, *Neuer*, *Godfrey* and *Fredrickson* and require a complainant to disclose a material fact or omission related to shareholder fraud to establish "protected activity" under SOX.

II. Protected Disclosures Under Sarbanes-Oxley Must Relate To Material Fraud on Shareholders.

The legislative history, statutory text and practical considerations support the Board's interpretation of the Act in *Harvey*, *Platone*, *Smith*, *Giurovici*, *Neuer*,

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[3] For the same reasons, the Board's decisions in *Brown* and *Parexel* should not be afforded any deference in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) because "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gonzales v. Oregon,* 546 U.S. 243, 269 (2006). *See also*, *McGraw v. Barnhart,* 450 F.3d 493, 501 (10th Cir. 2006) ("[u]nder *Skidmore,* the degree of deference given informal agency interpretations will vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position") (internal quotation marks and citations omitted).

Godfrey and *Fredrickson* wherein the Board required that, in order to be protected under SOX, an employee's disclosures must concern material fraud on shareholders. *See Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory interpretation requires courts to "rea[d] the whole statutory text, conside[r] the purpose and context of the statute, and consul[t] any precedents or authorities that inform the analysis").

A. SOX's Purpose and Context Require An Allegation of Shareholder Fraud

Congress enacted Sarbanes-Oxley to "prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, 148 Cong. Rec. S7418, S7420, (July 26, 2002). Congress recognized that:

> [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."

Id. Congress therefore included the whistleblower protection provision in the Act to protect "employees of publicly traded companies *who blow the whistle on fraud and protect investors*." S. Rep. No. 107-146, reprinted in 2002 WL 863249 at *9 (May 6, 2002) (emphasis added). *See also*, 149 Cong. Rec. S1725 (Jan. 29, 2003) (statement of Sen. Leahy) ("[t]he law was intentionally written to sweep broadly,

protecting an employee of a publicly traded company who took such reasonable action to try to protect investors and the market").

Congress' overall intent in enacting SOX to prevent serious threats to public company investors and the nation's financial markets demonstrates that Congress enacted the whistleblower protection provision to protect individuals who raised concerns about material shareholder fraud.

B. The Overall Statutory Text of SOX Supports Requiring An Allegation of Shareholder Fraud To Establish Protected Activity

The plain language and structure of SOX as a whole confirms that its intent is the protection of public company shareholders. *See Corley v. United States*, 556 U.S. 303 n.5 (2009) (stating that it is a "cardinal rule" of statutory construction that "a statute is to be read as a whole"); *United States v. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) ("[s]tatutory construction is a holistic endeavor, and, at a minimum, must account for the statute's full text, language as well as punctuation, structure and subject matter." (internal quotations and citations omitted).

The Act's preamble states that that Act's purpose is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, 116 Stat. 745 (2002). Consistent with the Act's preamble, Congress – through SOX – took a variety of steps to accomplish this end. It established the Public Company Accounting Oversight

Board to establish quality control, ethics, independence, and other standards governing accounting firms. *See* 15 U.S.C. § 7262. The Act also required management to attest to the accuracy of internal controls and financial reports, enacted criminal penalties for intentional misrepresentations to the investing public, and allocated nearly a billion dollars to fund the SEC and mandated the addition of at least 200 new government positions for oversight of auditors. *See* 15 U.S.C. § 7211; 15 U.S.C. § 7241; 15 U.S.C. § 78j-1; 18 U.S.C. § 1350.

The title and caption of the whistleblower provision also demonstrate that protection is afforded only to employees disclosing fraud on investors in publicly-traded companies. *See Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947) (stating that titles of statutory sections are tools "available for the resolution of a doubt" to be used "when they shed light on some ambiguous word or phrase"). In the enrolled bill that was signed into law, the whistleblower protection provision is titled: "Protection For Employees Of Publicly Traded Companies *Who Provide Evidence of Fraud*." Pub. L. No. 107-204, § 806 (2002) (emphasis added). In addition, Section 1514A is captioned "Civil action to protect against retaliation *in fraud cases*." (emphasis added). The next section of the Act is titled "Criminal Penalties For *Defrauding Shareholders of Publicly Traded Companies*." Pub. L. No. 107-204, § 807 (2002) (emphasis added). Congress' choice of language in these statutory titles directly reflects the

problem the Act sought to address – fraud on the investing public and publicly-traded company's shareholders. Thus, the references to "fraud" in the whistleblower protection provision should be read as reference to fraud on shareholders.

As one discrete component of this effort to protect public-company shareholders, Congress enacted the SOX whistleblower protection provision, which is tailored to eliminating fraud against shareholders. It is important to recognize that, unlike other statutes broadly enacted by Congress with the purpose of regulating employment (*e.g.*, the Family and Medical Leave Act), the SOX whistleblower provision was the only employment-related provision among the many provisions of SOX. That provision provides protection for an employee who reports information that the employee "reasonably believes constitutes a violation of sections 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). The limiting phrase "relating to fraud against shareholders" is properly read as modifying all of the enumerated forms of fraud and securities violations in Section 1514(A).[4]

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[4] Indeed, Congress has tacitly signaled its approval of this reading of the Act given that it recently amended SOX's whistleblower coverage in the Dodd-Frank Wall Street Reform and

Congress' use of commas to separate the enumerated statutes does not indicate that the limiting clause was intended to apply solely to the phrase that it immediately follows. *See United States v. Hayes*, 129 S. Ct. 1079, 1086 (2009) (noting that the grammatical rule that the last antecedent of the limiting clause ordinarily is read as modifying only the noun or phrase that it immediately follows "is not an absolute and can assuredly be overcome by other indicia of meaning"). It was a reasonable drafting decision to use commas to separate a laundry list of offenses without intending the punctuation to confine the reach of the limiting phrase to the last item on the list. Moreover, the phrase "relating to fraud against shareholders" must modify all of the statutes listed in Section 1514A because this reading of Section 1514A advances the purpose of the Act. Conversely, failing to apply the limiting phrase to the enumerated statutes would convert this provision from being one that is tailored to advance the purpose of the Act to a general federal whistleblower provision. To do so would not only be inconsistent with the Act and its purpose, it would be contrary to the statutory approach to whistle-

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Consumer Protection Act ("Dodd-Frank") without disturbing the Board's then-settled precedent on this point. 18 U.S.C. § 1514A(b)(2)(D). Dodd-Frank expanded SOX whistleblower coverage by, *inter alia*, including within the definition of covered employees those employees of public company subsidiaries for which the subsidiaries are included in the publicly-traded parent corporation's consolidated financial statements. Notably, "[t]he issue of subsidiary coverage before Dodd-Frank was far from settled law" (*Johnson v. Siemens Building Technologies, Inc.*, ARB Case No. 08-032, slip op. at 10 (ARB Mar. 31, 2011)) – but Congress decided to address it in Dodd-Frank in any event – Congress nonetheless decided to leave untouched the Board's well-established material shareholder fraud standard.

blowing that has been adopted by Congress generally. Congress has chosen to offer protections to whistleblowers, not through any sort of general whistleblower protection provision, but by attaching whistleblower protection provisions to statutes with other substantive purposes. *See*, *e.g*., The Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (protecting whistleblowers who report violations of drinking water regulations); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (protecting nuclear whistleblowers), the Clean Air Act of 1990, 42 U.S.C. § 7622 (protecting whistleblowers who report violations of the statute), Federal Rail Safety Act, 49 U.S.C. § 20109 (protecting whistleblowers who report violations of laws "relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security"); The Consumer Product Safety Improvement Act, 15 U.S.C. § 2087 (protecting whistleblowers who report violations of the act); The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (protecting airline employees who notify authorities that their employer is violating a federal law relating to air carrier safety).

As the Fourth Circuit aptly recognized when applying the material shareholder fraud standard for each form of protected activity provided for in SOX, "[t]o conclude otherwise would absurdly allow a retaliation suit for an employee's complaints about administrative missteps or inadvertent omissions from filing

statements." *Livingston v. Wyeth Inc.*, 520 F.3d 344, 355 (4th Cir. 2008). *See also*, *Bishop v. PCS Admin. (USA), Inc*., No. 05-C-5683, 2006 WL 1460032 at *9 (N.D. Ill. May 23, 2006) (stating that "relating to fraud against shareholders" must be read as modifying each item in the series); *Hopkins v. ATK Tactical Systems*, ALJ Case No. 2004-SOX-19, slip op. at 5 (ALJ May 27, 2004) ("[w]hile fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit"); *Tuttle v. Johnson Controls Battery Division*, ALJ Case 2004-SOX-76, slip op. at 3 (ALJ Jan. 3, 2005) (same).

C. Practical Considerations Support An Interpretation of The Statute Requiring Material Shareholder Fraud

Unmoored from shareholder interests, and absent a requirement of materiality, SOX would become nothing more than a general whistleblower statute giving rise to trivial claims under the Act. For example, if a terminated employee had previously complained to management that a co-worker engaged in "mail fraud" by unlawfully sending by mail a ream of the company's paper to a friend, the former employee could conceivably challenge his termination as unlawful under SOX. Similarly, if an employee complained to his supervisor that an administrative assistant was running an online gambling operation through her work computer, that complainant would have technically complained of wire fraud, but the fraud would not have had any possible bearing on investors'

interests. *See* 18 U.S.C. § 1343 (prohibiting "criminally fraudulent activity that has been determined to have involved electronic communications of any kind").

Extending SOX's whistleblower provision to cover allegations that do not implicate material shareholder fraud would transform the provision into a general whistleblower provision covering a broad array of workplace disputes. OSHA, the Office of Administrative Law Judges, the Board and the federal courts would be inundated with whistleblower claims that have little, if any, discernable connection to shareholder fraud, making it nearly impossible to provide timely relief to meritorious claimants.[5] *See Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 160 (D. Mass. 2010) (failing to apply the limiting phrase to all categories of fraud enumerated in SOX would "result in an overly broad application of the statute that would be counter to the statute's purpose").

Furthermore, interpreting the SOX whistleblower provision to cover employee reports about how a public company conducts its affairs, regardless of whether the alleged practice relates to shareholder fraud, would render the civil remedies in many other federal statutes superfluous. *See*, *e.g.*, 5 U.S.C. § 2303 (Civil Service Reform Act); 15 U.S.C. § 615(a) (Clayton Act); 15 U.S.C. § 622

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[5] The court need not look any further than the instant case, which was commenced by Brown in January 2008 and not addressed by the Board until February 2011, for evidence of the substantial logjam of cases already facing the Department of Labor.

(Toxic Substances Control Act); 15 U.S.C. § 2651 (Asbestos Hazard Emergency Response Act of 1986); 20 U.S.C. § 3608 (Asbestos School Hazard Detection & Control Act); 29 U.S.C. § 158(a)(4) (National Labor Relations Act); 29 U.S.C. § 206(d) (Equal Pay Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 301 (Labor Management Relations Act); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); 29 U.S.C. § 1132(a) (Employee Retirement Income Security Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Workers Protection Act); 29 U.S.C. § 2615 (Family Medical Leave Act); 30 U.S.C. § 815(c) (Federal Coal Mine Health and Safety Act); 31 U.S.C. § 3730(h) (False Claims Act); 42 U.S.C. § 300j-9 (Safe Drinking Water Act); 42 U.S.C. § 1997d (Civil Rights of Institutionalized Persons Act); 42 U.S.C. § 2000e (Civil Rights Act of 1964); 42 U.S.C. § 5851 (Atomic Energy and Energy Reorganization Act); 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 9610 (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 12203(a) (Americans with Disabilities Act); 45 U.S.C. § 441 (Federal Railway Safety Act); 46 U.S.C. § 688 (Jones Act); 46 U.S.C. § 1506 (Safe Containers for International Cargo Act); 46 U.S.C. § 2144 (Coast Guard whistleblower protection); 49 U.S.C. § 1801 (Hazardous Materials Transportation Act); 49 U.S.C. § 31105 (Commercial Motor Vehicles Program).

For all of the foregoing reasons, to establish protected activity under SOX, an employee must establish that the asserted violation of the laws listed in Section 1514A relates to material fraud against shareholders. Applying the correct standard to Brown's disclosures, it is clear that she did not engage in protected activity.

III. Brown's Communications Were Not Protected Disclosures Under Sarbanes-Oxley Because They Did Not Relate To Material Fraud on Shareholders.

Brown failed to establish that she engaged in protected activity under SOX because the record is devoid of any evidence demonstrating that her disclosure related to material fraud against shareholders. Brown's purported "protected activity" was that she relayed concerns that Owen had "used company funds to provide gifts to paramours and that the costs were passed onto the government, given Lockheed's standard business practice was to bill its costs to its customers." *Brown* v. *Lockheed Martin Corp*., ARB Case No. 10-050, slip op. at 9 (ARB Feb. 28, 2011). The Board erred in affirming the ALJ's decision that Brown had engaged in protected activity by (according to the Board) accusing Owen of "mail and wire fraud" (*id.)* because none of Brown's allegations (even if true) would have been material to shareholders or members of the public who could have invested in Lockheed stock.

First, because Brown believed that the costs incurred by Owen were being passed onto Lockheed's customers, Brown's disclosure had nothing to do with Lockheed's shareholders. Even if Brown had complained that Owen spent millions of dollars (in excess by many orders of magnitude of any conceivable actual cost here) on lavish gifts for soldiers, because she believed those costs were being passed onto the federal government (and not to Lockheed's shareholders) her disclosure would not have had any bearing on Lockheed's finances whatsoever, much less its share price.

Second, even if Brown had expressed concerns about improper expenditures by Owen that were not passed on to the government, there is no evidence that such concerns about Owen's actions were material to Lockheed's shareholders or the investing public. Lockheed is a Fortune 500 company that employs roughly 140,000 people worldwide and publicly reported net earnings of $3.2 billion and sales of $42.7 billion for 2008.[6] Even taking all of Brown's allegations about Owen as true and assuming that each alleged improper expenditure had (contrary to her claims) a net negative effect on Lockheed's bottom line, they could not

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[6] This information was obtained from the following website: http://www.lockheedmartin.com/news/press_releases/2009/0122hq-4thq-2008-earnings.html (last viewed on July 18, 2011).

amount to more than several thousand dollars.[7] Owen's alleged misuse of company funds to purchase a single laptop computer, limousine rides and hotel rooms for U.S. soldiers thus could not approach any notion of materiality for a company the size of Lockheed.

As discussed above, SOX was enacted in the wake of some of the largest corporate frauds in American history to protect investors from the fraudulent accounting practices that had gone largely unnoticed. The whistleblower protection provision was included in the law to protect employees who "blew the whistle" and reported conduct that the Act sought to prohibit. An employee complaining that her supervisor misused a relatively marginal amount of company funds for personal reasons doesn't remotely approach the sort of concern that the Act sets out to protect. *See Neuer v. Bessellieu*, ARB Case No. 07-036, slip op. at 5 (ARB Aug. 31, 2009) (the reporting of "corporate expenditures with which the employee disagrees" does not constitute protected activity under SOX). To hold otherwise would "open the floodgates" to *de minimis* claims (like this one) that have no potential impact on a company's shareholders or the investing public. Accordingly, Brown's communications were not protected disclosures under SOX.

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[7] Notably, with respect to the single laptop computer that Brown alleges Owen purchased for a soldier, Brown testified at the hearing that she had "no idea what a lap top costs", mentioned "$1,000" as a possible price, and otherwise made no attempt to quantify any of the other allegedly improper expenses. TR 366 – 67.

CONCLUSION

For all of the foregoing reasons, the Chamber requests that the Court reverse the Board's decision that Brown engaged in protected activity.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(a)(7)(B), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2003, and in accordance with provisions of Federal Rule of Appellate Procedure 32(a)(7)(B)(3)(iii), this brief contains 5,457 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing brief submitted in digital form via the Court's ECF system, is an exact copy of the written document being filed with the Clerk and has been scanned for viruses with McAfee VirusScan and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

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