NO. 10-60144

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KEITH KLOPFENSTEIN,

Petitioner,

V.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review of Orders of the United States Department of Labor

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND DEPARTMENT OF LABOR, URGING AFFIRMANCE ON ISSUE ADDRESSED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.2 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Keith Klopfenstein
2. PCC Flow Technologies Holdings, Inc.
3. Precision Castparts Corp.
4. Allen Parrott
5. Stephen Fink and Marc Grossberg, Thompson and Knight, LLP, attorneys for Keith Klopfenstein
6. Keith Ashmus and Kelly Lawrence, Franz Ward LLP, attorneys for PCC Flow Technologies Holdings, Inc. and Allen Parrott

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission ("Commission" or "SEC") is the agency responsible for the administration and enforcement of the federal securities laws and has a strong interest in ensuring that whistleblowers who report evidence of federal securities law violations by public companies are protected under Section 806 of the Sarbanes-Oxley Act ("SOX"). That provision prohibits companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78l) and companies that are required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) (collectively "public companies"), as well as their officers, employees, contractors, subcontractors and agents, from retaliating against employees who report evidence of federal securities law violations to their supervisors or law-enforcement agencies, such as the SEC. The Commission submits this brief as *amicus curiae* to address two issues raised in this litigation: (i) whether Section 806 applies to the employees of private contractors, subcontractors, and agents of public companies, and (ii) if so, whether Section 806 only applies to these entities if they act at the direction of a public company in retaliating against a purported whistleblower.

The Commission urges the Court to first find that Section 806 protects the employees of private contractors, subcontractors and agents of public companies.

Excluding the employees of private contractors, subcontractors, and agents from the scope of Section 806 is inconsistent with both the statute's plain language and Congress' objective of providing protection from retaliation to the employees of contractors, subcontractors, and agents of public companies. Were this Court to limit the application of Section 806 only to employees of public companies, as urged by Respondent PCC Flow Technologies Holdings, Inc. ("Holdings"), many professionals most likely to uncover evidence of federal securities law violations by the public companies they work with would be excluded from Section 806's whistleblower protections. Such a reading would impede the Commission's protection of investors as it would deter potential whistleblowers from coming forward.

Further, contrary to Holdings' arguments below, nothing in Section 806 supports limiting its application to contractors, subcontractors, or agents of a public company that retaliate against a whistleblower only when they do so at the direction of the public company. Holdings' statutory interpretation is without any textual basis. Moreover, it is at direct odds with Congress' intent–articulated in clear legislative history–to cover retaliation by contractors, subcontractors, and agents acting on their own, and in their self-interest, to preserve the relationship with a public-company client.

At issue in this appeal is whether Section 806 applies to Holdings, a privately-

held agent and/or contractor of Precision Castparts Corp. ("PCC"), a public company, where Holdings is alleged to have retaliated against Petitioner Keith Klopfenstein for engaging in "protected activity" relating to PCC, Holdings' principal. The facts here represent a paradigm that Congress plainly intended to address in Section 806: A public company's private agent retaliating against an employee it supervises for blowing the whistle on a potential violation of the federal securities laws by that public company. Construing Section 806–as Holdings urges–to carve out that very fact pattern from the reach of Section 806 is contrary both to the statute's plain language and to its underlying purpose.[1/]

STATEMENT OF RELEVANT FACTS AND CASE

Klopfenstein alleged that Holdings and Allen Parrott, Vice President of Finance for PCC– Holdings' publicly traded parent corporation–violated Section 806 when Klopfenstein was allegedly terminated in retaliation for disclosing to his managers at Holdings and PCC that assets were being potentially overstated on PCC's balance

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[1/] We express no opinion as to whether Section 806 reaches other fact patterns not presented here, such as an agent's employee blowing the whistle on a violation of the securities laws by a party other than his or her employer's public-company client, nor do we address other issues raised by the parties in this appeal, including whether Klopfenstein's protected activity was a "contributing factor" in his termination. Likewise, because the parties have not raised the issue here, we express no views on whether a subsidiary whose financial results are consolidated with the parent's filings made with the Commission is considered part of the reporting company for purposes of Section 806.

sheet. Klopfenstein filed a Section 806 complaint against Holdings on July 3, 2003. Holdings moved for summary dismissal, arguing that Section 806 was inapplicable to a private company. The Administrative Law Judge ("ALJ") denied Holdings' motion, but–after a two-day hearing–concluded that Holdings was not a proper respondent under SOX because Holdings was not PCC's agent.

On appeal, the Administrative Review Board ("ARB" or "Board") reversed the ALJ's decision. The ARB disagreed with Holdings' argument that Section 806 is inapplicable to private agents, explaining that a respondent need not be a public company to be a "covered employer" under Section 806. The ARB further clarified that "principles of the 'general common law of agency'" should be relied upon to assess whether a principal-agent relationship exists.[2/] The Board remanded the proceeding to the ALJ to determine whether Holdings was PCC's agent, and thus a "covered employer."

On remand, the ALJ determined that Holdings was an "agent" for purposes of SOX but only because "PCC made the ultimate decision to terminate [Klopfenstein]." Beyond this, the ALJ held that because Klopfenstein failed to show that his protected activity was a "contributing factor" to his termination, the ALJ dismissed

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[2/] *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, ARB's Decision (Dep't of Labor May 31, 2006), 2006 DOL Ad. Rev. Bd. LEXIS 50 at *31.

Klopfenstein's complaint. The ARB affirmed the decision of the ALJ. Klopfenstein appealed the ARB's decision to this Court.

ARGUMENT

Section 806 applies to employees of a public company's private contractor, subcontractor, or agent. Section 806 states:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES-
>
> No company with a class of securities registered under Section 12 of the [Exchange Act], or that is required to file reports under section 15(d) of the [Exchange Act], or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . .[3/]

Holdings claims that Section 806 applies exclusively to public companies and, therefore, is inapplicable to a public company's private agent, contractor or subcontractor. Holdings further argues that even if private agents are covered under Section 806, it applies only to agents when they act at the direction of their public company principal in retaliating against alleged whistleblowers. According to Holdings, because Klopfenstein cannot show that PCC "ratified" the alleged

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[3/] 18 U.S.C. 1514A(a).

retaliation, Holdings is not a "covered employer" under the Act.[4/] As we discuss below, Holdings' arguments are contrary to the statute's plain language, its legislative history, and its purpose.

I. SECTION 806 COVERS EMPLOYEES OF PRIVATE CONTRACTORS, SUBCONTRACTORS, AND AGENTS OF PUBLIC COMPANIES

A. The Statute's Plain Language Demonstrates That Employees of Private Contractors, Subcontractors and Agents Are Covered Under the Act.

The plain language of Section 806 applies to whistleblowing employees of private contractors, subcontractors, and agents. Where the plain meaning of a statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citation omitted).[5/] Section 806

[4/] Holdings' Brief on Appeal to the ARB, at 7.

[5/] Section 806's caption–which refers to "employees of publicly-traded companies"–does not evidence an intent on the part of Congress to so limit Section 806's scope. It is well established that although statutory captions may be helpful aids, "they do not control." *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 479 (7th Cir. 1999). The Supreme Court explained that statutory captions are not intended to be a "reference guide or a synopsis." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947). Clearly, Section 806's caption does not fully describe its scope. Although Section 806, for instance, plainly applies to both public companies and those that are "required to file reports under section 15(d) of the [Exchange Act]," the caption makes no reference to the latter category. In any event, as noted in *Lawson v. FMR LLC*, No. 08-10466-DPW and No. 08-10758-DPW, 2010 U.S. Dist. LEXIS 31258 at *39 (D. Mass. Mar. 30, 2010), even if "Section 806 protected not only

(continued...)

expressly prohibits "***any*** officer, employee, contractor, subcontractor, or agent" of a public company from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing]" against an employee engaging in "protected activity."[6/] The use of the term "any" makes clear that Congress intended the clause "contractor, subcontractor or agent" to be interpreted in an all encompassing sense.[7/] The word "any" "by any definition, sets no boundaries. 'Any' does not refer to certain things and not others. 'Any' means 'every' and 'all.' It is unlimited."[8/] Had Congress "intended any other meaning, [it could] have inserted a single word of restriction."[9/]

[5/](...continued)
employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use [this caption] in the section's heading, given that . . . all protected employees would have some connection to public companies, even if indirectly."

[6/] 18 U.S.C. 1514A(a) (emphasis added).

[7/] *United States v. Thompson*, 685 F.2d 993, 996 (6th Cir. 1982) (discussing Congress' use of the term "any" in legislation).

[8/] *In re Gosman*, 282 B.R. 45, 49 (Bankr. S.D. Fl. 2002) (noting that Congress' use of the word "any" in a Bankruptcy Code provision suggests that such legislation should be read broadly).

[9/] *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976) (discussing Congress' use of the word "any" in Title IX of the Organized Crime Control Act). To the extent there is any ambiguity in the statute, whistleblower statutes and federal securities laws, of which Section 806 of SOX is an important part, should be construed broadly, consistent with their "remedial
(continued...)

The logical reading of Section 806 is reinforced by the Department of Labor's regulations implementing Section 806 (the "Regulations"). The Regulations apply to both "compan[ies]" and/or "company representative[s]." 29 C.F.R. 1980.101. The Regulations define a "company representative" as "*any* officer, employee, contractor, subcontractor, or agent of a [public] company." *Id.* (emphasis added). Thus, under the Regulations, both (i) public companies and (ii) any "contractor, subcontractor, [and] agent" of a public company, are covered under the Act, and make no distinction between public and private companies. *Id.* The Department of Labor's Administrative Review Board–the appellate tribunal tasked with adjudicating Section 806 whistleblower complaints–has similarly held, in two recent decisions, that Section 806 applies to a public company's private contractors, subcontractors, and agents.[10/]

[9/](...continued)
purposes." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-97 (1983) (quoting *SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180, 195 (1963)); *SEC v. Zandford,* 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("Congress has broad remedial goals in enacting securities laws.") (internal quotation marks omitted); *SEC v. Ralston-Purina Co.*, 346 U.S. 119, 126 (1953); *Haley v. Restinasi*s, 138 F.3d 1245, 1250 (8th Cir. 1998) (whistleblower statutes should be construed "broadly, in favor of protecting the whistleblower.").

[10/] *See Klopfenstein*, 2006 DOL Ad. Rev. Bd. LEXIS 50 (ARB May 31, 2006) (holding that employee of a private, wholly-owned subsidiary of a public company was covered under Section 806); *Kalkunte v. DVI Fin. Serv., Inc.*, ARB No. 05-139 and 05-140, ALJ No. 2004-SOX-056, ALJ's Final Decision, (Dep't of Labor, Feb 27, 2009), 2009 DOLSOX LEXIS 1 (holding (continued...)

Indeed, if Section 806 were construed as protecting only the employees of public companies, as urged by Holdings, this would mean that "contractors, subcontractors and agents" would be liable under Section 806 only in the rare situation that they themselves are publicly-traded–or, perhaps in the extraordinarily unlikely situation that they are alleged to have engaged in retaliation against the employees of their publicly traded client. But a contractor, subcontractor, or agent will almost never be in a position to retaliate against their public-company client's employees. As one court recognized, "It is difficult to think of circumstances that would [] enable a subcontractor to discharge, demote, or suspend the employee of a public company."[11/]

B. The Legislative History Supports the Conclusion That Private Contractors, Subcontractors and Agents Are Covered Under Section 806.

SOX's legislative history further supports our reading of Section 806, and shows that Congress intended to enact robust whistleblower protections for employees of private contractors, subcontractors, and agents of public companies.[12/]

[10/](...continued)
that private consulting firm retained by a public company was covered under Section 806).

[11/] *Lawson*, 2010 U.S. Dist. LEXIS 31258 at * 31.

[12/] *See e.g.*, S. Rep. 107-146, at 2 ("This bill would play a crucial role in
(continued...)

The legislative history discusses not only Congress' objective of protecting whistleblowing by employees of a public company but also by employees of private firms that work with, or contract with, that issuer. In analyzing the "Enron debacle," for instance, Congress expressed serious concerns with the misconduct perpetrated by not only Enron Corporation (i.e., a publicly traded company), but also the "accounting firms, law firms and business consulting firms" (i.e., private contractors, subcontractors, and agents) "who were paid millions to advise Enron."[13/] According to the Senate Report, Enron's contractors, including Arthur Andersen LLP ("Andersen") engaged in serious misconduct in connection with Enron, including stifling their own employees' attempts at "blowing the whistle." Indeed, the Senate Report expressly noted that among the contributors to the fraud were "the well paid professionals who help create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns." S. Rep. 107-146 at 11. "[W]hen

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[12/](...continued)

restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted."); 148 Cong. Rec. No. S7350-04, S7358 (statement of Sen. Leahy) ("We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court."); 48 Cong. Rec. No. H5462-02, H5470 (statement of Rep. Carson) ("if we are to restore market confidence, and investors and workers are to be made whole, Congress must pass a strong bill that . . . protects whistleblowers.").

[13/] S. Rep. 107-146, at 4-5.

corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, [] they were discouraged at nearly every turn." *Id.* at 5. "An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000." *Id.*

In *Lawson*, the court properly focused on this legislative history in concluding that Section 806 applied to employees of both public companies *and* their private contractors, subcontractors and agents. At issue in *Lawson* was whether the employees of various mutual funds' private investment advisers were "covered employees" under the Act. The court observed that applying Section 806 broadly to both the employees of public companies and their private contractors, subcontractors, and agents was consistent with Congress' intent in promulgating SOX. The court explained that Section 806's whistleblower protections were enacted because, among other things, "Congress was concerned about the [contractors, subcontractors, and agents] of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity." *Id.* at *49-50. "For the goals of SOX to be met, contractors and subcontractors, when performing tasks essential to insuring that no fraud is committed against shareholders, must not be permitted to retaliate against whistleblowers." *Id.* at 56.

The practical effect of entirely excluding the employees of private contractors, subcontractors, and agents of public companies from Section 806's whistleblower protections would be enormous. For example, Holdings' statutory interpretation, if accepted, would effectively insulate from liability a broad range of Commission-regulated entities (such as investment advisers and broker-dealers) and other private firms (such as auditors and law firms) who work with public companies and whose employees are among those most likely to learn of (and in some cases be required to report) securities-law violations through their work for those companies. Because "insiders are [often] the only firsthand witnesses to [a complex] fraud," Congress made whistleblower protection for such insiders "central to the Act."[14/] Nullifying this whistleblower protection would inhibit the reporting of violations by such employees and frustrate the statutory objective of encouraging employees with information about violations to come forward.

1. Investment Advisers

Investment companies, including all mutual funds, file reports under Section 15(d) of the Exchange Act and thus fall within the scope of Section 806. However, nearly all mutual funds are structured so as to have *no* employees of their own, and instead rely on third-parties, principally private investment advisers, to function.

[14/] *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 484 (2d Cir. 2006) (citing and quoting SOX's legislative history).

Mutual funds ordinarily rely primarily on the employees of their investment advisers to operate the funds.[15/] As such, these employees are likely the most knowledgeable about a fund's operations. Yet, were Section 806 construed as applying only to public companies, it would place employees of investment advisers, an industry with nearly 157,000 employees that manages more than $12 trillion on behalf of almost 90 million investors, essentially unprotected by SOX's whistleblower protections.[16/]

[15/] "Mutual funds, with rare exception, are not operated by their own employees. Most funds are formed, sold, and managed by external organizations [called 'investment advisers,'] that are separately owned . . . . The advisers select the funds' investments and operate their businesses . . . . Since a typical fund is organized by its investment adviser which provides it with almost all management services . . ., a mutual fund cannot, as a practical matter, sever its relationship with its adviser." *Burks v. Lasker*, 441 U.S. 471, 480-81 (1979) (quoting S. Rep. No. 91-184, p. 5 (1969), *reprinted in* 1990 U.S.C.C.A.N. 4897, 4901); *see also Daily Income Fund v. Fox*, 464 U.S. 523, 536 (1984) ("Unlike most corporations, [a mutual fund] is typically created and managed by a pre-existing external organization known as an investment adviser.").

[16/] *See 2010 Investment Company Fact Book*, Chapter 1 ("Overview of U.S.-Registered Investment Companies "). By year-end 2009, mutual funds held 28 percent of all outstanding stock of U.S. issuers; 10 percent of U.S. foreign and corporate bonds; 12 percent of U.S. Treasury and agency securities; 35 percent of U.S. municipal securities; and more than 50 percent of U.S. commercial paper. *Id.* at 4-5. Likewise, by year-end 2009, the mutual fund industry managed 46 percent of the $16 trillion U.S. individual retirement account ("IRA") market and 55 percent of the $2.7 trillion U.S. 401(K) market. Id. at Chapter 7 ("Role of Mutual Funds in Retirement and Education Savings").

2. Accountants and Auditors

The so-called "Big Four" accounting/auditing firms are comprised of four private companies–PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche and KPMG. The Big Four dominate the auditing industry with respect to public companies, auditing nearly 97 percent of "large accelerated filers" and 67 percent of "accelerated filers."[17/] If SOX's whistleblower provisions were held not to apply to private contractors, as Holdings urges, employees of the Big Four, as well as other private accounting and auditing firms, would be virtually unprotected under Section 806.[18/]

3. Attorneys

Congress enacted Section 307 of SOX, directing the SEC to promulgate minimum ethical standards for attorneys representing issuers. Congress, among other things, instructed the SEC to include in these rules an "up the ladder" reporting provision, requiring attorneys representing issuers to report evidence of material

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[17/] Under Exchange Act Rule 12b-2, a "large accelerated filer" is an issuer that has "an aggregate worldwide market value of . . . $700 million or more." 17 C.F.R. 240.12b-2. "Accelerated filers" have market capitalizations of between $75 million and $700 million. *Id.*

[18/] S. Rep. 107-146, at 5 (noting that "employees at both Enron and [Arthur Andersen] attempted to 'blow the whistle'" on Enron but were discouraged by their employers. An Arthur Andersen partner was even removed from his firm's Enron account because he "expressed reservations about [Enron's] financial practices").

securities-law violations within the client company.[19/] Congress enacted Section 307 to ensure that lawyers follow the law and, as importantly, to make sure that their issuer-clients follow the law.[20/] But, if the vast majority of securities attorneys who work closely with issuers (i.e., attorneys employed by private law firms) are excluded from SOX's whistleblower protections, the result would be that although attorneys are the only professionals expressly *required* by Congress to report evidence of material securities law violations, the statute would not protect them from retaliation for complying with those directives.[21/]

II. SECTION 806 SHOULD NOT BE READ TO APPLY ONLY TO PRIVATE CONTRACTORS, SUBCONTRACTORS, AND AGENTS WHO ACT AT THE DIRECTION OF A PUBLIC COMPANY IN RETALIATING AGAINST A WHISTLEBLOWER.

Holdings argues in the alternative that if Section 806 applies to private contractors, subcontractors, or agents, it applies only when those entities retaliate

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19/ *See* 17 C.F.R. Part 205.

20/ *See* 148 Cong. Rec. No. S6552 (July 10, 2002) (statement of Sen. Edwards).

21/ In *Jordan v. Sprint-Nextel Corp*, the ARB concluded that the argument that retained counsel representing issuers are not protected under Section 806 makes little sense. "SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' . . . who reports such violations." *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-41, ARB's Order (Dep't of Labor Sept. 30, 2009), 2009 DOLSOX LEXIS 19 at *31.

against a whistleblower at an issuer's direction.[22/] As we show below, the fact that a public company's contractor, subcontractor, or agent retaliates against a whistleblower on its own initiative and for its own self-interest–without any direction from its public-company client–should not render Section 806 inapplicable.

First, Holdings' proposed statutory construction finds no support in statutory language and reads superfluous limitations into a statute without any clear textual basis for doing so.[23/] Section 806 prohibits retaliation by an issuer's "contractors, subcontractors and agents" against an employee–nowhere does it require that the issuer direct the retaliation. The fact that Holdings acted as PCC's agent in terminating Klopfenstein–as the ARB found here–is certainly a sufficient, but not a necessary, basis to conclude that Holdings may be covered under Section 806. So long as a

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[22/] *See, e.g., Malin v. Siemens Med. Solutions Health Serv.*, 638 F. Supp. 2d 492, 501 (D. Md. 2008); *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922 at *15 (E.D. Mich. May 14, 2007); *Andrews v. ING Group*, No. 2005-SOX-50 and 2005-SOX-51, ALJ's Decision and Order (Dep't of Labor Jan. 8, 2009), 2009 DOLSOX LEXIS 4 at *22; *Brady v. Calyon Sec.*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005).

[23/] *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (recognizing court's "duty to refrain from reading a phrase into the statute when Congress has left it out"); *Owens v. Samkle Auto. Inc.*, 425 F.3d 1318, 1321 (11th Cir. 2005) ("To augment the statutory language with an additional element, never mentioned by Congress, . . . violates the cardinal rule of statutory construction."); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) ("Congress expresses its purpose by words. It is for us to ascertain–neither to add nor subtract, neither to delete nor to distort.") (internal citation and quotation marks omitted).

purported whistleblower (i) engaged in activity that is protected under Section 806, and (ii) was discriminated against in the terms and conditions of employment because he engaged in such "protected activity," the Act prohibits "any" contractor, subcontractor or agent of a public company from retaliating against the whistleblower. 18 U.S.C. 1514A(a).

Second, Holdings' proposed statutory interpretation is at odds with Congressional intent. Congress expressly intended to protect whistleblowers employed by private third parties whose employers retaliate against them without any direction from their client–such as the Andersen partner who was removed from an account after expressing concerns about Enron. Congress observed that third-party professionals, such as Andersen, "were paid millions to . . . assure others that Enron was a solid investment," while adopting a "'Wild West' attitude which embraced profit over honesty."[24/] In enacting Section 806, Congress knew "Enron was an important client of [Andersen] and a significant source of revenue when the accounting firm" removed one of its partners for expressing Enron-related concerns.[25/] Yet, were this Court to adopt Holdings' statutory construction, Section 806 would not apply to this Andersen

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[24/] S. Rep. 107-146, at 3-4.

[25/] *Walters v. Deutsche Bank*, No. 2008-SOX-70, ALJ's Decision (Dep't of Labor Mar. 23, 2009), 2009 DOLSOX LEXIS 61 at *20-21.

partner, and it would "leave essentially unchanged conditions Congress passionately wanted to reform."[26/] Indeed, as one ALJ opined, private firms may retaliate against whistleblowers not because they are directed to by their client, but for their own self-serving reasons, such as to "keep the business of an important client or to keep damaging financial disclosures from coming to light." *Walters*, 2009 DOLSOX LEXIS 61 at *21.

Some ALJs and courts have held that a contractor, subcontractor or agent is covered under Section 806 *only* when it retaliates against a whistleblower at the direction of a public company client apparently on the assumption that Section 806 is primarily a labor law.[27/] We disagree. Section 806 is first and foremost an "antifraud provision" that has as its principal goal the detection of securities fraud.[28/] In contrast with labor law, which is concerned primarily with "the protection of employees,"

[26/] *Id.* at *22.

[27/] See, e.g., *Walters*, 2009 DOLSOX LEXIS 61 at *20 ("labor law focuses on the ability of the whistleblowers to show that the [] agent, contractor, or subcontractor for which they worked was the parent company's agent or contractor for personnel matters."); *Malin*, 683 F.Supp. 2d at 501 (for the private firm to be covered, it must be "an agent [or contractor] with respect to employment matters or the [principal/client must have been] involved in some direct manner in the alleged misconduct."); *Rao*, 2007 U.S. Dist. LEXIS 34922 at *15.

[28/] *Walters*, 2009 DOLSOX LEXIS 61 at *19.

"[w]orker protection in Section 806 is not an end in itself, it is simply a method designed to encourage insiders [who are aware of fraud] to come forward without fear of retribution."[29/] Whether a particular agency or contractor relationship with an issuer addresses employment matters is entirely immaterial to whether that entity's employees may know of possible securities law violations by that issuer.[30/] Applying this labor-law standard to Section 806 will result in a far more narrow application of Section 806 than Congress intended. As one ALJ observed:

> The legislative history of [SOX] would seem to confirm that Section 806 was meant to include an agent or contractor like the accounting firm of [Andersen], not because there was any evidence that Andersen implemented Enron's personnel actions,

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[29/] *Id.* at *25.

[30/] Similarly, applying an "integrated enterprise" analysis–as some ALJs and courts have done–to address issues of coverage under Section 806 with respect to contractors, subcontractors and agents is not appropriate. *See, e.g., Carciero v. Sodexo Alliance*, No. 2008-SOX-00012, ALJ's Decision and Order (Dep't of Labor Feb. 19, 2009), 2009 DOLSOX LEXIS 22 at *37-38. The "integrated enterprise" analysis–a test used in labor discrimination disputes–looks to whether multiple entities should be viewed as a unitary actor. But, because Section 806's plain language explicitly reaches entities (including contractors, subcontractors and agents), which are distinct from their public company clients, applying an "integrated enterprise" analysis is not particularly useful in this context. Furthermore, even in those circumstances where the "integrated enterprise" analysis is apposite, the issue of whether the person alleged to have engaged in retaliatory conduct was acting as the agent, contractor or subcontractor of the issuer is largely irrelevant as it would be viewed as a unitary actor.

> but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud [Andersen] helped to conceal.[31/]

Indeed, requiring whistleblowers to satisfy this labor law standard in Section 806 cases "erect[s] a formidable, if not in most instances an insurmountable, obstacle to coverage" under SOX.[32/]

Finally, it is difficult to believe–given the statute's plain language and the Act's legislative history described above–that Congress intended for Section 806 to apply only when a private firm is directed to retaliate against a whistleblower by their publicly traded client. Rarely will any company be involved in making personnel decisions about another company's employees, let alone have the authority to terminate or discipline them. As the ALJ in *Walters* recognized, "the burden of establishing agency for purposes of implementing whistleblower personnel matters is so steep, it has essentially proven insurmountable to all [but] a very few employees" of a public company's private contractor or agent. *Walters*, 2009 DOLSOX LEXIS 61 at *23.

CONCLUSION

For the foregoing reasons, Section 806 of SOX should be construed as applying to an employee of a private contractor, subcontractor, or agent of a public company

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[31/] *Walters*, 2009 DOLSOX LEXIS 61 at *21.

[32/] *Id.* at *22.

where the employee engaged in "protected activity" with respect to that public company. This Court should not limit its application to only those cases where the contractor, subcontractor, or agent retaliates at the direction of a public company.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I caused I caused two paper copies of the brief *amicus curiae* of the Securities and Exchange Commission and a CD containing a PDF version of the brief on the following by U.S. first class mail to:

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