



**Issue Date: 12 May 2014**

**CASE NO.: 2014-SOX-00016**

**IN THE MATTER OF**

**ARTURO GUTIERREZ,**  
**Complainant**

**v.**

**INB FINANCIAL CORPORATION,  
GRUPO FINANCIERO BANORTE S.A.B. de C.V.,  
BANORTE-IXE SECURITIES INTERNATIONAL LTD.,  
SOLIDA USA, LLC  
GRUMA S.A.B. de C.V.,  
Respondents**

**ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS AND CANCELLING  
HEARING**

This case arises out of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. §1514A *et seq.*, and the employee protective provisions promulgated hereunder at 29 C.F.R. Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of publicly traded companies who are allegedly discharged, retaliated against, or otherwise discriminated against, with regard to their terms and conditions of employment, for providing information about fraud against company shareholders to supervisors, federal agencies, or members of Congress.

**I. BACKGROUND**

**A. Procedural History**

On January 3, 2014, Complainant filed his Original Complaint with OSHA in this matter, which arises from his termination from employment as Senior Vice President of International Business Development with INB Financial Corporation (INB or "Inter National Bank"). The Original Complaint asserted a claim for retaliatory discharge under the whistleblower protection provision of SOX. On January 28, 2014, OSHA dismissed the Original Complaint, citing a lack of jurisdiction over all Respondents: Gruma S.A.B. de C.V. (Gruma), a publicly-held corporation and the Respondent covered by SOX; and INB, Grupo Financiero Banorte (GF Banorte),

Banorte-Ixe Securities International, Ltd. (Banorte Securities), and Solida USA (Solida) (collectively “the Banorte Respondents”). Complainant objected to the dismissal and, on February 24, 2014, he filed a brief with this Court. On March 13, 2014, this Court issued a Notice of Hearing and Pre-Hearing Order to Complainant and the Respondents.

On April 10, 2014, Complainant filed an amended, but substantially similar, complaint (Amended Complaint). At the heart of each complaint is Complainant’s assertion that he was terminated by his employer, INB, for reporting his concerns about an effort to convey a bribe to an official of a foreign government. (Am. Compl., ¶¶ 33, 40.). He further alleges joint employment with Gruma, and that INB, GF Banorte, Banorte Securities, and Solida (the Banorte Respondents) are subsidiaries, contractors, subcontractors or agents of Gruma. (Rep. to Mot. to Dis., p. 1). Complainant also asserts an “associational retaliation claim” based on the joint employment of his brother-in-law, Jose Maria Barrionuevo (JMB). (*Id.*).

On April 11, 2014, Complainant served a subpoena on JMB requesting several documents related to JMB’s employment and termination with Gruma and the Banorte Respondents, and of allegations of bribery involving the late Don Roberto Gonzalez Barrera and attempts to locate a painting for him or the Banorte Respondents and Gruma. (Mot. Prot. Order, pp. 5-6; Resp. to Mot. Prot. Ord., EX-1 (JMB Subpoena)).

On April 15, the Banorte Respondents filed three motions: Motion to Dismiss, Motion for Stay on Discovery Pending Decision on Motion to Dismiss, and Motion for Protective Order/Motion for Restricted Access to the Record. This Court granted the protective order and motion to stay discovery to the Banorte Respondents on May 6, 2014.

On April 22, 2014, Complainant filed his opposition to the Motion to Dismiss the Banorte Respondents. Complainant asserts that jurisdiction exists over the Banorte Respondents under theories of joint employment, agency, and/or contractor/subcontractor, with Gruma, the SOX-covered entity. Complainant also asserts that he has met the pleading standard of “fair notice” to the Respondent of his claims.

On April 24, 2014, Gruma filed a Motion to Dismiss, asserting that Complainant was never an employee of Gruma and, alternatively, because he failed to allege a *prima facie* case of retaliation under SOX.

On April 28, 2014, Complainant responded to the Banorte Respondents’ motions for the stay of discovery and protective order, and submitted a Motion to Compel Discovery for each of the Banorte Respondents individually and Gruma to respond to its discovery requests (Resp. to Mot. to Stay, p. 2; EX-1). This court denied that motion on May 6, 2014.

Also on April 28, the Banorte Respondents replied to Complainant’s opposition to its Motion to Dismiss and addressed additional issues raised by Complainant that were not included in the Amended Complaint.

## **B. The Respondents**

## 1. Gruma

Gruma, S.A.B. de C.V. is a publicly held corporation headquartered in Monterrey, Nuevo Leon, Mexico. Gruma is considered the leader of corn and flour tortilla production worldwide and counts Mission, Maseca, and Guerrero among its many brands.<sup>1</sup>

In 1994, Gruma became a publicly listed company in both Mexico and the U.S.<sup>2</sup> Gruma is a SOX-covered entity, in that it has securities registered under Section 12 of the Securities Exchange Act of 1934 or is required to file reports under section 15(d) of the Securities Exchange Act of 1934.<sup>3</sup> (Compl., EX-2). OSHA, in dismissing Complainant's original complaint, mistakenly identified Gruma as a company not covered by SOX's employee whistleblower protections. (Compl., EX-1). However, Gruma and the Banorte Respondents, while disputing this Court's jurisdiction over Complainant's SOX claim, do acknowledge that Gruma is a company covered by SOX's employee whistleblower protections. (Banorte Resp. Mtn. to Dismiss; Gruma Mtn. to Dis., p. 6).

## 2. GF Banorte

Grupo Financiero Banorte S.A.B. de C.V., also referred to as GF Banorte or GF Norte, is holding company engaged, through its subsidiaries, in the financial sector, specifically in banking services.<sup>4</sup> GF Banorte is headquartered in Monterrey, Nuevo Leon, Mexico.<sup>5</sup>

GF Banorte is the parent company of INB, Banorte Securities, and Solida USA (Wortsell Decl., ¶ 2). In other words, INB, Banorte Securities, and Solida are wholly-owned subsidiaries of GF Banorte. (Ban. Resp. Mtn. to Dis., p. 6). GF Banorte does not have any securities registered under Section 12 of the Securities and Exchange Act of 1934 nor is it subject to the reporting requirements of Section 15(d) of the Securities and Exchange Act of 1934. Thus, GF Banorte does not qualify for SOX coverage, and OSHA properly dismissed it from Complainant's original complaint.

## 3. INB

Inter National Bank (INB), based in McAllen, Texas, became a subsidiary of GF Banorte in 2006.<sup>6</sup> Complainant was employed by INB as the Senior Vice President of International Business for more than three years until being terminated on July 15, 2013. (Am. Compl., ¶¶ 2,

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<sup>1</sup> *About Gruma*, Gruma, available at: <http://www.gruma-en.com/we-are-gruma/about-gruma.aspx?sec=8836> (last visited May 6, 2014).

<sup>2</sup> *Form 20-F – Annual Report Pursuant to Section 13 or Section 15(d) of the Securities and Exchange Act of 1934 (For the fiscal year ended December 31, 2013)*, p. 21, United States Securities and Exchange Commission (Apr. 30, 2014), available at: [http://www.gruma.com/media/522638/gruma\\_2013\\_20f\\_final.pdf](http://www.gruma.com/media/522638/gruma_2013_20f_final.pdf) (hereinafter 2013 Annual 20-F) (last visited May 6, 2014).

<sup>3</sup> *Id.* at p.1.

<sup>4</sup> *Grupo Financiero Banorte SAB de CV*, Reuters.com, available at: <http://www.reuters.com/finance/stocks/companyProfile?symbol=GFNORTEO.MX> (last visited May 6, 2014).

<sup>5</sup> *Annual Report 2012*, Grupo Financiero Banorte, p. 1, available at: [http://banorte.com/pv\\_obj\\_cache/pv\\_obj\\_id\\_13D85DBC06DC8620F93F8ECF57712FDCFB774700/filename/GFNORTEO\\_Annual\\_Report\\_2012\\_FINAL.pdf](http://banorte.com/pv_obj_cache/pv_obj_id_13D85DBC06DC8620F93F8ECF57712FDCFB774700/filename/GFNORTEO_Annual_Report_2012_FINAL.pdf) (hereinafter GF Banorte 2012 Annual Report) (last visited May 9, 2014).

<sup>6</sup> *About INB*, Inter National Bank, available at: <https://www.inbweb.com/en/about> (last visited May 9, 2014).

5; see also Ban. Resp. Answ., p. 1). INB does not have any securities registered under Section 12 of the Securities and Exchange Act of 1934 nor is it subject to the reporting requirements of Section 15(d) of the Securities and Exchange Act of 1934. Thus, it does not qualify for SOX coverage, and OSHA properly dismissed it from Complainant's original complaint.

#### 4. *Banorte Securities*

Banorte-Ixe Securities International, Ltd. is a financial brokerage firm with a principal place of business in New York, New York. (Am. Compl., p. 2; Worstell Decl., ¶ 6). Banorte Securities does not have any securities registered under Section 12 of the Securities and Exchange Act of 1934 nor is it subject to the reporting requirements of Section 15(d) of the Securities and Exchange Act of 1934. Thus, Banorte Securities does not qualify for SOX coverage, and OSHA properly dismissed it from Complainant's original complaint.

#### 5. *Solida*

Solida USA, LLC is GF Banorte's asset recovery unit and is responsible for the management, collection and recovery of delinquent loans originated by the bank.<sup>7</sup> Solida's principal place of business is McAllen, Texas. (Ban. Resp. Answ., p. 2). Solida does not have any securities registered under Section 12 of the Securities and Exchange Act of 1934 nor is it subject to the reporting requirements of Section 15(d) of the Securities and Exchange Act of 1934. Thus, Solida does not qualify for SOX coverage, and OSHA properly dismissed it from Complainant's original complaint.

### **C. Don Barrera (Roberto Gonzalez Barrera)**

Roberto Gonzalez Barrera was Gruma's Chairman of the Board and GF Banorte's Chairman Emeritus at the time of his death on August 25, 2012.<sup>8</sup> Barrera was considered a "visionary" who revolutionized tortilla production through Gruma and became known as the "King of Tortillas."<sup>9</sup> In 1992, Don Barrera headed a group of Mexican investors that bought a small local bank; in the span of 20 years, Barrera's guidance helped build a "financial powerhouse" now known as GF Banorte.<sup>10</sup> Don Barrera rose to billionaire status through his stake in GF Banorte and became the seventh richest man in Mexico, according to Forbes magazine.<sup>11</sup> He was the Chairman of GF Banorte until 2011, when he became Chairman Emeritus.<sup>12</sup> Don Barrera died at age 81 of pancreatic cancer.<sup>13</sup>

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<sup>7</sup> *About Us*, Solida USA, available at: <http://www.solidausa.com/en/about> (last visited May 12, 2014); Worstell Decl., ¶ 6.

<sup>8</sup> *Don Roberto Gonzalez Barrera (1930-2012)*, Gruma, Aug. 25, 2012, available at: [http://www.gruma-en.com/press-room/news-and-releases/august-25,-2012-don-roberto-gonzález-barrera-\(1930-2012\).aspx](http://www.gruma-en.com/press-room/news-and-releases/august-25,-2012-don-roberto-gonzález-barrera-(1930-2012).aspx) (hereinafter *Don Barrera*) (last visited May 9, 2014).

<sup>9</sup> *History*, Gruma, available at: <http://www.gruma-en.com/we-are-gruma/history.aspx> (last visited May 6, 2014); *Roberto Gonzalez Barrera Dead: Mexican Billionaire Known as the 'King of Tortillas' Dies*, Huffington Post, Aug. 27, 2012, available at: [http://www.huffingtonpost.com/2012/08/27/roberto-gonzalez-barrera-dead-king-of-tortillas-dies\\_n\\_1834497.html](http://www.huffingtonpost.com/2012/08/27/roberto-gonzalez-barrera-dead-king-of-tortillas-dies_n_1834497.html) (last visited May 7, 2014).

<sup>10</sup> *Don Barrera* (last visited May 9, 2014).

<sup>11</sup> *Id.*

<sup>12</sup> *Mexico's Banorte Says Former Chairman's Heirs Main Shareholder*, Reuters, Aug. 27, 2012, available at: <http://in.reuters.com/article/2012/08/27/mexico-banorte-idINL1E8JR3Y020120827> (last visited May 9, 2014).

#### **D. JMB (Jose Maria Barrionuevo)**

Jose Maria Barrionuevo (JMB) is the brother-in-law of Complainant. JMB had multiple ties to Gruma and the Banorte Respondents. JMB was a financial consultant to the late Don Barrera. (Opp. to Mtn. to Dis., EX-2, p. 4). Complainant asserts that Don Barrera orchestrated JMB's appointments to the Board of INB and Solida and ensured he was compensated for his activities on behalf of Gruma and GF Banorte. (Am. Compl. ¶ 23). Although his formal status as an "employee" is denied by the Banorte Respondents, according to Gruma, he was paid variously for his "engagement" by both Banorte and Gruma. (Ban. Resp. Ans., p. 3; Opp. to Mtn. to Dis., EX-2, p. 4; Am. Compl., ¶ 16). JMB was also provided an office at Banorte Securities in New York. (Ban. Resp. Ans., p. 3).

#### **E. Complainant**

Complainant worked as INB's Senior Vice President of International Business Development for more than three years. (Am. Compl. ¶ 12). He was based in The Woodlands, Texas, and he managed several bank branches for INB. (*Id.* at ¶¶ 1, 12-13). Complainant stated that he was often told he was a valued team member. (*Id.*).

According to Complainant, at a point in time in or before January 2012, Don Barrera sought JMB's assistance in locating a painting by a famous artist. (Am. Compl., ¶ 24). JMB asked Complainant about any contacts he had, and Complainant was told that the painting had to be bought in the United States. (*Id.* at ¶¶ 25, 28). JMB and Complainant engaged in several conversations about the painting. (Am. Compl., ¶ 29). A painting was allegedly bought by transferring monies from a Banorte account in January 2012. (*Id.* at ¶29).

After the painting was sent, JMB and Complainant allegedly learned that the painting was going to be a bribe to a government official in Mexico. (Am. Compl., ¶ 30). JMB and Complainant were concerned about their roles in conveying what they believed was a bribe, which Complainant asserted is a violation of SEC rules, regulations, and law. (Am. Compl. ¶¶ 30-32). According to Complainant, JMB reported the activity to several executives at GF Banorte and Gruma. (*Id.* at ¶ 30). Complainant stated that he reported the activity to INB's Vice President of Human Resources. (*Id.* at ¶ 33).

Late in 2012, JMB was allegedly terminated from his positions at Gruma and GF Banorte and board positions at INB and Solida without warning. (Am. Compl. ¶¶ 34-35). In December 2012, JMB sent a demand letter to Gruma and the Banorte Respondents alleging wrongful termination and other claims. (Opp. to Mtn. to Dis., EX-2, p. 4). Gruma and GF Banorte jointly reached settlement of all JMB's claims on April 24, 2013. (*Id.*). JMB was paid \$1.5 million.<sup>14</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> On November 1, 2013, Gruma filed suit in the U.S. District Court for the Western District of Virginia against the Banorte Respondents regarding JMB's settlement, where it sought arbitration to enforce the parties' understanding that each would contribute to paying a portion of the \$1.5 million. (Opp. to Mtn. to Dis., EX-2). Gruma voluntarily dismissed the case on December 31, 2013. (Ban. Resp. Ans., p. 4).

(*Id.*). Complainant has alleged the parties jointly contracted and paid JMB to “hide the bribe.” (Opp. to Mtn. to Dis., p. 4).

Following JMB’s termination, Complainant stated that JMB warned him about “the company” being “evil” and advised him to look for another job. (Am. Compl., ¶ 37). On July 15, 2013, Complainant was terminated from his position with INB without warning. (*Id.* at ¶ 40; Opp. to Mtn. to Dis., p. 2).

## F. Contention of the Parties

### 1. Banorte Respondents

The Banorte Respondents filed a Motion to Dismiss asserting that they are not subject to the whistleblower provisions of SOX and alternatively, Complainant has failed to assert a *prima facie* case of retaliation under SOX. They argue that Complainant has failed to allege that any of the Banorte Respondents are covered by the whistleblower protection provisions of SOX, or how any other respondent other than INB was involved in his employment and termination. Gruma, the SOX-covered entity, “does not control” any the Banorte Respondents nor is there common control between Gruma and any of the Banorte Respondents. (Worstell Decl., ¶ 8). In addition, no joint employment, agency or contractor/subcontractor arrangement exists between the Banorte Respondents and Gruma regarding his employment at INB.

The Banorte Respondents further claim that Complainant’s termination from INB did not result from whistleblowing activities but rather stemmed from his efforts to intimidate two employees and his failure to provide adequate documentation for opening a new bank account, which violated INB’s ethics and banking policies. (Ban. Resp. Ans., p. 4; EX-1). Moreover, the painting referred to by Complainant was never conveyed to a government official and is now hanging in the board room of GF Banorte. (Ban. Resp. Ans., p. 4).

### 2. Gruma

In Gruma’s Motion to Dismiss, it argues that jurisdiction over it by this Court is improper because Complainant was never employed by Gruma and that INB, his employer, is an entity wholly unconnected from Gruma. (Gruma Mtn. to Dis., pp. 1, 5). Like the Banorte Respondents, Gruma denies the existence of a control relationship between the parties or joint employment of Complainant and that Complainant has failed to allege a *prima facie* case of retaliatory discharge under SOX.

### 3. Complainant

Complainant asserts that this court has jurisdiction over the Banorte Defendants as joint employers, subsidiaries, contractors, subcontractors, or agents of Gruma, a publicly traded company. (Opp. to Mtn. to Dis., p. 1). He maintains that he meets the definition of “employee” under SOX because he is an “**individual whose employment could be affected by a covered person.**” 29 C.F.R. § 1980.101(g) (emphasis by Complainant). A covered person includes

employees, officers, agents, subsidiaries, contractors and subcontractors of an entity subject to SOX. 29 C.F.R. § 1980.101(f). He cites *Villanueva v. Core Laboratories N.V.*, ARB Case No. 09-108 (Dec. 22, 2011) and *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365 (N.D. Ga. 2004) to advance the proposition that officers of a publicly traded parent company have authority to affect the employment of the subsidiary's employees, and thus a non-covered company can be held liable under SOX. (Opp. to Mot. to Dis., pp. 4-5).

Consequently, there are at least two ways for him to be an "employee" under the SOX definition, according to Complainant. First, if Don Barrera, an officer of Gruma, had the authority to affect his employment, then Complainant would qualify as an employee of Gruma. (Opp. to Mot. to Dis., pp. 4-5). Don Barrera could appoint members to the Board of INB and had "orchestrated" JMB's appointment to the Board. Also, a personal employee of a public company officer is a covered employee under SOX. (*Id.* at p. 6, citing *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1168, n. 11 (Mar. 4, 2014)). Second, JMB could affect Gutierrez's employment and thus would be covered by SOX. By engaging Complainant to assist him in locating a painting, it can be inferred that JMB complained to Gruma on behalf of Gutierrez and himself, and Gruma had the power to investigate the allegations. (Rep. to Mot. to Dis., p at 6.). Complainant stated that JMB helped secure his employment with INB. (*Id.*). Further, the fact that JMB lost all of his positions with Gruma and the Banorte Respondents in quick succession and the joint settlement indicates coordination between all of the Respondents related to his employment, too. (*Id.*).

Moreover, Complainants asserts he has given "fair notice" under the SOX pleading standards that Gruma and the Banorte Respondents became each other's contractors or subcontractors when firing JMB, and thus a joint scheme existed to fire Complainant from his position at INB because of his alleged protected activity. (Rep. to Mtn. to Dis., pp. 1, 3, 6-7). In the alternative, Complainant should be allowed to assert JMB's employment status because he falls within the "zone of interests" protected by SOX. (*Id.* at 7).

## II. DISCUSSION

### A. Standard for Motion to Dismiss

#### 1. Rule 12(b)(1)

Gruma and the Banorte Respondents first assert a jurisdictional challenge and claim they are not subject to the whistleblower provisions of SOX. Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, Fed. R. Civ. P. 12(b)(1) addresses a motion to dismiss for lack of subject matter jurisdiction.

The ARB has discussed subject matter jurisdiction in SOX cases, notably in *Sylvester v. Parexel Int'l, LLC*, ARB Case No. 07-123, ALJ Case Nos. 2007-SOX-39 AND 2007-SOX-42, slip op. at 10-11 (ARB May 25, 2011):

Subject matter jurisdiction “refers to a tribunal’s power to hear a case.” *Morrison v. Nat’l Australian Bank*, 130 S. Ct. 2869, 2877 (2010) (citing *Union Pacific v. Bhd. Of Locomotive Eng’rs*, 130 S. Ct. 584, 596-97 (2009)). Subject matter jurisdiction “presents an issue quite separate from the question whether the allegations the plaintiff makes entitles him to relief,” *Morrison*, 130 S. Ct. at 2877, and thus under the whistleblower laws over which the Department of Labor has jurisdiction, should not be confused “with the wholly separate question whether [a complainant’s] actions might be covered as ‘protected activities.’” *Sasse v U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998- CAA-007, slip op. at 3 (ARB Aug. 31, 2000).

Similar to federal complaints based on federal question jurisdiction, the burden of establishing subject matter jurisdiction under Section 806 is not particularly onerous. *See, e.g., Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1317 (7th Cir. 1997); *Musson Theatrical*, 89 F.3d 1244, 1248 (6th Cir. 1996). As the Board explained in *Sasse*, the Department of Labor’s subject matter jurisdiction is invoked “when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is not obviously frivolous.” *Sasse*, slip op. at 3 (quoting *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954)).

## 2. Rule 12(b)(6)

Gruma and the Banorte Respondents also seek to dismiss the case through Rule 12(b)(6) regarding the sufficiency of the pleadings. Under Rule 12(b)(6), a pleading may be subject to dismissal for either of two reasons: “First, the law simply may not afford relief on the basis of the facts alleged in the complaint. ... Second, regardless of whether the plaintiff is entitled to relief, the pleadings may be so badly framed that the plaintiff is not entitled to a trial on the merits.” *Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5<sup>th</sup> Cir. 1990). A complaint is deemed inadequate if it fails to “set forth sufficient information to outline the claim or permit inferences to be drawn that these elements exist.” *Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5<sup>th</sup> Cir. 1999). “[C]onclusory allegations of legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362 (5<sup>th</sup> Cir. 2003) (quoting *Fernandez-Montez v. Allied Pilots Ass’n.*, 987 F.2d 278, 284 (5<sup>th</sup> Cir. 1993); *see also Jones v. Greninger*, 188 F.3d 322, 325 (5<sup>th</sup> Cir. 1999) (“Mere conclusory allegations of retaliation will not be enough to withstand a proper motion for dismissal of the claim.”).

Unlike a motion for summary decision filed after discovery, a facial challenge offered to a complaint through a Rule 12(b)(6) points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-3, slip op. at p. 10 (ARB July 31, 2012). A motion

to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *Id.*

To survive a motion to dismiss, “the complaint must be reviewed to determine whether it provides fair notice of the complainant’s case claim by encompassing: (1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes under the ALJ’s jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation and (4) a description of the relief that is sought.” *Evans*, ARB Case No. 08-059 at p. 11.

Also, “Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules.” *Sylvester*, ARB Case No. 07-123, slip op. at p. 13.

The court must first address whether it has subject matter jurisdiction under 12(b)(1) to hear Complainant’s SOX whistleblower action.

## **B. Jurisdiction under SOX**

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a); *see also Hendrix v. American Airlines, Inc.*, 2004-AIR-00010, 2004-SOX-00023 (A.L.J. Dec. 9, 2004) (unpublished).

A **company** means “any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.” 29 C.F.R. § 1980.101(d).

A **covered person** means “any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, ... or any officer, employee, contractor, subcontractor, or agent of such company....” 29 C.F.R. § 1980.101(f).

An **employee** is means “an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.” 29 C.F.R. § 1980.101(g).

Thus, the aggrieved employee’s first responsibility is to show that the Act covered his employer.

Jurisdiction in SOX attaches from the date of the adverse personnel action, not from the date of the protected activity. *Gallagher v. Granada Entertainment USA*, slip op. at p. 1, 10, 2004-SOX-74 (Apr. 1, 2005); *Lerbs v. Buca de Beppo, Inc.*, 2004-SOX-8 (June 15, 2004). SOX decisions have implicitly acknowledged that the requisite elements bringing the governed actor under the Act must be present on the date of the adverse action.

*Lerbs*, a case arising in the immediate aftermath of SOX’s implementation that discussed the timing of jurisdiction, is instructive. In *Lerbs*, the employee, a cash manager, reported a concern to the employer’s chief information officer that certain entries on a general ledger misrepresented the employer’s true financial position to bankers and investors, and thus he engaged in protected activity. *Id.* at 2, 10. Yet the employee reported his concerns in March or May of 2002; SOX took effect on July 30, 2002. *Id.* at 10. The employee was terminated on October 10, 2002. *Id.* The ALJ determined that jurisdiction over the SOX claim existed because the employer conduct described in the SOX statute – retaliation (“discharge,” “demote,” etc.) – became prohibited as of July 30, 2002. *Id.* at 11. Hence, adjudicators must look to the date of

the adverse personnel action, not the date of the protected activity, in determining whether the Act applies. *Id.* at 11.

*Gallagher*, which involved periods where the employee's employer was not covered under SOX, and then was covered under SOX, is also instructive. In *Gallagher*, the employee voiced objections over how the earnings of his non-SOX covered employer, Granada Entertainment USA (Granada), were treated in financial documents as it merged with Carlton America, which was covered under SOX. *Gallagher*, 2004-SOX-74 at 1-3. The merger occurred on February 2, 2004. The respondents included Granada and ITV, the parent company of the merged entities (Granada Ltd. and Carlton, Ltd.). *Id.* at 4. Granada asserted that it was not subject to the Act at the time the first adverse personnel decision, the decision not to promote the employee to senior vice president of legal and business affairs, on January 22, 2004. *Id.* at 1, 5. The second adverse personnel action, the termination, occurred on February 9, 2004. *Id.* at 6.

The court separately analyzed jurisdiction over each adverse personnel action – the non-promotion claim on January 22, 2004, before the merger on February 2, 2004, and the termination on February 9, 2004, when the entities had merged and the respondents were now covered under SOX. *Gallagher*, slip op. at 10. The court determined that on January 22, 2004, there was a complete absence of proof that Granada was a company with a class of securities registered under Section 12 of the Securities and Exchange Act of 1934, or that it was required to file reports under Section 15(d). *Id.* at 10. Thus, the failure to promote the employee “is not actionable.” *Id.* However, the termination occurring after the merger, when the respondents became subject to SOX's statutory protection of the employee, was actionable. *Id.*<sup>15</sup>

Likewise, this court must look to the date of the lone adverse personnel action taken against Complainant to determine whether Gruma or any of the Banorte Respondents were covered by SOX.

In this matter, there is a complete lack of proof that when Complainant was terminated on July 15, 2013, an actor governed by SOX, i.e., “company” and/or “covered person,” retaliated against Complainant for his alleged protected activity under SOX's provisions, and that Complainant was an “employee” under SOX.

I first find that Complainant was not a direct employee of Gruma. That is, he was not an employee of a publicly-traded company or company required to make the specified reports to the SEC. Nor was Complainant employed by a Gruma subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, such as Gimsa, Gruma Corporation, or Molinera de Mexico, among others.<sup>16</sup> See also Guajardo Decl., ¶¶ 3-4. Complainant was directly employed in The Woodlands, Texas, by INB, which is not a “company” under SOX.

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<sup>15</sup> The ALJ eventually dismissed all claims against the respondents because the employee failed to make a triable issue on the causation element of his claim and his insubordination trumped any claim he might have had to whistleblower protection. *Gallagher*, 2004-SOX-74 at p. 13-14.

<sup>16</sup> *Company Overview*, Gruma, p. 3 available at: [http://www.gruma.com/media/515059/gruma-feb\\_14.pdf](http://www.gruma.com/media/515059/gruma-feb_14.pdf) (last visited May 7, 2014).

Complainant maintains that a joint employer relationship exists between Gruma and the Banorte Respondents, especially in light of facts indicating the joint employment of JMB and JMB's termination from all employment in quick succession. (Am. Compl., ¶ 11; Gruma Mtn. to Dis., pp. 6-7). A joint employer relationship exists when two or more employers exert significant control over the same employee, and evidence shows that they share or co-determine those matters governing the essential terms and conditions of employment. *See Stone v. Instrumentation Laboratory SpA, et al.*, 2007-SOX-21, slip op. at 21 (Sept. 6, 2007) (citing *Nat'l Labor Relations Bd. V. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117,1122-24 (3<sup>rd</sup> Cir. 1982); *see also Williams v. Lockheed Martin Energy Systems, Inc.*, No. 98-059 (ARB Jan. 31, 2001). To determine the existence of a joint employer relationship, courts look to well-established factors such as hiring and firing, discipline, pay and employment records, supervision of the complainant and other employees. *Stone*, 2007-SOX-21 at 21. Gruma has produced the affidavit of its General Counsel, Salvador Vargas Guajardo, to demonstrate that Gruma does not have or has not had the ability to "exert significant control" over INB employees or the essential terms and conditions of any employee's employment with INB. (Guajardo Decl., p. 2). Complainant has only reached a conclusion and has not indicated how he would prove that a joint employer relationship exists under the law for his employment, not JMB's employment, and thus this assertion does not have merit.

Nonetheless, Complainant asserts that he is considered an employee under SOX because he was an "**individual whose employment could be affected by a covered person.**" 29 C.F.R. § 1980.101(g) (emphasis by Complainant). Again, a covered person includes not just the company and its subsidiaries and affiliates, but an officer, employee, contractor, subcontractor, or agent of such company. I will address each potential "covered person" in turn.

As of July 15, 2013, the status of the two individuals Complaints refers to as "covered persons" under SOX was as follows:

- Don Barrera, Chairman of Gruma and Chairman Emeritus of INB's parent, GF Banorte, had been deceased, i.e. he was no longer an officer of a publicly traded company, for approximately 11 months before Complainant's termination.
- JMB, a financial consultant to Don Barrera and board member of INB, had been terminated from his "engagement" or employment position at Gruma, i.e. he could no longer be considered an officer or employee of a publicly traded company or the employee of an officer of a publicly traded company, for at least seven months before Complainant's termination.

Consequently, the primary quality needed of a governed actor subject to SOX's whistleblower rules – a "company" and/or a "covered person" under SOX who has the authority to affect an "employee" through an adverse personnel action – did not exist on, or even shortly before, the date of the adverse action against Complainant.<sup>17</sup> *Gallagher*, 2004-SOX-00074 at p. 10.

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<sup>17</sup> In their respective declarations, Salvador Vargas Guajardo, General Counsel and Secretary of the Board of Gruma, and Jeffrey Worstell, First Vice President and Corporate Governance Officer of INB, emphasize that an "affiliate" or "subsidiary" relationship neither exists nor has ever existed between Gruma and any of the Banorte

Complainant noted that his termination came within 90 days of JMB's settlement. (Opp. to Mtn. to Dis., p. 2). Also, Complainant stated that JMB helped him get the job at INB. (Opp. to Mtn. to Dis., p. 6). But to the extent of JMB's SOX "employee" status as an individual who "formerly worked for a covered person" (Gruma and Don Barrera), JMB was no longer in, or ever in, a position of "authority" to adversely "affect" Complainant in his employee status at INB. (Guajardo Decl., ¶¶ 7-9). Moreover, no parent-subsidary relationship existed between Gruma and the Banorte Defendants, unlike the situations cited by Complainant in *Villanueva v. Core Laboratories N.V.*, ARB Case No. 09-108 (Dec. 22, 2011) and *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365 (N.D. Ga. 2004). (See generally Guajardo Decl.).

Complainant attempts to reach SOX's protections by asserting that a contractor and/or subcontractor relationship exists between Gruma and the Banorte Respondents that has affected

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Respondents, and that there was no "control" or "common control" exercised by Gruma and any of the Banorte Respondents in relation to each other.

However, this Court takes notice of the following statement, which appeared in the "Notes to the Consolidated Financial Statements" in Gruma's Annual 20-F reports to the SEC for fiscal years 2011, 2012, and 2013:

During January 2011, the Company decided to sell its 8.7966% interest in the capital stock of **Grupo Financiero Banorte, S.A.B. de C.V.** (GFNorte). On **February 15, 2011**, the sale of 177,546,496 shares of the capital stock of GFNorte was concluded, resulting in cash proceeds of Ps.9,232,418, before fees and expenses. ...

Until the date of GFNorte's sale, the **Company had significant influence over this associate** due to its representation on the Board of Directors of GFNorte **through the Company's principal shareholder**.

(*Form 20-F – Annual Report Pursuant to Section 13 or Section 15(d) of the Securities and Exchange Act of 1934 (For the fiscal year ended December 31, 2013)*, F-42 (p. 139), United States Securities and Exchange Commission – Gruma, S.A.B. de C.V. (Apr. 30, 2014), available at: [http://www.gruma.com/media/522638/gruma\\_2013\\_20f\\_final.pdf](http://www.gruma.com/media/522638/gruma_2013_20f_final.pdf) (last visited May 6, 2014); *Form 20-F – Annual Report Pursuant to Section 13 or Section 15(d) of the Securities and Exchange Act of 1934 (For the fiscal year ended December 31, 2012)*, F-42 (p. 142), United States Securities and Exchange Commission – Gruma, S.A.B. de C.V. (Apr. 30, 2013), available at: [http://www.gruma-en.com/media/444333/2012\\_gruma\\_20-f\\_ingl\\_s.pdf](http://www.gruma-en.com/media/444333/2012_gruma_20-f_ingl_s.pdf); *Form 20-F – Annual Report Pursuant to Section 13 or Section 15(d) of the Securities and Exchange Act of 1934 (For the fiscal year ended December 31, 2011)*, F-40 (p. 145), United States Securities and Exchange Commission – Gruma, S.A.B. de C.V. (Apr. 30, 2012), available at: [http://www.gruma-en.com/media/342174/2011\\_gruma\\_20-f.pdf](http://www.gruma-en.com/media/342174/2011_gruma_20-f.pdf) (emphasis added) (last visited May 7, 2014).

According to the SEC, an "associate" is "an unconsolidated enterprise in which the company has a significant influence or which has significant influence over the company," and "significant influence" over an enterprise is "the **power to participate in the financial and operating policy decisions** of the enterprise **but is less than control** over those policies." *Form 20-F*, United States Securities and Exchange Commission, p. 21, available at: <https://www.sec.gov/about/forms/form20-f.pdf> (emphasis added) (last visited May 7, 2014). Through Gruma's own words reported to the SEC in the Annual 20-F reports, Gruma, prior to February 15, 2011, had significant influence, i.e. the "power to participate" in the "financial and operating policy decisions" over associate GF Banorte (and, consequently, GF Banorte's subsidiaries and affiliates) through its "principal shareholder," Don Barrera and family. Thus, Gruma and the Banorte Respondents are not as historically disconnected as they have indicated to the Court through the declarations. Yet the "significant influence" relationship between the Gruma and GF Banorte ended February 15, 2011 – more than two years before the date of the adverse employment action against Complainant.

his employment. Yet he offers no indication a document or valid contract exists or of any integration in decisions for his employment at INB, that could prove this allegation. (Ban. Resp. Rep., p. 3; Guajardo Decl., ¶¶ 10-11). Complainant cites the Supreme Court's recent decision in *Lawson v. FMR LLC*, 134 S.Ct. 1158 (Mar. 4, 2014) to demonstrate how a contractor is covered by SOX. In *Lawson*, the Supreme Court noted the "common" definition of contractor supplied by the plaintiffs ("a party whose performance of a contract will take place over a significant period of time") and decided on the "mainstream application" of 18 U.S.C. § 1514A, as suggested by the Solicitor General. *Lawson v. FMR LLC*, 134 S.Ct. 1158. Complainant has not demonstrated how to potentially prove that a publicly-traded tortilla company in Mexico and a private bank in McAllen, Texas had a contractor/subcontractor relationship as contemplated by SOX, and they engaged in a "joint scheme" which adversely affected his employment on July 15, 2013. (Opp. to Mtn. to Dis., p. 6-7).

Similarly, Complainant alleges that an agency relationship exists between Gruma and the Banorte Respondents regarding his employment. Specifically, Gruma is under the control of the late Don Roberto's family, and thus INB could be influenced by Gruma or function as the alter ego for Gruma or Don Roberto's family. (Opp. To Mtn. to Dis., p. 7). The ARB has stated that factors relevant in assessing whether an agency relationship exists in SOX include whether there are overlapping officers between the two companies and whether the principal was involved in decisions relating to the complainant's employment. *Stone*, 2007-SOX-21 at 21 (citing *Klopfenstein v. Flow Technologies Holdings, Inc.*, ARB 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006), slip op. at 15). However, *Stone* and *Klopfenstein* involved established parent-subsidiary relationships; Complainant has only reached legal conclusions that the parties are intertwined, authority exists through agency, or INB "could be" an alter ego for Gruma and Don Roberto's family.

Complainant then turns to asserting JMB's "employment" status or "engagements" with Gruma, GF Banorte, and/or Don Barrera as his own. (Opp. to Mtn. to Dis., p. 7, EX-2). Even if found to be contractual, JMB's work status with Gruma, GF Banorte, and Don Barrera, which all ended by December 2012, do not attach to Complainant and his employment relationship with INB, which ended in July 2013. The plain language of the statute's definition of "employee" and the concept of the "zone of interests" in non-SOX cases<sup>18</sup> do not reach Complainant's association with his brother-in-law, JMB.

Because I find that the Court lacks subject-matter jurisdiction over this SOX claim, I decline to fully address the Respondents' arguments to dismiss the case under 12(b)(6) and Complainant's arguments about the pleading standards set forth in *Evans*, and whether Complainant has alleged a *prima facie* case of retaliation to move forward with the SOX claim.

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<sup>18</sup> In *Thompson v. N. Amer. Stainless, LP*, 131 S.Ct. 863, 869-70 (Jan. 24, 2011), the Supreme Court held that an employee fired by his employer three weeks after his fiancée filed a Title VII charge with the EEOC fell within the "zone of interests" of Title VII because the employer's conduct could have "dissuaded a reasonable worker from making or supporting a discrimination charge." While the employee was found to be a "person aggrieved with the standing to sue," the Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful under Title VII. *Thompson*, 131 S.Ct. at 869-70. Furthermore, the employee and his fiancée in *Thompson* were employed by the same employer on the date of the adverse action.

Yet it is worth noting the elements required to show why Complainant's retaliation discharge claim under SOX would ultimately be dismissed under 12(b)(6) even if subject matter jurisdiction could be established. A complaint will be dismissed unless the complainant has made a *prima facie* showing that protected activity was a contributing factor in the adverse action alleged in the complaint. 29 C.F.R. § 1980.104(e)(1). To allege facts sufficient to demonstrate a *prima facie* case of retaliatory discharge under SOX, the complaint must demonstrate that:

- (i) The employee engaged in a protected activity;
- (ii) The respondent knew or suspected that the employee engaged in the protected activity;
- (iii) The employee suffered an adverse action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

29 C.F.R. § 1980.104(e)(2).

Protected activity under SOX is thus essentially comprised of three elements: (1) a report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant's belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his employer, the federal government, or a member of Congress who has the requisite reviewing ability. See *Harvey v. Safeway, Inc.*, 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005). A complainant must show by a preponderance of evidence that the complainant's protected activity was a contributing factor in the unfavorable action. Also, failure to show temporal proximity between the alleged protected activity and the adverse personnel action is fatal to a SOX whistleblower claim. See *Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004); *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29, slip op. at 83-84 (ALJ Oct. 5, 2006) (stating that one year is too long to warrant an inference of causation, but one month is sufficient to warrant an inference). If the employee does prove that the protected activity was a contributing factor in the unfavorable action, the burden shifts to the employer to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iv); *Allen v. Admin Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008).

Complainant has not provided a date of the alleged protected activity, only stating that the painting was acquired in January 2012, he and JMB reported their concerns about a bribe, and then JMB was terminated from his posts in December 2012. (Am. Compl. ¶¶ 29-34). Complainant's termination on July 15, 2013 would have occurred at least seven months or as many as 18 months after the alleged protected activity, which courts have declared is too long to warrant an inference of causation. Thus, Complainant would have likely been unable to show temporal proximity.

Moreover, the Banorte Respondents provided an Employee Disciplinary Notice from INB dated July 11, 2013 in their Answer to Complainant's Amended Complaint. The notice discusses how two subordinate employees had filed a written grievance against Complainant

regarding an incident where they allege Complainant steered them toward violating company policy. (Ban. Resp. Ans., p. 4; EX-1). The acts violated INB's Code of Ethics Policy and Banking Policies. *Id.* INB's report states that "[t]his behavior from a Senior Vice President is not acceptable," and "[a]s a result of these actions, Arturo is being terminated immediately." *Id.* at EX-1. Complainant did not mention these events spanning late June and early July 2013 in the Amended Complainant clarifying his case, and the Notice issued four days before his termination date, in his pleadings to this Court. Thus, the Respondents would likely be able to show by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of protected behavior.

### **III. ORDER**

For the aforementioned reasons, it is **ORDERED** that the Motions to Dismiss set forth by the Respondents, Gruma, INB, GF Banorte, Banorte Securities, and Solida USA, are hereby **GRANTED**.

**YOU ARE HEREBY NOTIFIED** that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **June 25, 2014**, in **Houston, Texas**, is cancelled.

**SO ORDERED** this 12<sup>th</sup> day of May, 2014, at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**ADMINISTRATIVE LAW JUDGE**