



**Issue Date: 14 February 2007**

**CASE NO: 2006-SOX-91**

**IN THE MATTER OF**

**GARY E. GERACI**  
**Complainant**

**v.**

**RELS VALUATION and**  
**WELLS FARGO BANK, N.A.**  
**Respondents**

## **RECOMMENDED DECISION AND ORDER**

### **Preface**

In 2004 Complainant started a residential appraisal business working from his home and at his own expense. As an independent contractor, Complainant applied and was accepted on several appraisal panels, including Rels who provided real estate appraisals for Wells Fargo Bank. Though not his only client and representing but a small percentage of his total appraisals, once approved in July of 2004 Complainant continued in the months that followed to perform appraisals for Rels until his removal from the Rels' panel of appraisers on January 30, 2006. It is Complainant's contention that a complaint he made to the Comptroller of Currency in August 25, 2004, amounted to protected activity and is the reason he was ultimately removed from the panel. As set out hereafter, I do not agree with the Complainant. Neither Respondents appear to be covered employers under the Act, Rels, the party with whom Complainant contracted, knew nothing of the complaint Complainant filed until after Complainant's removal from Rels' appraisal panel on January 30, 2006, and the evidence supports no finding that such a complaint was the reason for any adverse action that befell Complainant. The reason for his removal was Complainant's refusal to use Rel's required electronic delivery system in transmitting his appraisals.

## Background

This case arises from a complaint filed by Gary E. Geraci (Complainant) against Rels Valuation (Rels) and Wells Fargo Bank, alleging violations of the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. §1514A (Act). Enacted on July 30, 2002, the Act provides the right to bring a “civil action to protect against retaliation in fraud cases” under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Security Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange of 1934 (15 U.S.C. 780(d)). Specifically, the law protects so-called “whistleblower” employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. §42121(b). 18 U.S.C. §1514A(b)(2)(B).

On March 3, 2006, the Complainant filed a whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U. S. Department of Labor. After an investigation, OSHA’s regional director issued a letter dated May 8, 2006, advising the parties that Respondents were not covered employers, nor was Complainant a covered employee under the Act. On May 24, 2006, Complainant filed his objections with the Office of Administrative Law Judges, U. S. Department of Labor. A formal hearing was conducted before me in Austin, Texas, on September 19 and 20, 2006, at which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant’s exhibits, Respondents’ exhibits and ALJ exhibits were admitted into evidence<sup>1</sup>. The parties submitted post-hearing briefs and proposed findings of facts on February 1, 2006<sup>2</sup>. I have reviewed and considered these briefs and proposed findings and the entire record in making my determination in this matter.<sup>3</sup>

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<sup>1</sup> The exhibits that were received in evidence are enumerated at pages 474-476 of the trial transcript. Complainant did not offer all of his exhibits, some were withdrawn and others were rejected for lack of foundation or authenticity. Likewise, the other parties withdrew some of their exhibits.

<sup>2</sup> Throughout these proceedings the parties have waived any time constraints imposed by the Act.

<sup>3</sup> The factual conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

## Findings of Fact

### Complainant

1. Complainant was a self-employed real estate appraiser, who did business under the assumed name, Geraci, Roche & Company.
2. Geraci, Roche & Company was a sole proprietorship owned by Complainant which was begun in late 2003.
3. The offices of Geraci, Roche & Company were located in Complainant's residence.
4. Complainant provided all business equipment necessary to complete his appraisal assignments.
5. Complainant provided all supplies and materials necessary to complete his appraisal assignments.
6. Complainant, through Geraci, Roche & Company, purchased computers, software, a company vehicle, a laser and wheel with which to measure land, and a tape measure for use in his appraisal business.
7. Complainant claimed depreciation on this business equipment on his personal income tax returns for 2004 and 2005.
8. Complainant paid the fees to the State of Texas to obtain and maintain his appraiser license.
9. Complainant paid business personal property taxes on the equipment used in his appraisal business.
10. Complainant paid the premiums for his errors and omissions insurance.
11. Neither Respondent reimbursed Complainant for any of his business expenses.
12. Geraci, Roche & Company paid payroll taxes on its employees.
13. Geraci, Roche & Company had a tax identification number.

14. Complainant did not receive any employee benefits from either Respondent, nor did either provide Complainant with a 401k plan, vacation days, sick pay, medical insurance coverage, or dental insurance coverage.

15. Complainant opened a business bank account in the name of Geraci, Roche & Company, and all receipts from his appraisal business were deposited into this bank account.

16. Complainant hired two part-time employees to work for Geraci, Roche & Company.

17. Complainant does not appear to have been an employee of either Rels or Wells Fargo Bank.

18. By the terms of his contract with Rels, Complainant was designated an independent contractor.

19. Complainant was free to and did perform appraisals for any companies he chose, and during 2005, Complainant performed appraisals for 26 different companies, in addition to Rels.

20. During 2005, Complainant performed 180 to 200 appraisals. Of those, Complainant performed 31 to 35 appraisals for Rels, and performed the remainder of the appraisals for other companies.

### **Rels**

21. Rels is the assumed business name of Value Information Technology, LLC.

22. Value Information Technology, LLC is not a publicly traded company.

23. Value Information Technology, LLC does not have a class of securities registered under section 12 of the Securities and Exchange Act of 1934.

24. Value Information Technology, LLC is not required to file reports under section 15-D of the Securities and Exchange Act of 1934.

25. Value Information Technology, LLC is owned by Rels, LLC.

26. Rels, LLC is owned 50.1% by First American Real Estate Solutions, LLC, and 49.9% by Foothill Capital Corporation.

27. First American Real Estates Solutions, LLC is a subsidiary of First American Corporation, a publicly traded corporation.

28. Foothill Capital Corporation is a subsidiary of Wells Fargo & Company, a publicly traded corporation.

29. There is no evidence offered that Rels was the agent of either First American Corporation or Wells Fargo & Company for purposes of coverage under the Act.

### **Wells Fargo Bank**

30. Wells Fargo Bank is legally chartered in Sioux Falls, South Dakota.

31. Wells Fargo Bank is headquartered in San Francisco, California.

32. Wells Fargo Bank is not a publicly traded company.

33. Wells Fargo Bank does not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934.

34. Wells Fargo Bank is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934.

35. Wells Fargo Bank is one of 600-700 subsidiaries of Wells Fargo & Company.

36. Wells Fargo & Company is a publicly traded company.

37. Wells Fargo Bank and Wells Fargo & Company do not share employees.

38. Wells Fargo Bank and Wells Fargo & Company have different boards of directors.

39. Wells Fargo & Company does not control the day-to-day decision making of Wells Fargo Bank. The board of directors and the management of Wells Fargo Bank make the day-to-day decisions for Wells Fargo Bank.

40. Wells Fargo & Company does not control Wells Fargo Bank's employment relationships.

41. There is no evidence offered that Wells Fargo Bank was an agent of Wells Fargo & Company for purposes of coverage under the Act.

42. No evidence indicates Complainant was an employee of Wells Fargo Bank.

43. No evidence indicates Complainant was even an independent contractor of Wells Fargo Bank.

### **Appraisal Panel**

44. When Complainant started his business, he selected his clients by joining various appraiser panels, including Rels Valuation's appraiser panel.

45. In July 2004, Complainant contacted Value IT, which is now known as Rels Valuation, and expressed interest in becoming a member of the Approved Appraiser Panel of Value IT.<sup>4</sup>

46. On July 15, 2004, Breon W. Krug forwarded to Complainant the contract and application package, which included the contract and application which Complainant was required to complete in order to be added to the Approved Appraiser Panel of Value IT (Rels).

47. On or about July 20, 2004, Complainant completed and executed the contract and returned it to Value IT (Rels).

48. In paragraph one of the Contract, Complainant agreed that he was an independent contractor and that he was not and would not represent himself to be an employee of Value IT (Rels).

49. The Contract required Complainant to use an electronic delivery system to deliver appraisals to Value IT (Rels).

50. On or about July 20, 2004, Complainant completed and executed the Residential Appraiser Application (the "Application") and returned the Application to Value IT (Rels).

51. On page 1 of the Application was the following:

#### **"EDI Standards**

Value IT operates with a system of electronic data interchange (EDI) for all electronic appraisal ordering and report transmission. Applicant

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<sup>4</sup> Subsequently, Value Information Technology, LLC adopted Rels Valuation as its assumed business name. For purposes of this decision I will identify the entity as Rels.

understands that they are required to comply with these standards, or the standards put forth by Value IT and agrees to maintain software and system hardware to comply with these standards. Applicant understands that these standards are subject to change or revision as current technology changes. Value IT will apprise appraiser of any changes in the most current standards employed by Value IT. Value IT also expects that appraiser maintain systems and software that are Year 2000 compliant. Applicants' approval status is subject to compliance with the electronic standard requirement.

52. It is obvious that both the Application and the Contract contained provisions that required Complainant to comply with Rels' electronic data interchange ("EDI") requirements.

53. Complainant had received a license as a State Certified Residential Real Estate Appraiser on June 24, 2004, shortly before he contacted Rels.

54. In addition to contacting Rels, Complainant also applied to other appraisal management companies to be included on their appraiser panel lists.

55. Complainant informed Rels that there were 14 different Texas counties within which he was willing to perform appraisal services.

56. On July 27, 2004, Rels wrote to Complainant and advised him that he had been granted temporary approval pending EDT training.

57. Until such time as Complainant completed the EDI training, he was not eligible to receive appraisal assignments.

58. Complainant was aware that the Contract and the Application required him to comply with the EDI requirement.

59. Rels required its contract appraisers to submit their appraisals through the EDI process because it is an electronic system tied into the Wells Fargo underwriting system which allows Wells Fargo Bank to run its underwriting rules electronically.

60. The client required Rels to submit the appraisals to Wells Fargo Bank electronically.

61. Complainant was aware, when he received the letter from Value IT dated July 27, 2004, granting temporary approval, that he would not receive any appraisal assignments from Value IT until he completed the EDI training.

62. When Complainant executed the Contract, he knew that his status with Value IT was that of an independent contractor.

63. On or about August 25, 2004, within the first month of his contract, Complainant sent a letter to the Comptroller of the Currency in which he complained of undue lender pressure by Wells Fargo Bank, N.A.

64. Complainant did not send a copy of his complaint filed with the Comptroller of the Currency to Value IT (Rels) nor did he ever tell Rels that he had filed such a complaint.

65. Rels was not aware that Complainant had filed a complaint with the Comptroller of the Currency at the time that it removed Complainant from the Approved Appraiser Panel on January 30, 2006.

66. Rels did not learn that Complainant had filed a complaint with the Comptroller of the Currency until March 2006, when Rels was contacted by the OSHA investigator who advised Rels of the earlier complaint on August 25, 2004.

67. On or about September 21, 2004, Wells Fargo Home Mortgage sent a letter to Complainant and the OCC explaining that loan officer Nicki Brandt had requested that Complainant remove the "Cost to Cure" addendum from the appraisal report because an "as-is" appraisal request had been made, and therefore, the addendum was not required. That ended the matter.

68. For each appraisal that Complainant performed for Rels, he was paid a set fee, which fee was determined in accordance with the Contract.

69. After filing his complaint with the Comptroller of the Currency, Complainant continued to receive appraisal assignments from Rels. From August 25, 2004 through January 30, 2006, Complainant received approximately 39 appraisal assignments from Rels. After making his complaint to the Comptroller of the Currency, Complainant remained on the Approved Appraiser Panel of Rels for approximately 17 months.

70. For 16 months Complainant transmitted appraisals to Rels in accordance with Rels' EDI requirement, during which time Complainant could have refused any appraisal assignment that he received from Rels.

### **Termination**

71. In December 2005, Complainant, without approval, dropped the EDT-compliant software that he had used to transmit his appraisals to Rels and began forwarding his appraisals to Rels in PDF (Acrobat) format.

72. When Rels contacted Complainant concerning his use of PDF (Acrobat) format, Complainant stated that he was “taking a stand” and would not comply with Rels’ EDI requirements.

73. On January 30, 2006, Rels removed Complainant from its Approved Appraiser Panel because of his refusal to comply with Rels’ EDI requirements.

74. Rels removes from its approved appraiser panel all contract appraisers, like Complainant, who fail or refuse to comply with its EDT requirements.

75. In order to have been reinstated to the Approved Appraiser Panel in February, 2006, Complainant would have had to notify Rels that he wished to change to a different EDI-compliant software and to have gone through the training process for that software. He did not do so.

76. While Rels was unaware of Complainant’s complaint to the Comptroller of the Currency, Rels would have taken the same action with respect to Complainant, namely to remove him from the Approved Appraiser Panel due to his failure and refusal to comply with the EDI requirements, even if he had not made a complaint to the Comptroller of the Currency.

77. Complainant understood that the Application and the Contract required him to comply with the EDI requirements and that he would not receive appraisal assignments from Rels Valuation unless he was EDI-compliant.

78. EDI compliance was a necessity to Rels because the EDI system allowed Rels Valuation to automatically and immediately deliver the appraisal to Wells Fargo Bank underwriting.

79. Wells Fargo Bank did not remove Complainant from the Rels Valuation Appraiser Panel, nor did it play any role in Rels Valuation’s January 2006 decision to do so.

80. Wells Fargo Bank did not have the ability to affect Complainant’s relationship with Rels Valuation.

81. Wells Fargo Bank did not exercise control over how Complainant performed his appraisal work for Rels Valuation.

## Discussion and Conclusions of Law

### Covered Employers

Neither Respondent is shown to be a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), nor is either company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). (AU Ex. 4, Ex. B; Tr. 758-59).

Section 806 of the Act, states, in relevant part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), 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—

(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, when the information or assistance is provided to or the investigation is conducted by —

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). ...

18 U.S.C. §15 14A(a)(1); *see a/so* 29 C.F.R. §1980.102(a),(b)(1).

The Administrative Review Board has determined a publicly traded corporation need not be named in order to bring an action under the Act so long as the Complainant names at least one respondent who is covered under the Act as an officer, employee,

contractor, or agent of a public entity. A subsidiary or a public parent corporation is not necessarily covered, however, unless there is a showing that, according to common law principles of agency, the subsidiary is an agent of the parent corporation acting on the parent's behalf and under the parent's control.

In this instance, it does not appear that Complainant has made a showing that the two named Respondents, who are not publicly traded corporations but subsidiaries of publicly traded corporations, were agents of their parent companies and thus covered employers under the Act. Regardless, however, whether covered or not and whether Complainant made a *prima facie* case or not, those issues are irrelevant because after a full hearing I find the Respondents have demonstrated by clear and convincing evidence that the same unfavorable action (removal from panel) would have been taken even in the absence of any assumed protected activity on Complainant's part. 29 C.F.R. § 1980.109.

Complainant applied with Rels in July 2004 to perform real estate appraisals on their behalf. He was sent a package of material which set out plainly that the Complainant was expected to use the electronic data interchange (EDI) for electronic appraisal ordering and report transmissions and that his "approval status was subject to compliance with this electronic standard requirement." (Rels Exhibit 1, pg. 3.) As an "independent contractor" Complainant signed and agreed in his contract dated July 20, 2004, that completed appraisals would be delivered via EDI (Rels Exhibit 2); and by letter dated July 27, 2004, Complainant was advised that after EDI training was completed he would begin receiving appraisal orders electronically. (Rels Exhibit 19.) His electronic transfer procedures training completed, Complainant was given a password. (Rels Exhibit 18).

In the 16 months that followed all seemingly went well with the exception of one event which occurred in the first month of Complainant's approval. On August 25, 2004, Complainant wrote the Comptroller of Currency complaining that undue lender pressure had been put on him to "eliminate or materially alter a single quote cost addendum" included in his appraisal (Complainant's Exhibit 1B). Inquiry followed, causing a letter from Wells Fargo Home Mortgage, dated September 21, 2004, explaining that this was an "as is inspection" and that an estimate of repair cost was not necessary in this type of appraisal. (Complainant's Exhibit 1A).

Rels, the company with whom Complainant had contracted, denied any knowledge of the events of August and September 2004, until it was brought to their attention after Complainant's removal from their Approved Appraisal Panel in January 2006. Regardless of who knew what or whether the action on Complainant's part arose to the level of protected activity, the record contains no evidence that the matter was brought up again or that Complainant was penalized or suffered any type of hostile work environment as a consequence. To the contrary, in the ensuing months Complainant continued to receive appraisals from Rels.

Working as an independent contractor, Complainant was on the approved appraisal lists for approximately 26 companies and in 2005 had a gross income of \$43,355.50.<sup>5</sup> During this period, Complainant estimated he did 180 to 200 appraisals and that 31 to 35 were for Rels. He placed his income from Rels at \$5,857.50 and guessed Rels gave him approximately three appraisals a month. Complainant was free to decline any work offered him by Rels in the counties he had chosen to provide his services.

In December 2005, for reasons best known to Complainant, he decided to cease using the electronic data interchange (EDI). Although agreeing he complied for 16 months (Tr. 265), Complainant testified at trial that:

Well, I decided not by Rels, nothing that your company had done, I decided as a business decision that Aurora, the replacement to this initial one, their new version, was a piece of crap. It locked up, it delayed reports. For that reason, I canceled, and then I learned that you guys wouldn't take my report as is PDF (Tr. 266).

Complainant continued to be referred appraisals into January 2006 when Rels discovered Complainant's refusal to use the EDI, at which time he was called by John Alquino and told he must comply with the terms of his contract. At that point, Complainant "took a stand" and on January 26, 2006 Complainant emailed Rels Area Manager, Paul Noyd, and Matt Potter that he was "no longer an Xsite/Almode user" and threatened to drop "all three of my licenses." (Complainant's Exhibit 58, Rels Exhibit 4.) On January 30, 2006, Complainant received a letter from Rels Approval Panel Management removing him from the panel because he was "no longer interested in complying with our EDI requirements." (Rels Exhibit 6.)

Paul Noyd, Area Manager of Rels, and Deborah Nikodym, Senior Vice-President of Rels, both testified at the hearing. Compliance with EDI was required in servicing Rels clients, and it was explained that other appraisers had been removed from the Approved Appraisal Panel for the same reason. There was no other reason given or shown for Complainant's removal in this instance.

### **Conclusion**

Complainant's employment history, both in civilian and army life, seems to indicate, as here, Complainant's difficulty with authority. Complainant is seeking an \$8,500.00 lifetime monthly annuity from a company who, though not representing but a portion of his appraisal business, offered and provided Complainant with work until

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<sup>5</sup> Unfortunately, because of his overhead Complainant testified his net earnings for 2005 were negative.

Complainant decided he would not comply with the contracted obligation which went along with the referrals. Complainant is entitled to no relief under the Act; Respondents have demonstrated by clear and convincing evidence that Complainant would have been removed from the Approved Appraisal Panel of Rels whether he had made a complaint to the Comptroller of Currency or not.

## **ORDER**

Complainant's complaint is hereby **DISMISSED**.

So **ORDERED** this 14<sup>th</sup> day of February, 2007, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).