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Issue Date: 09 November 2016

CASE NO: 2014-SOX-00044

In the Matter of:

GREGG BECKER,
Complainant,

v.

COMMUNITY HEALTH SYSTEMS, INC.,
and **ROCKWOOD CLINIC, P.S.**,
Respondents.

Appearances:

Mary Schultz, Esq.
For the Complainant

Keller W. Allen, Esq.
For the Respondent Rockwood Clinic

Stellman Keehnel, Esq.
For the Respondent Community Health Systems, Inc.

Before:
Christopher Larsen
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This is a claim under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act," or "SOX") and regulations at 29 C.F.R. Part 1980. The Complainant, Gregg Becker, seeks compensation and medical benefits from Respondents Community Health Systems, Inc., and Rockwood Clinic, P.S.

PROCEDURAL HISTORY

The court held a formal hearing in this case on January 19 through 21, 2016, and from January 23 through January 26, 2016, at which both parties were afforded a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

At the hearing, Mr. Becker offered Exhibits 1 through 135. Respondents offered Exhibits 1 through 129. I admitted Mr. Becker's Exhibits ("CX") 1, 3 through 5, 8 through 11, 13, 14, 15, 17 through 26, 29 through 30, 32, 35, 36, 37, 41, 42, 43, 50, 51, 55, 56, 58 through 60, 61, 63, 64, 70 through 73, 76 through 80, 82 through 73, 76 through 80, 82 through 88, 89, 90, 93, 102, 103, 104, 105, 106, 109, 112, 116, 117 through 122, 124, 125, 126, 128 through 133, 135 (TR 1384 to 1385). I admitted Respondents' Exhibits ("RX") 1 through 7, 9, 13, 22, 50, 54, 55 through 57, 59, and 62, which Mr. Becker offered into evidence without objection (TR 1384 to 1385). I admitted Respondents' Exhibits 3, 4, 6, 8, 10, 11, 13, 14, 15, 16, 17 through 21, 23, 26 through 30, 32, 34, 36, 38 through 42, 44, 52, 58, 60, 61, 63, 64, 65, 67, 69, 70, 71, 73, 74, 76 through 79, 81 through 87, 89, 90, 102, 103, 105, 106, 110, 112, 113, 115, and 117 (TR 1357). Respondents also offered Mr. Becker's Exhibits 5, 24, 29, 51, 56, 60, 78, 85, 116, 117, 118, 119, 120, 121, 122, and 129, which I received into evidence (TR 1357). Both parties filed post-hearing briefs and replies to those briefs. I also allowed both parties to file a supplemental one-page brief on *Beacom v. Oracle Americ*a, Inc., 825 F.3d. 376 (8th Cir. 2016). The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each one in arriving at this decision.

ISSUES

The issues include:

1. Whether Mr. Becker engaged in protected activity by not submitting a negative-$4-million earnings before interest, taxes, depreciation, and amortization ("EBITDA") projection to a shared corporate database as a final product.

2. Whether Respondents knew Mr. Becker engaged in protected activity by not submitting the negative-$4-million projected EBITDA.

3. Whether Mr. Becker suffered adverse action under 18 U.S.C. § 1514A(a), such as constructive discharge, circumvention, threats, or harassment.

4. Whether Mr. Becker is entitled to front and back pay under 8 U.S.C.A. § 1514A(c).

5. Whether Mr. Becker is entitled to compensatory damages under 8 U.S.C.A. § 1514A(c).

FACTS

This case involves a bewildering array of related business entities. Respondent Community Health Systems, Inc. ("CHSI") is a publicly-held corporation with its principal place of business in Tennessee (RX 60, p. 1). CHSI comprises one of the largest affiliations of operators of hospitals and clinics in the United States, both in terms of number of facilities and in net operating revenues (RX 4, p. 1; RX 60). Respondent Rockwood Clinic, P.S. ("Rockwood") is a non-profit and non-stock professional service corporation registered in the State of Washington (RX 60, p. 1). Rockwood operates as a multi-specialty health care clinic in Spokane County, Washington (TR 685). Rockwood became affiliated with CHSI in December of 2009 (TR 687, 691-692, 810). CHS/Community Health Systems, Inc. is a subsidiary of CHSI (TR 621, 985), and Community Health Systems Professional Services Corporation ("CHSPSC") is, in turn, a subsidiary of CHS/Community Health Systems, Inc. (RX 4). CHSPSC is a management company that provides services to the various CHSI subsidiaries and affiliated companies, including revenue management and internal audit (*Id.*). In December, 2009, as part of CHSI's acquisition of Rockwood, CHS/Community Health Systems, Inc. and Rockwood entered into a Finance Agreement under which CHS/Community Health Systems, Inc. gave Rockwood a $25 million line of credit through the end of 2014 (RX 3; TR 693 to 694, 826 to 827, 831). At the same time, Rockwood also entered into a written Services Agreement with CHSPSC (RX 4; TR 827). Rockwood retained control over the operations of its clinics (RX 4). Rockwood became part of Division IV of CHSPSC (TR 693).

CHSI periodically publicly discloses to its investors information about its EBITDA, or "earnings before interest, taxes, depreciation, and amortization" (TR 66-67). It discloses two EBITDA figures. The first is a company-wide actual EBITDA figure, which consolidates the actual achieved results of the hospitals and clinics that are CHSI's indirect subsidiaries; and the second is a range of consolidated estimated future EBITDA projections (TR 431 to 432, 597 to 598; RX 44). EBITDA is an indicator of a company's performance over time, used by investors to understand the financial performance of hospital companies (TR 66 to 67). CHSI discloses these two different EBITDA numbers in an 8-K filing with the SEC (RX 44). CHSPSC calculates CHSI's consolidated EBITDA projection range on a "top-down" basis – that is, the executives at the top of the organizations dictate the budgets down to different operating units (TR 73, 584). For estimated 2012 EBITDA projections announced in February, 2012, the difference between the low estimated EBITDA projection and the high estimated EBITDA projection was $40 million (TR 595 to 596; RX 44, p. 882). The 8-K announcing CHSI's projected 2012 EBITDA range states: "These projections are based on the Company's historical operating performance, current trends and other assumptions that the Company believes are reasonable at this time" (RX 44, p. 880).

Mr. Becker obtained an M.B.A. and Masters of Health Services Administration degree with a B.A. from Xavier University in Cincinnati, Ohio (TR 160). He worked for the Veterans' Administration ("VA") as a Chief Financial Officer ("CFO") for approximately 15 years (RX 8). On February 14, 2011, he began his work for Respondents as CFO of Rockwood (TR 172). When he applied to Rockwood, he had received awards and recognition for his achievements at the VA (TR 158). Before accepting the CFO position with Rockwood, Mr. Becker had no experience as a CFO in a for-profit company (RX 8; TR 375 to 377).

Besides meeting with Rockwood's Chief Executive Officer, Dr. Craig Whiting, Mr. Becker interviewed in Tennessee with Larry Cash, the CFO of CHSI, and Stephanie Moore, CHSPSC Vice President of Division IV (TR 167). Rockwood hired Mr. Becker on January 24, 2011, and he began work on February 14, 2011 (CX 8; TR 171, 172). After beginning work with Rockwood, Mr. Becker bought a home in Spokane, and moved his family (his wife and three children) to the area (TR 359 to 360). Larry Cash and Stephanie Moore warned Mr. Becker that he would be walking into a "mess" of an accounting system (TR 172 to 173). Upon arriving at Rockwood, Mr. Becker addressed a 38-page audit of Rockwood's various SOX "problems" (TR 173 to 175). It identified numerous SOX issues between ledgering of revenues and credits along with a failure to separate duties and personnel (TR 175),

Respondents assigned Mr. Becker two tasks that are the focus of this case. First, they assigned him to project Rockwood's actual cash needs through the end of 2014 (TR 1068 to 1069). At the beginning of 2011, it appeared Rockwood would reach the $25 million ceiling under the line of credit sometime late in 2011 or early 2012 (TR 694 to 696; TR 701 to 702). By October, 2011, Rockwood had accumulated $24.7 million of debt on its credit line (TR 193). Mr. Becker was supposed to start from Rockwood's actual revenue and expenses, and then project future revenue and expenses based on Rockwood's current spending through the end of 2014 (TR 704, 727 to 728, 1068 to 1069). The purpose of the analysis was to obtain more money from Respondent CHSI's credit facility, so Rockwood could continue operations (TR 1155). This task required Mr. Becker to project Rockwood's EBITDA for the year 2012 (TR 1168 to 1169). Mr. Becker believed this "line of credit projection" needed be "consistent with actual numbers, known events, and credible criteria and assumptions" (TR 245).

Second, Mr. Becker was to complete a strategic business plan for Rockwood. On September 20, 2011, he received an agenda document from Division IV (CX 11; TR 193 to 194). This document laid out a chronological process for a 2012 strategic business plan for Rockwood as part of a presentation to CHSI (CX 11; TR 193 to 194). The strategic business plan is "used to communicate how you believe you're going to perform" over the next few years (TR 194 to 195). Like the line of credit analysis, Rockwood's strategic business plan would include an EBITDA projection for 2012 (TR 195). The entire plan would be presented in a slide show, and Mr. Becker's duty was to prepare whatever slides Rockwood assigned to him (TR 197). Mr.

Becker would work on these projects for several months (TR 706, 1214, 1215, 1219, 1222; RX 103). According to Dr. Whiting and Mr. Becker, the figures used for both the line of credit spreadsheet projection and for the EBITDA strategic business plan should be "consistent" (TR 261 to 262, 897). Although Respondents contend otherwise, in Mr. Becker's view, the EBITDA numbers in both the line of credit and the strategic business plan projections should have been not merely "consistent," but identical (TR 262).[1]

CHSI's corporate agenda required its hospitals, by December 13, 2011, to complete and download into a shared "corporate database" their final budgets for the preceding year (TR 199). By January 17, 2012, Rockwood's earnings targets were to be "confirmed" (TR 200 to 201). The final projects were to be entered into the corporate database, where they could be used for "several things," including calculating a reporting number to the public (TR 200, 201). Mr. Becker believed those figures would be a component of what CHSI reported to the public and would be used as part of Rockwood's extension to increase its line of credit (*Id.*). He assumed that the numbers CHSI reported to the public were compiled from information CHSI's subsidiaries reported to CHSI (TR 428).

On October 3, 2011, Mr. Becker gave Debra Herrin, Director of Financial Operations of Division IV, an analysis of Rockwood's projected cash needs through 2014 as part of his efforts to seek an extension to its existing line of credit with CHS/Community Health Systems, Inc., a subsidiary of CHSI (TR 203, 1197; CX 14). Mr. Becker's projection showed a $12.8-million operating loss for Rockwood in 2012, also characterized as a negative $12.8-million EBITDA (CX 14; CX 102, p. 236 to 237).

On October 24, 2011, Christine Silberger, a financial manager from Division IV Finance, sent an email to Mr. Becker (CX 15). Working with Stephanie Moore and Debra Herrin, Ms. Silberger directed Mr. Becker to use net revenue of $150 million for Rockwood in 2012, and to assert that Rockwood would present a negative-$4-million dollar EBITDA "target budget" instead of the negative $12.8 million EBITDA (CX 15). Mr. Becker did not receive any information illustrating how CHSI had calculated the negative-$4-million EBITDA, nor did he receive any further information that would help him reach this number (TR 210). Dr. Whiting and Ms. Herrin each testified they did not tell Mr. Becker that the negative-$4-million EBITDA would be shared with outside lenders – but, at the same time, there is no evidence in the record to suggest they ever told him it would *not* be shared with outside investors, either (TR 683, 1225).

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[1] Respondents provided testimony which argues that the strategic business plan and line of credit analysis were two separate exercises (TR 704 to 705, 782, 1139, 1254). The strategic business plan exercise, argue Respondents, required Mr. Becker to take into account proposed operational changes in order to meet a pre-assigned goal, whereas the line of credit analysis asked for a projection of Rockwood's actual future needs supposing no operational changes (*Id.*). Respondents assert that Becker was never given a negative-$4-million EBITDA target, or any other target, as part of the line of credit analysis (TR 704, 1069, 1206, 1207, 1218).

As detailed below, friction continued between Mr. Becker and Division IV finance staff for the next few months, stemming at least in part from Mr. Becker's refusal to incorporate Division IV's comments and financial conclusions into his work, including the negative-$4-million EBITDA (TR 710 to 718, 1069 to 1072, 1203 to 1213, 1216 to 1217, 1218 to 1219; RX 103).

After reviewing the actual operating results for Rockwood up to September 2011, Mr. Becker believed there was no reasonable way Rockwood could achieve the negative-$4-million EBITDA (TR 211 to 212). Mr. Becker extrapolated Rockwood's performance from before September, 2011, and accounted for expected changes in 2012 (*Id.*). After receiving the email from Ms. Silberger on October 24, Mr. Becker told Rockwood CEO Dr. Whiting that CHSI's demand was impossible (TR 212). At first, Dr. Whiting agreed with Mr. Becker, and did not believe that number could be the correct target (TR 213). He agreed to discuss the matter with Division IV President Bill Hussey (*Id.*).

Sometime in October, 2011, Stephanie Moore sent her subordinate, Debra Herrin, Director of Financial Operations for Division IV, to Rockwood's office (TR 1197, 1200 to 1201). Ms. Moore sent Ms. Herrin in order to "improve" Mr. Becker's line-of-credit projection (TR 1200 to 1201). Dr. Whiting supported the trip, believing Mr. Becker was struggling with his adjustment from the VA to the for-profit world (RX 103.08, p. 2616). At the same time, Dr. Whiting was "absolutely certain" Mr. Becker was fully capable of learning those differences (RX 103.08, p. 2616). Before mid-October, Ms. Herrin's only involvement with Mr. Becker "would have been limited to just a review of actual operations and mid-months" (TR 1200 to 1201).

Ms. Herrin returned to Franklin, Tennessee, and through November and December, 2011, continued to work with Mr. Becker (TR 1203; RX 103). Mr. Becker exchanged emails with Ms. Herrin, Ms. Moore, and the rest of Division IV almost daily as Ms. Moore and Ms. Herrin either made changes to Mr. Becker's work or demanded he change it (RX 103). Mr. Becker refused to incorporate Ms. Herrin's changes, even removing them from his work (RX 103; TR 1234).

On November 11, 2011, Ms. Moore sent an email to Mr. Becker directing him not to change reportable statistics without her approval, but also complaining that he had not changed stats quickly enough when other members of Division IV asked him to (CX 18). She told Mr. Becker, "<u>Your critical thinking skills are extremely concerning to me</u>. Thanks!" (*emphasis in original*)(*Id.*). She reserved her approval as "final" (CX 18). Dr. Whiting, who was copied on the email, complained to Ms. Moore that Mr. Becker was getting "very mixed messages" on the project (CX 18).

On November 14, 2011, Division IV's Maria Caruso, copying Debra Herrin, sent Mr. Becker CHSI's completed "preliminary budget trended income statement" for Rockwood (CX 19). Ms. Caruso told Mr. Becker that the "NR AND EBITDA MUST TIE TO YOUR TAR-

GETS. **NO EXCEPTIONS!!!!!!**" (*emphasis in original*)(*Id.*). Ms. Caruso told Mr. Becker that he needed to upload the "preliminary budget" to the corporate shared drive no later than November 28, 2011 (CX 19).

Division IV bombarded Mr. Becker with constant phone calls and emails from Stephanie Moore, Debra Herrin, Christine Silberger, and Maria Caruso (TR 245 to 246). Ms. Herrin spent 600 to 700 hours working with Mr. Becker over the line of credit projections (TR 1234). Respondents' Exhibit 103 comprises hundreds of emails to Mr. Becker from late October, 2011, onward. Often, Division IV would send several each day demanding almost immediate responses. Some of these emails included language questioning Mr. Becker's critical thinking, work ethic, and reading skills (RX 102; RX 103). The emails accused him of failing to provide proper details to justify his results, and complained that his results were often incorrect (RX 103).

In November of 2011, Mr. Becker did not express his concerns in writing to Ms. Silberger or anyone else because he believed he could work with Dr. Whiting to address the issue with Division IV President William Hussey (TR 224 to 225). Mr. Becker thought Dr. Whiting was addressing the issue with Mr. Hussey while Ms. Caruso, Ms. Herrin, and Ms. Moore pressured him to change his numbers (TR 225). On November 17, 2011, Dr. Whiting hand wrote a note of encouragement to Mr. Becker, saying that he appreciated Mr. Becker's work, and that Mr. Becker had been an incredible asset (CX 20).

On November 18, 2011, Ms. Herrin told Mr. Becker that he was working too slowly and the "project" was entering week six (CX 21). She wrote "Again, the project is entering Week 6" on its own line, separated from the rest of the email by multiple spaces (*Id.*). Dr. Whiting, who was copied on the email chain, told Mr. Becker to "stick with it" (*Id.*). Later that day, Ms. Moore emailed Mr. Becker and asked him on Friday to complete the project by the end of the weekend, stating that "this has taken too long" and "every day this drags on becomes a bigger black eye to you and your staff. Thanks!" (RX 103.66). As Thanksgiving approached, the final review of the line of credit projection was due and Mr. Becker submitted spreadsheets with the $12.8 million negative EBITDA (TR 246 to 247). Division IV told Mr. Becker that "[t]hese are not the numbers we want to see" despite Mr. Becker's assertion that his numbers were a more accurate projection for 2012 (TR 247).

On December 13, 2011, CHSI held a strategic business plan meeting in Tennessee with Rockwood (RX 106). By that time, Rockwood had incurred a $9.8 million loss for the year (*Id.*). Dr. Whiting indicated that "[b]ecause of Rockwood's financials and the budget, the capital could become more difficult to obtain unless we show a better return on capital investment" (TR 865). The point of this discussion was to show that Rockwood was doing better to get that extra capital (TR 866).

Mr. Becker was to assist in presenting Rockwood's strategic business plan during the meeting by providing, among other statistics, the EBITDA projection. Before the presentation, he gave Dr. Whiting his $12.8-million negative EBITDA (TR 253, 258). However, when Rockwood made its presentation, it used a projected EBITDA of negative $5.2 million (TR 255). Mr. Becker did not put the negative-$5.2-million number into the financial slides (TR 258). The entire finance department at Rockwood would have had access to Mr. Becker's spreadsheet (TR 971).

That same day, during a break in the meeting, Stephanie Moore pulled Mr. Becker into her office (TR 257). Mr. Becker testified that she directed him to provide a negative-$4-million EBITDA or his job status would be in question (TR 257, 263). Ms. Moore acknowledges that she spoke with Mr. Becker about his performance in her office (TR 1116 to 1117).

Immediately after the meeting with Ms. Moore, she led Mr. Becker to Debra Herrin's office (TR 263, 1116 to 1117). Ms. Herrin told Mr. Becker that she was "building a file" on him and that he needed to conform and provide the $4 million EBITDA or he would be terminated (TR 264). Ms. Moore acknowledges walking Mr. Becker directly to Ms. Herrin's office, (TR 1116, 1117), but Ms. Herrin denies telling Mr. Becker that she was "building a file" on him or that she threatened his job security (TR 1200).

Mr. Becker testified that he confronted Dr. Whiting about the negative-$5.2-million number and the threats to his job after the meeting, when the two of them were at the airport waiting to return home (TR 265, 298). Dr. Whiting told Mr. Becker he was trying to help him get closer to the negative-$4-million EBITDA and promised to discuss the matter with Bill Hussey (TR 266, 299). Dr. Whiting assured Mr. Becker that only Dr. Whiting himself had the power to fire Mr. Becker, and that Mr. Becker did not need to worry about Ms. Moore or Ms. Herrin (TR 918 to 919). Dr. Whiting does not remember if Mr. Becker told him that his job was threatened, but admits telling him that only he had the power to fire him (TR 919 to 920).

Mr. Becker continued to have problems with Ms. Moore and Ms. Herrin. For example, on December 16, 2011, Ms. Moore sent an email to Mr. Becker after an exchange between Mr. Becker and Debra Herrin (RX 103.111). Ms. Moore stated that "projections continue to be a huge weakness for you and Rockwood clinic. All the questions that Debra outlined are appropriate. In the future you need to anticipate the questions before being asked" (RX 103.111).

On an unspecified date, Dr. Whiting sent an email to William Hussey, President of Division IV and Ms. Moore's superior, that Ms. Moore believed was critical of her subordinate, Ms. Herrin (TR 1174, 1176). Two weeks later, on December 27, 2012, Debra Herrin, at the direction of Ms. Moore, wrote 10 memoranda addressed to Stephanie Moore (CX 24; TR 1175, 1219 to 1222). Ms. Herrin and Ms. Moore wrote these memoranda to persuade Dr. Whiting to take a more active role in resolving "things" with Mr. Becker (TR 1174). All of these memoranda are related to Mr. Becker's work on the line of credit (TR 1221). At some point, Ms. Moore and Ms. Herrin forwarded these memoranda to Dr. Whiting (TR 1180).

On January 6, 2012, Division IV scheduled another call with Rockwood to discuss the strategic business plan (TR 299). Before the conference call, Dr. Whiting discussed the $5.2-million EBITDA loss with Mr. Becker (TR 299 to 300). Dr. Whiting directed Mr. Becker to put the negative-$5.2-million EBITDA number into the spreadsheets, while identifying $1.2 million of additional profit as "to be determined" which would result in an EBITDA of negative-$4-million (TR 300, 924 to 925). Mr. Becker told Dr. Whiting that it was not a realistic number and that he would not use it (TR 300). After Dr. Whiting demanded this again, Mr. Becker walked out (TR 925).

During the call, Dr. Whiting opened his spreadsheet and saw that Mr. Becker had not inserted the negative-$4-million EBITDA (with $1.2 million in profits to be determined) into the spreadsheet (TR 924 to 925). Dr. Whiting told Mr. Hussey that Mr. Becker would use that number in the strategic business plan (TR 922). Mr. Becker said in the meeting that the negative-$4-million number was incorrect, and that Rockwood was going to lose over $10 million (TR 300 to 301).

Dr. Whiting and Mr. Becker had another meeting after the January 6, 2012, call while Dr. Whiting was still upset (TR 301, 927 to 928). Dr. Whiting once again asked Mr. Becker to enter the negative-$4-million EBITDA with $1.2 million profit to be determined and Mr. Becker told Dr. Whiting that he could not do it (TR 301, 928). Dr. Whiting then ordered him to enter those figures (TR 928 to 930). Mr. Becker left the room shaking his head (TR 301, 928 to 929).

On January 13, 2012, during regularly scheduled performance reviews of all of Rockwood's executive staff, Dr. Whiting gave Mr. Becker a negative performance review and placed him on a Performance Improvement Plan ("PIP")(RX 26; RX 27; TR 770 to 776). Dr. Whiting rated Mr. Becker's performance as "unacceptable" (RX 26). The topics from Ms. Moore and Ms. Herrin's December 27, 2011, memoranda package were essentially the same topics included in Dr. Whiting's PIP (TR 1173). The PIP listed the reasons for the negative performance review:

- prolonged time-frame needed to accomplish line of credit project;
- Prolonged time-frame needed to provide departmental financial performance reports;
- Multiple errors in above noted reports requiring multiple revisions;

- Failure to update 2012 EBIDTA reconciliation slide submitted to corporate as part of 2012 strategic business plan;
- Apparent deficiency in ability to analyze

(RX 27; TR 771 to 776).

Dr. Whiting was also "tired of hearing complaints from Division IV that incomplete or incorrect data was being sent up there" (TR 773). Mr. Becker had to put the negative-$4-million-EBITDA-with-$1.2-million-to-be-determined number into the strategic business plan spreadsheet within seven days (RX 26; RX 27; TR 930 to 931). The PIP clarified that failure to meet these standards would result in termination of employment (RX 27; TR 307, 940 to 942).

Mr. Becker contacted his current legal counsel on January 14, 2014 (TR 500), and wrote an email to Dr. Whiting the next day (RX 29). In his email, Mr. Becker stated that he was being pressured to submit the budget showing a negative-$4-million EBITDA, which would allegedly be represented to investors or lenders as Rockwood's expected 2012 EBITDA loss (*Id.*). Mr. Becker stated that he could not justify a budget with a $4 million EBITDA loss and that misreporting financing as a CFO in a reporting company is not only illegal, but criminal (*Id.*). Mr. Becker demanded that Dr. Whiting remove him from the PIP, redefine his performance as "exceeds requirements" to align with Dr. Whiting's previous evaluations, and demand that Respondent CHSI cease and desist from requiring Mr. Becker to misrepresent financial conditions to retain his job (*Id.*). Dr. Whiting responded to Becker's email, asserting that that Becker had not been asked to misrepresent any data (*Id.*).

Because Dr. Whiting was leaving for Tennessee, Mr. Becker spoke with him at his house on January 15 (TR 309 to 310). Mr. Becker repeated that he was going to submit what he genuinely believed Rockwood's performance would be for 2012, and not the negative-$4-million EBITDA loss (TR 310). Dr. Whiting told him that he would work with Bill Hussey about getting the negative-$12.8-million approved (TR 311). Mr. Becker followed up his earlier e-mail that same night, sending a message confirming that the meeting took place and that he was looking forward to completing the "EBITDA rec" with the "correct numbers" and finalizing the LOC PowerPoint (TR 310; CX 29).

On January 17, 2012, Dr. Whiting responded to Mr. Becker's original January 15 email (CX 30). Dr. Whiting insisted Mr. Becker represent the negative-$4-million EBITDA, with $1.2 million in profit as "yet to be determined" no later than January 20, 2012 (*Id.*). Mr. Becker refused to do so, stating that he would not "misrepresent this status to any financial institution or investor as CFO of this corporation, period" (*Id.*).

Dr. Whiting discussed Mr. Becker's January 15th email with Stephanie Moore, who told Dr. Whiting that Mr. Becker had not been asked to do anything illegal or unethical (TR 954). At some point, Dr. Whiting forwarded Mr. Becker's January 15th email to Division IV legal counsel Debra Cooper (RX 23). On January 19th, the day before the January 20th deadline, Ms. Cooper tried to set up a meeting in Tennessee at CHSPSC's offices with Mr. Becker, VP of Internal Audit Mike Lynd, a Compliance officer, Employment Counsel Rhea Garrett, and herself, to "ease his concerns" about what Mr. Becker was being asked to do (*Id.*). Mr. Garrett later testified that he found Mr. Becker's concerns "foolish" (TR 994). Dr. Whiting told Mr. Becker the negative-$4-million EBITDA number was "meaningless" (TR 778). Ms. Cooper informed Mr. Becker that the meeting would be "pretty informal" and that their goal should be accomplished in a few hours (CX 36). Mr. Lynd assumed that Mr. Becker was incorrect, and intended to discuss the matter in person (TR 1320). Mr. Lynd explained at the hearing that the meeting was meant to "alleviate" Mr. Becker's concerns and resolve Mr. Becker's "confusion" (TR 1319, 1321). Ms. Cooper's email asserted that she wanted to "get the communication back on track" and scheduled the meeting for January 24, 2012 (RX 23; CX 41).

Mr. Becker initially embraced the idea of the meeting but asked for additional information before he flew from Spokane to Tennessee (*Id.*). On January 23rd, the day before his flight, Ms. Cooper told Mr. Becker that Mr. Garrett, Mr. Lynd, and a representative from compliance would attend the meeting (CX 41). Mr. Becker emailed Ms. Cooper, asking where the negative-$4-million EBITDA figure came from, what the goal of the meeting was, and whether he should have an attorney (*Id.*). Mr. Becker also noted that Dr. Whiting was still directing him to enter the negative-$4-million EBITDA (*Id.*).

Later that day, Ms. Cooper responded (*Id.*). She said the goal of the meeting was to get an understanding of the facts and get communications back on track. She also stated that so far the actions taken had not fit the situation and that the meeting would take less than an hour and a half (*Id.*). She did not answer the question of whether he should have an attorney and did not discuss Dr. Whiting's request to submit the negative-$4-million EBITDA. Mr. Becker inidcated he was not willing to attend the meeting without more information about it (*Id.*). No one rescheduled and the meeting never took place (TR 989, 1305).

Mr. Becker's January 15, 2012, email found its way to Andi Bosshart, the compliance officer for CHSI (TR 1345). Ms. Bosshard forwarded the complaint to Respondent CHSI's Internal Audit's Michael Lynd because it addressed a SOX 404 issue (*Id.*). Respondents argue that CHSPSC's Mr. Garrett had a discussion with Mr. Lynd, and they agreed to let Mr. Becker know that he could use his own EBITDA target of negative $12.8 million if that's what Mr. Becker wanted to do (TR 991 to 993, 1023 to 1026, 1320 to 1322, 1339).

On January 30, Mr. Lynd spoke with Mr. Becker by phone (RX 32). Mr. Becker explained that his job was being threatened unless he submitted a negative-$4-million dollar EBITDA (TR 331; RX 32). Mr. Lynd did not understand where the negative-$4-million dollar loss came from (TR 331). Mr. Becker made it clear to Mr. Lynd that he believed this figure related to CHSI's representations to its investors (CX 51; TR 1294). Mr. Lynd testified that he told Mr. Becker that the EBITDA reconciliation was just a "target exercise" for internal use only and that he told Mr. Becker to go ahead and use whatever EBITDA target number Mr. Becker felt appropriate (RX 32; TR 1283 to 1284, 1335). At Mr. Becker's request, Mr. Lynd told Mr. Becker he would do some checking to determine the source of the negative-$4-million EBITDA target that had been assigned to Rockwood (TR 1284 to 1286). After the call with Mr. Becker, Mr. Lynd claims he informed CHSPSC CFO Larry Cash that he had advised Mr. Becker to use his own EBITDA number for the strategic business plan (TR 1333, 1335). In an email sent to himself immediately after the call, Mr. Becker asserted that Mr. Lynd offered "no solution to this issue" (TR 332; RX 32).

Mr. Lynd did not perform Respondents' ordinary compliance process (TR 1347 to 1348). This process involves logging and maintaining contacts within corporate compliance, summarizing the allegations, a report of the status of the respective investigations, and a report of any corrective action taken in response to the investigation (RX 13). He was, however, aware that Mr. Becker was raising concerns regarding SOX Section 404 (TR 1295). Mr. Lynd argues that he did not perform any further investigation because he believed the conflict was resolved. Mr. Becker would submit the negative-$12.8-million EBITDA and his PIP would be removed (TR 1287).

Sometime just before January 31, 2012, Dr. Whiting met with Mr. Becker and revoked the PIP and negative performance review (TR 795 to 796). Dr. Whiting told Mr. Becker the performance issues would be revisited in four or five months and he would get Mr. Becker some assistance and training on financial issues in publicly-traded companies (TR 796). Dr. Whiting asked Division IV to bring Mr. Gary Singer, Special Project CFO for CHSI, to Rockwood (TR 797, 985). Stephanie Moore was under the impression that Mr. Singer was going to Spokane to assist Mr. Becker CFO in trying to bring resolution (TR 1180). Mr. Becker believed Mr. Singer was coming to take over his position (TR 325 to 326). As "project CFO" Mr. Singer was used when CHSI removed a CFO to "augment that period of time of recruitment for the new CFO" (TR 326).

On January 31, 2012, Maria Caruso asked Mr. Becker to submit an "updated EBITDA rec today, based on the budget changes yesterday" (CX 55). Mr. Becker asked if Ms. Caruso was asking him to submit a false EBITDA based on the targets she sent out on October 24 which was a $4 million loss, and Ms. Caruso did not respond (CX 55; RX 34). On February 2nd, Mr. Lynd told Mr. Becker that best I can tell "the negative-$4-million dollar EBITDA was "probably" from the "initial acquisition model for Rockwood" (CX 58).

By February 6, 2011, the constant communication with Mr. Becker had slowed. He continued to be engaged in a number of email chains for the rest of his employment, but overall he received a small number of emails compared to October through December (*See* RX 76; RX 78; RX 79; RX 80; RX 81; RX 82; RX 83; RX 85; RX 86; RX 87; RX 89; RX 90; TR 523 to 534). On occasion, he would go to see Dr. Whiting and find him talking with CHSI personnel in a meeting Mr. Becker ordinarily would have been invited to attend (TR 523).

On February 6, 2012, Mr. Becker received an email from the VA confirming his acceptance of employment as a Director with the VA in Tennessee, with plans to start work by March 11, 2012 (RX 39). On February 7, 2012, Mr. Becker notified Dr. Whiting that because he was being asked to misrepresent financial terms, and had been circumvented, replaced by Gary Singer, and was experiencing undue stress, it was obvious he could not work at Rockwood anymore (RX 41). Mr. Becker offered to leave "CHS/Rockwood" if it would address the damages to Mr. Becker, his reputation, and his family (*Id*.). Mr. Becker stated that he wanted to "do this as discretely and efficiently as can be done so both of us can move on with the least amount of damage possible" (*Id*.).

Mr. Becker informed Dr. Whiting of his discovery that the negative-$4-million dollar EBITDA was "probably" from the "initial acquisition model for Rockwood" and reiterated his concerns of misrepresentation and complained that he was no longer included in communications (CX 59). Mr. Becker repeated his refusal to comply with the negative-$4-million dollar EBITDA because he believed forcing the projected EBITDA to conform to a pre-acquisition model created for investors would not be appropriate (*Id*.). Finally, Mr. Becker accused Dr. Whiting of circumventing him by bringing in Mr. Singer (CX 61). Mr. Becker assumed that he was not the only CFO that had been put in this position (*Id.*). Dr. Whiting told Mr. Becker that his financial perceptions were wrong and that they would set up a meeting when he returned to the office, but did not address the issue of circumvention in his response (*Id*.).

CHSPSC Vice President of Division IV Operations, Mr. Hussey, scheduled a meeting related to the Rockwood strategic business plan for February 24, 2012, while Mr. Becker was on vacation (CX 73; TR 805 to 807). On February 14, 2012, and after the meeting was scheduled, Dr. Whiting told Mr. Becker he could send someone else from his department (CX 73; TR 807 to 808). Dr. Whiting testified that the meeting was scheduled at Mr. Hussey's convenience due to travel and it was not unusual for meetings to be scheduled around Mr. Hussey's availability without consideration to others (TR 806 to 807).

On February 20, 2012, Mr. Becker told Respondents through his counsel that he would not submit any negative-$4-million EBITDA while he remained Rockwood's CFO and that he believed he was being asked to commit financial reporting fraud (CX 77). Mr. Becker again accused Respondents of circumventing him by bringing in Mr. Singer to "help" (*Id*.). Therefore, Mr. Becker stated that he had "no choice" but to submit his resignation (*Id.*). Mr. Garrett responded with "Rockwood Clinic accepts Gregg's tender of resignation effective today" (CX 78). Mr. Becker was 47 years old at the time of his resignation and had been employed with Respondents for just over a year (CX 132, p. 4, 5).

Mr. Becker never completed the line of credit analysis project (TR 718 to 719, 1069, 1214), and Dr. Whiting testified that when Mr. Becker left his employment, he had not inserted any figure into the template for the strategic business plan (TR 968). Ms. Moore testified that Division IV submitted the negative-$4-million EBITDA reconciliation to itself after Mr. Becker left his employment (TR 1194 to 1195). Ms. Moore stated that Division IV submitted the same EBITDA for the line of credit as the strategic business plan (TR 1194).

Dr. Whiting insisted that the strategic business plan EBITDA projection was "meaningless" (TR 934). Even though this number was supposedly "meaningless," Dr. Whiting demanded that Mr. Becker complete the strategic business plan himself, and never made any plans for another person to do so (TR 935, 968). He also stated that Mr. Becker was keeping everyone from finishing the strategic business plan by refusing to enter the number (TR 935). Dr. Whiting was adamant that this "unachievable" goal would force Rockwood to look closely at what it was doing so it could enhance revenue or cut expenses (TR 723). He also stated that Rockwood's target was a "stretch," but they could come close (TR 724).

Despite complaints that Mr. Becker never submitted the "meaningless" negative EBITDA, Respondents also argue that Mr. Becker submitted the negative-$4-million EBITDA in several spreadsheets during the course of his employment (RX 64; RX 65; RX 67; RX 70; RX 73; RX 74). These incomplete spreadsheets are attachments to various documents purporting to update Mr. Becker's work (*Id.*).

Rockwood produced an actual EBITDA of negative $13.731 million in 2012 (TR 964). By the time Mr. Becker left his employment, he calculated that Rockwood would likely lose $11 million in 2012, $7.8 million in 2013, and $11 million in 2014 (TR 1240). Each of these projections came close to Rockwood's actual losses (TR 1241). Mr. Becker also predicted that Rockwood's total debt by the end of 2014 would be $116,064,987 (TR 1246). As of June, 2012, Ms. Herrin calculated an outstanding debt of $116,305,000 (*Id.*). She thought it was a "coincidence" that Mr. Becker's projection was off by only $300,000 (TR 1247). When asked if she knew Mr. Becker's projections "almost hit every single year right on the head," Ms. Herrin said, "That's luck" (TR 1241).

On March 7, 2012, the Spokane *Spokesman-Review* published an article about Mr. Becker's complaint (TR 361). After the publication, Spokane's Providence Hospital canceled Mr. Becker's pre-set meeting with its CEO (TR 361 to 362). Mr. Becker made "several" attempts to reach out to others in the health care industry to find other employment in the Pacific Northwest, but he could not secure an interview (TR 362).

Mr. Becker accepted a director position with the VA in Nashville, and began his new employment on April 9, 2012 (TR 364). After resuming work at the VA, Mr. Becker had to sell his home in Spokane (*Id.*). Mr. Becker's Rockwood salary was $245,000 a year, but on his return to the VA, his salary dropped to $140,000 (TR 366). He is still searching for a job in the private sector and had a "few" telephonic interviews (TR 367). Mr. Becker's stress during this ordeal was "extreme," but he did not provide specific details (TR 370).

COMPLAINANT'S EXPERTS

Dr. Barry Epstein has been a certified public accountant ("CPA") since 1966 and has a Ph.D. in management information systems and statistical decision (TR 45 to 46). After reviewing the second amended complaint, assorted correspondence among the parties, and other related documents, he issued a report dated November 12, 2014, and testified at the hearing on behalf of Mr. Becker (CX 133; TR 45).

Dr. Epstein testified that no practicing finance or accounting person could believe that deliberately producing materially incorrect information to superiors in an organization for possible dissemination or use in investing or financing activities could be correct (TR 62). The purpose of SOX, he explained, is to ensure accurate reporting to the public, including the prevention of material distortions of financial statements (TR 87, 140). He further testified that a person trained in accounting in a subsidiary CFO position would know that financial information is disseminated to the investors and creditors of the parent corporation (TR 62 to 63). Therefore, according to Dr. Epstein, if a subsidiary CFO is asked to provide information that is material, and has reason to believe it will be incorporated into some sort of consolidated communications to investors or creditors, he is on notice that his actions could result in misleading or potentially-fraudulent financial reporting (TR 63). Dr. Epstein did not limit this to historical financial statements; he included any financial information in his analysis (*Id.*).

Dr. Epstein also addressed the "safe harbor provisions" of SOX, which in his view offer protection for projections based on reasonable assumptions (TR 145). He clarified that the "bespeaks caution" language of "forward looking statements" is not intended to allow companies to shield themselves from presenting deliberate misinformation (*Id.*). Financial information, Dr. Epstein opined, cannot be deliberately or knowingly misstated (*Id.*).

Dr. Epstein testified that Mr. Becker should have been "very concerned" it was improper or illegal to upload a negative-$4-million dollar loss, when he believed that a negative $12.8 million loss was the most likely outcome (TR 86). Mr. Becker, according to Dr. Epstein, would have "every reason" to believe it was being produced so that the people above him in decision-making capacities would use that number to create a bottom-up set of consolidated financial projections (TR 84). He also responded to CHSI's CEO Larry Cash's testimony that he does not use any information from the subsidiaries' projection to project the earnings for CHSI (TR 79). Dr. Epstein found it "inappropriate, irresponsible, and almost reckless" for a CEO to do such a thing (*Id*.).

Dr. Epstein opined that Mr. Becker reasonably believed that the reporting company, CHSI, would look at the information Mr. Becker uploaded to the corporate hard drive (TR 81). It also would have been unreasonable for a subsidiary CFO to assume the reporting company would not have used the uploaded information. In Dr. Epstein's view, Mr. Becker could not rule out the information being used for public reporting purposes, and accordingly ought to anticipate the information could be subject to public disclosure and litigation (TR 82 to 83).

Dr. Epstein also discussed materiality. He relied on SEC's Staff Accounting Bulletin to discuss the qualitative factors relevant to materiality (TR 64). Dr. Epstein concluded that no one could say a deliberate misstatement is "immaterial merely by applying a quantitative yardstick of having it fall below some computed threshold of materiality" (TR 65).

Dr. Barbara Luna is a Senior Partner and CPA with the accounting and litigation services firm of White, Zuckerman, Warsavsky, Luna & Hunt with a Master of Science and Doctor of Philosophy Degrees in Applied Mathematics from Harvard University (CX 132). She submitted a report dated October 30, 2015, which Mr. Becker entered into evidence (*Id*.). For her analysis, Dr. Luna reviewed various documents, including Mr. Becker's resume, labor statistics, and legal documents related to this case, and Mr. Becker's tax history (*Id*.). Dr. Luna created six different scenarios detailing Mr. Becker's potential loss (*Id*.). Mr. Becker advocates scenario six, which calculates a loss of $1,841,366 total (*Id*. at p. 4). The front pay runs through April 12, 2031. Dr. Luna calculated back pay without considering interest at $341,380 and front pay at $1,499,986 (CX 132, p. 4, schedule 1.6).

<u>RESPONDENTS' EXPERT</u>

Mr. Matt Medlin is a CPA in the state of Washington with a bachelor of arts in business administration with a concentration in accounting management information systems from Eastern Washington University (RX 60). Mr. Medlin reviewed depositions from this case; CHSI's filings with the SEC; Public Company Accounting Oversight Board auditing standards; and the American Institute of Certified Public Accountants Attestation Standards Codification AT Section 301: Financial Forecasts and Projections (*Id*.). Mr. Medlin submitted his report and testified at the hearing (RX 60; TR 576).

Mr. Medlin provided six opinions (RX 60). First, he opined that Mr. Becker should have known Rockwood's EBITDA as stated in the EBITDA Reconciliation was not a component of annual or quarterly financial statements filed with the SEC in Forms 10-K or 10-Q (*Id*.). Second, Mr. Becker should have known Rockwood's EBITDA was not material to CHSI's financial statements because CHSI's EBITDA range was $1.91 to $1.95 billion (TR 594; RX 60, p. 2051). Third, Mr. Becker should have known Rockwood's EBITDA as stated in the "EBITDA reconciliation" was not material to the EBITDA guidance provided by CHSI to the public in the Form 8-K (RX 60). Fourth, Mr. Becker should have known the EBITDA guidance provided by CHSI to the public contained many assumptions with financial impacts significantly larger than the disputed amount of Rockwood's 2012 EBITDA (*Id*.). Fifth, Mr. Becker should have known the EBITDA guidance provided by CHSI to the public was covered by the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 (*Id*.). Sixth, Mr. Becker should have known the EBITDA reconciliation process was for internal management purposes (*Id*.).

Mr. Medlin also weighed in on Mr. Becker's behavior and decision making from October, 2011, through February, 2012. He stopped short of saying that Mr. Becker unreasonably refused to attend the meeting in Tennessee on January 24, 2012, but argued that meeting included the people he would want to speak with (TR 591). He believed that those attending, including an employment lawyer and a representative from internal audit, were exactly the right people to investigate whether Mr. Becker was being asked to do something that would violate SOX and whether anyone was taking retaliatory action against him (*Id*.). Mr. Medlin testified that it was unreasonable for Mr. Becker to reject Mr. Lynd's assurances that Rockwood's budget was not publically reported, given Mr. Lynd's position as head of Internal Audit (TR 589). Mr. Medlin, however, could not testify whether the negative-$4-million EBITDA was a reasonable projection (TR 652).

Both Dr. Epstein and Mr. Medlin agree that PSLRA's safe harbor provision applies to EBITDA projection because the requisite cautionary language was used (TR 140, 598). Mr. Medlin opined that that there is not any law or accounting principle that prevents a CFO from knowingly and intentionally misrepresenting forward projections (TR 608 to 611). As noted in the previous section, Dr. Epstein disagrees.

CONCLUSIONS OF LAW

The legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (Air 21) govern SOX Section 806 actions. Accordingly, to prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: 1) he engaged in a protected activity or conduct; 2) that his employer knew that he engaged in protected activity; 3) he suffered an adverse action; and 4) the protected activity was a contributing factor in the unfavorable actions. *See Sylvester v. Parexel Int'l, LLC,* ARB Case No. 07-123, 2011 WL 2517148, at *7 (ARB May 25, 2011)(en banc).

I. Mr. Becker engaged in protected activity when he refused to submit the negative-$4-million EBITDA based on the reasonable belief that doing so would violate one of the enumerated federal statutes or regulations in the SOX Act's whistleblower protection provision

a. Reasonable belief

> Section 806 [of the Sarbanes-Oxley Act] requires that, to be protected from retaliation, an employee must "reasonably believe" the conduct she reports violates one of the enumerated federal statutes or regulations [in the Act's whistleblower protection provision]. 18 U.S.C. § 1514A(a)(1)…The [Administrative Review] Board has defined "reasonable belief" to include both a subjective and an objective component; an employee must actually believe in the unlawfulness of the employer's actions and that belief must be objectively reasonable. *Sylvester [v. Parexel Int'l LLC]*, 2011 WL 216854 at *11. The decisions of multiple Circuit Courts of Appeals are in accord. *See Harp [v. Charter Commc'ns, Inc.,* [558 F.3d 722, 723 (7th Cir. 2009)] (collecting cases). "Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (quotation omitted).

Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1132 (10th Cir. 2013).

> "The 'objective reasonableness' standard applicable in SOX whistleblower claims is similar to the 'objective reasonableness' standard applicable to Title VII retaliation claims." Accordingly, in *Parexel Int'l Corp. v. Feliciano*, 2008 WL 5467609 (E.D. Pa. 2008), the court found the complainant's reliance upon the employer's representations reasonable in light of the complainant's limited education, noting that had the complainant been, for example, a legal expert, a higher standard might be appropriate. *See also Sequeira v. KB Home*, 2009 WL 6567043, at 10 (S.D. Tx. 2009) [¶]The reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities.

Sylvester, 2011 WL 2517148 at *12 (citations omitted).

> The plain, unambiguous text of § 1514A(a)(1) establishes six categories of employer conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), §

> 1344 (bank fraud), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.

Lockheed Martin, 717 F.3d at 1130. "Congress chose statutory language which ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.'" *Sylvester,* 2011 WL 2517148 at *44 (citing *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 1001 (9th Cir. 2009)).

Although the disagreements between the parties on questions of fact are legion, there are a few undisputed facts which the court finds particularly significant. First, there is no dispute that the negative-$4-million EBITDA figure originates with Respondents, and not with Mr. Becker. How they arrived at it may be shrouded in mystery, but there is no doubt that number is their creation, and not Mr. Becker's. Second, the evidence and testimony unambiguously show that Respondents, and not Mr. Becker, believed the negative-$4-million EBITDA figure was appropriate to the purposes for which they intended to use it. There is much disagreement over what those purposes may have been, but there is no denying that Respondents liked the negative-$4-million EBITDA figure for their purposes, and Mr. Becker did not. The reason Mr. Becker was unhappy with the negative-$4-million figure was that he could not independently justify it, using information available to him. Finally, there is no evidence in the record to show that the negative-$4-million EBITDA figure was in fact reasonable for any purpose. Mr. Becker does not defend it, and Respondents did not defend it at the hearing, either. Respondents' expert, Mr. Medlin, specifically declined to do so:

> Q: And sir, at your deposition – I'll just ask you here. You can't testify, as you sit here today, after reviewing everything that you've reviewed, that that assumption that that negative-$4-million EBITDA was a reasonable assumption, can you?
>
> A: I saw some testimony that some people thought it was and, obviously, Mr. Becker didn't think it was.
>
> Q: You would testify and you're not testifying here, that that $4 million EBITDA was a reasonable number, are you?
>
> A: I didn't do the work to be able to form an opinion on that.
>
> Q: And so the answer is no, you cannot testify, as you sit here today, that that $4 million EBITDA was, in any respect, a reasonable number, can you?
>
> A: Either way, no – reasonable or easy or hard.

(TR p. 651, line 18 - p. 652, line 8).

In this case, the parties have filed hundreds of pages of pleadings and spent hours of hearing time arguing all around these facts, each attempting to portray the other as arbitrary, unreasonable, and inflexible. Respondents, inventors of the negative-$4-million EBITDA, contend Mr. Becker has no reason for refusing to follow their instructions to use it. Mr. Becker contends the number is arbitrary and divorced from reality, and consequently there is no good reason for anyone to use it. Respondents contend Mr. Becker should have obeyed orders, while Mr. Becker contends he cannot ethically assent to a financial projection which is essentially a work of fiction. As set forth below, because Respondents have offered the court no basis to conclude the negative-$4-million figure is reasonable for any purpose – even as an aspirational goal, as they sometimes contend – they concede the moral high ground to Mr. Becker. Either the negative-$4-million number was merely a target, for internal use only – in which case it would make little difference whether the CFO agreed with it – or it was a projection important enough to require CFO approval – in which case a CFO who, like Mr. Becker, reasonably anticipated a $12.8-million loss instead, would be disinclined to sign off on it. These facts alone put Mr. Becker between a rock and a hard place, and support a reasonable suspicion that his employer has not told him everything it knows about the negative-$4-million number, or about the uses to which they might put it.

The evidence shows Mr. Becker subjectively believed publication of the negative-$4-million EBITDA would violate § 1348. He so testified at the hearing (TR 211 to 212, 309 to 310). Mr. Becker could not justify the figure based on information available to him, and accordingly told Rockwood CEO Dr. Craig Whiting that CHS's demand was impossible (TR 211 to 212). Before each strategic business plan meeting mentioned above, Mr. Becker either gave Dr. Whiting his $12.8 million negative EBITDA or refused to submit a different EBITDA (TR 253, 258, 300 to 301, 925, 924 to 925, 928 to 930). After Respondents placed Mr. Becker on a PIP which forced him to enter the negative-$4-million EBITDA or risk his employment, Mr. Becker again told Dr. Whiting that he would not submit the negative-$4-million EBITDA (TR 309 to 311). Later, Mr. Becker sent emails on January 15 and February 20 each indicating that he subjectively believed Respondents were asking him to violate SOX (RX 29; CX 77). Dr. Epstein testified to the reasonableness of this suspicion.

Respondents argue that Mr. Becker did not have this subjective belief because he submitted the negative-$4-million EBITDA at least seven times (Respondents' Closing Brief, p. 13). This argument is not persuasive. Respondents assert Mr. Becker submitted the negative-$4-million EBITDA in several spreadsheets during the course of his employment (RX 64; RX 65;

RX 67; RX 70; RX 73; RX 74).[2] However, it is unlikely that anyone believed these negative-$4-million EBITDA entries represented Mr. Becker's final submission, conclusions, or work product. Certainly nobody acted like they believed it; on the contrary, Respondents continued to hector Mr. Becker without mercy to submit the negative-$4-million EBITDA virtually until his last day on the job, and he resolutely withstood their demands (TR 253, 258, 300 to 301, 310, 928; RX 29; CX 77). Many of the spreadsheets Respondents offer are filled with blanks and appear unfinished. Nobody contends that Mr. Becker never tried to justify the negative-$4-million EBITDA, and it should come as no surprise to anyone that there would be work product indicating some attempt to reach that number. Therefore, Respondents' argument that Mr. Becker submitted the negative-$4-million EBITDA fails.

The court evaluates the reasonableness of Mr. Becker's belief in the light of his training and experience, and in the light of the facts known to him at the time. As discussed above, he earned an M.B.A. and Masters of Health Services Administration degree with a B.A. from Xavier University in Cincinnati, Ohio, (TR 160), and worked for the Veterans' Administration as a CFO for approximately 15 years (RX 8). The court concludes Mr. Becker's skepticism towards the negative-$4-million EBITDA figure was objectively, as well as subjectively, reasonable. No one denies that Mr. Becker's own work showed an impending loss more than three times greater than the figure Respondents wanted him to use. No one has identified any flaw in the methods Mr. Becker used to arrive at his own negative-$12.8-million EBITDA figure, a figure which ultimately appeared prescient. No one denies that Mr. Becker notified his direct supervisor, Dr. Whiting, that he believed the negative-$4-million EBITDA was an impossible target (TR 211 to 212), and no one denies that Respondents continued to seek Mr. Becker's approval of it (CX 19; RX 26; RX 27; TR 247, 255, 257, 263, 264, 299 to 301, 922, 924 to 925, 928), despite occasional comments that the number was "meaningless" or unimportant. In the court's view, under these circumstances, any experienced CFO would properly wonder why his arm was being twisted to approve a number apparently based on fantasy. Fantasies, however useful in certain contexts, do not require CFO approval. And projections which *do* require CFO approval are often disclosed to outsiders.

Dr. Epstein's testimony supports this conclusion. He testified that no practicing finance or accounting person could believe that deliberately producing materially incorrect information to superiors in an organization for possible dissemination or use in investing or financing activities is justified under any circumstances (TR 62). He further explained that a person trained in accounting in a subsidiary CFO position would know that financial information is disseminated to the investors and creditors of the parent corporation (TR 62 to 63). Therefore, Dr. Epstein

[2] Mr. Becker suggests that these exhibits may have been tampered with after the fact because Respondents offer them as editable spreadsheets (Complainant's Reply Brief, p. 25). While editable spreadsheets are not the ideal way to present evidence to the court, Mr. Becker does not offer any evidence which indicates Respondents have tampered with these exhibits.

reasons, if the subsidiary CFO is asked to provide information that is material, and has reason to believe it will be incorporated into some sort of consolidated communications to investors or creditors, he is on notice that his actions could result in misleading or potentially fraudulent financial reporting (TR 63). Dr. Epstein did not limit this to historical financial statements; he included any financial information in his analysis (*Id.*). He opined that Mr. Becker reasonably believed that the reporting company, CHSI, would look at the updated information Mr. Becker uploaded to the corporate hard drive (TR 81). It also would have been unreasonable for a subsidiary CFO to have anticipated that the parent company would not use the uploaded information. Such a CFO would have to assume the information might, at some point, be reported to the public in some form (TR 82 to 83). Dr. Epstein testified that Mr. Becker should have been "very concerned" what he was being asked to do was improper or illegal because he was being asked to upload a negative-$4-million dollar loss, when he believed that a negative $12.8 million loss was the most likely outcome (TR 86). Mr. Becker, according to Dr. Epstein, would have "every reason" to believe the EBITDA figures were being produced so that the people above him in decision-making capacities would rely on them to create consolidated financial projections (TR 84). This points to the conclusion that Mr. Becker reasonably believed if he submitted the negative-$4-million EBITDA to the shared corporate database as a final product, Respondents might have used it for purposes that would violate SOX.

Mr. Medlin came to the opposite conclusion, but his logic is flawed. He opined that Mr. Becker's belief was unreasonable. Mr. Medlin believes a reasonable CFO could have inferred that the EBITDA strategic business plan would not be divulged to the public from reading CHSI's 10-K and 10-Q forms, and that Mr. Becker did not collect any facts that would indicate otherwise (RX 60; TR 580 to 581, 601). First, he observes that CHSI's 8-K indicates that the EBITDA projections are the result of looking at company-wide variables, including CHSI's historical operating performance, current trends and other assumptions (TR 583; RX 44, p. 880). Next, Mr. Medlin observes that CHSI specifically identifies its assumptions along with the projected EBITDA. The assumptions, Mr. Medlin believes, make it clear that CHSI's projected EBITDA is not based on the individual EBITDA targets of its affiliates (TR 585).

Evidence indicates, however, that Respondents relied at least in part on the EBITDA projections of CHSI's subsidiaries. CHSI, through Mr. Becker's superiors, instructed its subsidiaries to use certain numbers for their EBITDA projections so that its subordinates could send data back to CHSI to support those projections (CX 15; CX 58). If CHSI was not relying on the work of its subsidiaries, there would be no point to the assignment. This form of reliance makes Mr. Becker's beliefs objectively reasonable, even if Respondents ultimately did not simply add up all the EBITDA projections from its subsidiaries to create CHSI's own projections. Mr. Medlin does not address the obvious possibility that CHSI would rely on the EBITDA projections from its subsidiaries to calculate the numbers it would report to investors or at least to verify its own reported targets. The C-11 corporate agenda showed that Mr. Becker's projected EBITDA would be uploaded into the shared corporate folder (TR 236). From there, the numbers were in complete control of CHSI and could be used for anything (TR 201), presumably including calculating CHSI's EBITDA or as part of Rockwood's request to increase its line of credit. Mr. Medlin does not deny any of this.

As discussed above, no one provided evidence at the hearing to show the negative-$4-million EBITDA was a reasonable goal. Mr. Becker believed there was no reasonable way for Rockwood to achieve the negative-$4-million EBITDA in 2012 when it was on track to lose $12.8 million (TR 211 to 212). While Respondents and their witnesses are adamant that the "target" goal was possible, they produced no evidence to support this assertion, nothing to indicate that they attempted to reach this goal, and no expert testimony to indicate that the number was either possible or reasonable (TR 724, 727) – on the contrary, Mr. Medlin made no effort to determine whether it was (TR 652). In fact, Rockwood achieved EBITDA of negative $13.731 million that same year, a loss only slightly greater than Mr. Becker's projection (RX 55; TR 964). Since there is no evidence to suggest the negative-$4-million figure was reasonable, Mr. Becker's skepticism about it is understandable – and, in the light of his own negative-$12.8-million EBITDA projection, his skepticism is eminently reasonable.

Respondents argue that since they told Mr. Becker the negative-$4-million EBITDA would not be reported to the public in any way, Mr. Becker's belief was objectively unreasonable (Respondents' Closing Brief, p. 5). First, Respondents overestimate the information they provided Mr. Becker. At the hearing, Dr. Whiting and Ms. Herrin both testified that they did not tell Mr. Becker the negative-$4-million EBITDA would be shared with outside lenders – but there is no evidence to suggest they ever told him it would *not* be, either (TR 683, 1225). Mr. Lynd's testimony that he told Mr. Becker the negative-$4-million EBITDA was for internal purposes only is not corroborated anywhere else in the record before the court (TR 1281; RX 32).

But even if Respondents had assured Mr. Becker that the number was for internal use only, he had reason not to take those assurances at face value. First, until February, 2012, nobody told Mr. Becker how the number was calculated, and even then, all Respondents offered was Mr. Lynd's educated guess (CX 58). Second, so far as Mr. Becker knew, Respondents had not conducted any meaningful investigation into his verbal and written complaints. After he told Dr. Whiting in October, 2011, that he would not use the negative-$4-million dollar number because Rockwood could not achieve it, Respondents pressured Mr. Becker to use the negative-$4-million EBITDA anyway (TR 211 to 212, 255, 257, 258, 263, 264, 300 to 301, 928 to 930). What is more, Mr. Becker had just finished a thirty-eight-page SOX audit (TR 173 to 175), and when he first went to work for Rockwood, Mr. Cash and Ms. Moore had warned him he was walking into a "mess" of an accounting system (TR 172 to 173). Mr. Becker, a CFO with fifteen years of experience fresh off a SOX audit, might under these circumstances harbor reasonable doubts about bland assurances from other corporate figures who were not financial professionals about a number that nobody, least of all Mr. Becker himself, could justify.

Respondents' assertions that they adequately investigated the claim after the January 15, 2012, email are not persuasive. Instead of investigating the circumstances surrounding Mr. Becker's January 15, 2012, email, Respondents asked Mr. Becker to fly across the country for an informal meeting that would, according to Respondents, resolve all of Mr. Becker's concerns within an hour and a half (TR 1347 to 1348).[3] CHSI executives did not perform an investigation in conformance with their stated rules, did not take any notes of an investigation, and did not retain any kind of log of their investigation. Instead, Mr. Lynd contacted Mr. Becker by phone to discuss the situation (RX 32; CX 58). This discussion appears to be the only meaningful step Respondents took to investigate Mr. Becker's complaint. Respondents did not take Mr. Becker's actions seriously, making Mr. Becker's allegedly-protected activity reasonable in spite of Respondents' assurances.

Mr. Becker's inability to find an explanation for the negative-$4-million EBITDA also suggests his behavior was reasonable. Ms. Silberger provided no justification whatever for the negative-$4-million dollar EBITDA "target budget" when she first sent it to Mr. Becker (CX 15). He asked for, but did not receive, an explanation for the figure on January 23rd (CX 41). Ultimately, no one offered any justification for this number until February 2nd (CX 58). From Mr. Becker's perspective, Respondents threatened his employment three times, including placing him on PIP, unless he used a number which they would not explain (RX 26; RX 27; TR 257, 263, 1200). This kind of mystery would make a reasonable CFO suspicious of a possible SOX violation.

Eventually, on February 2nd, Mr. Lynd told Mr. Becker that as near as he could tell, the number came from the acquisition model (CX 58). This explanation only increased Mr. Becker's concern that this number would, intentionally or otherwise, distort an honest understanding of Rockwood's actual financial condition (CX 59). CHSI's insistence on using an old assumption in the place of actual operating data would be understandably counter-intuitive to a financial professional of Mr. Becker's training and experience.

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[3] Mr. Becker's refusal to attend the meeting was reasonable. While it may be true that the meeting, as Mr. Medlin points out, might offer Mr. Becker a chance to meet with people who could help resolve the issues at hand, Mr. Becker had less than a week's notice to attend the meeting held across the country (RX 23; TR 591). The language in the email suggests Respondents did not take his concerns seriously and did not believe a violation of any kind had occurred. Mr. Garrett stated that the meeting would be "pretty informal" and their goal could be accomplished less than an hour and a half (CX 36; 41). He just wanted to "get the communication back on track" (RX 23). At best, Mr. Becker would fly across the country for an hour and a half meeting to be told he was wrong. At worst, Respondents, from Mr. Becker's point of view, were going to fly him across the country to threaten his employment if he did not submit the negative-$4-million EBITDA. Leading up to the meeting, Respondents ignored Mr. Becker's questions about whether he would need his own lawyer and where the negative-$4-million dollar EBITDA came from (CX 41). A reasonable CFO might choose not to attend such a meeting either out of fear, or the belief that it would not be productive to attend.

Respondents argue that Mr. Becker did not engage in protected activity because they told him he could use his own number (Respondents' Closing Brief, p. 8), but the evidence on this point is unpersuasive.[4] At the hearing, Mr. Lynd testified that he gave Mr. Becker permission to use the negative $12.8 million EBITDA number (TR 1333, 1335). But the record does not show that Mr. Lynd ever put this advice in writing, and Mr. Becker's own notes of the conversation (RX 32) make no mention of it. Neither is there any evidence to show Mr. Becker in fact followed that advice. What Mr. Lynd is saying is that there was a meeting of the minds between the parties with respect to the negative-$12.8-million EBITDA during that conversation. Yet the parties continue to litigate against each other today, with Respondents still contending Mr. Becker could not reasonably refuse to adopt its own negative-$4-million figure. Whatever else may have occurred in that conversation, the court may safely conclude that Respondents' collective mind never met Mr. Becker's.

If Respondents had agreed Mr. Becker could submit the negative $12.8 million EBITDA, they had at least three opportunities to correct him, and took none of them. Mr. Becker asked Ms. Caruso if she was asking him to submit a false EBITDA based on the targets she sent out on October 24, 2012, and Ms. Caruso did not respond (CX 55; RX 34). On February 7, 2012, Mr. Becker told Dr. Whiting that because he was being asked to misrepresent financial terms, it was obvious he could not work for Rockwood anymore (RX 41). On February 20, 2012, Mr. Becker told CHSI through his counsel that he would not submit any negative-$4-million EBITDA while he remained as Rockwood's CFO (CX 77). If Respondents agreed that Mr. Becker could submit the negative $12.8 million EBITDA, they could have said as much on any (or all) of these occasions. Their failure to correct Mr. Becker casts doubt on the notion that Mr. Becker was allowed to submit the negative $12.8 million EBITDA. The absence of any written indication that Mr. Becker could use the negative $12.8 million EBITDA, along with Respondents' regular silence, suggests there was no agreement in the conversation between Messrs. Lynd and Becker.

This court, therefore, concludes Mr. Becker engaged in protected activity when he declined to submit the negative-$4-million EBITDA based on the reasonable belief that doing so would violate one of the enumerated federal statutes or regulations in the SOX Act's whistleblower protection provision.

i. Materiality

A SOX whistleblower cannot prevail on his claim unless he can show that he had an objectively reasonable belief that the alleged violation would be material to investors. *Van Asdale*

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[4] Dr. Whiting testified that Mr. Becker could always have entered a negative-$4-million EBITDA and marked the rest of the sum as "to be determined" (TR 299). This is the functional equivalent of the negative-$4-million EBITDA and is not a compromise. It would have required Mr. Becker to assent to the negative-$4-million figure, something he was entirely unwilling to do.

v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009); *Nazif v. Computer Sciences Corp.*, No. C-13-5498 EMC, 2015 WL 3776892 at *6 (N.D. Cal. June 17, 2015). Respondents argue that Mr. Becker could not reasonably believe Respondent Rockwood's projected EBITDA would be material, and his claim would therefore fail (Respondents' Closing Brief, p. 21).

Respondents rely on *Beacom v. Oracle Americ*a, Inc., 825 F.3d. 376 (8th Cir. 2016). The plaintiff in *Beacom* was Vice President of Sales for a division of Oracle (Respondents' Supplemental Brief). *Id.* at 378. As part of a new top-down approach, Oracle instructed plaintiff to include deals already in progress that had not yet closed under the category of "best case sales." *Id.* at 378. This approach resulted in Oracle overestimating projections by about $10 million. *Id.* at 378 to 379. The Eighth Circuit held that a person in plaintiff's position would understand the predictive nature of revenue projections and that they "would understand that $10 million is a minor discrepancy to a company that annually generates billions of dollars." *Id.* at 381.

A reasonable person with Mr. Becker's training and experience would believe Respondents' demand that he submit a negative-$4-million dollar EBITDA to be "material" despite the ruling in *Beacom*. Respondents correctly assert that Mr. Becker complained about a relatively small amount of money compared to CHSI's total value. Mr. Becker alleges a discrepancy of up to $8 million to CHSI, a company that makes over a billion dollars a year – a similar ratio to *Beacom*. However, *Beacom* is silent on whether to include the aggregate possibility of fraud in the analysis of materiality. Mr. Becker argues that the Respondents' EBITDA projection includes an inaccuracy of up to $8 million. There is a $40-million margin of error in the publicly-reported Respondent CHSI's EBITDA figures, large enough to absorb even an $8-million error from Rockwood (TR 595 to 596; RX 44, p. 882). But if four other CHSI subsidiaries also make $8-million errors, the Respondents' $40-million "delta" is gone. Mr. Becker, sincerely believing that he was being pressured into making a misstatement amounting to $8 million, might reasonably have believed that other subsidiary CFOs faced the same pressure, and that Rockwood's inaccurate EBITDA number, when coupled with other inaccurate EBITDA numbers, might significantly skew the ultimate CHSI EBITDA figures, even if the Rockwood number, standing alone, would not.

Mr. Becker introduced evidence indicating a reasonable belief that Rockwood was demanding other CFOs submit target EBITDAs without proper data to support them. As noted above, Ms. Herrin and Ms. Moore from CHSPSC, CHSI's personnel manager, demanded that Mr. Becker submit a negative-$4-million EBITDA or risk his job. Since CHSPSC is a management company for various subsidiaries and affiliated companies of Respondent CHSI, it would be reasonable to assume that Respondents were engaging in this behavior with other CFOs (RX 4). In addition, Respondents use a "top-down" approach, with executives at the top of the organizations dictating the budgets down to different operating units (TR 73). It would be reasonable for Mr. Becker, or someone of his experience, to assume that executives responsible for the negative-$4-million EBITDA target would provide similar impossible targets to other CFOs. In addition, Respondents admit that they regularly provide targets for projections to subsidiaries (TR 1140 to 1141). The system that raised Mr. Becker's suspicions was used throughout CHSI (*Id.*). Mr. Becker assumed that he was not the only CFO that had been put in this position (*Id.*). Therefore, a reasonable person in Mr. Becker's position might believe the fraudulent behavior to material in the aggregate when reports from other CFOs are included.

In addition to the quantitative measurement of materiality, it would be reasonable for someone with Mr. Becker's experience to believe that such intentional fraud would be material to investors. Dr. Epstein asserts that no one could say a deliberate misstatement is "immaterial merely by applying a quantitative yardstick of having it fall below some computed threshold of materiality" (TR 65). The respondents in *Beacom* asked plaintiff to include earnings for a low number of sales which were in progress and expected to be completed, but not yet finalized. In this case, Respondents asked Mr. Becker to spin targets out of the air without providing him justification, and when that failed, they asked him to use a specific number or risk his employment. Respondents escalated from sending disparaging emails questioning his abilities to threatening his job security. A reasonable person with Mr. Becker's background might view this aggressive and deliberate campaign to provide an unsupported number as particularly egregious, indicating the underlying issue was in fact material.

Respondents do not offer any authority to support that assertion that materiality is only a question of quantity. *Beacom* never discusses the question whether a deliberate falsehood would change the Eighth Circuit's analysis, and involved a less-aggressive campaign to encourage fraudulent activity. It is reasonable to assume that an aggressive campaign to use false financial information might be material to investors, as it could alert them to further fraud and misrepresentation or other illegal behavior.

Respondents' argument also fails because their actions indicate the number was material. Dr. Whiting argues that the negative-$4-million EBITDA was "meaningless" (TR 778, 934). If this number were genuinely "meaningless," it would make no sense whatever to threaten or pressure Mr. Becker in any way to give it his own *imprimatur*. Yet Respondents placed Mr. Becker on a PIP which forced him either to enter the negative-$4-million EBITDA, or risk his employment (RX 26; RX 27; TR 307). Dr. Whiting demanded that Mr. Becker complete the strategic business plan himself, and never made any plans for another person to do so (TR 935, 968). Dr. Whiting also argued that Mr. Becker's foot-dragging was delaying everyone from finishing the strategic business plan (TR 935). Respondents' conduct shows it mattered to them that Mr. Becker personally, and not anyone else, approved their EBITDA number. They cannot now credibly argue his approval was in fact "meaningless."

Ultimately, Mr. Becker has shown he had an objectively reasonable belief that the alleged violation would be material to investors.

ii. Safe Harbor Issue

Respondents also argue that Mr. Becker's belief was unreasonable because he knew about the safe harbor provision of the Private Securities Litigation Reform Act ("PSLRA") (Respondents' Closing Brief, p. 22). Under safe harbor provision of PSLRA, if a forward-looking statement is identified as such and accompanied by meaningful cautionary statements, then the state of mind of the individual making the statement is irrelevant, and the statement is not actionable regardless of the plaintiff's showing of scienter. Private Securities Litigation Reform Act of 1995, § 102(b), 15 U.S.C.A. § 78u–5(c)(1)(A)(i). *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2011). A forward-looking statement is "a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items." 15 U.S.C. § 78u–5(i)(1)(A). Those statements fall outside the safe harbor if the plaintiff can allege facts that would create a strong inference that the defendants made the forecast(s) at issue with "actual knowledge ... that the statement was false or misleading." 15 U.S.C. § 78u–5(c)(1)(B)(i); *see also Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1134 (9th Cir.2004).

Respondents assert that the safe harbor provision provides complete immunity from SOX for public statements, so long as those statements are accompanied by some kind of precautionary language (Respondents' Closing Brief, p. 22 to 23). Respondents cite *In re Cutera Sec. Litig*, 610 F.3d 1103, 1112 (9th Cir. 2010) to support this proposition. Respondents also argue that Mr. Becker's expert "concedes" that the safe harbor provision applies to CHSI's EBITDA projections.

First, Respondents ignore an important component of Dr. Epstein's testimony. Dr. Epstein agreed that the safe harbor provision applied to CHSI's forward projections because they were accompanied by precautionary language. However, Respondents omit Dr. Epstein's conclusion that knowingly false projections remove public statements from the protective bubble of the safe harbor provision.

Respondents' reading of the safe harbor provision is overly generous. It is true that the safe harbor provision provides some protection to Respondents. The reported projections and the accompanying language make it clear that the EBITDA projections CHSI provides are projections with a margin of error (RX 44, p. 880). However, the broad reading that the safe harbor provision provides complete SOX immunity for public statements, so long as they are accompanied by some kind of precautionary language, is incorrect. While Respondents' projections may be initially protected, those statements fall outside the safe harbor if Mr. Becker can allege facts that would create a strong inference that Respondents made the EBITDA projection with actual knowledge that the statement was false or misleading.

Mr. Becker had a subjective and reasonable belief that the safe harbor provision did not protect Respondents because Respondents demanded Mr. Becker knowingly use a false number which would be incorporated into CHSI's publically-reported EBITDA. As reasoned above, Mr. Becker had a subjective and objectively reasonable belief that he was being asked to submit an unjustifiable projection. Therefore, it would be reasonable for someone with Mr. Becker's background and experience to believe that Respondents were demanding he knowingly use a false number and that the safe harbor provision would therefore not protect Respondents.

This court concludes Mr. Becker had a subjective and reasonable belief that the safe harbor provision did not protect Respondents.

II. Respondents knew Mr. Becker was acting on the reasonable belief that submitting a negative-$4-million projected EBITDA would violate one of the enumerated federal statutes or regulations in the SOX Act because Mr. Becker specified and explained his refusal

a. Protected activity

Mr. Becker argues that he engaged in protected activity based on his subjective and reasonable belief when he refused to submit the negative-$4-million EBITDA (Complainant's Closing Brief, p. 69). Mr. Becker repeatedly told Dr. Whiting that he could not submit the negative-$4-million EBITDA as a final product, (RX 29; CX 77; TR 211 to 212, 255, 257, 258, 263, 264, 300 to 301, 928 to 930), and even refused to submit the negative-$4-million EBITDA as a final product after Respondents threatened his job (RX 26; RX 27; RX 29; CX 77; TR 257, 263, 264, 770 to 776). Respondents argue that Mr. Becker submitted the negative-$4-million EBITDA several times over the course of his employment and therefore never engaged in protected activity. This argument, as noted above, is not persuasive. The evidence Respondents cite includes incomplete work constructed as part of Mr. Becker's process. In addition, if Mr. Becker submitted the negative-$4-million EBITDA, Respondents' behavior after each submission is illogical and unbelievable.

Ultimately, this court concludes that Mr. Becker did in fact refuse to submit the negative-$4-million EBITDA and that this refusal is protected activity.

b. Notice of Violation

An unspecified or unexplained refusal to act may not be sufficient to alert a supervisor of a perceived SOX violation. *Getman v. Administrative Review Bd.*, No. 07-60509, 265 Fed.Appx. 317, 319-320 (5th Cir. 2008); *Also see Vannoy v. Celanese Corp.*, No. 2008-SOX-00064, 2009

WL 6496753, *12 (ALJ June 24, 2009). The communication "need not ring the bell on each element of one of the state provisions of federal law to support an inference that the employer knew or suspected that the plaintiff was blowing the whistle on conduct that may fall within the ample reach of the anti-fraud laws listed in § 806." *Wiest v. Lynch*, 710 F3d 121, 134 (3rd Cir. 2013). Employer cannot take the position that it could not have suspected that the plaintiff was engaged in protected activity because the communication did not recite facts showing an objectively reasonable belief in the satisfaction of each element of one of the listed anti-fraud provisions. *Id*.

The employee need not use the terms "fraud," "fraud on shareholders," or "stock fraud" as long as he identifies the employer's conduct of concern. *Van Asdale*, 577 F.3d at 997; *see also Harp v. Charter Communications*, 558 F.3d 722, 725 (7th Cir. 2009) ("the critical focus is on whether the employee reported specific conduct that constituted a violation of federal law, not whether the employee correctly identified that law"); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (4th Cir. 2008) (employee not required to cite code provision in question or show an actual violation, but general inquiries are not protected).[5]

Respondents argue that Mr. Becker's refusal to submit the negative-$4-million EBITDA was unspecified and unexplained (Respondents' Closing Brief, p. 9). Dr. Whiting, Debra Herrin, and Stephanie Moore each testified that Mr. Becker did not raise concerns of fraud or misrepresentation before his January 15, 2012 email (TR 684, 1075, 1225). Therefore, Respondents reason, they had no notice of Mr. Becker's alleged protected activity. It is true that there is no evidence of Mr. Becker accusing Respondents explicitly of fraud or misrepresentation under a specific statute until his January 15, 2012, email. But he is not required to do so. Respondents' argument is unpersuasive because of the ample evidence that Mr. Becker identified Respondents' conduct of concern.

Mr. Becker alerted Respondents to their problematic conduct as early as October 24, 2011, and repeated his warnings both verbally and in writing. First, Mr. Becker testified that he told Dr. Whiting in October of 2011 that he could not justify the negative-$4-million EBITDA target (TR 212). At first, Dr. Whiting agreed with Mr. Becker, and did not believe that number could be the correct target (*Id.*). He promised to discuss the matter with Division IV President Bill Hussey (*Id.*). Nothing ever came of this promise.

Dr. Whiting heard Mr. Becker's protests again in December. After he met with Ms. Herrin and Ms. Moore during the December 13, 2011, meetings in Tennessee, Mr. Becker spoke to Dr. Whiting at the airport as the two were waiting to return home. Dr. Whiting remembers assur-

[5] The requirement in Energy Reorganization Act cases that, to be protected, the employee must complain "specifically and definitively" about the violation does not extend to Sarbanes-Oxley cases. *See Sylvester v. Parexel Int'l LLC*, 2011 WL 2517148, at *17-19 (ARB May 25, 2011)(en banc).

ing Mr. Becker that only he had power over Mr. Becker's employment. Dr. Whiting also remembers that Mr. Becker was upset (TR 265, 298, 918 to 920). While Ms. Herrin and Ms. Moore claim not to have threatened Mr. Becker's employment on that occasion, the fact that Dr. Whiting reassured Mr. Becker that no one other than Dr. Whiting could fire him suggests Mr. Becker was afraid that somebody in the company was trying to get rid of him, and that he told Dr. Whiting so. What is more, Dr. Whiting's assurance is consistent with Mr. Becker's testimony that he told Dr. Whiting that Ms. Herrin and Ms. Moore had threatened his job if he did not submit the negative-$4-million EBITDA (TR 253, 257, 263, 265, 298). The court concludes that Dr. Whiting knew on December 13, 2011, that Mr. Becker believed he could not assent to the negative-$4-million EBITDA figure.

Mr. Becker again put Respondents on notice on January 6, 2012. Mr. Becker told Dr. Whiting that he could not justify the negative-$4-million EBITDA before a meeting (TR 299). Mr. Becker notified Dr. Whiting during the meeting that he would not be using that number (TR 300 to 301). After the meeting, Dr. Whiting met with Mr. Becker; Mr. Becker shook his head at the idea of using the negative-$4-million EBITDA and left the room (TR 301, 928 to 929). Mr. Becker may not have said the word "fraudulent," but his behavior makes it clear he did not approve of submitting the negative-$4-million EBITDA. Dr. Whiting could not have inferred anything else from Mr. Becker's behavior.

These three verbal reports make Dr. Whiting's professed ignorance that Mr. Becker believed there was fraudulent behavior afoot until he received the January 15, 2012, email difficult to believe. On at least three occasions Mr. Becker communicated his belief that he could not submit the negative-$4-million EBITDA to Dr. Whiting. Therefore, Respondents cannot argue that they did not have notice or that Mr. Becker engaged in a general, silent refusal to submit the negative-$4-million EBITDA before Mr. Becker's January 15, 2012, email.

While Mr. Becker left some ambiguity in these three verbal complaints, Respondents cannot argue that they had no knowledge of Mr. Becker's protected activity after the January 15, 2012, email. In his email, Mr. Becker tells Dr. Whiting he was being pressured to submit the budget showing a negative-$4-million EBITDA, which would allegedly be represented to investors or lenders as Rockwood's expected 2012 EBITDA loss (RX 29). Mr. Becker stated that he could not justify a budget with a $4-million EBITDA loss and that misreporting financing as a CFO in a reporting company was not only illegal, but criminal. He demanded that CHSI cease and desist from requiring him to misrepresent financial conditions to retain his job (*Id.*). After the email, Mr. Becker continued to refuse to submit the negative-$4-million EBITDA (CX 77).

As discussed above, Mr. Becker told Dr. Whiting at least three times before January 15, 2012, that he could not submit the negative-$4-million EBITDA. Respondents correctly assert that Mr. Becker did not specifically use the term "fraud" or "misrepresentation" on any of those three occasions. But there is no magic word to trigger SOX whistleblower protection. Ultimately, Respondents had known since October, 2011, that Mr. Becker could not justify the negative-$4-million EBITDA projection (TR 212). Again at the airport in December, 2011, and on January 6, 2012, Mr. Becker had expressed his unwillingness to assent to the figure, complaining in December that his refusal to do so might cost him his job. This conduct is sufficiently specific to comprise protected activity. Even if it were not, Mr. Becker's January 15, 2012, email explicitly raises the issues of fraud and misrepresentation.

Since Mr. Becker notified Respondents that he was refusing to submit the negative-$4-million EBITDA as early as October 24, 2011, and repeatedly thereafter, this court concludes that Respondents had notice of Mr. Becker's protected activity.

III. Mr. Becker suffered adverse action under 18 U.S.C. § 1514A(a) because he suffered constructive discharge, circumvention, and threats and harassment

a. Adverse action

As set forth above, no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because of the employee's protected activity. 18 U.S.C. § 1514A(a). The broad sweep of this language indicates Congressional acknowledgement that an employer has many tools at its disposal, other than formal discipline or termination, for making an employee's work life miserable. What is more, in *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254, 259-260 (5th Cir. 2014), the Fifth Circuit defines "adverse action" broadly. In *Halliburton*, for example, an employee complained to the Securities and Exchange Commission about his employer's accounting practices, and the employer told the employee's co-workers that he had reported them. The court concluded this disclosure, standing alone, was an adverse action, because it would result in ostracism, could be read as sending a warning, and be a potential deprivation of opportunities for future advancement. 771 F.3d at 262. An adverse action is harmful enough to trigger statutory protection when it might dissuade a reasonable employee from engaging in protected whistleblowing. *Haliburton, Inc.*, 771 F.3d 254, 259-60 (5th Cir. 2014) (citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 60, 126 S. Ct. 2405, 2410, 165 L. Ed. 2d 345 (2006)).

i. <u>Constructive Discharge</u>

Mr. Becker argues that he suffered constructive discharge (Complainant's Closing Brief, p. 87). "Constructive discharge" occurs when, under the totality of the circumstances, the employer unlawfully creates working condition so intolerable that a reasonable person in that employee's position would feel forced to resign. *Watson v. Nationwide Ins., Co.*, 823 F.2d 360, 361 (9th Cir. 1987); *See Lockheed-Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121, 1133 (10th Cir. 2013) (citing *Strickland v. United Parcel Servs., Inc.*, 555 F.3d 1224, 1228 (10th Cir.

2009)). The court must consider the totality of circumstances. *Lockheed-Martin Corp.*, 717 F.3d at 1134.

In this case, Respondents unlawfully created working condition so intolerable that a reasonable person in Mr. Becker's position would feel forced to resign. As noted above, they threatened his job on three occasions: twice on December 13, 2011, when Ms. Moore and Ms. Herrin did (TR 257, 263, 264); and again in the January, 2012, PIP (RX 26; RX 27; TR 770 to 776). Ms. Herrin spent 600 to 700 hours working with Mr. Becker over the line of credit projections while Division IV worked with him through email (TR 1234; RX 103). The interactions were constant. Respondents sent emails to Mr. Becker questioning his critical thinking skills and telling him how poorly he reflected on his department (CX 18; RX 103; RX 103.11; RX 103.66). After becoming frustrated with him, two of Respondents' employees padded Mr. Becker's file with ten memoranda in a single day to convince Mr. Becker's supervisor to take action against him (CX 24; TR 1174, 1175, 1219 to 1222). Before a January 6, 2012, meeting, Dr. Whiting pressured Mr. Becker to use the negative-$4-million EBITDA (TR 300). When Mr. Becker refused, Dr. Whiting told Mr. Hussey during the meeting that Mr. Becker would use the number, forcing Mr. Becker to speak out against the number and to become upset enough to leave (TR 300, 924 to 925). After the meeting, Dr. Whiting pressured Mr. Becker again, forcing Mr. Becker to become so upset he left the room shaking his head (TR 301, 928 to 929). Mr. Becker was under constant pressure to use the negative-$4-million EBITDA. This would contribute to an extremely stressful environment.

While threatening and harassing Mr. Becker, Respondents took steps to circumvent him. After Respondents placed Mr. Becker on the PIP, and thereafter removed him from it, they called Gary Singer to complete Mr. Becker's projects (TR 1180). At the same time, Mr. Becker's communication with Division IV began to recede (TR 523). He received a small number of emails compared to October through December, while Dr. Whiting left him out of meetings (*See* RX 76; RX 78; RX 79; RX 80; RX 81; RX 82; RX 83; RX 85; RX 86; RX 87; RX 89; RX 90; RX 103 TR 523 to 534). Mr. Becker became concerned that Respondents were going to replace him (TR 325 to 326). Respondents had used "project CFOs" like Mr. Singer to fill in for absent CFOs in the past (TR 326). When Complainant confronted Dr. Whiting with the accusation in a February 7 email, Dr. Whiting did not respond (CX 61).

On February 20, 2012, Mr. Becker declared he would resign if Respondents continued to insist on the negative-$4-million dollar EBITDA (CX 77). Mr. Becker accused Respondents of circumventing him by bringing in Mr. Singer to "help", and using Mr. Becker's subordinates (*Id.*). Therefore, Mr. Becker stated that he had "no choice" but to submit his resignation (*Id.*). Respondents accepted Mr. Becker's resignation that day (*Id.*).

These actions are particularly troubling – and would have been to Mr. Becker, or to anyone else in his situation – because of what touched them off. Serving as Chief Financial Officer of Rockwood, he had been directed to manifest his assent to a projection of negative-$4-million EBITDA for Rockwood for the year 2012. Using the information available to him, and methods which no one in this litigation has questioned, he concluded that figure was unjustifiable and unreasonable, projecting instead an EBITDA deficit more than three times higher. He reported this conclusion to his immediate supervisor, CEO Dr. Whiting, and to others. In response, nobody ever offered any explanation justifying the negative-$4-million number; indeed, to this very day, no one has. No one told him his own negative-$12.8-million EBITDA projection was wrong; in fact, later events suggest it was right. Instead, he had been ignored, pleaded with, cajoled, told the negative-$4-million figure was "meaningless," directly ordered to submit it, and ultimately threatened[6] unless he assented to it. No one else's approval would do but his, and nobody appeared concerned that he had no reasonable basis for approving the figure and an entirely reasonable basis for rejecting it. This is not a simple disagreement over company policy or a matter of different philosophies about the best way to do business. This is a dispute going to the very heart of what it means to be the Chief Financial Officer of an organization which is a component of a publicly-traded business. If, on the one hand, the negative-$4-million EBITDA was "meaningless," it ought not to matter to anyone what Mr. Becker personally thought of it. If, on the other hand, it was essential for the CFO to approve the negative-$4-million EBITDA figure, it ought to matter very much whether Mr. Becker personally endorsed it. Respondents demanded something else entirely: approval of a number Mr. Becker did not create and could not justify, solely because they ordered him to do it, in utter disregard of his own independent analysis. A reasonable person in Mr. Becker's position, being ignored, threatened, and shut out, would conclude Respondents did not really want a Chief Financial Officer, but a stooge.

This court concludes that Respondents constructively discharged Mr. Becker on February 20, 2012, the date of his resignation.

ii. <u>Circumvention</u>

Mr. Becker also suffered adverse action when Respondents circumvented him. Respondents lowered the frequency of their communications with Mr. Becker and brought in Gary Singer, the Project CFO, to complete Mr. Becker's projects in February of 2012 (TR 797, 985). Stephanie Moore was under the impression that Mr. Singer was going to Spokane to "assist his CFO in trying to bring resolution" (TR 1180). Mr. Becker believed Mr. Singer was coming to take over his position (TR 325 to 326). As "project CFO" Mr. Singer was used when Respond-

[6] Respondents' argument that Mr. Becker did not suffer adverse action because the PIP was removed is unpersuasive (Respondents Closing Brief, p. 10). Removing the PIP does not erase the threats to Mr. Becker's job security, harassment, or circumvention highlighted in this section, and does not prevent Respondents from threatening him again later.

ent CHSI removed a CFO to "augment that period of time of recruitment for the new CFO" (TR 326). When Mr. Becker sent Dr. Whiting an email stating his concern that Mr. Singer was coming to be his replacement in his February 7 email, Dr. Whiting did not address the issue in his response (CX 61). Dr. Whiting's failure to object suggests Mr. Becker's assessment was not far off the mark.

As Dr. Whiting was asking Mr. Singer to assist Rockwood in late January, Mr. Becker's communications with Dr. Whiting and Division IV slowed by early February, indicating he was being removed from the loop on the line of credit and strategic business plan projects. Respondents points out that Mr. Becker continued to be engaged in a number of email chains near the end of his time with Respondents (*See* RX 76; RX 78; RX 79; RX 80; RX 81; RX 82; RX 83; RX 85; RX 86; RX 87; RX 89; RX 90; TR 523 to 534). However, Mr. Becker received almost 200 emails from November to January of 2012, a much higher rate than in February, 2012 (RX 102; RX 103). On occasion, he would go to see Dr. Whiting and find him talking with Respondent CHSI personnel in a meeting he would have ordinarily been invited to attend (TR 523).[7]

The reduction in communications and Mr. Singer's arrival made Mr. Becker's work life miserable and would make him less likely to blow the whistle in the future. Therefore, it is included in the broad sweep of 18 U.S.C. §1514A(a). This court finds that Respondents circumvented Mr. Becker in February of 2012 and that this circumvention was an adverse action.

iii. Threats and harassment

Mr. Becker also suffered adverse action when Respondents threatened his job and harassed him. 18 U.S.C. §1514A(a) enumerates threats and harassment as a means to discriminate against an employee in the terms or conditions of employment. Respondents' emails, sent by Division IV, questioning his critical thinking and professional reputation indicate an aggressive campaign designed to change Mr. Becker's resistance to the negative-$4-million EBITDA number. Ms. Moore and Ms. Herrin also padded Mr. Becker's file with a series of hastily-written memoranda to convince Dr. Whiting to punish him. Finally, Respondents, as noted numerous times in this decision, threatened Mr. Becker's job on at least three occasions: Stephanie Moore and Debra Herrin in December of 2011, and Dr. Whiting's PIP in January of 2012. This pattern of threats and harassment constitutes adverse action which would make Mr. Becker less likely to blow the whistle.

[7] This court does not believe the meeting scheduled during Mr. Becker's vacation on February 24, 2012 was part of Respondents scheme to circumvent Mr. Becker. Dr. Whiting told Mr. Becker in advance that he could send someone from his department as his representative (CX 73; TR 808). Since Mr. Becker was on a pre-planned vacation, this means he was given every opportunity to participate as best as possible given the circumstances.

This court concludes that Respondents threatened and harassed Mr. Becker and that these threats and harassment constituted an adverse action against him.[8]

b. Mr. Becker's protected activity was a contributing factor in the unfavorable actions

A "contributing factor" means any factor which alone, or in combination with other factors, tends to affect in any way the outcome of the decision. *Bechtel v. Administrative Review Bd., U.S. Department of Labor*, 710 F.3d 443, 447 (2nd Cir. 2013). A recent decision, *Palmer v. Canadian Nat'l Ry.*, ARB no 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016), clarifies that "[w]here the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its non-retaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action." *Palmer*, ARB no 16-035, ALJ No. 2014-FRS-154, at *16 (ARB Sept. 30, 2016). If the employee proves that his or her refusal was a "contributing factor" to the employer's adverse action, the employer must prove by clear and convincing evidence they would have taken the same adverse action in absence of that protected activity. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003–04 (9th Cir. 2009); *Bechtel v. Administrative Review Bd., U.S. Department of Labor*, 710 F.3d 443, 447 (2nd Cir. 2013).

Mr. Becker alleges his refusal to submit the negative-$4-million EBITDA was his protected activity. Therefore, he must show that his refusal, either alone or in combination with other factors, tended to affect the outcome of Respondents' decisions. Mr. Becker's refusal does not need to be the primary or sole reason for Respondents' behavior.

As to Mr. Becker's constructive discharge, Mr. Becker's protected activity was a contributing factor in Respondents' decision to create an environment that would force a reasonable employee to leave his employment. Respondents threatened Mr. Becker's employment three times, and each time demanded that Mr. Becker submit the negative-$4-million EBITDA or risk his employment (RX 26; RX 27; TR 257, 263, 264, 770 to 776).

Mr. Becker's refusal to submit the negative-$4-million EBITDA contributed to the extensive phone calls and emails and the December 27, 2011, memoranda placed into Mr. Becker's file. There is little to no evidence that indicates Mr. Becker had significant problems doing his job before October, 2011. On October 24, 2011, Division IV sent an email to Mr. Becker directing him to conclude Rockwood would present a negative-$4-million dollar EBITDA "target

[8] Mr. Becker argues that Ms. Cooper's request for a meeting was adverse action (Complainant's Closing Brief, p. 89). However, Mr. Becker fails to explain how proposing a meeting as part of an investigative process constitutes retaliation. While Mr. Becker may have been reasonable to refuse to fly across the country, there is no evidence the request to attend this meeting had any impact on Mr. Becker.

budget" instead of the negative $12.8 million EBITDA (CX 15). After Mr. Becker refused to enter the negative-$4-million EBITDA, Ms. Herrin began to work with Mr. Becker to change his numbers (TR 1197, 1200 to 1201). Before mid-October, there is no evidence that Respondents had a conflict with Mr. Becker (TR 1200 to 1201). Division IV proceeded to send Mr. Becker large quantities of emails and regularly called his office (TR 1234). Ms. Herrin worked with him for up 700 hours (TR 245 to 246). Some of these emails included language questioning Mr. Becker's critical thinking, work ethic, and reading skills while others attacked his reputation (RX 102; RX 103; RX 103.66; CX 18; CX 19). Some of these emails demanded Mr. Becker submitted a specific EBITDA. For example, on November 14, 2011, Ms. Caruso told Mr. Becker that the "NR AND EBITDA MUST TIE TO YOUR TARGETS. **NO EXCEPTIONS!!!!!!**" (*emphasis in original)*(CX 19). The timing and content of these emails indicates that the negative-$4-million EBITDA affected the way Division IV handled Mr. Becker at least in part.

There was friction between Mr. Becker and Division IV finance staff that continued for the next few months stemming at least in part from Mr. Becker's refusal to incorporate Division IV's comments and financial conclusions into his work, including the negative-$4-million EBITDA (TR 710 to 718, 1069 to 1072, 1203 to 1213, 1216 to 1217, 1218 to 1219; RX 103). This conflict between Mr. Becker and Division IV led Ms. Herrin and Ms. Moore to write ten memoranda to persuade Dr. Whiting to take a more active role in resolving "things" with Mr. Becker (TR 1174). Further, all of these memoranda are related to Mr. Becker's work on the line of credit, which included the negative-$4-million EBITDA requirement imposed on Mr. Becker (TR 1221). It is clear that Mr. Becker's protected activity played a role in Respondents' behavior.

Mr. Becker's refusal to submit the negative-$4-million EBITDA was also a contributing factor to his circumvention. Respondents, growing frustrated with Mr. Becker after his January 15 email, decided to bring in Mr. Singer to perform Mr. Becker's task for him at least in part due to his failure to submit the negative-$4-million EBITDA (RX 29; TR 797, 985, 1180). Stephanie Moore was under the impression that Mr. Singer was going to Spokane to assist in trying to bring resolution to Mr. Becker's ongoing projects, which would include submitting the negative-$4-million EBITDA (TR 1180). Dr. Whiting testified that Mr. Becker needed to be trained, assisted, and educated to resolve his deficiencies in performance, which would have included Mr. Becker's refusal to submit the negative-$4-million EBITDA (RX 26; RX 27; TR 959). Mr. Becker's refusal to submit the negative-$4-million EBITDA also contributed to the slow of communications. After the January 15, 2012 email and the decision to bring in Mr. Singer, Respondents slowed communication with Mr. Becker. Dr. Whiting excluded Mr. Becker from his usual meetings while the number of emails Mr. Becker received slowed at a significant rate (*See* RX 76; RX 78; RX 79; RX 80; RX 81; RX 82; RX 83; RX 85; RX 86; RX 87; RX 89; RX 90; TR 523 to 534). Therefore, Mr. Becker's protected activity motivated Respondents at least in part to circumvent him.

Respondents argue that protected activity played no role whatsoever in the adverse action. First, Respondents assert that Mr. Becker received negative performance reviews before his protected activity and therefore cannot argue that the two are linked (Respondents' Closing Brief, p. 16). Respondents assume Mr. Becker did not engage in protected activity until January 15, 2012, the date of his first written complaint, but this is not the case (*Id.*). Mr. Becker, as noted above, engaged in protected activity as early as October 24, 2011, when he first refused to submit the negative-$4-million EBITDA. This argument also fails to account for the adverse action taken against Mr. Becker after the January 15, 2012, email.

Respondents only other argument is that they did not circumvent Mr. Becker. Respondents' assertion that they brought in Mr. Singer to provide additional training for non-retaliatory reasons is unpersuasive. Nothing in the record suggests Mr. Singer made any effort whatsoever to address Mr. Becker's concerns with the negative-$4-million EBITDA, or to criticize in any way Mr. Becker's own negative-$12.8-million projection. Mr. Singer does not appear to have made any particular effort to train Mr. Becker or to work with him personally. Respondents brought in Mr. Singer and reduced communications with Mr. Becker to circumvent him.

Respondents' arguments that Mr. Becker's protected activity was not a contributing factor in the adverse action are not persuasive. Mr. Becker's refusal to submit the negative-$4-million EBITDA contributed to the threats to his employment, harassing communications, and circumvention. Therefore, Mr. Becker's protected activity was a contributing factor in his constructive discharge.

Since Mr. Becker has established that he suffered adverse action and that his protected activity was a contributing factor, the burden shifts to Respondents to introduce clear and convincing evidence they would have taken the same adverse action in absence of that protected activity.

As noted above, Respondents make two arguments in an attempt to assert that Mr. Becker's protected activity played no role in the adverse action. Neither argument meets the clear and convincing evidence standard. First, Respondents' argument that Mr. Becker did not engage in protected activity until January 15, 2012, fails, since he told Dr. Whiting that he could not submit the negative-$4-million EBITDA as early as October, 2011, and the court concludes his unwillingness to do so, and the possible consequences thereof, were topics of discussion in Tennessee in December. In addition, Respondents' argument that they did not circumvent Mr. Becker fails to meet the clear and convincing evidence standard. Whatever Mr. Singer may have been doing at Rockwood in early 2012, there is no evidence that it involved working with Mr. Becker, or training him, or taking any steps to minimize or prevent future misunderstandings or disagreements between Mr. Becker and Rockwood. On the other hand, the record does suggest that as soon as Mr. Singer arrived, there was less for Mr. Becker to do. The court concludes there is no clear and convincing evidence that Mr. Becker did not engage in protected activity until after the PIP, nor clear and convincing evidence that Mr. Singer would have been brought in if Mr. Becker had not refused to submit the negative-$4-million EBITDA.

Mr. Becker provided evidence which proves that his protected activity was a contributing factor in the adverse action. Respondents failed to provide clear and convincing evidence that they would have taken the same actions if Mr. Becker had not engaged in protected activity. Therefore, this court finds that Mr. Becker's protected activity was a contributing factor to the adverse action.

a. CHSI is also responsible

Respondents argue that CHSI cannot be held liable because it is a holding company with no employees (Respondents' Closing Brief, p. 35). Under 18 U.S.C. § 1514A(a), "No company . . . including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee that constitutes whistleblowing under the statute."

Respondents do not deny that Rockwood and CHSPSC are affiliates of CHSI. As Respondents state in proposed findings of fact, CHS/Community Health Systems, Inc. is a subsidiary of CHSI (Respondents' Proposed Findings of Fact, p. 2 to 3). Community CHSPSC is a subsidiary of CHS/Community Health Systems, Inc. (*Id.*). CHSPSC is a management company that provides services to the various CHSI subsidiaries and affiliated companies, including revenue management and internal audit (RX 4; Respondents' Proposed Findings of Fact, p. 2 to 3). In December, 2009, as part of CHSI's acquisition of Rockwood, CHS/Community Health Systems, Inc. and Rockwood entered into a Finance Agreement through which CHS/Community Health Systems, Inc. provided Rockwood a $25 million line of credit through the end of 2014 (RX 3; TR 693 to 694, 826 to 827, 831; Respondents' Proposed Findings of Fact, p. 2 to 3). At the same time, Rockwood also entered into a written Services Agreement with CHSPSC (RX 4; TR 827; Respondents' Proposed Findings of Fact, p. 2 to 3). Therefore, CHSPSC and Rockwood worked for the public company, CHSI, to threaten, reprimand, and discipline Mr. Becker. In addition, Respondents do not cite any authority to suggest that a holding company with no employees has a special exemption from SOX.

IV. Damages

a. Loss of pay

This Court has the power to grant "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014). An employee who proves his or her claim is entitled to back pay with interest, reinstatement, and special damages including reasonable attorney fees. 18 U.S.C.A. § 1514A(c). In *Jones v. SouthPeak Interactive Corp. of Delaware*, 986 F. Supp. 2d 680, 686 (E.D. Va. 2013), the court reviewed the various factors that courts of appeals have identified as significant in the analysis of front pay issues including: 1) the plaintiff's age, 2) the length of time the plaintiff was employed by the defendant employer, 3) the likelihood the employment would have continued absent the discrimination, 4) the length of time it will take plaintiff to secure comparable employment, 5) the plaintiff's work and life expectancy, 6) the plaintiff's status as an at-will employee, 7) the length of time other employees typically held the position lost, 8) the plaintiff's ability to work, 9) the plaintiff's ability to work for the defendant-employer, 10) the employee's efforts to mitigate damages, and 11) the amount of any liquidated or punitive damage award made to plaintiff. (citing *Ogden v. Wax Works, Inc.,* 29 F.Supp.2d 1003, 1012–15 (N.D.Iowa 1998) (collecting cases from the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits)).

Post-judgement interest on an award of back wages in a Sarbanes-Oxley whistleblower case is governed by the rate that applies to civil cases in federal district courts. *Van Asdale v. Int'l Game Tech*., 763 F.3d 1089, 1090-1091 (9th Cir. 2014) (citing 18 U.S.C.A. § 1514A(c)(2)(B)); 26 U.S.C.A. § 6621; 28 U.S.C.A. § 1961; F.R.A.P. Rule 37(a). Interest "shall be calculated from the date of the entry of the judgement, at rate equal to the weekly average 1-year maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." 28 U.S.C.A. § 1961.

Mr. Becker relies on Dr. Luna's damage calculations to argue that he is entitled to $1,841,366 for back and front pay (CX 132). Dr. Luna provided six scenarios. The first three assume Respondent Rockwood would provide bonuses while the last three do not consider any bonus (*Id.*). Each set of three argues for a different length of employment. Mr. Becker argues for scenario six, which asserts that Mr. Becker would have worked for Rockwood until April 12, 2031, his entire work life expectancy (*Id.*). Dr. Luna calculates front pay damages to that date applying his VA mitigating salary and taxes (*Id.*). Mr. Becker offers no evidence to indicate that executive employees at Rockwood received bonuses based on their performance. Therefore, the court eliminates scenarios one through three.

With scenarios one through three eliminated, the Court is left to choose from scenarios four through six. Choosing from these scenarios forces the court to project how long Mr. Becker would have worked for Rockwood. At the time of his constructive discharge, Mr. Becker was 47 years old (*Id.* at p. 4, 5). Dr. Luna's estimate would place Mr. Becker's retirement age at approximately 66 years old, a reasonable figure.

Mr. Becker most likely would have worked for Respondents for the indefinite future but for the conflict over his protected activity. Respondents argue that Mr. Becker was both too incompetent to expect to continue working and had a habit of changing employers and residences (Respondents' Closing Brief, p. 36 to 37). However, Mr. Becker purchased a home in Spokane, Washington, and moved his entire family once he began his work for Respondents, indicating he had no plans of moving in the near future (TR 359 to 360). Respondents emphasize Mr. Becker's habit of moving for work, but ignore that Mr. Becker worked almost exclusively for the VA since 1998 (RX 8). By 2011, the year he was employed by Respondents, Mr. Becker spent almost 13 years with the same employer, an indication that Mr. Becker prefers to stick to a single employer (*Id.*). Mr. Becker's changes in position were generally promotions or transfers to larger offices in larger cities (*Id.*). Mr. Becker moved from fund coordinator in St. Petersburg, Florida, to the more prestigious position of CFO in Anchorage, Alaska (*Id.*). Then, he moved to the Director of Business Operations Office in New Orleans, Louisiana (*Id.*). Eventually, Mr. Becker worked his way up to become acting Deputy Network Director and Network CFO from 2008 to 2012, when he took employment with Respondents (*Id.*). While it is true that he briefly worked for a private employer over the course of the year, Mr. Becker's resume indicates that he worked steadily to rise up within the VA. This kind of loyalty combined with Mr. Becker's move to Spokane suggests he was interested in working for Respondents for the entirety his career.

Respondents also argue that Mr. Becker's record of employment at Rockwood indicates that he was not competent enough to maintain long-term employment with Respondents (Respondents' Closing Brief, p. 36 to 37). However, Respondents rely on Division IV's characterization of Mr. Becker's employment to argue that Mr. Becker could not perform his duties. The conflict over the negative-$4-million EBITDA makes Respondents' characterization of Mr. Becker's employment unpersuasive. Mr. Becker's work suffered as Division IV pressured him. It would be unreasonable to expect Mr. Becker to excel while being asked to do "impossible" or "illegal" tasks under threats to his employment. Dr. Whiting even noticed Mr. Becker's struggles and on November 17, 2011, hand wrote a note of encouragement to Mr. Becker saying that he appreciated his work and that Mr. Becker had been an incredible asset (CX 20). Dr. Whiting even complained to Ms. Moore that Mr. Becker was getting "very mixed messages" on the project (CX 18).

It is also difficult to find Respondents' reviews of Mr. Becker credible. Respondents fail to introduce evidence that Mr. Becker had significant problems before his refusal to submit the negative-$4-million EBITDA or any kind of written record or indication that Mr. Becker was so incompetent that his job would be at risk. Once Mr. Becker refused to input the negative-$4-million EBITDA, Division IV created ten memoranda in a single day to besmirch his record as an employee, making Division IV's evaluation of Mr. Becker suspect (CX 24; TR 1175, 1219 to 1222). Dr. Whiting would incorporate the memoranda into Mr. Becker's PIP, which in turn makes the PIP an untrustworthy evaluation of Mr. Becker's employment; in any case, Dr. Whiting later destroyed the PIP (TR 956). The negative-$4-million EBITDA is at the center of Respondents' negative reviews of Mr. Becker, and make Respondents' arguments that Mr. Becker would have been forced to leave Rockwood due to incompetence difficult to believe. In contrast, Mr. Becker has a record of excellence in his previous employment. When Mr. Becker applied to work for Respondents, he had received awards and recognition for his achievements at the VA (RX 8; TR 158). Respondents never argue that Mr. Becker left any other of his previous positions due to incompetence, and do not introduce any evidence other than Mr. Becker's low level of experience with private corporations to suggest that Respondents were not justified in hiring him (RX 8; TR 375 to 377).[9]

Mr. Becker's accurate predictions also indicate that he was competent at his job. He predicted a negative $12.8 EBITDA for 2012 and Rockwood had an actual EBITDA of negative $13.731 million (TR 964). Other predictions Mr. Becker produced during his time at Rockwood also came to pass. Rockwood's actual losses were close to Mr. Becker's projections for 2013 and total debt by the end of 2014 (TR 1241). Accurately projecting a million dollar company's losses for three straight years and total debt through the next three is not "luck" or a "coincidence" as Ms. Herrin claims (TR 1241, 1247). These accurate projections punch a hole in Respondents' insinuations that Mr. Becker was incompetent and would not have lasted as an indefinite employee for Respondents.

Finally, Respondents argue that Mr. Becker "completely" failed to take reasonable steps to mitigate damages (Respondents' Closing Brief, p. 35 to 36). However, Mr. Becker began his new employment at the VA less than three months after leaving Rockwood (CX 132). His salary dropped from $240,000 a year to approximately $140,000 a year, but this does not mean Mr. Becker did not take reasonable steps to mitigate damages (*Id.*). After struggling over his protected activity for several months, Mr. Becker returned to an employer who praised his work in a comparable position. Since then, he has made some efforts to find private employment, and has gone as far as to have a "few" telephonic interviews (TR 367). Respondents are critical of the selective nature of Mr. Becker's job search, but after securing comparable employment and telephonic interviews, it would be unreasonable to expect more (Respondents' Closing Brief, p. 36). Mr. Becker's already secured adequate employment to ensure his livelihood and prestige, the court does not expect him to flood the market with resumes in search of any possible private position. Mr. Becker's employment at the VA and current job search constitute reasonable steps to mitigate damages.

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[9] Respondents also argue that Mr. Becker suffered no damages because he left his employment "voluntarily" and he did not suffer constructive discharge (Respondent's Closing Brief, p. 35; Respondent's Response to Closing Brief 29). As reasoned above, Mr. Becker has established constructive discharge and he did not leave his employment "voluntarily."

Respondents' arguments fail and this court adopts scenario six. Scenario six calculates Mr. Becker's back pay at $341,380. Since Mr. Becker left his employment on February 20, 2012, the statutory rate should be calculated as of February 21, 2012. The remaining $1,499,986 from scenario six is calculated at the statutory rate as of the trial on January 19, 2016, at the same interest rate until paid in full.

Mr. Becker asks for permission to submit additional evidence from Dr. Luna. He would like Dr. Luna to calculate the interest on Mr. Becker's back pay (Complainant's Closing Brief, p. 99). The court declines to re-open the record to allow Mr. Becker to claim additional damages.

b. Compensatory damages

Mr. Becker insists that he is entitled to general damages because he "weathered stress, criticism, disparagement threats, leveraging and professional humiliation" (Mr. Becker's Closing Brief, p. 99). Mr. Becker also demands recovery based on damage to reputation, but argues that those damages should be measured based on severance packages for high level executives in CHSI (Complainant's Closing Brief, p. 99 to 100). Respondents are correct in their assertion that Mr. Becker's demand for damages similar to those of the top five named executives for CHSI were to receive for an "involuntary termination" is unpersuasive (Respondents' Closing Brief, p. 32). The compensation plan Mr. Becker cites applies to the top five executives of CHSI. CHSI is a for-profit company that reported a $1.9 billion EBITDA in 2012 while Rockwood, a single subsidiary of the company, produced an EBITDA of negative $13.731 million that same year (RX 55; TR 964). It would be inappropriate to compare Mr. Becker to top level executives of a company that earns billions of dollars a year.

In the recent case of *Menendez v. Halliburton, Inc.*, ARB No. 12-026, 2013 WL 1385561 at *11 (ARB March 15, 2013), the Administrative Review Board upheld an award of $30,000 in compensatory damages to a whistleblower in a SOX case who was subjected to the hostility of his co-workers after his employer "outed" him as the person who had touched off an investigation of the employer. In *Fink v. R&L Transfer, Inc.*, ARB No. 13-018, 2014 WL 1401089 at *3 (March 19, 2014), the Board upheld a $100,000 economic-damage award to an STAA whistleblower who suffered considerable financial difficulties, including the loss of his home, as a result of his employer's retaliation. Twenty years ago, the Board upheld a $40,000 award to a whistleblower in an Energy Reorganization Act case where complainant suffered a heart attack as a result of the retaliation in *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24, 1996 WL 171403 at *11 (DOL Off.Adm.App., February 14, 1996).

Mr. Becker endured a period of undue stress and damage to his reputation which the Court will address. He was lucky enough to move quickly into new employment, since he shifted to his job at the VA on April 9, 2012 (TR 364). However, his experience was not without stress. This move forced Mr. Becker to sell his home, purchase a new one in Tennessee, and relocate his family (TR 359 to 361). Respondents threatened Mr. Becker's employment on three occasions while demanding he do something he reasonably believed was illegal for months. While Mr. Becker testified that his stress during this ordeal was extreme, he did not provide details indicating that his health was in any way at risk (TR 370).

In addition to stress, Mr. Becker suffered at least some damage to his reputation. On March 7, 2012, the *Spokesman-Review* published an article about Mr. Becker's complaint (TR 361). However, Mr. Becker has provided little evidence, beyond the fact that the article exists, to indicate much negative impact on his reputation. Mr. Becker theorizes that this article cost him at least one interview, but does not offer any proof other than the timing of his rejection. Ultimately, Mr. Becker has only proven minimal damage to his reputation.

I conclude an award of $15,000 in his case is appropriate for compensatory damages given Mr. Becker's emotional distress and damaged reputation.

c. Attorney's Fees

Mr. Becker requests that the court allow him to submit a brief on his attorney fees and costs for lodestar valuation. A successful complainant may recover attorney fees and costs reasonably incurred. 18 U.S.C.A. § 1514A(c); *Wells* v. *Kansas Gas & Elec. Co.,* 85-ERA-72 (Sec'y Mar. 21, 1991), slip op. at 17. Therefore, this Court will allow the submission.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, the court orders Respondents to pay damages to Mr. Becker as follows:

1. Back pay totaling $341,380.00.

2. Front pay totaling $1,499,986.00.

3. $15,000.00 in compensatory damages.

4. Mr. Becker's attorney fees and costs reasonably incurred in this action. Mr. Becker's counsel must file a fee petition (*see Jackson* v. *Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), 2004-WL-1955436, slip op. at 10-11) within 30 days of the final decision of the Secretary of Labor in this matter. Respondents must file its objections within 14 days of service of the fee petition. Within 14 days of service of those objections, the parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Mr. Becker's counsel must file a report identifying the objections that have been resolved, the objections that have been nar-

rowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

SO ORDERED.

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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

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. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(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. §§ 1980.109(e) and 1980.110(b). 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. § 1980.110(b).