



**Issue Date: 18 August 2017**

Case No.: 2016-AIR-00020

In the Matter of

**CHARLES SHI**

Complainant

v.

**MOOG INC., AIRCRAFT GROUP**

Respondent

**DECISION AND ORDER**  
**DISMISSING COMPLAINANT'S COMPLAINT**  
**FOR LACK OF JURISDICTION**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor ("DOL") complaint procedure. Protection of Employees Providing Air Safety Information, 49 U.S.C. § 42121 (2012). Implementing regulations are at 29 CFR Part 1979. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. **PROCEDURAL BACKGROUND**

On March 13, 2016, Complainant filed a written complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that Respondent terminated his employment in violation of the Act. Specifically, Complainant alleged that he notified Respondent in August 2015 and January 2016 of his concerns regarding a Chinese subcontractor's use of fake materials in machine parts that may have been installed on airplane control systems that could cause aircraft to crash. Complainant also alleged that he filed a report with the Federal Aviation Administration ("FAA") on January 13, 2016 and January 16, 2016, relaying these concerns. Respondent terminated Complainant's employment on January 14, 2016 and he alleges that it was due to these protected activities.

On April 12, 2016, OSHA issued a Closing Letter because it determined that Respondent is not a contractor or subcontractor of an air carrier within the meaning of 49 U.S.C. § 42121(e), finding that Respondent does not perform safety-sensitive functions by contract for an air carrier. Thus, OSHA concluded that Complainant and Respondent are not covered under AIR21.

On May 9, 2016, Complainant appealed OSHA's determination and the matter was subsequently transferred to the Office of Administrative Law Judges ("OALJ"). This Tribunal issued a "Notice of Assignment and Conference Call" dated June 2, 2016.

On July 19, 2016, following a pre-hearing conference with the parties,<sup>1</sup> this Tribunal issued a "Notice of Hearing and Pre-hearing Order," in which it scheduled the hearing for February 7, 2017 through February 10, 2017 in Buffalo, New York. This Tribunal also set a discovery deadline of November 25, 2016; the deadline to submit a pre-hearing statement for December 23, 2016; and the deadline to file dispositive motions for October 14, 2016.

On October 28, 2016, this Tribunal received via facsimile a joint motion in which the parties asked this Tribunal to resolve two issues: whether Complainant should be compelled to appear for deposition in this proceeding; and the location of such deposition.

On October 31, 2016, this Tribunal issued an "Order Concerning the Manner and Location of Complainant's Deposition," which ruled that Complainant had to make himself available for deposition at a location controlled by the United States and that Respondent was not required to depose him in China. This Tribunal gave Complainant the option of identifying Honolulu, Hawaii; Anchorage, Alaska; or Guam as possible locations for the deposition. Complainant was warned that should he opt not to attend a scheduled in-person deposition, he would be precluded from presenting his testimony at the scheduled hearing.

On November 2, 2016, this Tribunal's office received an e-mail with attachments from Complainant's counsel. Complainant plainly stated "I will not set foot on US soil for testifying." In this letter, he disagreed with this Tribunal's statement about the nature of China's procedures for collecting testimony for foreign hearings<sup>2</sup> and offered to provide testimony at a U.S. consulate in China. Thus, he did not comply with this Tribunal's Order requiring him to select one of the locations set forth in its Order.

On November 4, 2016, this Tribunal issued an Order to Show Cause directing Complainant to explain why this matter should not be dismissed for failure to prosecute or to cooperate in discovery. In this Order, Complainant was specifically directed to make an offer of proof as to how he could reasonably show a violation of the Act given the preclusion of Complainant's testimony for failing to subject himself to a deposition, as directed by this Tribunal.

On November 17, 2016, this Tribunal received Complainant's response to the Order to Show Cause. Complainant maintained his refusal to be deposed in the territory of the United States out of fear that his life would be placed in danger if he were to enter U.S. soil. However, he did agree to appear at the hearing if it were held in Guam. Further, Complainant's counsel's response indicated that Complainant would "be able to meet its burden without testifying."

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<sup>1</sup> As in his pre-hearing statement, Complainant requested that the hearing be held in China.

<sup>2</sup> Complainant asserted "[t]he law governing taking evidence in China for a foreign proceeding is the Civil Procedure Law of the People's Republic of China (Amended on August 31st, 2012)."

On November 18, 2016, this Tribunal issued an Order sanctioning Complainant for his failure to submit to a deposition. The sanction order provided: “Complainant shall be precluded from providing testimony at the hearing. Further, no statement made by Complainant that goes to the elements of the complaint will be admitted.” The Order further discussed the evidence available to Complainant as a result of the application of sanctions. Complainant suggested this Tribunal use the materials submitted in support of his Motion for Summary Decision;<sup>3</sup> however, the Order noted that such sources constitute argument rather than evidence and other sources provided “little if any probative information.” This Tribunal concluded the November 18, 2016 Order:

So the parties clearly understand this ruling . . . [Complainant] shall not be permitted to testify at this hearing, nor will this Tribunal give weight to any statement made by Complainant offered at the hearing. This preclusion includes any statements by Complainant contained in any document either party attempts to offer at the hearing.

The November 18, 2016 Order also directed Complainant to inform this Tribunal by December 7, 2016, if he planned to participate in these proceedings in Guam via teleconference. In the absence of a timely response, Complainant was expected to participate in person and this Tribunal cautioned him that the hearing would proceed without his presence if he did not appear at the hearing at the appointed time.

On November 25, 2016, discovery closed.

On November 29, 2016, Complainant’s initial counsel moved to withdraw his representation.

On December 5, 2016, Complainant filed his first request for reconsideration of the sanction order. This Tribunal denied that motion on December 20, 2016.

Also on December 20, 2016, this Tribunal granted Complainant’s counsel’s motion to withdraw his representation.

On December 21, 2016, this Tribunal issued an Order asking why the parties could not resolve this matter on the record, rather than through hearing.

On December 27, 2016, Complainant filed his second request for reconsideration of the sanction order. This Tribunal denied that motion on January 10, 2017.

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<sup>3</sup> These include: an email dated January 13, 2016 from Complainant to the FAA filing his complaint; an email dated August 17, 2016 from Complainant’s counsel that included a written statement from Complainant; the District Court for the D.C. Circuit’s memorandum opinion *Bombardier v. U.S. Dep’t of Labor*, No. 15- cv-604 (D.D.C. Nov. 12, 2015)(case below 2014-AIR-00017); Complainant’s response to [Respondent’s] Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction; and a one page summary of very poor quality audiotapes previously provided to this Tribunal.

On January 4, 2017, Complainant responded to the December 21, 2016 Order agreeing that the matter could be resolved on the record.

On January 9, 2017, Respondent filed its Motion for Summary Decision.

On January 11, 2017, based upon the parties agreeing to have the matter decided on the record, this Tribunal cancelled the hearing and set February 24, 2017 as the date for submission of evidence, with a briefing schedule to follow.

On January 18, 2017, an attorney filed a Notice of “Limited” Appearance requesting to appear on Complainant’s behalf for the limited purposes of filing certain motions. Attached to this notice was Complainant’s third request for reconsideration of the sanction order and motion to consolidate a summary decision motion with the hearing on the record.

On January 21, 2017, Complainant submitted his Opposition to Respondent’s Motion for Summary Decision by email, with over 75 exhibits included. A January 30, 2017 Order directed Complainant to provide an index of such exhibits, and to remove any evidence lacking in evidentiary value.

On January 24, 2017, Respondent filed a Motion to Strike Notice of “Limited” Appearance. In this motion, Respondent asserted that a limited appearance is not permitted in these proceedings, that Complainant had been represented by counsel, and recounted Complainant’s purported dilatory approach to discovery and his failure to comply with the Tribunal’s orders. Respondent also opposed reconsideration of the sanction order.

Notwithstanding Respondent’s motion, also on January 24, 2017, this Tribunal granted Complainant counsel’s motion to appear for the limited purpose of filing motions on behalf of Complainant.

On January 31, 2017, Respondent submitted its Memorandum of Law in “Opposition to [Complainant’s] Motions to Vacate Sanctions and to Combine [Respondent’s] Motion for Summary Decision with a Decision on the Record.”

On February 10, 2017, this Tribunal denied Complainant’s request for reconsideration of its sanction order. Further, this Tribunal denied Complainant’s January 18, 2017 request to consolidate Respondent’s summary decision motion with the hearing on the record, stating: “This matter is not appropriate for summary disposition because there is a genuine issue of fact as to whether Complainant is a person protected under the Act.”

Also on February 10, 2017, this Tribunal received Complainant’s pre-hearing statement and index of proposed exhibits; Respondent submitted such items on February 24, 2017.

On February 27, 2017, Complainant’s counsel filed an “Unopposed Motion to Withdraw Limited Appearance of Counsel for Complainant” and informed this Tribunal that Complainant

will continue prosecuting his case *pro se*.<sup>4</sup> A March 6, 2017 Order granted Complainant's motion.

On March 10, 2017, Respondent filed a "Motion to Preclude [Complainant's] Exhibits."

On May 11, 2017, this Tribunal issued an Order that clarified its exclusion of the following exhibits: CX 12, CX 26, CX 36, CX 44, and CX 46. The Order also notified the parties of this Tribunal's decision not to consider the statements Complainant made in exhibits CX 19–CX 25, CX 28, CX 30, CX 32–CX 33, CX 42 and 45. The Order further excluded CX 1, CX 5, and CX 13.<sup>5</sup> Finally, the Order regularized Complainant's exhibit numbers (in contrast to the numbering system Complainant utilized within his "Index of Exhibits," which this Tribunal received on February 13, 2017).

## II. FACTUAL BACKGROUND AND EVIDENCE

### A. Brief Overview of the Factual Background

Complainant—a Chinese citizen who at all times relevant to the case lived and worked in China—alleges that his Chinese employer violated the Act when its non-American agents terminated his employment in alleged retaliation over his expressed concerns regarding the creation of Chinese-made aircraft parts, which were purportedly placed into service by certain American aircraft manufacturers.

### B. Testimonial Evidence

The record contains no testimonial evidence. *See* this Tribunal's Order of November 18, 2016.<sup>6</sup>

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<sup>4</sup> As an initial matter, it is a well-established principle that factfinders must liberally construe the complaints and papers filed by *pro se* litigants "in deference to their lack of training in the law and with a degree of adjudicative latitude." *Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 10-11 (May 15, 2014) (internal quotation marks omitted). *See also* *Wyatt v. Hunt Transport*, ARB No. 11-039, slip op. at 2 (Sep. 21, 2012); *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 3 (Dec. 19, 2013). At all times, this Tribunal has attempted to follow the Board's mandate to liberally construe Complainant's papers and statements.

<sup>5</sup> On June 15, 2017, Respondent submitted a motion requesting this Tribunal to direct Complainant to affirm that he has not made any disclosures in violation of this Tribunal's protective orders. In the event that Complainant answered in the affirmative, Respondent moved this Tribunal to dismiss Complainant's case. Because this Tribunal does not have jurisdiction over Complainant's claim, any additional action on this Tribunal's part would be conducted in *ultra vires*. *See* Black's Law Dictionary (10th ed. 2014) (defining *ultra vires* as "unauthorized; beyond the scope of power . . . granted . . . by law."). Accordingly, this Tribunal cannot remedy the concerns Respondent asserted in its June 15, 2017 motion.

<sup>6</sup> This Tribunal recognizes the exceptional nature of this case in the sense that it requires adjudication absent Complainant's testimonial evidence. The lack of such evidence is known to the parties and is a direct result of Complainant's refusal to stand before this Tribunal in open hearing and subject himself to cross examination. *See* Orders dated November 18, 2016; December 20, 2016; January 10, 2017; and February 10, 2017. A January 11, 2017 Order acknowledged the parties assent to a hearing on the record and, in part, cancelled the hearing.

C. Summary of the Documentary Evidence

In support of his case, Complainant presents the following evidence, as described below:

Exhibit	Description
CX 2 <sup>7</sup>	Respondent's Form 10-K (End of Fiscal Year 2015). Complainant highlighted a paragraph stating that all of Respondent's subsidiaries are "wholly owned by [Respondent], directly or indirectly. The names of indirectly owned subsidiaries are indented under the names of their respective parent corporations." Moog Control Systems (Shanghai) Co., Ltd. <sup>8</sup> is listed as an indented name under Moog Controls Hong Kong Ltd.
CX 3 <sup>9</sup>	Complainant's Employment Contract. Complainant was hired as "Supply Chain Manager in Aircraft Group."
CX 4	Complainant's name card containing his official work-address. Complainant worked for "Moog Aircraft Group," at the Jinke Road, Shanghai facility. Estella Ling was the HR Manager for "Moog China" located at the Yiwei Road Shanghai facility.
CX 6	"Aircraft Group Supply Chain Organization." Complainant was listed as the "Development Lead, Far East Supplier."
CX 7 <sup>10</sup>	Declaration of Katherine Schaefer, Respondent's Vice President and Head of Global Supply Chain.
CX 8	Pictures of Complainant among Respondent's representatives.
CX 9	"Moog China Organization." Chart showing that Complainant worked in the "Supply Chain," in part, under Kevin Walek.
CX 10	FOIA Request 2017-001768, dated December 21, 2016. This exhibit includes other documents, such as FAA memoranda from November 4, 2016 and May 27, 2016 concerning Complainant's complaints to the Agency about the same allegations underlying the instant matter.
CX 11	FAA letter to Complainant substantiating a violation dated November 8, 2016.
CX 14	Diagram of a B737 spoiler.
CX 15	Email from Claire Starzak to Jesse Mangual and Subramanya Bhat concerning NHJ risk mitigation actions, dated August 25, 2015.
CX 16	Deep dive audit of NHJ-proposal to mitigate risks, dated August 25, 2015.

<sup>7</sup> Also included in the record as JX T.

<sup>8</sup> This Tribunal, hereinafter, will refer to this entity as **Moog Shanghai**.

<sup>9</sup> Also included in the record as RX 22, Exhibit B.

<sup>10</sup> Also included in the record as RX 21.

<b>Exhibit</b>	<b>Description</b>
CX 17 <sup>11</sup>	NHJ Production Traceability Survey, dated August 7, 2015.
CX 18	NHJ Major Issue Summary, dated September 6, 2015.
CX 19* <sup>12</sup>	Email exchange dated April 5, 2015 between Complainant and Robert Fortune, an agent of the FAA.
CX 20*	Email exchange between Complainant and Fortune, dated September 26-27, 2016.
CX 21*	Transcript of phone conversation between Complainant and Sun Yongjun, Sales Manager at Gloria Material Technology, dated August 16, 2016.
CX 22*	Transcript of meeting between Complainant and Simon Shu, dated January 5, 2016.
CX 23*	Transcript of phone conversation between Complainant and Ziv Yu, General Manager of Suzhou Yike, dated January 7, 2016.
CX 24*	Email exchange between Complainant and Kevin Walek, dated August 20-21, 2015.
CX 25*	Transcript of phone conversation between Complainant and Pan Yongjuan, dated February 2, 2017.
CX 27	Email from Shawn Shao to Kevin Walek, dated August 28, 2015.
CX 28*	Email from Complainant to FAA personnel, dated October 31, 2016.
CX 29	FAA's "Suspected Unapproved Parts Program" Order, dated June 3, 2016.
CX 30*	Email from Starzak to Respondent's employees, dated September 8, 2015.
CX 31	777 Spoiler-Hydrogen Embrittlement Discrepancies Action Plans to Allow Disposition, dated September 14, 2015.
CX 32*	Email from Complainant to Bhat, dated September 24, 2015.
CX 33*	Email from Complainant to Bhat, dated September 24, 2015 (September 24 Email II).
CX 34	Email from Walek to several of Respondent's employees, dated August 26, 2015. Walek stated, "[w]e would like to bring to your attention a potential issue with New Hongji Prec. Parts Co. (NHJ) in Suzhou, China." Walek decided to perform a process audit.
CX 35	NHJ Process Walk Report, dated August 20, 2015. Claire Starzak, "Supplier Quality Engineer – Asia Supply Chain" created the report.

<sup>11</sup> Also included in the record as JX D.

<sup>12</sup> A star denotes that the exhibit contains Complainant statements. The November 18, 2016 Order sanctioned the Complainant and precluded this Tribunal from taking Complainant's statements into account when adjudicating his case.

<b>Exhibit</b>	<b>Description</b>
CX 37	Email from Shao to Walek, dated August 27, 2015.
CX 38	Email exchange between Walek, Complainant, Shao, and several other of Respondent's employees, dated August 28-29, 2015.
CX 39	Email from Walek to Joe Zou, Complainant's direct supervisor, dated August 29, 2015. Walek stated "We cannot sacrifice quality for delivery. [Starzak] and her team need to be confident NHJ is conforming to our requirements."
CX 40	Email from Walek to Zou with Counseling Session form attached, dated September 10, 2015. The reason for counseling involved Zou's handling of Complainant's ethics concerns.
CX 41	Emails from September 2015 between Ling, Don Needham, and Walek and forwarded to Satish Kumar. Needham determined that Zou "may have been in violation of Moog ethics policies"; however, it was not considered a "major violation."
CX 42*	Transcript of phone conversation between Complainant and Shao, dated January 14, 2016.
CX 43 <sup>13</sup>	Declaration of Ling.
CX 45*	Transcript of Termination Meeting, dated January 12-13, 2016. The meeting occurred between Complainant, Estella Ling, and Kumar at the 2nd floor meeting room of Moog Shanghai's 2966, Jinke Road address.
CX 47	Copy of Labor Contract of the People's Republic of China Approved by the National People's Congress Standing Committee on June 29th, 2007.
CX 48 <sup>14</sup>	Complainant and Respondent's Termination Agreement, dated January 13, 2016.
CX 49 <sup>15</sup>	Declaration of Minliang Xiong.

In support of its position, Respondent presents the following evidence, as described below:

<b>Exhibit</b>	<b>Description</b>
RX 1	Email dated September 7, 2015 from Claire Starzak to various individuals, including Complainant, about an audit conducted due to Complainant's concerns about quality and delivery of parts. Respondent provided this exhibit purportedly to show that it conducted an audit based on Complainant's complaints.
RX 2	Email dated September 24, 2015. Claire Starzak wrote to Complainant, among others, concerning the certificate used by a secondary supplier. Respondent provided this exhibit purportedly to show that Respondent was aware of

<sup>13</sup> Also included in the record as RX 22.

<sup>14</sup> Also included in the record as RX 22, Exhibit F.

<sup>15</sup> Also included in the record as JX Y.

Exhibit	Description
	Complainant’s allegations of non-compliance “by a second-tier supplier prior to August 2015, the first alleged instance of [Complainant’s] reporting.”
RX 3	Email dated September 24, 2015 from Complainant to Subramanya Bhat, forwarding emails from Lee Morris, Manager of Manufacturing Engineering, Asian Supply Chain, Moog Aircraft Group, concerning the second tier supplier Complainant complained of. Morris stated that Respondent “cannot audit a supplier informally as this is a breach of Moog’s processes.” Respondent provided this exhibit purportedly to show that “Moog was aware of alleged non-compliance by second-tier supplier prior to August 2015, the first alleged instance of [Complainant’s] reporting.”
RX 4	Memorandum dated September 30, 2015 from John Scannell to “all employees.” Respondent provided this exhibit purportedly to show the planned downsizing of Moog Shanghai operations. The document begins: “The last few years have been a tough time for our Company and for many of you who are part of the Moog family.”
RX 5	“Machined Parts [Powerpoint] Presentation” purportedly about “Downsizing of Moog Shanghai operations, resulting in reduction in force in 2016.” Each slide has a header containing the Moog corporate logo, and a header stating “Moog Proprietary and/or Confidential Data.” The document does not contain the term “Moog Shanghai,” but does state that a “side effect” of the new rules of engagement was “removal of [the] Shanghai office.”
RX 6	Katherine Schaefer’s <sup>16</sup> notes related to the “Machined Parts [Powerpoint] Presentation” allegedly related to the “downsizing of Moog Shanghai operations, resulting in reduction in force in 2016.”
RX 7	Email dated January 5, 2016 between Katherine Schaefer and Satish Kumar <sup>17</sup> concerning the plan to “decentralize the China operations into various other countries in Asia and moving out of Shanghai as well.”
RX 8	Email dated January 5, 2016 between Subramanya Bhat, Katherine Schaefer, Mike Ratajczak, Satish Kumar, Joe Zou, Kevin Walek, Mike Rowen, and Paul Wilkinson discussing the reduction in force “in Shanghai.”
RX 9	Email dated January 5, 2016 between Subramanya Bhat, Katherine Schaefer, Mike Ratajczak, Satish Kumar, Joe Zou, Kevin Walek, Mike Rowen, and Paul Wilkinson concerning “taking a totally different look at how we do business in China.”
RX 10	Email dated January 8, 2016 between Lynn Wang, <sup>18</sup> Satish Kumar, Joe Zou, and Estella Ling. The email contains details concerning the termination of Complainant, including his “calculation of payment.” Complainant’s last day of work was set for January 12, 2016. Respondent provided this exhibit purportedly to show that Complainant “was terminated as a result of a reduction in force in Moog Shanghai.”

<sup>16</sup> Schaefer’s email signature is as follows: “GM/Head of Global Supply Chain Moog Aircraft Group.”

<sup>17</sup> Kumar’s email signature is as follows: “Regional head – HR, Asia Pacific, Moog Aircraft Group.”

<sup>18</sup> Wang’s email signature is as follows: “HR Advisor, Moog Industrial Group” with an office address in Shanghai.

Exhibit	Description
RX 11	Spreadsheet dated January 8, 2016 reflecting the payment schedule concerning Complainant's termination. Respondent provided this exhibit purportedly to show that Complainant "was terminated as a result of a reduction in force in Moog Shanghai."
RX 12	Email dated January 17, 2016 from Satish Kumar to Estrella Ling attaching a report concerning a conversation held with Complainant. Respondent provided this exhibit purportedly to show that Complainant "was terminated as a result of a reduction in force in Moog Shanghai. [Complainant] tried to blackmail Moog Shanghai to provide [a] higher severance package."
RX 13	Satish Kumar's January 22, 2016 memorandum concerning his termination session with Complainant. As well as Complainant and Kumar, Estrella Ling was present at the meeting. The memorandum begins, Complainant "was one of the two employees in the RIF list in AG supply chain in China." Joe Zou "is [Complainant's manager] and was assigned to tell Complainant to attend the January 12, 2016 meeting." Complainant asked for three additional years of compensation. The meeting broke for the day and overnight Complainant sent an accusatory email concerning his boss to John Scannel and Mark Trabert, two "senior executives." The next day, Kumar and Ling decided to increase the proposed severance package "based on compassionate grounds." Complainant "wanted a reward for raising the issue of the vendor and Joe to Management and that Management has not responded to him. [Complainant] was clearly told that raising an issue with the Management does not result in reward or compensation and there is no such policy in Moog." Complainant demanded money for not informing the FAA of his "allegations." "He finally accepted the package and signed the letter that his service is terminated on mutually accepted terms." On the evening of January 13, 2016, Complainant sent an email "to [the] FAA making various allegations and forwarded the same [email] to Satish, which was forwarded to [Schaefer] and [Wilkinson]."
RX 14	January 22, 2016 Termination Agreement from Joe Zou to Rong Dingyi, which stated that "the labor contract between you and Moog will be terminated on this date . . . . You and Moog reach the following agreement after friendly negotiations." Respondent provided this exhibit purportedly to show that the "reorganization of Moog Aircraft Group included decentralization of China Operations and the resulting reduction in force." The agreement contained the "truncated Moog company stamp" and a stamp from "Moog Control System (Shanghai)."
RX 15	June 24, 2016 Termination agreement from Bo Kuibo to Simon Yan. The document contained the stamp of "Moog (Shanghai) Co. Ltd." and the stamp of "Moog Control Equipment (Shanghai) Co. Ltd."
RX 16	June 30, 2016 Memorandum with subject: "Notice of Expiry of Labor Contract." This document concerns the termination agreement between Moog Control System (Shanghai) and an individual named Mao Pingzhou.
RX 17	August 30, 2016 Memorandum with subject: "Letter of Relocation Agreement." This document concerns the relocation of Jerry Zhang, who was required to move to Xiamen and "continue to be employed by Moog Control

Exhibit	Description
	System (Shanghai) Co. Ltd.” Respondent provided this exhibit purportedly to show that the reorganization of “Moog Aircraft Group included decentralization of China Operations and the resulting reduction in force.”
RX 18	October 10, 2016 “Agreement on Termination of Labor Relations” between Tom Wu and “Moog Control Equipment (Shanghai) Co. Ltd.”
RX 19	Email from Anne-Maree Clarke to Christine Kimmel-Hurt regarding the relocation of Claire Starzak and Lee Morris to the United Kingdom. “Moog HR Shanghai” prepared a document concerning this relocation.
RX 20 <sup>19</sup>	Respondent’s expert disclosure form discussing the background of Randal Bougard, a regulatory compliance manager. Respondent provided this exhibit purportedly to show Bougard’s experience to serve as an expert witness.
RX 21	Declaration of Katherine Schaefer, “Vice President and Head of Global Supply Chain for Moog Aircraft Group.” According to Schaefer she is “personally familiar with Moog’s strategic plans concerning its supply chain in Asia in 2015 and 2016. Moog Control Systems (Shanghai) Co., Ltd. was incorporated in China in 1997 and is a subsidiary of Moog Controls Hong Kong, Ltd., which is a subsidiary of Moog Inc. Complainant was allegedly never employed by Moog Inc., only Moog Shanghai. Effective January 6, 2017, the Moog Shanghai facility was closed and the supply chain group was downsized “significantly.” The decision to restructure Moog’s Asian supply chain, including plans to move away from the Shanghai office, was made in January 2016. Restructuring involved “laying off a portion of the Moog Shanghai employees in China, including [Complainant].” Moog Shanghai’s Human Resource Manager, Estella Ling, implemented the terminations.
RX 22	<p>January 7, 2017 Declaration of Estella Ling, “Manager of Human Resources for Moog Control Systems (Shanghai) Co., Ltd.” Ling stated that Moog Shanghai was incorporated in 1997 in China as a subsidiary of Moog Controls Hong Kong, Ltd., which is, in turn, a subsidiary of Moog Inc. Its employees oversee the Chinese and Southeast Asia suppliers for Moog Aircraft Group, a division of Moog Inc., including procurement of components and supplier management. Moog Inc. conducts all the purchasing; “Moog Shanghai does not purchase or pay for components itself.” Moog Shanghai paid Complainant’s salary. A January 2016 reorganization of the supply chain department in Moog Shanghai meant that 30% of the supply chain employees would be paid off; Ling implemented the layoffs.</p> <ul style="list-style-type: none"> <li>• Exhibit A <ul style="list-style-type: none"> <li>○ August 14, 2006 Offer of Employment between Complainant and Moog Control System (Shanghai) Co. Ltd. <ul style="list-style-type: none"> <li>▪ Position: “Supply Chain Manager – China”</li> <li>▪ Reporting Manager: Global Supply China Development Manager; Regional Manager – China</li> <li>▪ Work Location: Shanghai</li> <li>▪ Salary and other Compensation: paid in renminbi</li> </ul> </li> </ul> </li> </ul>

<sup>19</sup> Respondent apparently decided not to employ Bougard, as his expert report does not appear in the record.

Exhibit	Description
	<ul style="list-style-type: none"> <li>▪ Benefits: “You will be eligible to all statutory benefits as stipulated by the local government as well as other supplementary benefits which may be provided by the company.”</li> <li>• Exhibit B <ul style="list-style-type: none"> <li>○ Contract details <ul style="list-style-type: none"> <li>▪ Moog Control System (Shanghai) Co., Ltd. is a “wholly foreign-owned enterprise” with a registered office in Shanghai.</li> <li>▪ The parties contracted “pursuant to the provisions of the <i>Labor Law of the People’s Republic of China</i>, the <i>Labor Contract Law of the People’s Republic of China</i>, and relevant Chinese laws and regulations” (italics in the original) (internal parenthetical statements omitted).</li> <li>▪ Remuneration is required in renminbi.</li> <li>▪ The company is required to pay social security, and provide a safe and sanitary workplace, as “stipulated by the State.” The company is also required to follow various Chinese workers’ rights laws.</li> <li>▪ The parties agreed that the contract could be rescinded due to “Other circumstances as stipulated by . . . Chinese laws and regulations.”</li> <li>▪ The contract included a clause specific to Complainant’s rights under Articles 24 and 32 “of the <i>Labor Law of the People’s Republic of China</i>” (italics in the original).</li> <li>▪ Any “labor dispute resolution” may be heard by the “local Labor Dispute Arbitration Committee.”</li> </ul> </li> <li>• Exhibit F <ul style="list-style-type: none"> <li>○ January 13, 2016 email from Joe Zou to Complainant with subject: “Mutual Agreement on Termination of Labor Contract.” <ul style="list-style-type: none"> <li>▪ The document contained the signature of Complainant and the stamp of “Moog Control System (Shanghai) Co., Ltd.”</li> <li>▪ Severance payments were included in renminbi.</li> </ul> </li> </ul> </li> </ul> </li> </ul>
RX 23	January 9, 2017 Termination Agreement between Moog Shanghai and Joy Liu. Respondent provided this exhibit purportedly to show that the “reorganization of Moog Aircraft Group included decentralization of China Operations, and the resulting reduction in force.”
RX 24	Office closure checklist for address No. 2966, Jinke Road, Zhanjiang with the “owner” being Moog Control System (Shanghai) Co. Ltd.
RX 25	Certificate of Accuracy concerning translation of the documents from Mandarin Chinese to English
RX 26	February 20, 2017 Declaration of Estella Ling. Ling stated that, due to the reorganization and downsizing of the “supply chain group that was employed by Moog Shanghai,” the following individuals were terminated: Complainant,

<b>Exhibit</b>	<b>Description</b>
	Cao, Rong, Mao, Liu. Starzak and Morris “were relocated from Shanghai (where they were based) and repatriated to the United Kingdom in December 2016. Five other employees who worked in the “Moog Shanghai facility” were relocated. Joe Zou, “[Complainant’s] direct supervisor, returned to the United States in the Fall of 2016 to work at Moog.” Complainant worked at the 2966 Jinke Road office, and that office was closed on January 6, 2017. Ling attached Exhibits A through G in support of her declaration.
RX 27	February 21, 2017 Declaration of Claire Starzak. Starzak is a supplier quality engineering manager who “formerly worked for Moog Shanghai, at the facility located at Wai Gao Qiao Free Trade Zone, Shanghai, China.” Starzak’s declaration generally concerned allegations that certain suppliers were sharing AS 9100 certificates. Starzak stated that the “Moog Shanghai was closed [in December 2016] as part of a corporate reorganization.”

The parties also present the following joint exhibits:

<b>Exhibit</b>	<b>Description</b>
JX A	Complainant’s August 14, 2006 Employment Contract with Moog Control System (Shanghai) Co. Ltd., summarized <i>supra</i> .
JX B	Specification for block trunnion.
JX C	Details of Complainant’s August 14, 2006 Employment Contract with Moog Control System (Shanghai) Co. Ltd., summarized <i>supra</i> .
JX D	NHJ Production Traceability Survey, dated August 7, 2015.
JX E	NHJ Process Walk Report, dated August 20, 2015.
JX F	Email from Claire Starzak <sup>20</sup> to Jesse Mangual and Subramanya Bhat, dated August 25, 2015 with subject “NHJ risk mitigation actions.”
JX G	Deep Dive Audit of NHJ, dated August 25, 2015.
JX H	August 26, 2015 Email from Kevin Walek <sup>21</sup> to various individuals, including Complainant, Joe Zou, and Shawn Shao concerning “a potential issue” with a parts supplier.
JX I	Shawn Shao’s <sup>22</sup> August 27, 2015 response to Walek’s email.
JX J	Lee Morris’s <sup>23</sup> August 27, 2015 response to Walek’s email.
JX K	August 28, 2015 email from Shawn Shao to Walek concerning the “NHJ parts issues.”
JX L	August 29, 2015 email from Claire Starzak to Complainant concerning the

<sup>20</sup> Starzak’s email signature is as follows: “Supplier Quality Engineering Manager Asia Supply Chain Moog Aircraft Group – Moog in China.” Starzak worked at the 2966 Jinke Road facility.

<sup>21</sup> Walek’s email signature is as follows: “Dir., Supply Chain, Moog Inc.” Walek worked at the East Aurora, New York facility.

<sup>22</sup> Shao’s email does not include a signature; however, it does contain a phone number containing a Chinese country code.

<sup>23</sup> Morris’s email signature is as follows: “Manager of Manufacturing Engineering, Asian Supply Chain, Moog Aircraft Group.” Morris worked at the 2966 Jinke Road address.

Exhibit	Description
	“NHJ parts issues.” Starzak states that information “should <b>only</b> be shared between Moog employees.” (emphasis in the original).
JX M	August 29, 2015 email from Walek to Complainant that Starzak should receive all quality concerns and “we should not push delivery of non-conforming parts to Moog.”
JX N	August 29, 2015 email from Walek to Complainant, stating that Starzak is leading the quality audit.
JX O	August 29, 2015 email from Walek to Joe Zou, Complainant, and others stating “We cannot sacrifice quality for delivery.”
JX P	August 29, 2015 email from Complainant to Walek, saying that Complainant will cancel the meeting to let Starzak conduct her audit.
JX Q	NHJ Major Issues Summary, dated September 6, 2015.
JX R	<p>September 10, 2015 email from Walek to Joe Zou containing “Counseling Session Documentation.” The document was drafted on “Moog” letterhead. Attached to this email was Moog’s “Statement of Business Ethics,” with a preamble paragraph written by John Scannell, Chairman and Chief Executive Officer of Moog. This document was addressed to “all Moog employees and representatives.” The principles “apply to all of Moog’s facilities, in the U.S. and around the world.” In particular, the Company will ensure its compliance with applicable U.S. Government regulations against fraud, waste, and abuse.” Moog prohibits its employees from accepting or providing:</p> <p>‘kickbacks’ . . . for the purpose of improperly obtaining or rewarding favorable treatment in either the selling or procurement activities of the Company . . . Moog’s stance in this regard is consistent with U.S. Federal Acquisition Regulations . . . All Moog employees in every facility around the world must be aware of and comply with U.S. laws and the laws of other countries that prohibit payments, gifts, and entertainment that could be considered a bribe . . . All Moog employees in every facility around the world, and their representatives, are subject to the [Foreign Corrupt Practices Act]. This is because Moog is a U.S. company.</p>
JX S	September 25, 2015 email from Subramanya Bhat to Kevin Walek. The email concerned the actions Respondent allegedly took to investigate Complainant’s concerns. JX S contains another email from Starzak to Bhat relating that Complainant told others that Joe (presumably Joe Zou) was “American so does not understand Chinese business.”
JX T	Respondent’s Form 10-K for 2015, filed with the U.S. Securities and Exchange Commission. Page 86 of the document shows that Moog Control Systems (Shanghai) Co., Ltd. is a company incorporated in the People’s Republic of China, and is a subsidiary of Moog Controls Hong Kong Ltd., which is incorporated in Hong Kong.
JX U	January 13, 2016 Termination Agreement between “Moog Control System (Shanghai) Co., Ltd.” and Complainant, summarized <i>supra</i> .

Exhibit	Description
JX V	January 18, 2016 email from Estella Ling to Satish Kumar regarding Ling’s comments concerning the January 12, 2016 meeting.
JX W	Letter dated March 10, 2016 from the FAA to Complainant concerning his complaint.
JX X	June 1, 2016 letter from the FAA to Complainant stating: “[t]he investigation did not substantiate that a violation of an order, regulation, or standard of the FAA related to air carrier safety occurred.”
JX Y	<p>September 28, 2016 Declaration of Xiong Mingliang. Mingliang reviewed the January 13, 2016 Termination Agreement (JX U) and made the following comments.</p> <ul style="list-style-type: none"> <li>• “The agreement was drafted, negotiated, and signed in China. By its terms, it is governed by the Labor Contract Law of the People’s Republic of China.”</li> <li>• “The Release contained in Section 1 of the Mutual Termination Agreement is legally enforceable as a contractual obligation under PRC law.”</li> <li>• “The termination package, in particular, item c – the ex-gratia payment, is evidence that [Complainant] was provided with a significant consideration in connection with the termination of his employment from Moog Shanghai.”</li> </ul>
JX Z	Severance agreement between “Moog Inc.” and Joe Zou. According to Respondent, the purpose of this document is to show that the “reorganization of Moog Aircraft Group included decentralization of China Operations and the resulting reduction in force.”
JX AA	December 21, 2016 FOIA request from Complainant to the FAA. Complainant’s allegations were allegedly not substantiated by the FAA.

### III. THE POSITIONS OF THE PARTIES

The central issue requiring adjudication is whether this Tribunal has jurisdiction to decide Complainant’s complaint.<sup>24</sup> The parties’ positions on this matter are summarized as follows.

#### A. Complainant’s Position

The relevant portion of Complainant’s position is derived from his October 13, 2016 “Response to Moog Inc.’s Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction” (hereinafter, “Complainant’s Brief”). Notably, Complainant did not submit a final brief that comprehensively discussed his case in chief.

<sup>24</sup> Although Respondent’s September 30, 2016 “Motion to Dismiss for Lack of Jurisdiction” remains outstanding, this Tribunal is not deciding that motion in this Decision and Order. Rather, because the parties have now had full opportunity to present evidence and argument concerning the issue of jurisdiction, this Tribunal has elected to review the totality of the evidence and to dismiss Complainant’s case, *sua sponte*, for lack of jurisdiction. *See generally*, 29 C.F.R. § 18.12(b)(7) & (8).

Complainant avers that he did not work for “Moog System and Controls (Shanghai),” as Respondent allegedly stated in its brief. Complainant continued that, “the named employer is non-existent,” and that he worked for “Moog Control Systems (Shanghai) Co., Ltd.,” a wholly owned subsidiary of Moog Inc. Complainant’s Brief at 2 (citing JX T). Complainant argued that it “was untrue and misleading” that he was never employed by Moog, Inc. because Moog Shanghai is a subsidiary of Moog Hong Kong, which is another “subsidiary wholly owned by Moog, Inc.” *Id.* Complainant also noted his “unique employee number,” which he stated showed that he was an employee of Moog, Inc. Complainant’s Brief at 2-3 (citing RX 22, Exhibit B).<sup>25</sup> According to Complainant, he served “as the East Asia Supply Chain Manager of Aircraft Group, Moog Inc., which reported directly to the headquarters of Aircraft Group in East Aurora, NY, USA.” Complainant’s Brief at 3. Joe Zou, the “Asia Supply Chain Director, Aircraft Group of Moog Inc.” was his “direct manager.” *Id.* According to Complainant, Zou had no employment relationship with Moog Shanghai. *Id.* Complainant described a business setup where Moog Shanghai managed Complainant’s “salary and expenses,” and Moog Inc. reimbursed Moog Shanghai. *Id.* Complainant stated that an “obscurification” was present in his employment contract, because it allegedly said that Complainant was an employee of “Supplier Chain Manager in **Aircraft Group**.” Complainant’s Brief at 3 (citing CX 3). However, Complainant posited that Moog Shanghai belonged to the “Industrial Group Segment.” Complainant’s Brief at 4.

Complainant further stated that he blew the whistle to Moog, Inc. management and the FAA, and such whistleblowing “was plainly related to very significant aircraft safety threats to the aviation industry of [the] United States.” Complainant’s Brief at 5-6. Complainant recognized that the Aircraft Group’s supply chain team, which Complainant oversaw, sourced “safety critical machined parts for flight control systems for Boeing and other US air manufacturers.” Complainant’s Brief at 6. Thus, Complainant averred that his claim involved aircraft safety within the United States. *Id.*

#### B. Respondent’s Position

The relevant portion of Respondent’s position is derived from its September 30, 2016 “Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction” (hereinafter, “Respondent’s Brief”). Respondent’s theory of the case is that it is an improperly named party because it never employed Complainant. Rather, according to Respondent, Complainant was an employee of “Moog System and Controls (Shanghai), Co., Ltd.” Respondent’s Brief at 1. Respondent posited that this Tribunal lacks the authority to adjudicate Complainant’s case for three reasons. First, AIR 21 does not extend to extraterritorial claims; second, Moog Shanghai is not a covered employer under the Act;<sup>26</sup> finally, Complainant and his employer executed a severance agreement, which released Moog Shanghai from any claims.<sup>27</sup> *Id.*

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<sup>25</sup> This Tribunal notes that RX 22, Exhibit B contains an “ID Card No.” next to Complainant’s name; however, this number is redacted. This Tribunal is unable to elicit from the document whether the issuer of the “ID Card No.” was Moog Inc., or its Chinese subsidiary Moog Shanghai.

<sup>26</sup> Respondent argued that, since Moog Shanghai is a corporation incorporated under the laws of China, it is not a “citizen of the United States,” which is a requirement for all “air carriers” under the Act. Respondent’s Brief at 15 (citing 49 U.S.C. § 40102(a)). Respondent further stated that Moog Shanghai

Respondent emphasized that Complainant is a Chinese citizen, who was terminated by his Chinese employer. *Id.* Complainant's allegations involved his direct supervisor, Joe Zou, who purportedly ordered machined sub-parts from a Chinese supplier not on the approved supplier list. Respondent's Brief at 2. Zou, Respondent stressed, worked in China. *Id.* Because this Tribunal does not have the authority to adjudicate a case concerning a "Chinese national, against a Chinese corporation, related to facts occurring in China," Respondent requested that this Tribunal deny Complainant's complaint.

Respondent averred that "Moog Shanghai is a subsidiary of Moog Controls Hong Kong Ltd., and was incorporated in China in 1997." Respondent's Brief at 3 (citing RX 22, ¶ 2). According to Respondent, Moog Shanghai oversees Chinese and Southeast Asia suppliers for Moog Aircraft Group. Respondent's Brief at 3-4. Moog Shanghai hired Complainant in 2006, and rehired him in 2011. Respondent's Brief at 4 (citing RX 22, ¶ 5-7). Complainant was only ever paid by Moog Shanghai. Respondent's Brief at 6 (citing RX 22, ¶ 8). In January 2016, Moog Shanghai allegedly implemented a reduction in force procedure, which resulted in Complainant's termination, along with thirty percent of Moog Shanghai's supply chain employees. *Id.* (citing RX 22, ¶ 9).

Respondent emphasized that Complainant's termination took place in China, when Estella Ling (Moog Shanghai's Human Resources Manager) and M.N. Satish Kumar (Regional Head of Human Resources – Asia Pacific) terminated Complainant allegedly due to a larger process requiring a reduction in force. Respondent's Brief at 4 (citing RX 22, ¶ 10). Complainant signed a severance agreement on January 13, 2016. Respondent's Brief at 4-5 (citing RX 22, ¶ 12). Respondent stated that Complainant inaccurately identified "Moog Inc., Aircraft Group" as his employer and the respondent in this matter. Respondent's Brief at 7.

Respondent chiefly argued that AIR 21 does not apply to claims based on extraterritorial conduct, and that Complainant's complaint exclusively involves conduct occurring outside the United States. *Id.* Respondent relied on a United States Supreme Court case titled *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010), which adopted a two-prong test to determine the viability of claim that may necessitate an extraterritorial application of a federal law. Respondent's Brief at 8. The first prong asks whether Congress intended the law to reach beyond the borders of the United States; the second, according to Respondent, requires a tribunal to determine where "the essential events [of the case] occurred." *Id.* (citing *Villanueva v. Core Laboratories NV*, ARB Case No. 09-198 (Dec. 22, 2011), *aff'd*, *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014)). Respondent stated that Complainant's case requires dismissal, under the first prong because "Congress included **no explicit statutory evidence** that it meant for AIR 21's whistleblower provision to apply extraterritorially." Respondent's Brief

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does not provide air transportation, and only oversees a supply chain, so it is not an air carrier or a contractor or subcontractor of such a company. Respondent's Brief at 15 (citing 49 U.S.C. § 42121(e)).

<sup>27</sup> Respondent posited that the severance agreement included a release of all claims, so this Tribunal is precluded from adjudicating the case. Respondent's Brief at 16-18 (citing *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022 (Dec. 30, 2005)).

at 8 (citing *Sobhani v. Bombardier*, OALJ Case No. 2014-AIR-00017, p. 7 (OALJ Nov. 4, 2014)) (emphasis in the original).<sup>28</sup>

Concerning the second prong, Respondent averred that the Supreme Court focused on the locus of the wrongful conduct. Respondent's Brief at 9 (citing *Morrison*, 561 U.S. at 273). Respondent analogized from *Morrison*, and argued that "AIR 21 should be interpreted as reaching only employment relationships in the United States and adverse employment action in the United States." Respondent's Brief at 9. Because Complainant's employment relationships occurred in China with a Chinese company, Moog Shanghai, Respondent argued that Complainant's complaint necessitated an extraterritorial application of the Act. Respondent's Brief at 10 (citing RX 22, ¶ 2-4). Respondent further noted that the protected activity comprising Complainant's allegations occurred in China and was based on his reports of "concerns about the quality of certain materials sold by a Chinese supplier to Moog Shanghai's facility in China." Respondent's Brief at 10-11. Complainant allegedly told his concerns to two Moog Shanghai employees, Shawn Shao and Claire Starzak. Respondent's Brief at 11. Respondent further averred that, contrary to Complainant's statement, he did not complain to John Scannell, Mark Trabert, and Katherine Schaefer, until after his termination. *Id.* Respondent argued that Complainant's statements to Kevin Walek, a Moog Inc. employee working in the United States, "would not alter the predominately foreign nature of [Complainant's] claim." *Id.* (citing *Villanueva*, ARB Case No. 09-198, at 9). Respondent continued that the location of the alleged retaliation, here China, also weighs against the application of AIR 21 to Complainant's complaint. Respondent's Brief at 12. Finally, Respondent said that Complainant's complaint related to vague federal laws, and that such a "tenuous" connection amounted to "impermissible bootstrapping" and should not rise to the level of showing a domestic application of the Act. Respondent's Brief at 12-14.

#### IV. CONCLUSIONS OF FACT AND LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took an unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, USDOL Reporter, page 15 (Sep. 30, 2016); *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If the record preponderantly establishes the three foregoing elements and Complainant, therefore, establishes his *prima facie* case, the burden then shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

Initially, however—and crucial to the viability of Complainant's claim—Complainant bears the burden to prove subject matter jurisdiction: to wit, that this Tribunal has the power to

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<sup>28</sup> Respondent here cited to this Tribunal's November 4, 2014 Decision and Order Denying Respondent's Motion for Summary Decision from the *Sobhani* case. This Tribunal notes that the Decision and Order cited was not a final decision and is not publically available on the OALJ website.

adjudicate and ultimately dispose of his claim. *Morrison*, 561 U.S. at 248; *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 607 (2d Cir. 1994). Put simply, Congress has tasked this Tribunal with the execution of AIR 21, a duly enacted United States Law. If Complainant is unable to establish either (1) that Congress intended AIR 21 to apply outside the territorial borders of the United States; or (2) that the facts comprising his complaint establish a sufficient nexus with the United States such that it constitutes domestic conduct protected under AIR 21, this Tribunal must dismiss Complainant's complaint for lack of jurisdiction. *See Lewis v. Synagro Technologies, Inc., et al*, Case Nos. 2002-CAA-00008, 12, 14 (OALJ Apr. 26, 2002) ("A complainant's failure and inability to plead facts establishing jurisdiction commands dismissal."). Although jurisdiction is always at issue, Respondent has specifically challenged Complainant's ability to appear before this Tribunal. *See* Respondent's September 30, 2016 "Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction." If the facts of Complainant's case are insufficient to show this Tribunal's authority to continue its adjudication of his claim, this Tribunal is compelled to dismiss Complainant's complaint without undertaking review of the substantive elements of Complainant's case (discussed in the preceding paragraph).

#### A. Facts

Complainant is a citizen of the People's Republic of China.<sup>29</sup> Complainant's direct employer was Moog Control Systems (Shanghai) Co., Ltd (hereafter "Moog Shanghai"), a company incorporated in the People's Republic of China. RX 22. Moog Shanghai is a direct subsidiary of Moog Controls Hong Kong Ltd., a company incorporated in Hong Kong. RX 22. A diagram of the corporate structure relevant to Complainant's claim (with country of incorporation in brackets) follows:

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<sup>29</sup> Although this Tribunal is unable to find direct evidence in the record concerning Complainant's citizenship, circumstantial evidence establishes that he is a Chinese national. For example, Complainant's employment and severance agreements were drafted in Mandarin Chinese and include provisions for payment in Chinese currency (renminbi), RX 22; this Tribunal also concludes that his Chinese citizenship is established by way of Complainant's behavior during discovery, including his lack of willingness to travel to American territory due to Chinese law and anticipated reprisal by Chinese authorities.

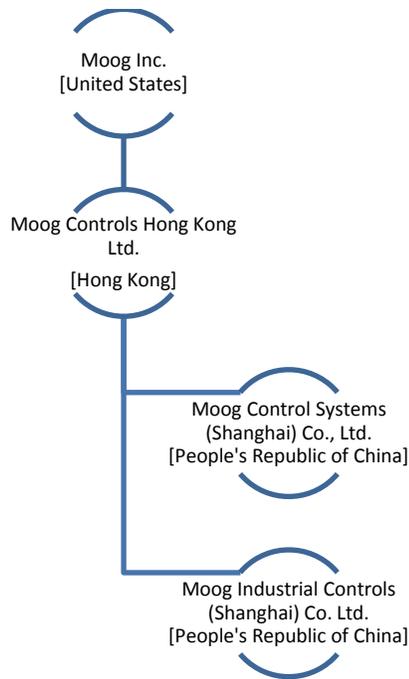


Figure 1. See JX T.

Complainant worked for Moog Control Systems (Shanghai) Co., Ltd.<sup>30</sup> in its 2966 Jinke Road office, located in Shanghai, China. RX 22. Complainant’s employment contract with Moog Shanghai was drafted in Mandarin Chinese; governed under and in deference to Chinese law; and included citations to various Chinese labor regulations. RX 22 (Exh. B). Pursuant to his contract, Moog Shanghai paid Complainant in Chinese currency (renminbi); Complainant also received severance in renminbi. See, e.g., RX 13; RX 15; RX 22 (Exhs. A-B, F); RX 26; JX A; JX T; JX Y; CX 48. Moog Shanghai was responsible for the payment of Complainant’s salary. RX 22, ¶ 8.

Complainant’s alleged protected activity concerned the manufacturing of certain parts at a Chinese supplier called NHJ. See, e.g., CX 15; CX 16; CX 17; CX 18; CX 34; CX 35; CX 39; RX 1-RX 3; RX 21-RX 22; JX H-JX P. Respondent took certain affirmative steps to remedy Complainant’s concerns. See, e.g. CX 10; CX 11; CX 15; CX 16; CX 17; CX 31; CX 34; CX 35; CX 39; CX 40; RX 1; RX 2; RX 3; RX 5; RX 6; RX 27; JX D – JX S.

Estella Ling and Satish Kumar, who are both non-Americans, terminated Complainant in their official capacities as agents of Moog Shanghai. RX 6; RX 12; RX 13; RX 22 (Exh. A); RX 23; RX 26; JX A; JX C; JX F; JX J. Complainant’s termination occurred at Moog Shanghai’s office in Shanghai China. RX 22. Lynn Wang, the “HR Advisor” at Moog Shanghai produced a spreadsheet detailing Complainant’s severance payments and sent this document to Ling and Kumar in anticipation of Complainant’s termination. RX 10; RX 11.

<sup>30</sup> It bears repeating, see n.8, *supra*, that this Tribunal has abbreviated “Moog Control Systems (Shanghai) Co., Ltd.” as “Moog Shanghai.” The entity “Moog Industrial Controls (Shanghai) Co. Ltd.” has little relevance to this case; if and when this Tribunal refers to this entity, it will use its full name.

- B. The essential facts of Complainant’s complaint require an impermissible extraterritorial application of the Act; this Tribunal, therefore, lacks jurisdiction and must dismiss Complainant’s complaint.

In its September 30, 2016 “Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction,” Respondent chiefly argued that Complainant’s complaint requires an impermissible foreign application of the Act. Based on this Tribunal’s review of the record as a whole, especially the documentary evidence summarized, *supra*, the preponderant evidence supports Respondent’s assertion. Because the essential facts of the case require an impermissible extraterritorial application of the Act, this Tribunal has no authority to review the substance of the complaint and, therefore, must **DISMISS** Complainant’s claim for protection under the Act.

1. Congress did not explicitly intend for AIR 21’s whistleblower protections to apply extraterritorially.

Respondent’s arguments on brief speak to the important issue of subject-matter jurisdiction. Subject-matter jurisdiction “refers to a tribunal’s ‘power to hear a case.’” *Morrison*, 561 U.S. at 254 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)); see *Sylvester v. Paraxel Int’l LLC*, ARB No. 07- 0123, ALJ Nos. 2007-SOX-00039 & -00042 (ARB May 25, 2011), \*21; see FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). In *Morrison*, the Supreme Court addressed the issue of subject-matter jurisdiction as it relates to the application of federal law to matters arising substantially outside the territorial borders of the United States—“extraterritoriality.” The Court found that § 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) does not provide a cause of action to foreign complainants suing foreign and U.S. defendants for securities fraud allegedly committed on foreign exchanges. The Court applied the “‘long standing principle of U.S. law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This principle rises to the level of a canon of statutory interpretation. See *id.* (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)). “Thus, ‘unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.’” *Id.* (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248). This presumption is rebutted only when the statute evinces a “clear indication of extraterritoriality.” *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2014) (quoting *Morrison*, 561 U.S. at 255). When a statute is silent on extraterritorial application, “it has none.” *Morrison*, 561 U.S. at 255.

As stated above, absent specific Congressional direction, federal laws are presumed to apply only within the territorial boundaries of the United States. See *Morrison*, 561 U.S. at 255. In this regard, the Complainant’s AIR 21 claim faces a steady headwind. For the following reasons, this Tribunal concludes that Congress included **no explicit statutory evidence** that it meant for AIR 21’s whistleblower protection provision to apply extraterritorially.

The whistleblower protection provision of AIR 21 is set forth in 49 U.S.C. § 42121(a). In relevant part, § 42121(a) provides that “[n]o air carrier or contractor or subcontractor of an air

carrier may discharge . . . or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment” because the employee filed a proceeding relevant to a violation of federal law. Nowhere in § 42121(a) did Congress include explicit language indicating any affirmative intention to apply this whistleblower provision extraterritorially. The Supreme Court mandates that to determine the “scope of a statute, we must look first to its language.” *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). Because the plain language of AIR 21’s whistleblower protection provision does not provide for its extraterritorial application, this weighs heavily against a finding that Congress intended for § 42121 to apply to facts arising substantially abroad.

Moreover, the term “air carrier” is defined in 49 U.S.C. § 40102(a). Under this provision, an air carrier is covered only when it is a “**citizen of the United States**,” or, in cases where the air carrier is a corporation, when the corporation has a sufficient ownership nexus with American citizens. § 40102(a) (emphasis added). As stated above, to show the extraterritorial effect of the Act, the Complainant must show a “clear indication of extraterritoriality.” *Morrison*, 561 U.S. at 255. The definition of the term “air carrier” makes Complainant’s task exceedingly difficult. The definition demonstrates explicit Congressional intent to require covered respondents be American citizens or have American ownership.<sup>31</sup> This weighs further against a finding that Congress intended AIR 21’s whistleblower protection provision to extend beyond the territorial boundaries of the United States.

The legislative history also fails to evince Congress’s intention to apply extraterritorially AIR 21’s whistleblower protection provision. *See, e.g.* H.R. Rep. No. 106-167 (1999) (“Title VI would provide whistleblower protection for employees of air carriers who notify authorities that the Respondent is violating a federal law relating to air carrier safety.”); H.R. Rep. No. 106-513 (2000); H.R. Rep. No. 100-883 (1988); S. Rep. No. 105-278 (1998). Furthermore, this Tribunal finds that when Congress did expect the provisions of AIR 21 to have extraterritorial effect, it specifically referenced such a purpose within the legislative history. *See, e.g.*, S. Rep. No. 105-278 (“Section 305(a) would restate the statutory authority that allows the FAA to charge fees for overflights of the United States by aircraft that neither land nor take off domestically . . . . The Committee expects that the U.S. and Canada, for example, which exchange air traffic control responsibilities along the border, will enter into a reciprocity agreement whereby neither one would charge the other for overflights that are purely domestic in origin and destination.”). The silence of the legislative history concerning the extraterritorial application of AIR 21’s whistleblower provision weighs further against a finding that Congress intended § 42121 to reach matters occurring substantially outside the territorial borders of the United States.

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<sup>31</sup> This Tribunal, furthermore, notes that OSHA, in its final rule implementing the “Procedures for the Handling of Discrimination Complaint under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,” 68 FED. REG. 14,100, 14,101, declined to incorporate the suggestion of commenters who wanted the term “air carrier” to include “carriers owned by foreign persons.” OSHA declined, because “the general definition of air carrier is set forth [in § 40102(a) so] OSHA has no authority to define the terms otherwise.” OSHA’s deference to the Congressional definition of “air carrier,” which only includes American companies, provides further evidence that Congress did not intend for AIR 21’s extraterritorial application.

More evidence of Congress’s intent to apply AIR 21’s whistleblower provision only to domestic matters is the fact that many other provisions of the Act, do, indeed, display Congressional intent for extraterritorial application. *See, e.g.* § 41313 (titled “Plans to address needs of families of passengers involved in **foreign air carrier accidents**); § 45301 (discussing the cost recovery mechanisms for **foreign aviation services**); *see also* § 44701 (titled “Implementation of Article 83 bis of the Chicago Convention<sup>32</sup> [of the Convention on International Civil Aviation (“CICA”)];” § 44936 (“An air carrier, **foreign air carrier, airport operator, or government** that employs, or authorizes or makes a contract for the services of, an individual . . . shall ensure that the investigation the Under Secretary requires is conducted.”). The foregoing AIR 21 provisions—especially the latter example, which differentiates between domestic air carriers and foreign air carriers—demonstrates that when Congress intended for an AIR 21 provision to apply extraterritorially, it specifically stated its intent. This interpretation coincides with the canon of statutory interpretation that: “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 474 U.S. 15, 23 (1983). A review of the Act’s language shows that when Congress intended to apply certain provisions of AIR 21 in an extraterritorial manner, it explicitly stated its intent to do so in the statutory language. Because § 42121 provides no language whatsoever extending AIR 21’s whistleblower protections extraterritorially, this weighs substantially against a finding that § 42121 is intended to apply outside the boundaries of the United States.

For the foregoing reasons, this Tribunal finds that the Complainant has not succeeded in rebutting the presumption that AIR 21’s whistleblower protection provision does not have extraterritorial reach. *See Kiobel*, 569 U.S. at 133 (quoting *Morrison*, 561 U.S. at 255). Even when viewing the issue outside of the *Kiobel/Morrison* presumption standard, this Tribunal finds that Congress did not explicitly intend for AIR 21’s whistleblower protection provision to apply abroad. Following *Morrison*, then, unless the totality of the evidence comprising Complainant’s complaint is sufficient to make out a domestic application of § 42121, this Tribunal lacks jurisdiction.

2. Although AIR 21 and its whistleblower protection provision each evince Congress’s focus on air safety, the essential events of Complainant’s

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<sup>32</sup> This section refers to Article 83 bis of the Chicago Convention of the International Civil Aviation Organization (“ICAO”). Articles 1 and 11, as well as the Preamble to the Chicago Convention, illustrate a theme of independent state sovereignty within the larger field of international civil aeronautics law. For example, the Preamble states that the purpose of the Chicago Convention is to ensure that international civil aviation “may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity . . . .” Convention on International Civil Aviation Done at Chicago on the 7th Day of December 1944, [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf) (last visited Aug. 17, 2017). *See also*, 15 U.N.T.S. 295. Furthermore, Article 1 is titled “Sovereignty,” and Article 11 is titled “Applicability of Air Regulations” and mandates that the law of the state, where an aircraft engaged in international air transportation is located, “shall be applied to the aircraft of all contracting States without distinction of nationality . . . .” The ICAO’s emphasis of state sovereignty over extraterritorial applicability in the international law context provides further evidence to show that AIR 21’s whistleblower protections do not extend beyond the borders of the United States.

complaint **DO NOT** establish a close enough nexus with domestic air safety to demonstrate this Tribunal's power to hear his case.

To draw the line between “domestic” and “foreign” claims in cases where Congress does not intend for an act’s extraterritorial application, the Supreme Court requires the trier of fact to determine the “focus” of congressional concern. *Morrison*, 561 U.S. at 266. Following *Villanueva*, the trier of fact must find not only the focus of the Act itself, but also the focus of the specific whistleblower provision under which the Complainant’s cause of action arises. *Villanueva*, ARB Case No. 09-198 at \*10-11 n.22 (addressing the general focus of the Sarbanes Oxley Act (“SOX”), as well as the specific focus of Section 806 of SOX); *see also Dos Santos v. Delta Airlines, Inc.*, OALJ Case No. 2012-AIR-00020, \*21-23 (Jan. 11, 2013). Once the Congressional focus is found, the *Villanueva* majority requires the judge to compare the facts of the case to Congress’s focus to determine whether “the essential part of the . . . activity occurred domestically or extraterritorially.” *Villanueva*, ARB Case No. 09-198 at \*9. Court precedent requires the connection between the driving force of the Act and the essential parts of the case to be “meaningful” and not the sort of “fleeting” connection that ‘cannot overcome the presumption against extraterritoriality.’” *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 180 (2d Cir. 2014); *Morrison*, 561 U.S. at 266 (recognizing that “it is a rare case of prohibited extraterritorial application that lacks *all* contacts with the territory of the United States.”) (emphasis in the original). As discussed below, this Tribunal finds that the essential parts of Complainant’s claim **DO NOT** demonstrate a substantial nexus with the safety-focus of AIR 21. Rather the domestic connections concerning Complainant’s case are “fleeting,” *Liu Meng-Lin* 763 F.3d at 180, and do not preponderantly establish this Tribunal’s ability to continue its adjudication of Complainant’s complaint.

a. The focus of AIR 21, generally.

A statutory analysis of the Act demonstrates that AIR 21 is, plainly, an air safety statute. Congress’s focus on air safety is illustrated through the following observations. First, Title V of the Enrolled Bill is titled “Safety.” Within this “Safety” title is Sec. 519. This section amended Chapter 421 of the United States Code to include § 42121 – the whistleblower protection program that provides the very cause of action under which the Complainant filed his complaint against the Respondent in the instant action. Second, Sec. 714 amended 49 U.S.C. § 44701 and redesignated subsection (e) of this section as “Bilateral Exchanges of **Safety Oversight Responsibilities**,” pursuant to Article 83 bis of the CICA. (Emphasis added). Third, discussing a bill that eventually became AIR 21, the Senate Committee on Commerce, Science and Transportation stated that “[t]itles I through V of the bill reaffirm the commitment of the Committee to ensuring [sic] that the **U.S. continues to have the safest and most efficient air transportation system in the world.**” S. Rep. No. 105-278, at 2 (1998) (emphasis added) (“The bill also includes various provisions **to improve aviation safety**, security and system capacity . . . .”); *see also* 146 Cong. Rec. H1002-01, H1009 (daily ed. Mar. 15, 2000) (statement of Rep. Kelly) (“[L]et there be no mistaking that **our fundamental purpose** here for undertaking this initiative is **to ensure the safety of the traveling public.**”) (emphasis added). Finally, in his signing statement accompanying AIR 21, President Clinton remarked that “[t]his legislation contains **important measures to improve aviation safety.**” 36 Weekly Comp. Pres. Doc. 14 (Apr. 10, 2000) (emphasis added).

In a larger sense, one may view the drafting and passing of AIR 21 as a continuation of Congress's long standing regulatory concern over aviation safety, a legacy traceable to the Air Mail Act of 1925 and the Air Commerce Act of 1926. Such Acts were codified in the United States Code under Subtitle VII of Title 49. Part A of Subtitle VII is entitled "Air Commerce and Safety." Section 40101 (the first section under Part A) is entitled "Policy." It defines the following as being in the "public interest:"

- (1) assigning and maintaining **safety as the highest priority in air commerce.**
- (2) before authorizing new air transportation services, evaluating the **safety implications** of those services.
- (3) preventing deterioration in established safety procedures, **recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce,** and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

49 U.S.C. § 40101(a)(1-3) (emphasis added) (punctuation in the original).

In this way, AIR 21's text, the Executive and Legislative branches' comments about the Act, and the historical context of the Act's creation all show that AIR 21 is, fundamentally, an air safety statute. Therefore, in relation to the *Morrison* Court's instructions, as interpreted by the ARB in *Villanueva*, this Tribunal finds that AIR 21 contains a substantial "focus" on air safety.<sup>33</sup> *See* 561 U.S. at 266; *see also* ARB Case No. 09-198 at \*10-11 n.22.

b. The focus of § 42121, AIR 21's whistleblower provision, specifically.

The ARB also requires an ALJ to determine the "additional focus" of the whistleblower provision under which a complaint arises. *See Villanueva*, ARB Case No. 09-198 at \*10 n.2; *see also Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, \*11 (ALJ Mar. 23, 2009) (concluding that the "predominant purpose of [the whistleblower provision of SOX] is fraud detection, not worker protection."). This Tribunal follows *Dos Santos* in finding that § 42121 is not principally a worker protection regulation; rather, the provision is concerned, chiefly, with the promotion and maintenance of air safety. *See Dos Santos*, OALJ Case No. 2012-AIR-00020 at \*24.

The plain language of § 42121 illustrates well AIR 21's "additional focus" as an air-safety provision, rather than one aimed specifically at worker protection. For example, § 42121(a)(1) prohibits an "air carrier or **contractor**" from discriminating against an employee "because the employee . . . provided . . . to the Respondent . . . **information relating to any violation [of] . . . Federal law relating to air carrier safety.**" (emphasis added). The term "**contractor**" is defined in § 42121(e), as "a company that performs **safety-sensitive** functions by contract for an air carrier." (emphasis added). The plain language of § 42121, then, clearly displays Congress's intent to regulate air-safety when drafting AIR 21's whistleblower protection provision.

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<sup>33</sup> This is also the conclusion found in the *Dos Santos* case. OALJ Case No. 2012-AIR-00020 at \*22.

This Tribunal also finds the title of § 42121 persuasive to this same end. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (“The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.”) The title of § 42121 is “Protection of Employees Providing Air Safety Information.” This title indicates that, even though workers are protected under the Act, only specific kinds of workers are protected: those providing air safety information. This lends credence to the conclusion that the “additional focus” of § 42121 is to promote air safety.

The legislative history also evinces Congress’s concern for airline safety when implementing AIR 21’s whistleblower provision. *See, e.g.*, 146 Cong. Rec. S1247-07, S1252 (daily ed. Mar. 8, 2000) (statement of Sen. Grassley) (“Whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation’s air transportation system.”); 146 Cong. Rec. S1255-01, S1257 (daily ed. Mar. 8, 2000) (“[Air 21 provides] whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.”). Thus, the Act’s legislative history provides additional insight into the intent of the drafters of § 42121, which was to promote air safety.

Finally, this Tribunal is persuaded by judicial precedent—specifically Chief Administrative Law Judge Stephen L. Purcell’s cogent analysis—holding that § 42121 is not primarily a labor law; rather “[it is] a means for incentivizing airline employees to speak up when they observe violation of Federal aviation safety laws.” *Dos Santos*, OALJ Case No. 2012-AIR-00020 at \*25. Judge Purcell put it another way, finding that the “objects of [§ 42121’s] solicitude” is “the domestic aviation system (and the actors within it).” *Id.* at 28. For the foregoing reasons, this Tribunal finds that the “additional focus” of AIR 21’s whistleblower provision is to maintain the safety of the Nation’s airways. As a consequence, should an application of the essential events comprising Complainant’s case signal a close nexus with domestic air safety, this connection will weigh in favor of finding a domestic application of § 42121, thereby mitigating any extraterritoriality concerns.

- c. Applying the Villanueva factors to the essential elements of Complainant’s complaint reveals that this Tribunal lacks subject-matter jurisdiction. The totality of the evidence concerning Complainant’s claim demonstrates an insufficient nexus with domestic air safety.

Finding that “the essential events [of the case] occurred” abroad, the *Villanueva* majority dismissed the *Villanueva* plaintiff’s complaint. ARB Case No. 09-198 at 9. The plaintiff in *Villanueva* was a Colombian citizen working in Colombia for a Colombian subsidiary of a Dutch parent company. The *Villanueva* plaintiff blew the whistle on improper transactions between his employer and a company in the Dutch Antilles, which the *Villanueva* plaintiff believed resulted in a violation of Colombian tax law. The *Villanueva* majority decided the case exclusively on the “locus of the fraud [that the *Villanueva* plaintiff] reported,” because the “facts weigh[ed] so heavily” in favor of a finding that the *Villanueva* plaintiff’s reporting was extraterritorial, based on that factor alone. *Id.* at 10.

The *Villanueva* majority recognized, however, that in addition to the “locus of the fraud” factor, certain “labor elements can also play a role in determining whether or not events alleged in a complaint would require extraterritorial application of Section 806.” ARB No. 09-108 at 10. In a lengthy footnote, the Court explained that the “essential parts” of the activity include, but are not limited to: (1) where the alleged protected activity and underlying violations occurred; (2) the location of the retaliatory actions; (3) the location of the Respondent; (4) the location of the retaliatory act; and (5) “the nationality of the laws allegedly violated that the complainant has been fired for reporting.” *Id.* at \*10 n.22 (numbering added). To reiterate, even though the *Villanueva* majority recognized the importance of the foregoing “labor elements,” it decided the case exclusively on the locus of the fraud factor alone, because the “facts [of the case] weigh[ed] so heavily” in favor of a finding that the *Villanueva* plaintiff’s reporting was extraterritorial, based on the locus of the fraud factor alone. As a result, the ARB affirmed the dismissal of the *Villanueva* plaintiff’s claim as extraterritorial.

Judge E. Cooper Brown wrote in dissent that the *Villanueva* majority gave short shrift to the factors it discussed in footnote 22. *See id.* at 25 (Brown, J., dissenting). Judge Brown expanded on the majority’s footnote and advanced five substantive reasons as to why the facts of the *Villanueva* plaintiff’s case, in his opinion, warranted reversal of the ALJ’s decision to dismiss. *See id.* at 19–30. Judge Brown specifically discussed: (1) the domestic nature of the alleged fraud or wrongful conduct that the *Villanueva* plaintiff reported; (2) the location of the protected activity, including the individuals the *Villanueva* plaintiff notified of the alleged wrongdoing; (3) the domestic nature of the *Villanueva* plaintiff’s employment relationship; (4) the location of the adverse employment action, which Judge Brown recognized as the “most important[] for analytical purposes under *Morrison*”; and (5) whether the Department of Labor or United States courts could enforce a judgement over the parties. *Id.* at 20, 22–29. In this way, Judge Brown tailored his discussion to the elements of a *prima facie* SOX/AIR 21 case, with the addition of one prudential concern. *See Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011). Judge Brown applied the facts of *Villanueva* to the foregoing elements and concluded that the “relevant factors necessary for establishing a judiciable complaint under Section 806 [were] domestic in nature.” ARB No. 09-108 at 20. Judge Brown, therefore, dissented from the majority’s decision to dismiss the complaint, *id.* at 20, even though he agreed in principle with the factors the majority discussed in footnote 22.

The *Dos Santos* decision represents the seminal case on jurisdiction within an AIR 21 context.<sup>34</sup> In that decision (which, due to settlement, the ARB never had opportunity to review), Judge Purcell drafted an exegesis of *Villanueva*, and specifically adopted the ARB’s ruling in that case, albeit within an AIR 21 context. *See* OALJ Case No. 2012-AIR-00020 at \*18–30. To determine whether the specific case “falls within the statute’s territorial scope,” Judge Purcell proffered that an administrative law judge should apply the “labor elements” discussed in *Villanueva* to the facts of the case at hand. Judge Purcell continued that an administrative law judge should undertake such an analysis on a case by case basis, noting that the relevance of

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<sup>34</sup> Judge Purcell drafted the decision in *Dos Santos* from a summary decision posture. The *Dos Santos* plaintiff was an American citizen working for Delta Airlines in Paris, France, who reported to his employer and the FAA that his supervisor had falsified FAA aircraft safety clearance documents. *Dos Santos*, OALJ Case No. 2012-AIR-00020, \*1.

certain factors could change based on the exigencies of the specific case. *Id.* at 18. Prior to applying the facts of *Dos Santos* to the labor elements discussed in *Villanueva*, Judge Purcell concluded:

[I]n determining whether the essential facts of the instant complaint place it within or outside of the territorial scope of Section 42121's protections, I keep in mind Section 42121's purpose within AIR 21's scheme of ensuring aviation safety by strengthening the domestic aviation system. I do not view Section 42121 as primarily a "labor law," but rather as a means for incentivizing airline employees to speak up when they observe violations of Federal aviation safety laws.

This Tribunal substantially adopts the jurisprudence set forth in *Dos Santos*. Unlike the holding in that case, however, this Tribunal ultimately finds that an analysis of the *Villanueva* factors in light of the facts comprising Complainant's case, as detailed below, demonstrates an insufficient nexus with the United States and Congress's focus on domestic air safety to invoke the whistleblower protections at § 42121. *See Liu Meng-Lin*, 763 F2d at 180 (requiring the connection between the driving force of the Act and the essential elements of the case to be "meaningful" and not "fleeting"). Put another way, Complainant asserts before this Tribunal an impermissible extraterritorial application of the Act. This Tribunal, therefore, has no jurisdiction to continue its adjudication of Complainant's complaint. Accordingly, this Tribunal must **DISMISS** Complainant's complaint.

The location of Complainant's alleged protected activity and the location of the alleged underlying violation each demonstrate extraterritorial conduct.

The first *Villanueva* labor element that the *Dos Santos* tribunal explored concerned the location of the plaintiff's protected activity. *See* OALJ Case No. 2012-AIR-00020 at \*26; *Villanueva* ARB Case No. 09-198 at 10 (labeling this the "locus of the fraud" issue). The plaintiff in *Dos Santos* allegedly blew the whistle on "his former manager's falsification of FAA documents to improperly clear aircraft." *Id.* Because such conduct directly implicated Federal aviation safety regulations, and were reported, at times, to American individuals (even though such individuals were stationed abroad), Judge Purcell concluded that such conduct demonstrated a domestic connection. *Id.* ("Thus, both the misconduct that prompted Complainant's communications and the recipients of those communications evidence that Complainant's protected activity is directly associated with the domestic aviation regulatory system.").

Here, Complainant's conduct does not demonstrate as close a nexus to the United States as did the plaintiff's conduct in *Dos Santos*. The location of Complainant's protected activity occurred in China; the subject of his alleged protected activity involved Chinese suppliers. *See, e.g.,* RX 1–RX 3; RX 21–RX 22; JX H–JX P. Furthermore, Judge Purcell acknowledged the importance of the nationality of the individuals to whom the *Dos Santos* plaintiff related his protected activity. *See* OALJ Case No. 2012-AIR-00020 at \*26. Complainant has not preponderantly shown that the individuals he reported to were American-nationals or worked in

America in a manner this Tribunal finds sufficient to show domestic conduct.<sup>35</sup> Indeed, the record demonstrates that certain individuals involved in Complainant's alleged protected activity, including Starzak, Schaefer, and Morris, worked in China. *See, e.g.*, RX 6; JX F; JX J.<sup>36</sup> Therefore, this Tribunal finds that, unlike the complainant in *Dos Santos*, Complainant is unable to establish the domestic nature of his case either by way of: (1) the location and nationality of the individuals who were aware of his alleged protected activity; or (2) the geographical considerations comprising Complainant's protected activity and the alleged underlying violation. This Tribunal weighs this deficiency against Complainant's burden to show the domestic nature of his claim.

Geographical considerations concerning the circumstances around  
Complainant's termination further demonstrates extraterritorial  
conduct.

The second labor element discussed in *Dos Santos* involved the location of the alleged retaliatory actions. OALJ Case No. 2012-AIR-00020 at \*27. Operating under summary decision standards, Judge Purcell deferred to the *Dos Santos* plaintiff's allegations that "Delta officials based in the United States made [a] retaliatory decision." Judge Purcell found such acts evinced a "strong connection with the territorial United States." *Id.* In a SOX context,<sup>37</sup> courts have also emphasized the centrality of this factor, dismissing SOX complaints where the locus of the adverse action occurred abroad. *See, e.g., Talisse v. UBS*, OALJ No. 2008-SOX-00074 (Jan. 8, 2008) (dismissing, in part, because the decision to terminate complainant was made in Japan); *Liu Meng-Lin*, 763 F.3d at 179 (dismissing when "complainant's employers decided, apparently in China and/or Germany, to terminate his employment."); *Ede v. Swatch Group*, OALJ No.

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<sup>35</sup> This Tribunal recognizes the importance of this factor, as one that Judge Purcell specifically discussed in the *Dos Santos* decision. Complicating the adjudication of this factor here, however, were the sanctions limiting this Tribunal's consideration of Complainant's testimony and the fact that Complainant's brief was silent on this issue.

<sup>36</sup> The record contains no information concerning the nationality of Starzak, Schaefer, and Morris. Further, although Walek (whose email signature shows that he worked in New York State) apparently knew of Complainant's allegations, there is no information in the record concerning Walek's nationality. Consequently, although this Tribunal recognizes that some Americans knew of Complainant's alleged protected activity, the preponderance of individuals directly involved in handling Complainant's allegations were either non-Americans or individuals of unknown citizenship. Assuming, *arguendo*, that Walek's involvement demonstrates domestic conduct, the preponderant evidence, when viewed in the totality, establishes that Complainant's claim involves substantially extraterritorial matters.

<sup>37</sup> When Congress adopted the statutory language concerning the whistleblower protections provisions of Sarbanes Oxley, it specifically incorporated the "rules and procedures" and burdens of proof contained within AIR 21's analogous protections. *See* 18 U.S.C. 1514(b)(1)(A) (. . . shall be governed "under the rules and procedures set forth in section 42121(b) of title 49, United States Code."); 80 FED. REG. 11,865, 11,865, 70 (Mar. 5, 2015). This Tribunal, therefore, finds it appropriate to employ the holdings and rule statements contained in SOX adjudications with the facts comprising Complaint's claim. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). This Tribunal finds it generally instructive to view SOX cases as precedential in AIR 21 adjudications, because jurisprudence of the former Act is more highly developed than is jurisprudence of the latter Act.

2004-SOX-00068 (Jan. 14, 2005) (holding that “the whistleblower provision of the Act applies only to employees working within the United States”) *aff’d Ede v. Swatch Group*, ARB No. 05-053 (Jun. 27, 2007) (“[S]ubstantial evidence supports [the administrative law judge’s] finding” that the Act does not cover employees who, *inter alia*, “were subject to adverse actions that occurred outside the United States”); *cf. O’Mahoney v. Accenture Ltd.*, 537 F. Supp. 2d 506, 514 (S.D.N.Y. 2008) (denying a motion to dismiss, in part, because the alleged adverse action arose in New York City); *Penesso v. LCC International, Inc.*, OALJ Case No. 2005-SOX-00016 (Mar. 4, 2005) (denying a motion to dismiss, in part, when “respondent admitted in its response to the first pre-hearing order that at least one of the alleged retaliatory actions . . . took place in the United States”). To summarize, SOX precedent shows a clear preference toward dismissal when geographical considerations concerning a plaintiff’s termination lie outside the territorial boundaries of the United States.

The evidence comprising Complainant’s claim does not preponderantly support a showing that American individuals directed or effectuated his termination. Rather, Estella Ling, located in China and Satish Kumar, located in India, conducted the termination. *See* RX 12; RX 13; RX 23; RX 26. Further, Lynn Wang—“HR Advisor” at Moog Shanghai—produced a spreadsheet detailing Complainant’s proposed severance payments and sent this document to Ling and Kumar. RX 10; RX 11. Although the record demonstrates that a committee of individuals proposed and eventually agreed to the reduction in force at Moog Shanghai (which led to Complainant’s termination), *see* RX 8; RX 9, Complainant has not established the citizenship or location of such individuals.<sup>38</sup> Finally, the record establishes that Kumar and Ling met with and terminated Complainant at Moog Shanghai’s office in Shanghai, China. RX 22. This further establishes the connection between Complainant’s termination and an extraterritorial locale. For these reasons, this Tribunal weighs the location of the alleged retaliatory actions—prong against Complainant’s burden to show domestic conduct.

Geographical considerations concerning the Complainant, his employer, and the alleged adverse activity also demonstrate extraterritorial conduct.

The final labor element that the *Dos Santos* tribunal explored concerned the physical location of the employer and the employee. *See* OALJ Case No. 2012-AIR-00020 at \*28. Judge Purcell considered this factor “relevant, but not determinative.” *Id.* The *Dos Santos* plaintiff was stationed in France, but was “at all times in an exclusive employment relationship with Respondent, an American airline headquartered in Atlanta, Georgia.” *Id.* In finding the presence of a domestic connection, Judge Purcell noted the significance of the fact that Complainant’s employer was an American air carrier. *Id.* at \*28–29.

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<sup>38</sup> For example, Joe Zou, Complainant’s manager, played a role in Complainant’s termination, RX 13, but his citizenship was not affirmatively established in the record. *Cf.* JX S (where Starzak told Bhat that Complainant told others that “Joe”—presumably Joe Zou—was “an American [who] does not understand Chinese business.”). Even if Zou were American, he worked in China and helped facilitate the alleged adverse employment action in China; thus, assuming Zou’s participation demonstrated a domestic connection, in light of the totality of the evidence, this Tribunal would still not find that the preponderant evidence establishes that the details of Complainant’s termination demonstrates domestic conduct.

This Tribunal finds in the instant case that this factor further weighs against Complainant's burden to show that his complaint involves domestic conduct. Unlike the plaintiff in *Dos Santos*, here Complainant's direct employer, Moog Shanghai, was a foreign company, having been incorporated under Chinese law in 1997. *See* JX T; RX 22 (Exh. B); RX 26; Figure 1, *supra*. Moog Shanghai is a subsidiary of Moog Control Hong Kong Ltd.—an entity incorporated in Hong Kong. *See* JX T; Figure 1, *supra*. Although Respondent directly owns Moog Control Hong Kong Ltd., it indirectly owns Moog Shanghai. *Id.* In other words, Moog Control Hong Kong Ltd is an intervening corporate body that serves to disassociate Moog Shanghai—Complainant's employer—from its American parent, Moog, Inc. Further, Moog Shanghai both hired and terminated Complainant without substantial involvement from Moog, Inc. *See* JX A; JX C; RX 22 (Exh. A). This Tribunal also finds compelling that Complainant's employment contract was drafted in Mandarin Chinese “pursuant to the provisions of the Labor Law of the People's Republic of China, the Labor Contract Law of the People's Republic of China and relevant Chinese laws and regulations” (internal parenthetical statements omitted).” RX 22 (Exh. B). Finally, Complainant himself is a Chinese national and was contractually required to work in Shanghai. *See* RX 22-12. This Tribunal finds the foregoing facts important indicators of the extraterritorial nature of Complainant's employment relationship.

On brief, Complainant attempted to demonstrate that he was employed by “Aircraft Group,” *see* Complainant's Brief at 3; however, his contract clearly states that his employment offer came from Moog Shanghai for work located at its Shanghai office. *See* RX 22-8. In further support of his argument, Complainant cited to a document titled “Aircraft Group Supply Chain Organization.” *See* CX 6. Nevertheless, this Tribunal finds that this document does not show the corporate structure of Moog such that it establishes that the American company, Moog Inc., was Complainant's direct employer. Rather, it shows the internal organization of Moog's Aircraft Group, irrespective of the true identity of Complainant's direct employer. *Id.* Schaefer's Declaration establishes that Moog Shanghai employs supply chain managers, like Complainant, who provide services for Moog Aircraft Group, including “coordinating Chinese and southeast Asian suppliers.” CX 7; RX 21. Without citing to any factual evidence, Complainant argued that, even though Moog Shanghai paid his salary, the company was reimbursed by Moog, Inc.; the Declaration of Estella Ling supports the opposite factual conclusion. RX 22. For the foregoing reasons, this Tribunal finds that the geographical considerations of Complainant's employment relationship weigh against Complainant's burden to show that his complaint involves a sufficient amount of domestic conduct to demonstrate a domestic application of the Act.<sup>39</sup>

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<sup>39</sup> To assert that the American company, Moog Inc.—rather than Moog Shanghai—was Complainant's direct employer, Complainant would have had to argue convincingly that Moog, Inc. exercised sufficient direction and control over the day to day details of Complainant's employment. *See, e.g., Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006) (finding that a foreign citizen employed in Latin America by a Latin American subsidiary of a publicly traded U.S. company could not bring a claim under SOX due to the alleged “over-arching employment relationship” that Complainant alleged against his employer's U.S. parent). Absent probative evidence that Moog Inc. directed and controlled his employment, this Tribunal finds that Complainant is unable to assert that Moog Inc., was his direct employer. *See* Complainant's Brief at 5

An analysis of similar factors within the realm of SOX jurisprudence provides additional insight into why Complainant's complaint, *vis a vis* the geographical considerations of his employment relationship, does not involve domestic conduct. *See O'Mahoney v. Accenture Ltd.*, 537 F.Supp.2d at 514 (denying a motion to dismiss, in part, because Complainant was paid in U.S. dollars by a U.S. subsidiary of a foreign company); *see also Beck v. Citigroup*, OALJ No. 2006-SOX-00003, \*2 (Aug. 1, 2006) (dismissing a complaint even when the complainant's compensation was determined "via a global review process managed by Citigroup, Inc. out of New York and his compensation included Citigroup, Inc. stock options"). Here, Complainant's employment agreement and severance agreement were both drafted in Chinese, executed under the auspices of the Chinese government, and included provisions about Chinese labor and employment laws. Moog Shanghai, further paid Complainant's salary in renminbi and his severance payment was also provided in Chinese currency. *See, e.g.*, RX 13; RX 15; RX 22 (Exhs. A-B, F); RX 26; JX A; JX T; JX Y; CX 48. Following *O'Mahoney* and *Beck*, this Tribunal finds that the foreign aspects of Complainant's employment and severance agreements—including his assent to and payment in renminbi—illustrate the foreign nature of Complainant's employment relationship. This further preponderates against Complainant's burden to show that this Tribunal has the ability to adjudicate his case. Noting Judge Purcell's holding that no one labor element is determinative and that the importance of the *Villanueva* factors will vary on a case by case basis, *see Dos Santos*, OALJ Case No. 2012-AIR-00020 at \*28, this Tribunal finds that Complainant's substantially foreign employment relationship is a critical factor weighing against Complainant's burden to demonstrate that his claim involves domestic conduct.

Additionally, courts have taken the location of a complainant's place of work into consideration when rendering opinions on the extraterritoriality of a whistleblower claim. *See Liu Meng-Lin*, 763 F.3d at 183 (dismissing a SOX complaint from a worker employed in China); *Ulrich v. Moody's Corp.*, No. 13-CV-00008 (VSB), 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sep. 30, 2014) (dismissing a U.S. citizen employed in Hong Kong); *Talisse*, OALJ No. 2008-SOX-00074 (dismissing in part because the complainant worked in Japan); *Beck*, OALJ No. 2006-SOX-00003 (dismissing in part because the putative complainant worked in Germany); *Ede*, OALJ No. 2004-SOX-00068 (holding that "the whistleblower provision of the Act applies only to employees working within the United States"). Here, Complainant is a Chinese citizen who worked at all times in China. RX 22. This Tribunal considers this factor important proof that Complainant's employment relationship does not involve domestic conduct.

Additional prudential concerns warrant against this Tribunal's adjudication of Complainant's case.

The *Villanueva* majority also raised a prudential concern over enforcement of a putative SOX complaint, which this Tribunal finds instructive in the instant matter. ARB No. 09-108 at 11 ("Enforcing compliance or punishing noncompliance with Colombian financial laws necessarily implicates extraterritorial enforcement"); *see also Carnero*, 433 F.3d at 9 (holding that SOX's whistleblower protection provision does not have extraterritorial effect, partially through a recognition that "Congress has made no provision for possible problems arising when [the U.S. Department of Labor] seeks to regulate employment relationships in foreign nations, nor has Congress provided the DOL with special powers and resources to conduct investigations

abroad.”). Judge Brown, who issued a dissent in *Villanueva*, identified the enforcement issue not as one concerning the nationality of the laws allegedly violated, but as one concerned with “whether the agency and the courts have the authority to enforce any relief that is ordered upon a determination that [SOX’s whistleblower protection provision] was violated, and whether a party aggrieved by a final decision of the ARB could obtain court review of that decision.” ARB No. 09-108 at 29 (citing to 18 U.S.C. 1514A(b)(2)(A), which itself refers to the enforcement procedures of AIR 21, 49 U.S.C. § 42121(b)(4)). This Tribunal independently notes that the enforcement procedures of AIR 21 afford appellate rights in the court of appeals: (1) in which the “violation, with respect to which the order was issued” allegedly occurred; or (2) where the complainant resided. Additionally, the presumptive remedy under the Act is “reinstatement with the same seniority status that the employee would have had but for the discrimination.” 49 U.S.C. § 42121(b)(3)(B). Here, Complainant is a Chinese citizen, who worked for a Chinese employer. Because enforcement of Complainant’s claim would require either the U.S. Department of Labor or the U.S. Circuit Courts<sup>40</sup> to reach into China to reinstate his employment—powers that a U.S. tribunal could not possibly possess—the record, again, demonstrates that Complainant’s complaint requires an extraterritorial application of Section 806.

This point touches on a general deficiency of Complainant’s case. The foregoing discussion of the labor elements concerning Complainant’s complaint is meant to illustrate this concern; however, it also bears repeating in more direct terms. **To wit: Complainant has not established that the facts comprising his case involve sufficient contacts with factors relevant to the protection and maintenance of United States air safety to warrant protection under the Act.** As discussed above, the promotion and maintenance of domestic air safety was Congress’s primary concern when it passed both the Act, generally, and § 42121, the Act’s whistleblower protection provision, specifically. The Second Circuit instructs that such connections must be “meaningful” and not “fleeting.” *Liu Meng-Lin*, 763 F.3d at 180 (citing *Morrison*, 561 U.S. at 266). The crux of Complainant’s case is that he blew the whistle on Respondent’s use of materials, the quality of which was allegedly deficient. Complainant acknowledged this general principle, stating in argument that such materials were “installed into Boeing airplanes in the United States, and distributed domestically and internationally.” Complainant’s Brief at 6-7 (where Complainant characterizes his allegations as “quite possibly the biggest fraud in the history of the aviation industry”). Nevertheless, this Tribunal notes that in his brief Complainant cited to no concrete evidence in support of his (at times overstated) allegations. This Tribunal further recognizes the affirmative steps Respondent took in an attempt to remedy Complainant’s concerns. *See, e.g.* CX 10; CX 11; CX 15; CX 16; CX 17; CX 31; CX 34; CX 35; CX 39; CX 40; RX 1; RX 2; RX 3; RX 5; RX 6; RX 27; JX D – JX S. This Tribunal finds that Respondent’s mitigation attempts served to sever any “meaningful” connection between the subject of Complainant’s alleged protected activity—improperly manufactured

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<sup>40</sup> The absurdity of applying the Act’s language, which provides powers of remediation to the circuit court in which the “violation, with respect to which the order was issued” allegedly occurred, to the facts of Complainant claim—substantially arising in China where no circuit court resides—emphasizes this Tribunal’s thesis that adjudication of Complainant’s claim involves an extraterritorial application of AIR 21. Here, Complainant effectively asks this Tribunal to extend across the globe its Congressional mandate to adjudicate AIR 21 whistleblower claims and effectuate remedies over issues substantially involving Chinese actors, operating under Chinese sovereignty: power this Tribunal plainly lacks.

materials—and the focus of the Act—domestic air safety.<sup>41</sup> Without such a nexus, Complainant is unable to establish that his complaint substantially involves domestic conduct.

### GENERAL CONCLUSION

Although the AIR 21 whistleblower protection provisions are designed to effectuate Congress’s goal of promoting air safety, such protections do not extend to conduct occurring substantially outside the territorial borders of the United States. As discussed above, courts have fashioned certain labor elements, which assist an adjudicator in determining whether a claim substantially involves domestic conduct. *See Villanueva*, ARB Case No. 09-198 at \*10-11 n.22. Applying the *Villanueva* labor elements to the evidence concerning Complainant claim—especially his protected activity, his termination, and his employment relationship in general—preponderantly demonstrates the foreign nature of Complainant’s complaint.<sup>42</sup> Accordingly, based on a totality of the evidence, this Tribunal finds that the essential elements of Complainant’s complaint do not establish domestic conduct.

### V. ORDER

Because further adjudication of Complainant’s claim would require this Tribunal’s impermissible extraterritorial reach, this Tribunal finds that it lacks jurisdiction over Complainant’s claim. Accordingly, this Tribunal hereby **DISMISSES** Complainant’s complaint for lack of jurisdiction.

SO ORDERED.

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, NJ

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<sup>41</sup> This Tribunal’s review of the record demonstrates that CX 10, the FAA’s November 4, 2016 Memorandum concerning Complainant’s allegations, discusses this nexus. CX 10, page 10 shows that Boeing received the allegedly improperly manufactured materials. However, Respondent performed stress tests on such materials and Boeing accepted Respondent’s recommendation to use the materials “as is.” The FAA concluded that “[n]o further corrective action is required.” CX 10 at 10.

<sup>42</sup> This Tribunal recognizes that the *Villanueva* majority also suggested that adjudicators consider the nationality of the laws violated. ARB Case No. 09-198 at \*10 n.22. Here, Complainant’s concerns were focused on American law, specifically FAA regulations. Nevertheless, because the preponderant elements of Complainant’s case were preponderantly extraterritorial in nature, to apply more than an iota of weight to this *Villanueva* factor in favor of a finding of domestic conduct would serve to bootstrap Complainant’s claim to American sovereignty. This Tribunal is unwilling to afford Complainant such lenity, given the overwhelming preponderance of the evidence showing that his complaint is extraterritorial in nature.

**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 issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(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. You must also serve 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. *See* 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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. § 1979.110. Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).