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Issue Date: 14 March 2006

CASE NO: 2006-SOX-00041

In the Matter of:

JACK R. T. JORDAN,
Complainant,

v.

SPRINT NEXTEL CORPORATION,
CLAUDIA TOUSSAINT,
THOMAS GERKE, and
GARY FORSEE,
Respondents.

ORDER DENYING RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, GRANTING RESPONDENTS' REQUEST FOR INTERLOCUTORY REVIEW, AND STAYING PROCEEDING

This proceeding arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley" or "the Act"). The case is presently scheduled for formal hearing beginning June 13, 2006 in Kansas City, Missouri.

On January 27, 2006, I issued an order denying a motion filed by Sprint Nextel Corporation ("Respondent" or "Sprint")[1] requesting that the parties in this case be allowed to proceed using pseudonyms, that all pleadings, evidence, and orders in this case be sealed, and that all hearings be closed to the public.[2] However, I temporarily sealed, pending the filing of supplemental briefs by the parties, Respondent's motion, Mr. Jordan's complaint, and the Secretary's findings with respect to that complaint. *See Jordan v. Sprint Nextel Corp*., No. 2006-SOX-00041, Order Denying in Part Respondent's Motion for a Protective Order to Proceed Under Seal and Ordering Supplemental Briefing (Jan 27, 2006) at 9. I further ordered that Sprint

[1] Sprint has contested Mr. Jordan's right to include the three individually named parties as respondents in this matter. As explained further below, I find that they have been properly named as parties in this case, and any reference to "Sprint" or "Respondent" in this order should be construed as including both the corporate and individual respondents.

[2] In my order denying Respondents' request to proceed using pseudonyms, I noted that Complainant had not yet filed a response to the motion but that, since Respondent had requested expedited consideration and Complainant would not be prejudiced by my ruling denying Respondent's request, it was appropriate to rule on Sprint's motion with out awaiting Mr. Jordan's response. On February 1, 2006, I received Complainant's Response in Opposition to Sprint Nextel's Motion for a Protective Order to Proceed Under Seal.

and Complainant file supplemental briefs in support of, or in opposition to, Respondent's motion for a protective order, and expressly directed Sprint to "identify, at a minimum, specific statements and or documents which it contends are covered by the attorney-client privilege." *Ibid*.

Before responding to my January 27, 2006 order, Sprint filed on February 10, 2006 a Motion to Dismiss or, Alternatively, for Summary Decision ("Mot. to Dismiss"). According to Respondent:

> [T]his case should not go forward because complainant Jack Jordan cannot establish a *prima facie* case of Sarbanes-Oxley protected activity without introducing privileged and confidential attorney-client information and work product. The ARB held two years ago that a case under another whistleblower statute could not go forward for that very reason and, although the ARB's decision was reversed by the Fifth Circuit, the Board's considered decision compels dismissal here or, at a minimum, certification to the ARB for interlocutory review regarding whether it will continue to adhere to the rule it articulated in that case. *See Willy v. The Coastal Corp*., ARB No. 98-060 (Feb. 27, 2004), *rev'd sub nom*., 423 F.3d 483 (5th Cir. 2005) . . . .

Mot. to Dismiss at 2-3. With respect to its assertion that I should follow the Board's decision in *Willy* rather than the decision by the Fifth Circuit overruling the ARB's decision, Sprint argues simply that I should do so based on the fact that "[a]dministrative agencies have long ascribed to the doctrine of 'nonacquiescence,' under which an agency will decline to accede to a court of appeals precedent that conflicts with the agency's interpretation *of the law it administers*." *Id.* at 21 (italics added).

On February 13, 2006, Sprint filed a Supplemental Brief in Support of its Motion for a Protective Order to Seal the Proceedings ("Supp. Br."). Despite my order that it specifically identify communications and/or documents which it believed were protected by the attorney-client privilege, Respondent again appears to raise a "blanket assertion" of the privilege, *i.e.*, "all materials in this case should be sealed because the case is suffused with privileged information." *Supp. Br.* at 2.[3] It similarly alleges, without reference to any supporting legal authority, that "there is a <u>presumption</u> that the matter should be placed under seal . . . [since it is] founded entirely on privileged and confidential information obtained through a position of trust as a lawyer for Sprint . . . ." *Ibid.* (emphasis in original).

On March 2, 2006, Mr. Jordan filed Complainant's Response in Opposition to Motion to Dismiss or, Alternatively, for Summary Decision of Respondent Sprint Nextel Corporation ("Comp. Opp."). He argues, in part, that Respondent's motion must be denied because it failed to answer his complaint, which he identifies as his Objections and Notice of Hearing dated

[3] While I find that continuing the temporary seal of all pleadings in this matter is appropriate, given my decision to certify review of this order to the ARB, Sprint must, once this case proceeds, expressly identify those individual statements and documents, or portions of documents, which it reasonably believes should be subject to a protective order. Its failure to do so will be viewed as a waiver of any claim to the protections afforded by the attorney-client privilege for any statements or documents, or portions of documents, not so identified by Sprint.

December 28, 2005 filed with the Office of Administrative Law Judges.[4] Comp. Opp. at 22-26. Mr. Jordan further argues that Sprint's reliance on the ARB's ruling in *Willy* is misplaced. *Id.* at 26-29. Among the exhibits attached to Mr. Jordan's response is a 71-page Brief of Complainant Regarding the Inapplicability of the Attorney-Client Privilege which, in part, responds to my January 27, 2006 order partially denying Sprint's motion for a protective order and directing the parties to file supplemental briefs.

On March 3, 2006, Sprint filed a motion for leave to file a reply to Mr. Jordan's response, accompanied by a reply brief ("Sprint Reply").[5] Respondent continues to rely, in substantial part, on the ARB's decision in *Willy* as a basis for granting its motion to dismiss and/or for summary decision.

For the reasons set forth below, I find Respondent's reliance on *Willy* misplaced. I thus further that neither dismissal nor summary judgment is appropriate.

Discussion

I. MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT.

Sprint's motion to dismiss and/or for summary judgment is predicated on Rule 12(b)(6) of the Federal Rules of Civil Procedure and on 29 C.F.R. § 18.40, respectively. Mot. to Dismiss at 12-13.

Neither 29 C.F.R. Part 1980 (Sarbanes-Oxley whistleblower provisions) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim. Therefore, the standards set forth in the Federal Rules of Civil Procedure are applicable to Sprint's motion. 29 C.F.R. § 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). Under Rule 12(b)(6), a party may move to dismiss a claim based on the opposing party's "failure to state a claim upon which relief can be granted, ..." Fed. R. Civ. Pro. 12(b)(6). In considering whether dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. If the factual allegations, after having been accepted as true and construed most favorably on behalf of the non-moving party, present a cognizable claim if proved by a preponderance of the evidence, dismissal is not proper. *Jones v. City of Lakeland,*

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[4] Discrimination complaints under Sarbanes-Oxley are expressly governed by the rules set forth in 29 C.F.R. Part 1980. There is no requirement under 29 C.F.R. Part 1980 that a respondent file an answer or otherwise respond either to an initial complaint filed with OSHA or to a request for hearing filed by a complainant with the Office of Administrative Law Judges after a complaint has been denied or dismissed. Inasmuch as Respondent was not required to respond to either of Complainant's filings, Respondent did not waive its right to contest Mr. Jordan's allegations or, as it has done here, to seek summary judgment.

[5] The rule governing the filing of motions provides, in relevant part, that any application for an order or any other request shall be made by motion, and, within ten days after a motion is served, any party to the proceeding may file an answer. 29 C.F.R. § 18.6(a)-(b). The rule further provides that "[u]less the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed." *Ibid.* Although I did not previously authorize the filing of Sprint's reply, it is relevant to the issues raised, and I will thus grant it's motion for leave to file. However, the parties are hereby put on notice that similar filings by *either* party will be viewed unfavorably, and no motion to file such a reply will be granted absent exceptional circumstances.

Tennessee, 175 F.3d 410 (6th Cir. 1999). However, failure to allege a *prima facie* case is grounds for immediate dismissal. *See Lovermi v. Bell South Mobility, Inc.*, 962 F. Supp. 136, 139 (S.D. Fla. 1997); *Briggs v. Sterner*, 529 F. Supp. 1155, 1164 (S.D. Iowa 1981).

With respect to summary judgment, applicable regulations provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 18.40 is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc., USDOL/OALJ Reporter (HTML)*, ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)). The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. *See Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome the summary judgment motion. He may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 248.

A. Request to Dismiss Individually Named Respondents.

As a preliminary matter, I note that Sprint has taken the position that Claudia Toussaint, Thomas Gerke, and Gary Forsee, the three individually named Respondents in this case, are not parties to this litigation. In its Motion to Dismiss, counsel for Respondent wrote:

> In the proceedings before OSHA, complainant Jack Jordan named Sprint as the sole respondent. On review, however, he has attempted to name three Sprint executives as additional respondents – Gary Forsee, Tom Gerke, and Claudia Toussaint. Service has never been made on those individuals in the manner required by the rules of the Office of Administrative Law Judges. Further, the individuals may not be added as defendants at this stage because any claims against them personally were "not investigated and considered by OSHA" and are "untimely, as [they were] made more than ninety days after the alleged violation." Finally, there is no prejudice to the complainant in denying him the ability to add these three individuals to the case, since complete relief is available against the corporate defendant and indeed the individuals have only been added for vexatious purposes. . . .

Mot. to Dismiss at 2, n. 1 (citation and parenthetical quote omitted).[6]

Contrary to Sprint's assertion, Mr. Jordan has expressly and consistently identified these individuals as persons who violated the whistleblower provisions of the Sarbanes-Oxley Act. For example, in his original complaint he wrote: "I have been subject to retaliation by my supervisor [Ms. Toussaint], by Sprint's General Counsel [Mr. Gerke], and by Sprint's CEO [Mr. Forsee] for having reported various types of inappropriate conduct at Sprint." Complaint of Jack R. T. Jordan at 1. Similarly, in his appeal to this office, he wrote: "The named persons should include the individual company representatives who were named in the complaint as having engaged in the retaliation." Dec. 28, 2005 Request for Hearing and Notice of Initial Objections of Jack R. T. Jordan at 1.

Denial of Sprint's request to dismiss Mr. Jordan's complaint against these three persons is appropriate for several reasons.

First, Sprint's reliance on *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (Mar. 5, 2003) ("*Powers*") as a basis for challenging the inclusion of these three individual respondents in this proceeding is misplaced.[7] In *Powers*, Administrative Law Judge Linda S. Chapman rejected, *inter alia*, the complainant's attempt to add Northwest Airlines as a respondent in a

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[6] More recently, counsel for Sprint filed on March 10, 2006, a motion on behalf of the individual respondents in this case ("Non-Party Mot. to Dismiss") in which it again asserts, *inter alia*, that Ms. Toussaint, Mr. Gerke, and Mr. Forsee are not properly named as respondents in this proceeding. Nothing in its newly-filed motion, however, requires any change in my instant ruling denying Sprint's motion to dismiss and/or for summary judgment with respect to these three individuals. As explained below, the Act and its implementing regulations expressly permit employees to bring Sarbanes-Oxley complaints against a corporate employer *and its officers*. The complaint filed by Mr. Jordan in this matter expressly identified these three corporate officers as individuals who were directly involved in the incidents which gave rise to his departure from Sprint, and he has continued to identify them as individuals who were involved in these events in the request for hearing he filed with the Office of Administrative Law Judges after his complaint was denied by OSHA. Furthermore, Respondent's assertion that these three individuals "should not be parties for the additional reason that individual officers and employees should not be held individually liable under Sarbanes-Oxley Section 806, as consistent with other federal employment discrimination and retaliation statutes that do no provide individual liability" Non-Party Mot. to Dismiss at 2, is not only unsupported by any citation to legal authority, it is directly contrary to the express provisions of the Act and its implementing regulations. Finally, to the extent Mr. Jordan may not have served copies of any pleadings filed with this office based on his mistaken belief that Sprint's counsel represented both the corporation and these officers, I find, for the reasons stated below, that these individuals are now, and clearly have been, cognizant of the existence and substance of this litigation since its inception, as evidenced by, *inter alia*, Sprint's Non-Party Motion to Dismiss.

[7] Respondent incorrectly asserts that Judge Chapman's March 5, 2003 order in *Powers* was affirmed by a September 28, 2004 decision of the Administrative Review Board. However, Judge Chapman's March 5, 2003 order was an Order Granting Respondent's Request for Partial Dismissal and Denying Complainant's Request for Default Judgment. The ARB decision which Sprint cites as affirming the March 5 order was a Final Decision and Order of Dismissal issued by the ARB following Judge Chapman's issuance of a December 10, 2003 Recommended Decision and Order Granting Respondent, Pinnacle Airlines, Inc.'s Request for Summary Judgment. Dismissal by the Board was predicated on "Powers's continued delay and contumacious refusal to conform her brief to the Board's briefing requirements, along with her failure in her April 13, 2004 filing to provide any legitimate legal basis for her appeal . . . ," *Powers v. Pinnacle Airlines, Inc.*, ARB Case No. 04-035 (Sept. 28, 2004) slip op. at 4, and it was not an affirmance of Judge Chapman's March 5, 2003 order.

whistleblower case filed under several statutes, including Sarbanes-Oxley, after the complainant had appealed OSHA's dismissal of her claim to the Office of Administrative Law Judges. Judge Chapman noted, in relevant part, that Pinnacle Airlines was not a publicly traded company subject to the whistleblower provisions of Sarbanes-Oxley and that the complainant was simply trying to add Northwest Airlines, a publicly traded corporation, as a respondent to cure this deficiency. *Powers v. Pinnacle Airlines, Inc.*, *supra*., slip op. at 2. She further wrote:

> The Complainant filed her complaint at the OSHA level against Pinnacle, *not Northwest Airlines, Inc*. The Complainant cannot get around the fact that her Employer, Pinnacle, is not a publicly traded company by unilaterally adding another corporate entity that is publicly traded, *i.e.,* Northwest Airlines, Inc. as a respondent, after the investigation and determination by OSHA.

Id. at 4 (italics added). She also noted that the complainant had not "even alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities." *Ibid*. Finally, she wrote:

> [A]ny complaint against Northwest Airlines, Inc., is not only not properly before me, as it was not investigated and considered by OSHA, it is untimely, as it was made more than ninety days after the date of the alleged violation.

Ibid. The facts presented in *Powers* are thus substantially different from those presented here.

Second, the Sarbanes-Oxley Act makes clear that the misconduct it protects against is not only that of a publicly traded company itself, but also that of "any officer, employee, contractor, subcontractor, or agent of such company," who retaliates or otherwise discriminates against the whistleblowing employee. *See* 18 U.S.C. § 1514A(a). Similarly, the regulations implementing the Act state, in relevant part:

> Sarbanes-Oxley provides for employee protection from discrimination by companies *and representatives of companies* because the employee has engaged in protected activity pertaining to a violation or alleged violation of [various federal statues and regulations] relating to fraud against shareholders.

29 C.F.R. § 1980.100(a) (italics added). Consistent with the express provisions of the Act, the term "*company representative* means any officer, employee, contractor, subcontractor, or agent of a company." § 1980.101. Furthermore, the term "*named person* means the employer and/or the company or company representative *named in the complaint who is alleged to have violated the Act*." *Ibid*. (some italics added).

Ms. Toussaint, Mr. Gerke, and Mr. Forsee are clearly officers of Sprint. Furthermore, Mr. Jordan clearly and expressly asserted in his complaint that:

> I have been subjected to retaliation by my supervisor [Claudia Toussaint], Sprint's General Counsel [Thomas Gerke], and by Sprint's CEO [Gary Forsee] for having reported various types of inappropriate conduct at Sprint. The retaliatory actions

> that occurred on or after January 13, 2005, are clearly included within the 90 day period before the filing of the current complaint. In addition, retaliatory incidents that occurred as early as November 2003 have been included in the current complaint because the retaliatory nature of these actions was concealed by my supervisor and by the General Counsel and the CEO, including by means of continued denial of information that I have requested. In addition, the events that occurred on or after January 13, 2005 were based on or were a continuation of the prior retaliatory events.

Complaint of Jack R. T. Jordan at 1. He further wrote:

> I can support many of my statements with documentation such as emails and memoranda. However, some of the evidence supporting my statements is necessarily within the exclusive control of the Sprint executives who are implicated in my allegations. . . .

Id. at 4. Thus Mr. Jordan has properly identified Ms. Toussaint, Mr. Gerke, and Mr. Forsee as individual respondents in his Sarbanes-Oxley claim since the inception of this matter. Additionally, viewing the facts set forth in his complaint as true, as I am required at this juncture to do, Mr. Jordan has clearly alleged facts that warrant their inclusion as individual respondents in this case. Having properly named these individuals in his complaint, and having also alleged facts sufficient to establish a *prima facie* claim under the Act, Complainant has satisfied the requirements of both the regulations and Rule 12(b)(6).

Third, the fact that the December 21, 2005 letter setting forth OSHA's findings on the complaint names only Sprint Corporation as a respondent in this matter is not dispositive of whether Ms. Toussaint, Mr. Gerke, and Mr. Forsee are proper parties at this stage of the proceeding. Applicable regulations expressly provide, in relevant part:

> Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person (or named persons) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identify of any confidential informants). . . .

29 C.F.R. § 1980.104(a). Thus OSHA was required to notify *all named persons* identified by Mr. Jordan of its receipt of his April 11, 2005 complaint.[8] Any failure by OSHA to comply with this mandate cannot be attributed to Mr. Jordan, nor can it justify dismissal of his complaint.

The service requirement of the regulations applicable to this proceeding, including those requiring OSHA to serve complaints on all named individuals, is not jurisdictional. Its purpose is simply to ensure that respondents are given adequate notice of the lawsuit in sufficient time to respond and defend against the claims asserted therein. *See, e.g.*, *Shirani v. Calvert Cliffs*

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[8] Indeed, Mr. Jordan expressly identified Thomas Gerke, Sprint's General Counsel, as the person whom he believed to be the appropriate contact at Sprint with respect to his Sarbanes-Oxley complaint. Complaint of Jack R. T. Jordan at 1.

Nuclear Power Plant, Inc., ARB Case No 04-101 (Oct. 31, 2005).[9] It is quite clear from the pleadings filed by both parties that these three individuals are well aware of the pendency of the proceeding, and that they have been kept fully informed of the substance and progress of the litigation since it commenced. It is also clear that both Mr. Jordan's complaint and his request for hearing expressly informed them that they, as well as Sprint, were implicated in the retaliatory conduct alleged in his complaint. Since they have actual notice of this proceeding, and any hearing on the merits of the complaint will be stayed pending a ruling from the ARB on this order, Respondents have more than ample time to prepare their defense against Mr. Jordan's allegations. Furthermore, this is a *de novo* proceeding and the prior allegations of the parties and findings by OSHA are entitled to no weight. Ms. Toussaint, Mr. Gerke, and Mr. Forsee thus will not be prejudiced by their continued inclusion as named respondents in this case. Sprint's request to dismiss Mr. Jordan's complaint against these three individuals will therefore be denied.

B. Sprint's Motion to Dismiss and/or for Summary Judgment.

As noted above, Sprint asserts that Complainant cannot establish a *prima facie* case of retaliation in this case without introducing privileged and confidential information which is protected by the attorney-client privilege. Mot. to Dismiss at 2-3. It notes that Mr. Jordan was previously an attorney in Sprint's Corporate Secretary and Corporate Governance group, that his primary responsibilities included ensuring Sprint's compliance with securities laws, and, referencing a 39-page document dated February 9, 2005,[10] says that, before leaving Sprint, Mr. Jordan had been engaged in a long-standing dispute with his supervisor, Claudia Toussaint, revolving around his displeasure with her appraisal of his past work performance. *Id.* at 4-5. It goes on to argue that this litigation is simply a continuation of that dispute and an attempt to improperly use the whistleblower provisions of the Sarbanes-Oxley Act to further his desire to "obtain satisfaction on his personnel grievances." *Id.* at 8. In support of this argument, it points to, *inter alia*, two documents found on Mr. Jordan's laptop computer after his departure from Sprint in which he lays out various scenarios regarding the possible resolution of his unsatisfactory job situation with Sprint.[11] Based on the foregoing, Sprint argues that Mr. Jordan's complaint "should be dismissed because he cannot prove any set of facts that would entitle him to relief without recourse to confidential and privileged information and communications resulting from his position as an attorney for Sprint." *Id.* at 12. Alternatively, it argues that summary judgment is appropriate since "Jordan cannot present a material issue of

[9] As the Board noted there, "the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Id.*, slip op. at 6 quoting *Henderson v. United States*, 517 U.S. 654, 671 (1996).

[10] According to Sprint's motion, this document, and five Exhibits A-E attached thereto, have been redacted to protect privileged and confidential information. Mot. to Dismiss at 4, n. 2.

[11] Respondent notes that the laptop computer was issued to Jordan by Sprint for official purposes only and not for personal use. In his response to Sprint's motion to dismiss, Mr. Jordan asserts that these documents are confidential and constitute attorney-work product. Inasmuch as users of Sprint's computers are expressly informed, via a written statement that appears on the computer's screen when accessed that "[u]se of Sprint Computing and communications systems, with or without proper authority, is subject to monitoring and recording," Ex. 5 to Mot. to Dismiss, I find that Mr. Jordan had no reasonable expectation of privacy with respect to any documents found on his work-provided laptop computer.

fact without again relying on confidential and privileged information [and he thus cannot establish the existence of an element essential to his claim]." *Id.* at 12-13.

(1) *Failure to Adequately Assert Privilege*.

As noted in my prior order, the attorney-client privilege applies where: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or a subordinate thereof and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by the client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v United Shoe Machinery Corp*., 89 F.Supp. 357, 358 (D. Mass. 1950). As further noted in my prior order, blanket assertions that the privilege is applicable are unacceptable – the privilege must be asserted statement-by-statement and document-by-document so that a court considering its application may rule with specificity. *Foster v. Hill*, 188 F.3d 1259, 1264 (10th Cir. 1999); *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992); *United States v. Rockwell International*, 897 F.2d 1255 (3rd Cir. 1990); *In re Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980).

In this case, contrary to the terms of my January 27, 2006 order, Sprint has again failed to expressly identify, either in its Motion to Dismiss or its Supplemental Brief, any individual statement or document which it believes is protected by the attorney-client privilege. On the contrary, it has taken the position that each of the protected activities identified by Mr. Jordan in his original complaint can only be proven by disclosure of privileged information, and all statements and documents that Mr. Jordan can produce in support of his allegations are protected. I find, solely for purposes of deciding its motion to dismiss and/or for summary judgment, that Sprint has failed to properly assert, and thus cannot rely on, the attorney-client privilege inasmuch as it has not identified any specific communication to which the attorney-client privilege applies. This finding alone justifies the denial of Sprint's motion since the allegations set forth in Mr. Jordan's complaint, which are assumed to be true and viewed in Complainant's favor, are more than adequate to establish a *prima facie* claim upon which relief can be granted. Fed. R. Civ. Pro. 12(b)(6). Furthermore, viewing the facts set forth in the response to Sprint's motion in the light most favorable to Mr. Jordan, as I am required to do, there is clearly a dispute with respect to many facts material to this litigation, and summary judgment is thus inappropriate.

(2) *Inapplicability of ARB's Willy Decision*.

An even more compelling reason for denying Sprint's motion is its misplaced reliance on the decision of the ARB in *Willy v. The Coastal Corp*., ARB No. 98-060 (Feb. 27, 2004) despite the Fifth Circuit's reversal of that decision in *Willy v. Admin. Rev. Bd.*, 423 F.3d 483 (5th Cir. 2005). According to Sprint

> Jordan's claims of retaliation focus on legal advice he provided and disagreements he purportedly had with other in-house Sprint legal personnel about that advice. Under the clear holding of *Willy v. The Coastal Corp*., ARB No. 98-060 (ARB Feb. 27, 2004), because Jordan's 'whistleblower' claim rests exclusively upon privileged attorney-client material and confidential client information obtained in the course of representing Sprint, his complaint must be dismissed.

Mot. to Dismiss at 15. Sprint goes on to note that "[a]dministrative agencies have long ascribed to the doctrine of 'nonacquiesence,' under which an agency will decline to accede to a court of appeals precedent that conflicts with the agency's interpretation *of the law it administers*."[12] *Id.* at 21 (italics added). It thus suggests "that the ARB would not view itself as bound by the *Willy* decision outside the jurisdiction of the Fifth Circuit where it issued." *Id.* at 22. Finally, it asserts that I should "follow the ARB's precedent in *Willy* rather than the non-binding and contrary Fifth Circuit decision in the same case," *id.* at 23, and dismiss Mr. Jordan's complaint.

As a preliminary matter, Sprint's assertion, unsupported by any legal authority, that I can rely on the ARB's decision in *Willy* as precedent in this matter is simply wrong. The Board's ruling that the attorney-client privilege mandated exclusion of a report prepared by the complainant-attorney was expressly vacated by the Fifth Circuit, and the case was thereafter remanded "for a review of the merits of the original holding of the ALJ and of the previous Secretary in light of the facts that they had before them when they rendered their final decisions." *Willy v. Admin. Rev. Bd*., *supra*., 423 F.3d at 501. As of the date of this order, no decision on remand has been issued by the Board, and its February 27, 2004 decision in *Willy* is neither valid nor binding legal authority. Furthermore, Respondent has not cited any other decision by the ARB, nor am I aware of any, that would mandate dismissal of a whistleblower complaint which was predicated, in whole or in part, on information subject to the attorney-client privilege. The Board is clearly bound by the Fifth Circuit's decision *in that case*, and any decision it issues on remand must comply with the findings and conclusions of the appellate court. Whether the Board may choose to engage in "nonacquiescence" of the Fifth Circuit's decision *in some other case* is speculative at best, and it is an insufficient basis for granting Sprint's request that I simply ignore the court's valid legal precedent and dismiss Mr. Jordan's complaint. On the contrary, I find, for the reasons discussed below, that the court's decision in *Willy* is well reasoned, consistent with other legal authority, and dispositive of the issues raised in Respondent's motion.

Willy involved a retaliatory discharge claim filed by an in-house environmental attorney, Donald J. Willy, against his former employer, Coastal Corporation. While employed by Coastal,

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[12] While courts will generally give great deference to an agency's *interpretation of a statute it administers*, the issue presented in this case, *i.e.*, whether a complainant in a retaliatory discharge action may rely on statements or documents covered by the attorney-client privilege, is not such an issue, nor is it unique to any statute administered by the Department of Labor. Thus, Sprint's reliance on, for example, the Board's decision in *In the Matter of Suburban Air Freight, Inc.*, ARB No. 98-160 (ARB Aug. 21, 2000), Mot. to Dismiss at 21, holding that airline pilots are not "learned professionals" under the Service Contract Act is inapposite inasmuch as the Board there was clearly interpreting a statute administered by the Department of Labor. The applicability of the attorney-client privilege is an issue which arises in many varied contexts, both criminal and civil, and it is highly unlikely that a reviewing court would grant substantial, if any, deference to an agency's decision on that issue.

Willy had prepared an environmental audit report ("the Belcher Report") relating to Belcher Oil Company, a subsidiary of Coastal, which concluded that Belcher was exposed to substantial liability for violating several federal environmental statutes. Willy's co-workers and supervisors took exception to the substance, as well as tone, of Willy's conclusions, and revisions were thereafter made to the report without Willy's input or acquiescence. Willy's relationships with co-workers subsequently became strained, and, after an un-related incident involving Willy's work with another of Coastal's clients, Willy's supervisor concluded that he had lied about certain matters and terminated Willy's employment. Willy subsequently filed a whistleblower complaint with the Department of Labor, and was ultimately found entitled to relief by the presiding ALJ.[13]

In its February 27, 2004 decision, the ARB found that the Belcher report was covered by the attorney-client privilege and reversed prior orders of the Secretary and ALJ on remand which found in Willy's favor. When the Board's decision was appealed to the Fifth Circuit, the court agreed with Willy that the Belcher Report was admissible despite the attorney-client privilege. Finding that questions of privilege which arise in the course of claims involving federal rights are governed by the principles of federal common law, the court further determined that the "breach of duty" exception to the attorney-client privilege supported Willy's ability to use the Belcher Report in support of his claim. *Willy v. Admin. Rev. Bd.*, *supra*., 423 F.3d at 496. The court thus rejected the ARB's conclusion that "an attorney may use privileged documents *only* as a shield and never as a sword." *Ibid*. It wrote, in relevant part:

> The case law amply demonstrates the . . . proposition that the attorney-client privilege only prohibits a party from *simultaneously* using the confidential information as both a shield and a sword. Stated differently, the "shield *and* sword" analogy is conjunctive: it does not stand broadly for the proposition that an attorney may never use confidential information offensively.

Id. at 497. With respect to the First Circuit's decision in *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7 (1st Cir. 1998), upon which the ARB relied in dismissing Willy's claim, the Fifth Circuit concluded that the Board had "misinterpreted the holding of *Siedle* and the law on which that holding relied." It explained:

> First, it is indisputable that the *Siedle* court based its holding on Massachusetts law, not federal law. Second, . . . the *Siedle* court treated whether a seal order

[13] The procedural history of the case is considerably more lengthy and convoluted. After the Wage and Hour Division of the Department of labor (OSHA's predecessor in responsibility for investigating whistleblower complaints) found in Willy's favor, the presiding ALJ recommended dismissal of the complaint based in part on then-existing precedent which required that a whistleblower contact a governmental entity with respect to purported environmental violations. Prior to this decision, the ALJ had granted Willy's motion to compel production by Coastal of the Belcher report, but the report had not been produced before the ALJ's recommended decision was appealed. The Secretary (then the reviewing authority for ALJ decisions in whistleblower cases) rejected the ALJ's recommended dismissal of Willy's complaint, and it remanded the case for further proceedings. Coastal continued to refuse to produce the Belcher report, and the ALJ subsequently admitted into evidence two drafts of the report prepared by Willy when he was employed by Coastal. The ALJ thereafter found in favor of Willy and the decision on liability was reviewed and affirmed by the Secretary. The presiding ALJ in the case thereafter issued a recommended decision and order awarding damages, and that decision was appealed to the ARB, which by then had replaced the Secretary as the reviewing authority in whistleblower cases.

> should remain in effect and was primarily concerned with the right of the public – particularly, the press – to have access to court records, not with the attorney's use of the confidential information against his client/employer. . . . The *Siedle* court neither explicitly nor implicitly held that the attorney could never use confidential information against his employer. It merely reversed the district court's order that the seal should be lifted.

Id. at 497-98. The court further found the ARB's conclusion, that the self-defense exception to the privilege was limited to a breach of duty a lawyer owes a client, was "a strained interpretation of the language of the exception itself." *Id.* at 500. Citing the ABA Model Rules of Professional Conduct, the court wrote:

> [T]he Model Rules specifically provide that "[a] lawyer may reveal . . . information [relating to representation of a client] to the extent the lawyer reasonably believes necessary . . . to establish *a claim* or defense *on behalf of the lawyer in a controversy between the lawyer and the client* . . . ." That a lawyer may assert a "claim" against his client means that the client breached a duty to the lawyer, not the opposite, as the ARB held. The American Bar Association endorses this view as well:
>
>> The Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in-house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client *and may reveal information to the extent necessary to establish her claim against her employer*. The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed.

Ibid. citing MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) and AMERICAN BAR ASS'N FORMAL ETHICS OPINION 01-424 (Sep. 22, 2001) (italics in original). Based on the foregoing, the Fifth Circuit vacated the ARB's decision and remanded the case for a decision on the merits based on the ALJ's and Secretary's prior determinations. *Id.* at 501.

Here, as was the case in *Willy*, an in-house attorney is alleging that he was discharged in retaliation for disclosing what he reasonably perceived to be violations of law governed by a federal whistleblower statute. Here, also as in *Willy*, the ability of Complainant to prove his case is dependent upon his access to, and use of, statements and documents generated during the course of his professional endeavors on behalf of his employer. And here, as the court found in *Willy*, I find that Complainant is entitled to use and rely on such communications in support of his claim against Sprint. The ABA's Formal Ethics Opinion cited by the Fifth Circuit further supports this conclusion.

In its September 22, 2001 ethics opinion, the ABA expressly interpreted the term "claim" used in Rule 1.6(b)(2). It wrote, in relevant part:

> The term "claim is not defined under the Model Rules. In the predecessor Code of Professional Responsibility, DR 4-101(C) allowed a lawyer to reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." When the Model Rules were adopted in 1983, the Comments explained: "With regard to paragraph (b)(2), DR 4-101(c)(4) provided that a lawyer may reveal 'confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct.' Paragraph (b)(2) *enlarges* the exception to include disclosure of information relating to claims *by the lawyer* other than for the lawyer's fee – for example, recovery of property from the client." Recently, the Montana Supreme Court concluded that Rule 1.6 of the Montana Rules of Professional Conduct, which is identical to Model Rule 1.6, contemplates revealing confidential client information by a former in-house lawyer pursuing a retaliatory discharge claim against her former employer. We conclude that a retaliatory discharge or similar claim by an in-house lawyer against her employer is a "claim" under Rule 1.6(b)(2).

ABA Formal Ethics Opinion 01-424 at 1 (footnote references omitted) (italics added). The ABA expressly noted in its opinion that "[r]etaliatory discharge actions provide relief to employees fired for reasons contradicting public policy" and that "[t]he Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations." *Id.* at 2. The opinion thus makes clear that the Model Rules adopted in 1983 *expanded* the instances in which an attorney might rely on otherwise confidential information to include his or her *affirmative* use of such information in a claim of retaliatory discharge against a former employer.

In the instant case, Mr. Jordan alleges that he was discharged as in-house counsel for Sprint because he "reported various types of inappropriate conduct at Sprint [relating to, *inter alia*, the filing of inaccurate financial information with the SEC]." Complaint of Jack R. T. Jordan at 1-2. Mr. Jordan was *required* to report any evidence of a what he believed to be a material violation of federal securities laws pursuant to the provisions of the Act, as well as regulations adopted by the Securities and Exchange Commission ("SEC") pursuant to that statute. *See* 17 C.F.R. Part 205 (prescribing minimum standards of professional conduct for attorneys appearing and practicing before the SEC adopted pursuant to Section 307 of Sarbanes-Oxley Act, 15 U.S.C. § 7245). His conduct thus falls squarely within the parameters of the ABA's Formal Ethics Opinion.

Finally, it bears noting that Sprint relies, in part, on the First Circuit's decision in *Siedle* in support of its motion to dismiss and/or for summary judgment. Mot. to Dismiss at 23-24. As the Fifth Circuit noted, however, the *Siedle* court was only determining whether Defendant was entitled to a protective seal, not whether the case should be dismissed. *See Siedle v. Putnam Investments, Inc.*, *supra*, 147 F.3d at 9. Furthermore, the applicable Massachusetts disciplinary rule the court relied upon in *Siedle* was a superseded version of DR 4-101, not Model Rule 1.6. *Ibid*. As the ABA's 2001 Formal Ethics Opinion makes clear, Model Rule 1.6 *enlarges* the

exception previously permitted by DR 4-101 to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee.

Based on the foregoing, I find that Mr. Jordan is not precluded from relying on statements or documents covered by the attorney-client privilege in pursuit of his Sarbanes-Oxley whistleblower complaint against Sprint. I further find, however, that Mr. Jordan is obligated to take care not to disclose such information beyond that reasonably necessary to establish his claim, and that, at least at this juncture, the parties' pleadings filed in this case must remain sealed.

II. RESPONDENT'S REQUEST FOR CERTIFICATION FOR ARB REVIEW.

Sprint requests that, in the event its motion to dismiss and/or for summary judgment is denied, it should be allowed to "seek interlocutory review by the ARB and stay the proceedings in the interim." Mot. to Dismiss at 25. In support of its request, Sprint offers three reasons why an interlocutory appeal is appropriate: (1) "there plainly would be substantial grounds for disagreement with [my decision that the ARB's vacated decision in *Willy* does not support dismissal of Mr. Jordan's complaint] . . . ;" (2) an immediate appeal of my denial of the motion would materially advance the termination of the litigation; and (3) because of the "special sensitivity presented by disclosure of privileged information [which should be resolved before the case proceeds]." *Id.* at 26. I find, for the reasons set forth below, that interlocutory review by the ARB of my denial of Sprint's motion is appropriate.

In *United States Dept. of Labor, OFCCP v. Bank of America*, ARB No. 04-169 (Dec. 17, 2004), the Board reviewed the presiding ALJ's order denying the respondent's motion for certification for interlocutory appeal under the collateral order exception to the finality requirement established by 28 U.S.C. § 1291.[14] *Id.*, slip op. at 2 citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The Board wrote:

> [P]ursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The finality requirement's purpose is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."

[14] It further noted that the procedure for obtaining interlocutory review of an ALJ's order as being identical to that for appealing interlocutory orders from federal district courts. The statute providing for appellate review of district court orders states, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b).

Id. at 3-4 quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945) and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *Id.* at 3. Quoting from the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Risjord*,[15] it acknowledged that there exists a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 4. However, it further noted that "to fall within the collateral order exception, the order appealed must '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Ibid.* citing *Coopers & Lybrand*, *supra*, 437 U.S. at 468. Unless all three requirements are established, jurisdiction is not available under the collateral order doctrine. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988).

The issue in dispute with respect to Sprint's motion is whether Mr. Jordan may rely, in whole or in part, on information covered by the attorney-client privilege to prove his case. The Board previously decided this precise issue in *Willy*, but that decision has since been vacated by the Fifth Circuit. The Board's decision in *Willy* is thus no longer valid legal authority. However, despite my finding that the Fifth Circuit's decision is sound, particularly in light of the findings and conclusions set forth in ABA Formal Ethics Opinion 01-424 regarding an attorney's right to affirmatively use privileged material in his or her claim, it is conceivable that the Board, as well as other circuit courts of appeal, might reach a different conclusion. Furthermore, it is likely that a decision on this issue will have significant implications with respect to whistleblower claims brought under Sarbanes-Oxley by other attorneys who, like Mr. Jordan, were under a statutory duty to report perceived violations of securities laws. I also note that once disclosure of the statements and documents alleged by Sprint to be privileged is made, it would be difficult, if not impossible, to undo any potential harm to Sprint caused by an improvident disclosure of confidential information should the Board determine that Mr. Jordan may not rely on such information to prosecute his claim. As one court wrote:

> Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for a re-trial without use of the protected materials. At that point, however, the cat is already out of the bag.

In re Ford Motor Co., 110 F.3d 954, 963 (3rd Cir. 1997); *see also FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 407 (1st Cir. 1987) ("The privacy right to which the appellants lay claim must be vindicated now, or it will be forever lost; . . . .").

My decision on this issue also conclusively determines the issue of whether Mr. Jordan is entitled to proceed. Respondent alleges, and I agree, that if Complainant is unable to rely on privileged information to support his whistleblower complaint, he will be unable to allege sufficient facts upon which relief may be granted. Thus, in the event the Board reverses my

[15] 449 U.S. 368, 374 (1981) quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1950).

decision that Mr. Jordan may rely on privileged information to support his claim, such decision would entirely dispose of the case.

I further agree that resolution of the issue at this stage of the proceeding will promote, rather than impede, the litigation process. Clear guidance from the Board on the right of an attorney to proceed in a retaliatory discharge claim under Sarbanes-Oxley by using privileged information will, if the case goes forward, serve to facilitate any decision I may have to make prior to, or at, the formal hearing in this matter regarding the disclosure or use of such information. I thus find that this case falls within the collateral order exception to the provisions of 28 U.S.C. § 1291 and that interlocutory review is appropriate.

Conclusion

Congress created a statute which *requires attorneys* to report conduct the attorney reasonably believes constitutes a violation of federal securities laws, a breach of fiduciary duty, or any similar violation by the attorney's employer or an agent of the employer. 15 U.S.C. § 7245. At the same time, Congress provided that individuals who report such violations are to be protected from retaliation by their employer for having undertaken the actions required by the Act. There is no exception in the statute for attorneys, and Congress could not have intended that attorneys employed by publicly traded corporations be required to report suspected wrongdoing, but that they then be denied the whistleblower protections of Sarbanes-Oxley because the wrongdoing they reported was discovered while performing legal work for their employer. Such an interpretation of the statute would mean that no attorney who complies with his or her statutory and regulatory obligation under the Act, and who is then discharged for having done so, will ever be able to prevail in a whistleblower proceeding initiated pursuant to 18 U.S.C. § 1514A.[16]

There is no question that the attorney-client privilege is deeply embedded in our justice system, and that it is central to the free flow of information between an attorney and his or her client.[17] However, the privilege is not inviolable, and it is to be narrowly construed.[18] Here, where Congress has expressly imposed a reporting duty on attorneys which compels them to disclose suspected wrongdoing by their client, the privilege must give way under the circumstances presented by this case. Any other interpretation of the statute would exclude an entire class of corporate whistleblowers from the protections afforded by the Act and undermine the interests of the investing public which Congress sought to protect.[19] This does not mean, however, that every privileged communication between the client and attorney must become a matter of public record. Judges have the power, indeed the obligation, to maintain the confidentiality of protected communications through the use of protective orders or similar

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[16] Although it is conceivable that a corporation's attorney may learn of suspected wrongdoing by the corporation's officers or directors outside the scope of his professional duties as a lawyer, such instances will surely be rare, if they in fact ever occur.

[17] *See*, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[18] *See*, *e.g.*, *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983).

[19] The purpose of the Act is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745.

devices until such time, if at all, that an exception to the attorney-client privilege is shown to apply.

At the present time, the pleadings and other filings of the parties in this matter have been placed under seal, and they will remain under seal until such time as the Board determines whether it will conduct an interlocutory review of my denial of Sprint's motion. In the event the Board determines that Respondent's reliance on *Willy* is misplaced, and that its motion was properly denied, the case will then be remanded to me for further consideration. At that time, Sprint will be required to comply with my prior order that it specifically identify statements, documents, and/or portions of documents which it asserts are protected from disclosure by the attorney-client privilege. Mr. Jordan will then be permitted to respond to Sprint's designations, and a ruling on the applicability of the privilege will follow. In the event the Board determines that an in-house counsel, such as Mr. Jordan, may not rely on protected communications to prove his Sarbanes-Oxley complaint, such a decision would, as noted above, dispose of the case, and the matter would thereafter be dismissed. In that event, my protective order sealing the present record would remain in effect, and Sprint's reliance on the privilege would be vindicated.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Respondents' motion to dismiss and/or for summary judgment be, and hereby is, DENIED.

IT IS FURTHER ORDERED that this matter be, and hereby is, CERTIFIED to the Administrative Review Board to consider Respondents' interlocutory appeal[20] and that all proceedings at this level are STAYED pending the Administrative Review Board's ruling on the interlocutory appeal or refusal to accept the appeal for consideration.

SO ORDERED

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

[20] The rules applicable to Sarbanes-Oxley cases expressly provide that "[a]ny party desiring to seek review . . . of a decision of the administrative law judge . . . must file [within 10 business days of the date of the decision of the administrative law judge] a written petition for review with the [ARB]. . . ." 29 C.F.R. § 1980.110(a). It is thus incumbent upon Sprint to initiate interlocutory review by the Board by filing such petition within the prescribed period.