



**Issue Date: 08 March 2017**

Case No.: 2015-SOX-00014

In the Matter of

**ANTONIO JOSE JIMENEZ PEREZ**  
Complainant

v.

**CITIGROUP INC.**  
Respondent

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR  
DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY  
DECISION AND DISMISSING COMPLAINANT'S COMPLAINT**

This proceeding arises from a complaint filed under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (hereinafter "the Act," "SOX," or "Section 806"). See 18 U.S.C. § 1514A(b)(2)(A) (providing that the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121(b) (hereinafter "AIR 21"), shall govern in actions under the Act). The governing regulations are contained in 29 C.F.R. Part 1980. Antonio Jose Jimenez Perez (hereinafter, "Complainant" or "Jimenez Perez") alleges that Citigroup, Inc. ("Citigroup") took adverse employment actions against him for reporting his concerns over potential or actual violations of federal securities laws.

**I. PROCEDURAL BACKGROUND**

Complainant filed a complaint under Section 806 of the Act on January 20, 2015. On March 9, 2015, OSHA denied Complainant's complaint, finding that "[t]here is no SOX protected activity because the adverse action took place in Mexico at the hands of Complainant's Mexican supervisors and there is no indication that the U.S. parent company was involved." See Exhibit R to the Kaufman Declaration. On April 15, 2015, Complainant appealed OSHA's findings.

On July 28, 2015, Respondent's counsel filed a request to grant a three-month continuance of the hearing and adjournment of the pre-hearing deadlines. Subsequently, on July 29, 2015, Complainant filed its opposition to Respondent's request. On July 30, 2015, a letter issued to the parties advised that the undersigned would hold a telephonic conference on

Monday, August 3, 2015. During that conference call, the parties discussed a brief extension of the hearing dates and scheduling deadlines.

An Order dated August 5, 2015 continued the hearing and provided the parties with amended discovery deadlines and an updated hearing date. By facsimile dated August 10, 2015, Complainant's counsel requested the issuance of a supplemental order directing the Respondent to produce all available documents responsive to Complainant's "First Request for Production of Documents" by August 21, 2015.<sup>1</sup> Consequently, a Supplemental Order dated August 19, 2015 provided the parties with an amended schedule for pre-hearing deadlines.

On August 31, 2015, Complainant proffered his "Motion to Compel Production of Documents from Respondents" (hereinafter, "Motion to Compel"). On September 25, 2015, Complainant submitted a "Request for Sanctions for Failure to Produce Documents" (hereinafter, "Motion for Sanctions"). On October 9, 2015, Respondent's counsel submitted its response to Complainant's Motion for Sanctions.

On November 17, 2015, the undersigned, in response to the parties' requests, rescheduled the hearing. The undersigned again rescheduled the hearing in a January 13, 2016 Order. An April 5, 2016 order rescheduled the hearing another time. A July 22, 2016 Order cancelled the hearing pending further proceedings.

On January 7, 2016, the undersigned convened a teleconference (hereinafter, "January 7, 2016 teleconference"). There, the parties discussed various discovery issues, including, *inter alia*, the language in which the parties should exchange discovery documents. The undersigned notified the parties, *inter alia*, that they must submit any evidence in English via certified translation. An Order issued January 13, 2016 concretized the directives issued during the January 7, 2016 teleconference. On January 21, 2016, Respondent issued its Motion for Reconsideration. An Order dated February 1, 2016 addressed the parties' outstanding concerns about the January 13, 2016 Order.

During the January 7, 2016 teleconference, Complainant's counsel indicated her desire for the undersigned to issue an Order "that clarifies that the Respondent in this case is Citigroup". The undersigned and Respondent's counsel advised Complainant's counsel to make a motion. See Transcript of January 7, 2016 teleconference at 26-27. On January 21, 2016, Complainant's counsel submitted its Motion to change the caption "in order to correct the name of the Respondent in the above-referenced proceeding from Banamex USA to Citigroup Inc." The undersigned amended the caption on February 5, 2016.

On June 24, 2016, the undersigned received Respondent's Motion for Summary Decision. Complainant filed his opposition on July 20, 2016. On September 1, 2016, the undersigned received Respondent's Reply Memorandum in Further Support of Its Motion for Summary Decision, and Complainant filed its "Surreply in Further Opposition to Respondent's Motion for Summary Decision" on September 13, 2016.

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<sup>1</sup> A supplemental order was necessary, because the August 5, 2015 Order failed to specify that the discovery deadlines stated therein applied to Respondent's production of documents in response to Complainant's Initial Document Request.

## II. SUMMARY OF THE EVIDENCE

### A. Complainant's Deposition Transcript<sup>2</sup>

Complainant's deposition occurred over four days—August 6, 2015; August 10, 2015; October 13, 2015; and October 14, 2015. At all times, Complainant testified through a certified Spanish translator. Complainant is a citizen of Spain and Venezuela. (Tr. at 147.) Banamex hired Complainant in 2011. (*Id.*) According to Complainant, “Citigroup offered me the job through its executives. Citigroup set up targets for me . . . and it trained me, and it decided on my vacations.” (Tr. at 148.) Complainant testified that his “commitment in terms of honesty is, and continues to be, with Citigroup, its customers and its shareholders.” (*Id.*) Complainant served as a “divisional coordinator for special advice in charge of the central division with customer service, PPB<sup>3</sup>” while working for Banamex. (Tr. at 149.) Complainant downloaded his pay slips from Citigroup's web page. (Tr. at 150.) Complainant learned of the position when he contacted Citigroup during Christmas 2010. (*Id.*) Complainant's job interview occurred in Mexico. (Tr. at 155.) Complainant initially reported to Jose Antonio Ezquerria Fernandez, the deputy director for specialized advice at “Citigroup Seguros Banamex.” (Tr. at 164.) Jose Ramon Aladro Ezquerria became Complainant's boss in December 2011. (Tr. at 165.) Aladro Ezquerria's “direct boss” was Rafael Melchor Lopez Gasca, “commercial director for Citigroup Seguros Banamex.” Augustin Polanco Ibanez was CEO. (Tr. at 165.) Polanco Ibanez frequently travelled to Citigroup's headquarters in New York City. (Tr. at 166.)

In May 2014, Complainant began to work for Aladro Ezquerria as well as Hector Campos Vara. (Tr. at 170.) Both assigned work to Complainant. (Tr. at 171.) Complainant complained to Campos Vara in an online portal called “Citi For You.” (*Id.*) This complaint occurred within Complainant's July 2014 “self-evaluation.” (Tr. at 172, 175.) Complainant complained of the “irregularity of the documents. The operating [sic] risks. I mentioned a very valuable audio conference called by myself sometime around May 2014 [which fomented very thorough meetings] . . . [and] my salary reduction.” (Tr. at 173.) Complainant testified that he did not recall which operating risk he mentioned in his self-evaluation. (Tr. at 173–74.) “I expressed it in general terms . . . I did not give further details, but my boss knew what we . . . were talking about.” (Tr. at 174.) Complainant's concern about operational risk involved \$77,000 and \$1.8 million deposits into a concentrating account, as well as the “lack of consistency regarding photocopies of the documentation, when we finally received the original document.” (*Id.*) Complainant also complained to Lopez Gasca in a May 25, 2014 email. (Tr. at 178.)

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<sup>2</sup> Two documents contained in the record attached the Complainant's deposition transcript: (1) The “Declaration of Antonio Jose Jimenez Perez in Opposition to Respondent's Motion for Summary Decision” (Complainant's Exhibit 1), and (2) the “Declaration of Meredith L. Kaufman” (Respondent's Exhibit A). The undersigned has reviewed and summarized the transcript included in the Kaufman Declaration, because it was substantially more complete than the one included in the Jimenez Perez Declaration. The undersigned will cite to pages of Complainant's deposition throughout this Order with the abbreviation “Tr. at”.

<sup>3</sup> The initials “PPB” stand for “Plan Patrimonial Banamex.”

Complainant said that he raised a specific concern “with Banamex USA, through the dollar concentration account.” (Tr. at 8.) Complainant also voiced, “on many occasions,” his concerns over the “operational risk vis-à-vis our customers and vis-à-vis the legislation in effect on those . . . for instance, FATCA,<sup>4</sup> or tax legislation, tax evasion.” (Id.) Complainant told Aladro Ezquerra such concerns verbally in May or June 2013 and in Monday conferences held each week. (Tr. at 8, 10) Complainant specifically questioned Aladro Ezquerra as to the secrecy and confidentiality of the concentration account, especially concerning a recent \$70,000 transfer into the account from one of Complainant’s customers. (Tr. at 9.) Complainant did not know which law his employer broke, but was “convinced that they were doing something wrong” due to the secrecy around the concentration account. (Tr. at 462.) Complainant explained that a client would make a deposit into the concentration account and the money would be removed to an account bearing a completely different policy number. (Tr. at 10.) Complainant was concerned that they were “committing a crime,” because Aladro Ezquerra sent numerous emails about the \$70,000 transfer. (Tr. at 9.) Complainant allegedly asked Aladro Ezquerra, “what is it that we want to erase; what is it that we want to eliminate or delete[?]” (Id.) Aladro Ezquerra responded, “That’s the way the business works . . . .” (Id.) Complainant later averred that he discussed the “process” with Aladro Ezquerra, not the specific \$70,000 incident. (Tr. at 18.) Aladro Ezquerra allegedly sent emails to Complainant and his coworkers stating “that there had been a change in the Banamex USA policy from Citigroup with regard to the use of these concentration accounts.” (Tr. at 11.) At this point, “the business became even more concealed.” (Id.) Complainant averred that he made his complaints during the Monday morning calls in May or June 2013 “at least 10 or 15 times.” (Tr. at 12, 17.) Complainant referred to it as his “constant complaint.” (Tr. at 13.) Complainant felt as though he was “complying with [his] commitment with [Citigroup] of doing the right job.” (Tr. at 17.)

Complainant also recalled an incident that occurred a year after the May or June 2013 complaints, where he emailed Aladro Ezquerra and asked him “whether that operation constitute [sic] or implied a risk to the customer, to us, and whether or not we were complying with the law.” (Tr. at 19.) This 2014 conversation involved a \$1.8 million transaction. (Tr. at 20.) The \$1.8 million transaction traveled through the concentration account without a name or policy number attached to it. (Tr. at 474.) Complainant raised this concern in writing because he had “already [been] subject[ed to] some damage and some against me, to damage me, on the part of my boss.” (Id.)

Complainant testified that the concentration account was maintained “in Banamex USA” and dealt in U.S. dollars. (Tr. at 23.) The concentration account was in the name of Seguros Banamex, “with Banamex USA, United States of America. That bank is only in the United States.” (Tr. at 24.) Seguros Banamex held other concentration accounts in Mexico. (Id.) Complainant testified that he reported “irregular[ities] of business with Seguros Banamex [because Seguros Banamex used] the concentration account with Banamex United States by sending money underhandedly to PPB policies in Mexico, and [because Seguros Banamex

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<sup>4</sup> “Foreign Account Tax Compliance Act.” According to the Internal Revenue Service, FATCA “generally requires that foreign financial Institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments.” See <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> (last accessed January 17, 2017).

facilitated] the violation of the law.” (Tr. at 309.) Complainant also allegedly blew the whistle on his employer’s use of copies of original documents that did not match the originals. (Id.)

In June 2014, Complainant called a meeting over his concern that his company was operating with customers’ money without reviewing the original documentation. “We were activating and managing and moving the resources with photocopies or documents in PDF format, and subsequently upon receipt of the original documents, the documents did not match . . . [they] had been modified . . . .” (Tr. at 29–30.) Complainant further testified that documents would begin blank and then “[would] become completed, sometimes by people with different handwriting.” (Tr. at 30.) Complainant recalled that the legal department warned him and his colleagues about signatures that did not match customers’ names. (Id.) Complainant identified this as a “high risk in the event that a customer filed a complaint . . . against us.” (Tr. at 31.) Complainant was specifically concerned with money laundering, because it was “not a secret that there was a problem with the Banamex operations.” (Tr. at 37.) Citigroup sent information about the Banamex operations to everyone with a Citigroup email address. (Tr. at 38.)

Complainant said he never wrote down his complaints about money laundering. (Tr. at 38.) He felt that his employer would fire him if he ever raised concerns about money laundering in those terms. (Id.) Complainant hesitated to use the term “money laundering” because it was associated with “terrorists [and] drug dealers.” (Id.) Complainant averred that it was more “complete” to complain about possible FATCA violations. (Tr. at 38–39.) Complainant reiterated that he did not include his concerns about money laundering in his complaint to Aladro Ezquerria. (Tr. at 39, 410.) To discuss money laundering openly was “heresy at the bank.” (Tr. at 410.) Complainant said that he worked in sales and that he was “sufficiently” aware of private banking regulations. (Tr. at 63.) Complainant received anti-money laundering prevention training from Citigroup. (Id.) Aladro Ezquerria administered the training every year. (Id.)

Complainant also raised a complaint to Lopez Gasca, Aladro Ezquerria’s boss. (Tr. at 40.) Complainant asked Lopez Gasca for a meeting, which occurred on May 23, 2014. (Id.) Complainant addressed his concerns about the Banamex USA account and the concentrating account “and the legal and operational risk that implied.” (Id.) He also discussed the “mishandling of documentation” that he noticed occurring because copies of transactional documents contained information that was different from the information contained in the original document. (Id.) Notably, Complainant told Lopez Gasca, “The operations with Banamex USA represent a very serious operational risk.” (Tr. at 42.) By “operational risk,” Complainant referenced “the documentary process of working without originals . . . and also to the Banamex USA process involving the concentration account.” (Tr. at 459.) Lopez Gasca reassured Complainant. (Tr. at 44.) Complainant did not raise his various concerns about Banamex USA to the SEC or to any governmental agency. (Tr. at 147.)

As a sales manager, Complainant’s employer required him to solicit the opening of new PPB accounts and other Seguros Banamex insurance policies. (Tr. at 156, 188.) Complainant would review documents concerning these new accounts “and capture them in [Citigroup’s] system. That system was called SES Matrix.” (Tr. at 189.) Complainant would learn about his new policyholders through “[Citigroup’s] systems”. (Id.) An “operational risk in the PPB business” occurred when deposits were made into the concentration account from banks other

than Banamex USA. (Tr. at 190–91.) Complainant testified that he would get notice whenever such a deposit was made and that “Citigroup Banamex” created this notification procedure. (Tr. at 191.) Complainant took anti-money laundering courses through the Citigroup “Citi for You” web portal. (Id.)

Complainant’s compensation (which relied on performance bonuses) did not remain consistent throughout his career, even though his job duties remained the same. (Tr. at 192.) Specifically, Aladro Ezquerra removed three offices from Complainant’s “area,” which meant that he lost all of the income generated by such offices. (Tr. at 193.) Allegedly, Aladro Ezquerra gave these offices to another employee as a reward and as a “punishment” for Complainant’s “frequent complaints and denunciations, regarding the operating risks and concentration account . . . .” (Tr. at 284, 289.) Complainant alleged that later his employer removed two other offices from his supervision. (Tr. at 289.) Complainant received quarterly bonuses for each policy sold from an office he supervised. (Id.) Such bonuses amounted to eighty-five percent of Complainant’s income. (Tr. at 290.) He originally had eight offices. (Tr. at 193) Complainant estimated that he lost thirty-five to forty percent of his team, so his production (the number of policies his offices generated) decreased because of the loss of the offices. (Id.) Complainant testified that this procedure “was another one of [Aladro Ezquerra’s] traps.” (Tr. at 285.) Complainant complained to Aladro Ezquerra during a July 2013 meeting about the loss of offices he supervised, and the direct effect this decision had on his compensation. (Tr. at 194.) Complainant received fewer quarterly bonuses because of this reduction, which he termed a “reprisal.” (Tr. at 194–95.) In 2012, Complainant wrote 300 policies, in 2013, he wrote 210 policies, in 2014, he wrote “barely 100.” (Tr. at 195.) Aladro Ezquerra allegedly took the offices away from Complainant due to “business decisions.” (Tr. at 196, 316.)

In June or July 2014, Complainant called a meeting to discuss “the situation that I was going through, the salary reduction, reprisals, [and the] insults from Aladro [Ezquerra].” (Tr. at 208, 226.) Complainant told Aladro Ezquerra that he felt as though Aladro Ezquerra was trying to “damage” him. (Tr. at 210.) Complainant testified that Rafael Melchor and Polanco Ibanez each supported Aladro Ezquerra’s actions. (Tr. at 214.) Complainant felt as though the actions were taken “to get me out of [Citigroup] as soon as possible.” (Tr. at 214.) Complainant asked for financial assistance at the meeting, but his employer denied his request. (Tr. at 215.) Complainant either asked: (1) for a quarterly bonus; (2) for a better mortgage rate; or (3) an advance on his salary. (Tr. at 216.) “They denied everything. Every type of help and support, it was totally denied, everything.” (Tr. at 217.) Complainant averred that his credit situation was a direct result of the “actions that I suffered.” (Tr. at 213.)

Complainant met with Aladro Ezquerra on August 6, 2014 in Mexico City. (Tr. at 226.) Aladro Ezquerra called Complainant the night before and told him where to meet and to bring his Blackberry and work laptop, “because we might settle everything.” (Tr. at 227.) Complainant met with Aladro Ezquerra, Jose David Soto Luna, “the director of the legal department,” and another lawyer. (Tr. at 227–28.) Aladro Ezquerra said that “we have conducted an investigation about your use of the bank’s corporate credit card [and] we have detected a very serious irregularity.” (Tr. at 228.) Specifically, Complainant had a large outstanding balance on the card and had not made a payment in two months. (Tr. at 228, 365.) Complainant responded that Lopez Gasca, Campos Vara, and Galvan Rangel each knew about his outstanding balance “for a

very long time.” (Tr. at 229.) Complainant testified that he never had any written “minutes” in his personal record about any infraction. (Tr. at 230.) The individuals at the meeting then told Complainant that they “have to terminate [Complainant].” (*Id.*) The individuals at the meeting offered Complainant cash incentives, such as the “bonus they owe[d] me,” and promises to reduce his credit card debt if he resigned at the meeting. (Tr. at 239–40.) Complainant signed the resignation agreement. (Tr. at 240.) “Banamex” issued Complainant’s severance check. (Tr. at 334.) All of Aladro Ezquerria’s decisions concerning the assignment of personnel required the approval of Lopez Gasca and Polanco Ibanez, and the approval of human resources, so Complainant inferred that Lopez Gasca and Polanco Ibanez also knew about Complainant’s resignation. (Tr. at 304.) Complainant averred that he was the “number one person in term[s] of achievement of targets and national performance” prior to having his offices taken away. (Tr. at 305.) He averred that his employer’s decision to reduce his business was an “adverse action . . . punishment.” (Tr. at 309.)

Complainant was presented with Exhibit 3, Bates stamped PJ0293 through 296, which was his employment agreement with “[Citigroup] through its Mexican subsidiary, Servicios Ejecutivos Banamex, to provide services and to work directly with Seguros Banamex and asset banking . . . .” (Tr. at 327–28.) Complainant averred, “he worked for [Citigroup].” (Tr. at 333.) Complainant never traveled to the United States on business. (Tr. at 334.)

Complainant also testified that he gets harassing phone calls and that some days he gets as many as thirty-five calls. (Tr. at 55.) He feels that his life is at stake. (*Id.*) Complainant has a single creditor, called “Citigroup,” and his debts include a mortgage, car loan, and credit card debt. (Tr. at 56.) Complainant filed for bankruptcy in 2008. (Tr. at 98.) Complainant still owes 70,000 euros as part of the bankruptcy proceeding. (Tr. at 101.)

#### B. Rafael Melchor Lopez Gasca’s June 17, 2016 Declaration

Lopez Gasca is the Commercial Director of Seguros Banamex, a Mexican insurance company. (Declaration of Lopez Gasca at ¶¶ 1–2.) Servicios Ejecutivos, the company that Complainant worked for, is a subsidiary of Seguros Banamex.<sup>5</sup> (*Id.* at ¶¶ 3–4.) Servicios Ejecutivos is incorporated under the laws of Mexico and has no operations in the United States. (*Id.* at ¶ 4.) Complainant reported directly to Aladro Ezquerria. (*Id.* at ¶¶ 5–6.) Complainant “began exhibiting certain performance and behavior problems, including unapproved absences and aggressive demands for personal financial benefits,” in mid-2013. (*Id.* at ¶ 8.) Aladro Ezquerria reassigned the offices located in the cities of Aguascalientes, Pachuca, and Celaya due to “complaints about working with [Complainant].” (*Id.* at ¶ 9.) In June 2014, Lopez Gasca learned that Complainant “misused” his corporate credit card by charging personal expenses on it and not complying with his repayment obligations. (*Id.* at ¶ 10.) In July 2014, Aladro Ezquerria told Lopez Gasca that he decided to terminate Complainant. (*Id.* at ¶ 11.) Complainant never raised any issues of fraud or illegality to Lopez Gasca. (*Id.* at ¶ 15.)

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<sup>5</sup> Although Servicios Ejecutivos is a subsidiary of Seguros Banamex, the parties have used the names interchangeably.

C. Alejandra Gabriela Galvan Rangel's June 23, 2016 Declaration

Galvan Rangel is a "Human Resources Generalist" at the Banco Nacional de Mexico, S.A. and is "in charge of handling matters related to Human Resources for Seguros Banamex."<sup>6</sup> (Declaration of Galvan Rangel at ¶ 1.) Galvan Rangel declared that Citigroup is not involved in the employment decisions of Seguros Banamex or Servicios Ejecutivos. (*Id.* at ¶ 5.) Servicios Ejecutivos employed Complainant as the "Divisional Coordinator, Central District" from August 5, 2011 to August 6, 2014. (*Id.* at ¶ 6.) Complainant received a corporate credit card on January 24, 2012 and signed a statement that forbids personal use of the card. (*Id.* at ¶ 9.) Galvan Rangel had "several conversations" with Aladro Ezquerro about Complainant's "lack of discipline, his poor attitude and his improper conduct." (*Id.* at ¶ 10.) Aladro Ezquerro copied Galvan Rangel on an email to Complainant related to Complainant's tardiness to join a May 26, 2014 conference call. (*Id.* at ¶ 11.) Complainant also requested certain exceptions to company policies concerning a personal loan, a preferential interest rate on a mortgage, "and bonuses he did not earn." (*Id.* at ¶ 12.) Further, Complainant used the corporate credit card for personal expenses and did not pay off the balance. (*Id.* at ¶ 13.)

In July 2014 Aladro Ezquerro terminated Complainant. (*Id.* at ¶ 14.) The "main reason [for Aladro Ezquerro's decision] was [Complainant's] inappropriate use of the corporate credit card." (*Id.*) Exhibit H to the Galvan Rangel Declaration contains emails dated July 22 through July 29, 2014, which discuss, *inter alia*, Complainant's termination and his corporate credit card balance. On July 23, 2014, Aladro Ezquerro wrote specifically that:

[T]he justification [for Complainant's firing] is due to a series of repeated insubordination (tardiness and unjustified absences), complaints from the partner about his attitude (requests of change of office made by Equity Management and emails from the bank's loan department), failure to abide by company policies (misuse of the corporate credit card), threats to reveal confidential information and to file a labor complaint (said to the Divisional Equity Director and to me), untrustworthiness and an express request asking to be liquidated.

**Exhibit A Complainant's August 5, 2011 temporary employment agreement with Servicios Ejecutivos, translated from Spanish to English**

Complainant signed his employment contract in Mexico City. Complainant's employment agreement contained a preamble, as follows: "Individual contract of employment for a fixed-term entered into by and between Servicios Ejecutivos Banamex, S.A. DE C.V., hereinafter referred to as 'the Company,' and [Complainant], hereinafter referred to as 'the employee,' pursuant to the following representations and clauses." Complainant was a Venezuelan national and had a Mexican Institute of Social Security registration number (redacted). The Company paid Complainant in Mexican pesos for his services as a "regional

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<sup>6</sup> Banco Nacional de Mexico, S.A. and Seguros Banamex are each subsidiaries of Grupo Financiero. See Exhibit C to the Kaufman Declaration.

coordinator.” Servicios Ejecutivos is located at Venustiano Carranza #63 Col. Centro 06000<sup>7</sup> and Complainant was required to work at “any of the offices, premises or branch offices assigned by ‘the Company’ according to its corporate purpose.” Complainant granted his consent “to be transferred from the office or workplace where he works to any other throughout the Mexican Republic,” after Servicios Ejecutivos’s ten-day notice. Complainant’s employer required him to work forty hours per week and “enjoy[] two weekly rest days, preferably Saturday and Sunday.” Servicios Ejecutivos may request Complainant to work on weekends, or holidays “when so required by the nature of the services required”; however, the parties agreed that “Article 66 of the Federal Labor Law” would govern any such requests. The Mexican Federal Labor Law also governed holidays. Servicios Ejecutivos agreed to register Complainant with the “I.M.S.S.”<sup>8</sup> and registered him with the Mexican “Retirement Savings Fund System,<sup>9</sup> so that [Complainant] enjoys the benefits established by law.” Paragraph Eight allowed Servicios Ejecutivos to remove Complainant or modify his duties “according to the needs of ‘the Company.’” Servicios Ejecutivos agreed to train Complainant. The employment agreement included a non-disclosure term, and “failure to comply with the provisions of this clause shall be considered as a lack of integrity on the part of [Complainant], in which case the provisions set out in Article 47(II) of the Federal Labor Law shall apply.” Complainant was subject to discharge if he “incur[red a] significant and repeated decrease in the productivity level established for his position, pursuant to the goals and standards learned in due time . . . .” Complainant was required to provide Servicios Ejecutivos monthly progress reports.

**Exhibit B Complainant’s November 1, 2011 permanent employment agreement with Servicios Ejecutivos, translated from Spanish to English**

Complainant’s permanent employment agreement was substantially similar to his August 5, 2011 contract, with some notable changes. For example, Complainant served as “sales consultant.” In addition, under “Articles 134 and 135 of the Federal Labor Law,” Complainant agreed to “abide by all orders, letters, manuals and provisions issued by [Servicios Ejecutivos].”

**Exhibit C “Seguros Banamex ‘Expert Advice’ Variable Compensation Calculation Plan”**

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<sup>7</sup> According to Wikipedia, Venustiano Carranza is “one of 16 municipalities of Mexico City.” See [https://en.wikipedia.org/wiki/Venustiano\\_Carranza,\\_Mexico\\_City](https://en.wikipedia.org/wiki/Venustiano_Carranza,_Mexico_City) (accessed January 23, 2017).

<sup>8</sup> Instituto Mexicano del Seguro Social, or the Mexican Social Security Institute.

<sup>9</sup> Translated from the Spanish, “Sistema de Ahorra para el Retiro.” According to Wikipedia, “The National Commission for the Retirement Savings System (CONSAR) is a decentralized administrative body of the Ministry of Finance and Public Credit whose main task is to regulate the Retirement Savings System (SAR) of individual accounts, owned by the workers. These accounts accrue the contributions made by workers, employers and government, and are managed by Retirement Fund Managers (AFOREs) to be delivered to workers at the time of retirement. See [https://es.wikipedia.org/wiki/Comisi%C3%B3n\\_Nacional\\_del\\_Sistema\\_de\\_Ahorro\\_para\\_el\\_Retiro](https://es.wikipedia.org/wiki/Comisi%C3%B3n_Nacional_del_Sistema_de_Ahorro_para_el_Retiro) (accessed 1/6/2017; translated internally 1/6/2017).

The manual contained the Seguros Banamex name and logo on each page. The purpose of the manual was to “establish the procedures and rules to be followed for ensuring the proper calculation of variable compensation to the Seguros Banamex Specialized Advisory Sales Force.” The manual stated, “The Financial Consultants and Coordinators of Seguros Banamex may receive compensation” for the sale of the following instruments: Banamex Patrimonial Plan (PPB), Banamex Life Portfolio (PVB), and Retirement Personal Plan (PPR). Servicios Ejecutivos set the target sales for the individual offices that Complainant supervised. See Declaration of Galvan Rangel at ¶8. The following notable names appear on the “authorizations” page: Rafael Melchor Lopez Gasca, Jose Ramon Aladro Ezquerra, and Alejandra Galvan Rangel.

**Exhibit D** Complainant’s January 24, 2012 signed declaration that he read the Corporate Credit Card Policy

**Exhibit E** Email dated May 26, 2014 from Aladro Ezquerra to Complainant with Subject “Weekly audio conferences punctuality – Mondays 8:30 on the dot”

Aladro Ezquerra wrote that “once again” Complainant was late to the audio conference, and remarked, “the same has happened for the past two weeks.” Aladro Ezquerra attached several emails concerning Complainant’s lack of punctuality. Although Aladro Ezquerra did not want to take “further actions,” he told Complainant “many people in the company . . . are eager to join our team and deliver 100%.” Aladro Ezquerra asked Complainant to “fulfill your job duties with discipline and professionalism.”

**Exhibit F** Email correspondence dated between May 27, 2014 and June 30, 2014 between, *inter alia*, Complainant, Galvan Rangel, Campos Vara, and Lopez Gasca with Subject: “mortgage 7% subsidies”

Complainant wrote that he spoke with Lopez Gasca about his “situation regarding the mortgage and credit card balances, the personal and car loans, etc.” Complainant “maxed out [his] credit lines” due to home remodeling. Complainant suggested a plan to secure another loan, specifically one for \$900,000 pesos. Complainant noted that on August 5, 2014 he would celebrate his “3rd year with the company,” and asked to “consider [his] request to improve the conditions of my [loans].” The signature of Complainant’s email stated that he worked for Seguros Banamex. On June 3, 2014, Aladro Ezquerra denied Complainant’s requests. He denied the mortgage request due to Complainant’s “seniority in the company.” The “Human Resources Commission bylaws” did not permit exceptions to the rules. Complainant responded with certain “concern[s].”

**Exhibit G** Email correspondence dated between June 20, 2014 and June 24, 2014 between, *inter alia*, Aladro Ezquerra and Galvan Rangel with Subject: “Inappropriate use of Corporate Credit Card”

Aladro Ezquerra asked to cancel Complainant's corporate credit card. Aladro Ezquerra characterized Complainant as "on my team as Expert Advice Coordinator in the Centro Division." Aladro Ezquerra noted that Complainant used the card for personal items and noted "other issues regarding loans that has me concerned (sic)." Complainant's corporate credit card had an outstanding balance of \$74,203.22 pesos "which is two months past due." Aladro Ezquerra said, "we clearly have a very serious situation here" and contemplated Complainant's termination.

**Exhibit H      Email correspondence dated July 24, 2014 through July 30, 2014 between, *inter alia*, Aladro Ezquerra, Maria Del Socorro Chavez Aguilar, Lopez Gasca, Campos Vara, Jose David Soto Luna, and Galvan Rangel with Subject: "Dismissal JAJ"**

Aladro Ezquerra said that August 1, 2014 is an appropriate termination date, because Complainant returned from vacation that day. On July 29, 2014, Claudio Elizabeth Gallardo Soto of Seguros Banamex wrote that Complainant's dismissal would occur on August 6, 2014 at the Venustiano Carranza office in Mexico City.

**Exhibit I      Complainant's Voluntary Resignation**

Complainant, "acting on [his] own behalf, in attention to [his] personal interests . . . voluntarily and irrevocably terminat[ed] the work relationship held with" Servicios Ejecutivos Banamex, S.A. DE C.V, and "any legal or natural person and/or any of the stockholders, branches, and subsidiary companies thereof." Complainant stated that he received all due compensation and that he had no debts with the Company "in relation to the performance of my duties."

**Exhibit J      "Administrative Record" concerning Complainant's resignation**

Complainant signed his resignation letter in Mexico City. He held the position of "sales supervisor." Jose Ramon Aladro Ezquerra was his immediate supervisor. Two other members of "Servicios Ejecutivos Banamex" were present as witnesses. They attested that a review of Complainant's corporate credit card activity showed that Complainant used his corporate credit card for personal matters, carried a balance of \$76,453.42 pesos, and made no payments on that balance in the last two months.

**Exhibits K, L Complainant's Settlement**

Complainant signed an "out-of-court settlement" on August 6, 2014. Complainant's employer was Servicios Ejecutivos Banamex, S.A. DE C.V. Complainant received a check in the amount of "Five Hundred and Sixty-Seven Thousand and Twelve Mexican Pesos." The bank that issued the check was "Banco Nacional De Mexico, S.A. Member of Grupo Financiero Banamex." Complainant agreed that his salary, vacation premiums, seniority premiums, and "Sunday allowance were always covered timely, in accordance with the Federal Labor Law in force." Servicios Banamex provided the check to Complainant after "approval by the Federal

District Local Labor Board.” Complainant “considered himself paid for any amount or benefit . . . in pursuance to the Mexican Federal Employment Act, the employment contractual relationship, and his Individual Employment contract.” Complainant also agreed that his workday “did not exceed the legal limits by the Mexican Federal Employment Act” and that his working day was “distributed in the terms of Section 59 of the Mexican Federal Employment Act.” Complainant and Servicios Ejecutivos agreed that “compliance of this agreement shall be subject to ratification and approval by the Local Labor Board.”

**Exhibit M Complainant’s Check-Receipt concerning his settlement**

The check, dated August 6, 2014, issued from “Banco Nacional de Mexico, S.A. Member of Grupo Financiero Banamex” and bore Banamex’s name and corporate logo.

D. **Antonio Jose Jimenez Perez’s July 14, 2016 Declaration**

Complainant’s declaration included little substantive testimony. He stated that he provided information to Aladro Ezquerria and Lopez Gasca relating to the concentration account maintained at Banamex USA for Seguros Banamex, because he “believed [he] was providing them with information about money laundering at Banamex USA, and that information was not being disclosed to Citigroup Inc. shareholders nor US government authorities investigating Citigroup and Banamex USA. [Complainant] believed that keeping the concentration account secret and confidential indicated wrongdoing.” Complainant also attached fifteen exhibits.

**Exhibit 1 Complainant’s deposition**

A summary of Complainant’s deposition testimony appears, *supra*.

**Exhibit 2 (CX 71) News article dated February 26, 2015 titled “Citicorp’s Banamex USA Faces Further Regulatory Probe”**

Citigroup disclosed that the U.S. Department of Treasury and the California Department of Business Oversight have asked Banamex USA about information concerning its compliance with the Bank Secrecy Act and other anti-money laundering laws. According to the article, “Citigroup took over Banamex USA with the acquisition of the Mexican bank, Banamex, in 2001.” Possible legal losses related to Banamex amounted to an estimated four billion dollars.

**Exhibit 3 (CX 47) Email dated April 29, 2013 from Aladro Ezquerria to numerous individuals including Complainant with subject “Concentrating Account Banamex USA”**

Aladro Ezquerria wrote that Banamex USA decided not to allow clients to use the concentrating account to make transfers to PPB, and that he is looking into solutions that would allow the PPB to operate in dollars.

**Exhibit 4 (CX 48)** Email dated April 30, 2013 from Aladro Ezquerra to numerous individuals including Complainant with subject “Usage of Concentrating Account Banamex USA”

Aladro Ezquerra wrote that the operation of the Banamex USA concentrating account was “temporarily stopped.”

**Exhibit 5 (CX 46)** Email dated June 6, 2013 from Aladro Ezquerra to Complainant with subject “Re: Concentrating account transfer”

Aladro Ezquerra responded to a \$77,900 USD transfer to the concentrating account, which “implicates a considerable risk for business.” An entity called “SBA Asesoría Especializada” informed Aladro Ezquerra and Complainant about this “operative risk,” which existed in the Center Division.

**Exhibit 6 (CX 22)** Email dated March 18, 2014 from “Ivan Amaro” to numerous individuals including Complainant with subject “Re: form of use of the concentration account IN FORCE”

Amaro wrote that it was “very important” to keep the concentrating account “the most confidential possible” and to notify clients that cash deposits are not permitted.

**Exhibit 7 (CX 70)** Wall Street Journal article dated April 10, 2014 titled “Citigroup Faces Inquiry in California Over Failure to Report Suspicious Activity”

This article discussed a Justice Department investigation of Citigroup into “why Citigroup didn’t submit so-called suspicious-activity reports flagging the questionable transactions . . . .” The article also mentioned “revelations of potential fraud in a separate Mexican unit called Grupo Financiero Banamex.”

**Exhibit 8 (CX 40)** Bloomberg Business article dated July 22, 2015 titled “Citigroup to Close Banamex USA Unit, Pay \$140 Million Fine”

The article included a quote from the Federal Deposit Insurance Corp.: “The institution failed to retain a qualified and knowledgeable [Bank Secrecy Act] officer and sufficient staff, maintain adequate internal controls reasonable designed to detect and report illicit financial transactions.”

**Exhibit 9 (CX 35) Email chain to and from, among others Aladro Ezquerria and Complainant, dated April 29, 2014 with subject: “New intergovernmental agreement subscribed between Mexico and the United States to comply with”**

Aladro Ezquerria provided numerous individuals, including Complainant, with a “new intergovernmental agreement subscribed between Mexico and the United States to comply with FATCA.” Complainant replied to Aladro Ezquerria:

Then it would be good for you to clarify to us or maybe we can talk in private, if the use of the concentrating accounts in Banamex USA transferring dollars from SUA to PPB with Seguros Banamex complies with the new or currently in force regulation or if it may create risk for the client or for us in the future . . . .

Complainant also notified Aladro Ezquerria of a \$1.8 million deposit that would appear in the concentration account.

Aladro Ezquerria told Complainant that it was still permissible to receive transfers in USD from other Banamex USA checking accounts. Another option involved funds that are “in a checking account in pesos here in Mexico” which are converted to dollars and deposited into the concentrating account in dollars.

**Exhibit 10 (CX 41) Email dated May 26, 2014 from Complainant to Lopez Gasca with subject “Thanks for your time”**

Complainant discussed, *inter alia*, his concerns about various operational goals and quarterly bonuses.

**Exhibit 11 (CX 49) Email dated May 30, 2014 from Complainant to Aladro Ezquerria, Lopez Gasca, Lopez Gasca, and Galvan Rangel with subject “Bonus and kpi”**

Complainant asked about his quarterly bonus, “asking for what I earned working committed with the company.” Aladro Ezquerria responded that Complainant should “seriously consider the possibility of looking for another option.” Complainant replied that Aladro Ezquerria argued with him three times previously about “sensitive information and personal issues” and that “[Citigroup] is in a very strict process” concerning compliance with its code of conduct and treatment of its employees. Complainant wrote that he “still see[s] a marvelous opportunity to move forward in [Citigroup].”

**Exhibit 12 (CX 50) Email dated July 23, 2013 from Complainant to Aladro Ezquerria with subject “feedback summary Monday 07/08/2013”**

Complainant sent Aladro Ezquerra a summary of “what we talked about on the feedback of 07/08/2013.” Complainant’s email generally “highlighted [his] strengths,” and what he needed to “improve.”

**Exhibit 13 (CX 38) Banamex USA corporate profile “created from the Banamex USA website on January 13, 2016”**

Banamex USA’s “corporate profile” stated that it “provides full banking services for companies and individuals that do business in Mexico and the United States. As part of Citigroup, Banamex USA is the U.S. banking arm of Banco Nacional de Mexico (Banamex), Mexico’s premier bank.” The Federal Deposit Insurance Corporation (FDIC) insures deposits in Banamex USA. Banamex USA provides “corporate banking . . . products and services for companies that conduct business in the U.S. and Mexico.” Banamex USA offered investment accounts “through our affiliate, Citigroup Global Markets Inc.”

**Exhibit 14 (CX 76) Complainant’s “Midyear 2014” self-evaluation**

Complainant wrote that “PPB business demands improvements . . . [and] requires another strategy . . . .” Complainant “insisted [that] issuing policies without due support in original documents implies an operation risk in case of customer complaints.” He also complained about the structure of his compensation. Complainant further stated it was “completely unjust” that his employer did not allow him to restructure his debts or loans because they don’t meet the requirements or granting an exception, refusal to grant a payroll loan . . . no crediting of the four-month bonus and reassignment of [three] offices without compensation for the economic loss in my compensation (more than 80,000 to date and some 12,000 less per month) plus the loss of incentives from the productivity of those [eighteen] bankers . . . . [I]t’s as if my commitment and performance wasn’t recognized, but rather punishment and losses, I don’t feel valued or retained as a talent in the company.

**Exhibit 15 (CX 4) Email dated June 23, 2014 from Complainant to Campos Vara and Aladro Ezquerra with subject: “Files”**

Complainant told Campos Vara and Aladro Ezquerra that Santander and Bancomer require “documents to be signed by the clients” and require its bankers “to send the signed originals, in Santander if they do not receive the signed originals after [forty-eight hours] the policy does not become operational . . . and they are penalized . . . .” Complainant noted that he discussed this issue “in the audio with Lupida Puente, Alberta, etc.” Complainant was “concerned” that he did not have the original documents “that protect us before the client in the event of a possible claim from him, this is, we would not have legally and operatively how to protect us . . . . You could comment this [sic] with Legal, Compliance, etc.”

E. **Kathleen M. Kundar’s July 19, 2016 Declaration**

Although this tribunal has reviewed and considered all submitted evidence, summaries of the exhibits most salient to the issues addressed in Respondent’s Motion follow.

**Exhibit 1 (CX 75) Consent Order entered into between Citigroup and the Federal Reserve Board of Governors in the Matter of Citigroup Inc., dated March 21, 2013**

The consent order stated that Citigroup owned, *inter alia*, Banamex USA. Citigroup has established a compliance risk management program that includes an anti-money laundering (“AML”) program:

designed to identify and manage compliance risks, related to the Bank Secrecy Act (31 U.S.C. § 5311, *et seq.*); the rules and regulations issued thereunder by the U.S. Department of Treasury (31 C.F.R. Chapter X); and the AML regulations issued by the appropriate federal supervisors for [Citigroup], each of its subsidiary banks . . . and other subsidiaries of [Citigroup].

Banamex USA, specifically, “consented to the issuance of the Consent Order.” The Consent Order emphasized that “[Citigroup] lacked effective systems of governance and internal controls to adequately oversee the activities of the Banks with respect to legal . . . risks related to the Banks’ respective BSA<sup>10</sup>/AML compliance programs.” The Consent Order required Citigroup to create a plan to implement a BSA/AML compliance risk management program.

**Exhibit 2 (CX 14) “Citi’s’ Global Anti-Money Laundering Policy, updated June 2011”**

The objective of the policy is to “establish governing principles and minimum standards to protect [Citigroup], its subsidiaries, affiliates and/or joint ventures (“collectively “Citi”) from being used to launder money . . . and to guide all Citi employees as they conduct business in accordance with” AML regulations. The policy applied “to all of Citi.” The policy defined money laundering. It set forth a code of conduct for all Citigroup employees, which included compliance with the AML, and included punishments for violations of the AML. Appendix B, titled “Guidance to Assist in Evaluating Customer and Product Risk”, provided certain “characteristics of products and services that could pose increased money laundering” risks. One such characteristic was a product that “favors anonymity or involves third parties.”

**Exhibit 3 (CX 80) Citigroup’s Form 10-K provided to the United States Securities and Exchange Commission for fiscal year ending December 31, 2013**

Citigroup’s Form 10-K included a discussion about how Citigroup and its “affiliate Banamex USA, have received grand jury subpoenas issued by the United States Attorney’s Office for the District of Massachusetts, concerning, among other issues, policies, procedures and activities related to compliance with” the BSA and AML. The FDIC also sent Banamex USA a subpoena related to the BSA and AML.

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<sup>10</sup> BSA stands for the Banking Secrecy Act of 1970.

**Exhibit 4 (CX 82) Citigroup’s Form 10-Q provided to the United States Securities and Exchange Commission for the quarterly period ending June 30, 2015**

Citigroup disclosed that it entered into a consent order with the FDIC and the California Department of Business Oversight concerning Banamex USA’s alleged violations of the BSA. Banamex USA paid a penalty totaling \$140 million.

**Exhibit 6 (CX 24) Emails sent between July 21, 2014 and July 23, 2014 between, *inter alia*, Aladro Ezquerra, Campos Vara, and Galvan Rangel and Maria Del Socorro Chavez Aguilar with subject “vacations”**

On July 23, 2014, Chavez Aguilar asked Campos Vara for “help . . . with the justification [for Complainant’s] liquidation . . . .” Aladro Ezquerra’s response follows:

The justification obeys a series of recurrent misbehaviors (being late without an excuse), complaints from the partners of his attitude (change of office requests by Patrimonial Holders and emails from the credit area of the bank), disregard of company policies (improper use of corporate card), threats regarding the use of confidential information and a labor claim (verbally expressed to the Patrimonial Division director and me), loss of confidence and an express request from him requesting his liquidation.

**Exhibit 8 (CX 25) Emails sent August 16, 2013 between Complainant and Aladro Ezquerra with subject: “Information.” Aladro Ezquerra forwarded this email to Polanco Ibanez on June 16, 2014**

Complainant asked Aladro Ezquerra to “rely on [his] professionalism.” He informed Aladro Ezquerra “in difficult times, pure pressure doesn’t lead to the best results.” Aladro Ezquerra responded that his “problem with [Complainant] is that you always insist on doing things just the way you want.” Aladro Ezquerra stated his lack of surprise “about the credit cards . . . . If you have to jump procedures, policies, or formalities to get what you want and then find justification, there is no doubt in my mind that you’ll do it and I’m concerned about it. In my opinion, persistence is a virtue but stubbornness is a defect.” To move forward, Aladro Ezquerra required Complainant to admit that his “impetuosity exceeds [his] control, and that [he] must keep working on it.” Aladro Ezquerra said that the situation is “at a standstill” because Complainant brought up excuses or “justification with [his] results” every time he raised the issues. Complainant replied that he would “do [his] best to improve and successfully correct everything you mentioned . . . .” Aladro Ezquerra forwarded the email to Polanco Ibanez, saying, “Since August of last year he’s been raising the [credit] cards issue. Here he was already talking about the personal grudges he had.”

**Exhibit 9 (CX 26) Email sent August 15, 2013 between Alejandro Laddaga Garcia and Lopez Gasca; Lopez Gasca forwarded this email to Aladro Ezquerria who forwarded it to Complainant; Complainant responded to Aladro Ezquerria on August 16, 2013; Aladro Ezquerria forwarded the email chain to Polanco Ibanez on June 16, 2014**

Laddaga Garcia wrote that Complainant “has been asking the staff, directly and very insistently, for a credit line increase on one of his credit cards.” Laddaga Garcia explained that Complainant was not using the proper channels, and was communicating in an inappropriate, arrogant way. Aladro Ezquerria forwarded this message to Complainant on August 16, 2016, and wrote that he could not find Complainant at the office, even though it was 9 AM. Complainant responded that he was at a business meeting. Complainant then explained his credit card issue. He apologized “if [his] way of speaking was considered arrogant . . . .” On June 16, 2014, Aladro Ezquerria forwarded this “string of emails relevant to the complaint we received from the cards department about the manner [Complainant] addressed them and Melchor is asking me to review the issue.”

**Exhibit 14 (CX 91) Citi’s “Fraud Management Policy and Standards” with revised date of December 2013**

Citigroup wrote that it was “at risk of both internal and external fraud. Fraud . . . creates legal and reputational risk in addition to financial losses which, if not effectively addressed, may impact capital requirements.” The policy required all Citigroup businesses “to prevent, detect, and respond effectively to fraud and related wrongdoing against Citi, its employees, and its clients.” The policy also required all “Citi Businesses” to comply with “all laws, regulations, and regulatory guidance that impact fraud risk management and their organization.” The policy applied to all of Citigroup and its consolidated subsidiaries.

**Exhibit 16 (CX 2) Email dated August 5, 2014 from Michael Corbat to Complainant with Subject: “Congratulations on your Citi anniversary”**

Michael Corbat, General Director of “Citi,” congratulated Complainant on “reaching your Citi anniversary number 3.”

**Exhibit 17 (CX 7) Email dated June 30, 2014 from Brian Leach, head of Franchise Risk & Strategy, to “Citi Colleagues” with Subject: “Responsible Finance Goals”**

Leach wrote, “preventing money laundering and complying with applicable economic sanctions requirements are essential to promoting” Citigroup’s “commitment to building a culture of Responsible Finance.” The email set a goal regarding AML and Sanctions Compliance responsibilities. Leach concluded, “[d]oing business in the right way is an integral element of our culture and essential to our continued success.”

E. Declaration of Meredith L. Kaufman, dated June 24, 2016

**Exhibit A Complainant’s Deposition Transcript**

Summarized, *supra*.

**Exhibit B Complainant’s Declaration, dated October 12, 2015**

Complainant’s declaration concerning his deposition transcript.

**Exhibit C List of Citigroup’s subsidiaries**

List of “subsidiaries of Citigroup, as of December 31, 2014 and the states or countries in which they are organized.” The list is indented to “reflect the principal parenting of each subsidiary.”

**Exhibit D Email dated October 22, 2012 and October 23, 2012 between Complainant and, *inter alia*, Aladro Ezquerra with subject “Statement of Variable Compensation Account”**

Aladro Ezquerra and Complainant discussed his compensation. Aladro Ezquerra wrote that he knew “that you always do your best for your entire team!”

**Exhibit E Email dated May 26, 2014 between Complainant and, Lopez Gasca with subject “Thank you for your time”**

Complainant discussed restructuring his mortgage and his bonus compensation.

**Exhibit G Email correspondence dated between May 27, 2014 and June 3, 2014 between, *inter alia*, Complainant, Aladro Ezquerra Galvan Rangel, Campos Vara, and Lopez Gasca with Subject: “mortgage 7% subsidies”**

This tribunal partially summarized this email chain within Exhibit F to the Declaration of Galvan Rangel. The section not summarized concerned Aladro Ezquerra’s response to Complainant that he must operate “within the established policies” (underlining in the original), to receive a personal loan. Aladro Ezquerra explained that Complainant was not entitled to the bonus, because he did not meet certain sales targets.

**Exhibit H Complainant’s “Midyear 2014” self-evaluation**

This tribunal summarized Complainant’s self-evaluation within its summary of Exhibit 14 to Complainant’s Declaration.

**Exhibit I Email dated July 23, 2013 from Complainant to Aladro Ezquerra with subject “feedback summary Monday 07/08/2013”**

This tribunal summarized this email chain within its summary of Exhibit 12 to Complainant’s Declaration.

**Exhibit J Email correspondence dated August 19, 2013 from Aladro Ezquerra to, *inter alia*, Complainant with subject “Visit to Queretaro”**

Aladro Ezquerra thanked Alejandro Esponda for the “time you spent with [Complainant] and Emilio Esquivel . . . .” He continued, “[i]t gives me great pleasure to inform you that thanks to the work Equity Banking and Seguros Banamex have done together, today we’re the leading banking and insurance company of Mexico.”

**Exhibit K Email correspondence dated August 19, 2013 from Aladro Ezquerra to, *inter alia*, Complainant with subject “Visit to Toluca and Pachuca”**

Aladro Ezquerra wrote a substantially similar email to the one summarized in Exhibit J; however, Aladro Ezquerra addressed the email to another individual.

**Exhibit L<sup>11</sup> Emails sent August 16, 2013 between Complainant and Aladro Ezquerra with subject: “Information.” Aladro Ezquerra forwarded this email to Polanco Ibanez on June 16, 2014**

See the summary at Exhibit 8 to Complainant’s Declaration, which includes a summary of Exhibit L.

**Exhibit M Emails sent April 7, 2014 between Lopez Gasca, and Aladro Ezquerra with subject “Use of Equity Parking lot Leon and LM Tower”**

Lopez Gasca and Aladro Ezquerra both wrote that Complainant needed to “calm down” about his access to parking lots at certain office buildings. Aladro Ezquerra wrote that he had “problems with [Complainant’s] attitude” and that he had been asked to “move him from Equity.” Aladro Ezquerra moved him to “the Private Bank office to help lower the tension

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<sup>11</sup> Exhibit L can also be found contained in CX 25.

there.” Aladro Ezquerra asked Complainant to “put more head and less heart into his work.” He remarked that Complainant was “very tense and unfocused.” Aladro Ezquerra wrote that Complainant wanted to restructure a mortgage loan, apply for a car loan “and has other personal issues, but I have already asked him to deal with his personal problems without affecting his work.”

**Exhibit N**      **Emails sent June 23, 2014 from a Wealth Management Coordinator from Aguascalientes, Mexico and Aladro Ezquerra with subject “Change”**

A Wealth Management Coordinator drafted an email to Aladro Ezquerra and requested a change in its Insurance Consultant (likely referring to Complainant).

**Exhibit O**      **Emails sent June 24, 2014 from Aladro Ezquerra to, *inter alia*, Complainant, and Campos Vara, with subject “Reasignaciones Metro Norte y Centro”**

Aladro Ezquerra assigned to Complainant “Leon, Irapuato, San Luis Potosi, and the offices of Banca Privada of the Centro-Leon Division, Aguascalientes, and San Luis Potosi,” effective July 1, 2014.

**Exhibit P**      **Email chain to and from, among others, Aladro Ezquerra and Complainant, dated April 29, 2014 with subject: “New intergovernmental agreement subscribed between Mexico and the United States to comply with”**

See the summary of Exhibit 9 to Complainant’s declaration, which includes a summary of Exhibit P.

**Exhibit Q**      **Complainant’s January 16, 2015 letter to OSHA concerning his Claim Against Citigroup**

Complainant’s counsel wrote that Complainant currently lived in Mexico. He worked for “Servicios Ejecutivos Banamex S.A. de C.V., a subsidiary of [Citigroup].” The nature of his complaint involved “retaliation [that] arose out of the complaints of [Complainant] concerning Banamex USA,<sup>12</sup> another affiliate of [Citigroup], as well as concerning Banamex.” Complainant stated that he had been forced to resign from his position.

**Exhibit R**      **OSHA’s March 9, 2015 “Secretary’s Findings” Dismissing Complainant’s Complaint**

OSHA wrote that, on January 20, 2015, Complainant filed a timely complaint under the Act. OSHA also found that Banamex USA employed Complainant, and because Banamex USA was a subsidiary of Citigroup, it was covered by SOX. OSHA concluded, “There is no SOX

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<sup>12</sup> OSHA apparently incorrectly found that Complainant worked for Banamex USA.

protected activity because the adverse action took place in Mexico at the hands of Complainant's Mexican supervisors and there is no indication that the U.S. parent company was involved."

### III. THE PARTIES' ARGUMENTS ON THE MOTIONS

#### Respondent's Memorandum of Law in Support of Its Motion for Summary Decision – June 24, 2016

Respondent argued that the undersigned should dismiss Complainant's complaint for three main reasons. First, Complainant's complaint would require an "impermissible extraterritorial application of Section 806 of SOX and therefore fails to state a claim upon which relief can be granted." Resp't's Br. at 13. Second, Respondent Citigroup is not a proper respondent because it was not Complainant's employer and took no adverse action against Complainant. See id. Finally, Respondent argues that Complainant is unable to establish a prima facie case of retaliation under the Act.

Respondent averred that Section 806 of the Act has no extraterritorial application and the facts of Complainant's case are "entirely extraterritorial." Id. at 14–20. Respondent argued that domestic statutes do not extend to claims where the essential elements of congressional concern occurred abroad. See id. at 14 (citing Morrison v. National Australian Bank, Ltd., 561 U.S. 247, 255, 255–60; Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 183 (2d Cir. 2014); Cedeno v. Castillo, 457 F. App'x 35, 37 (2d Cir. 2012)). Respondent discussed the Administrative Review Board (hereinafter "ARB" or "the Board") case Villanueva v. Core Laboratories NV, Saybolt de Colombia Limitada, ARB No. 09-108, ALJ No. 2009-SOX-00006, at 8–13 (ARB Dec. 22, 2011). Villanueva adopted the Morrison test to determine whether SOX allowed for extraterritorial application or whether the specific facts alleged in a SOX complaint warranted a domestic application of the Act. In Villanueva, the complainant lived and worked in Colombia for an "indirect Colombian subsidiary of Core Labs, a publicly traded company listed on the New York Stock Exchange." Resp't's Br. at 15 (citing Villanueva, ARB No. 09-108 at 3). The Villanueva court declined to find that Section 806 had an extraterritorial application. ARB No. 09-108, at 10–12. Respondent also asserts that Villanueva stands for the premise that the focus of SOX "is to prevent and uncover domestic corporate financial fraud, criminal conduct in domestic corporate activity, and violations of domestic securities and financial reporting laws." Resp't's Br. at 18 (citing ARB No. 09-108 at 10–11). For these reasons, Respondent concluded that Section 806 of the Act does not apply to Complainant's complaint.

Respondent also averred that the facts underlying Complainant's employment with Servicios Ejecutivos "[were] entirely extraterritorial." Id. at 18–20. Complainant is a Spanish and Venezuelan national who worked in Mexico for his entire employment with Servicios Ejecutivos. Id. at 18. He reported his alleged protected activity to Aladro Ezquerria and his other supervisors in Mexico and did not report his concerns to Citigroup's U.S. representatives. See id. The events surrounding his termination also occurred exclusively in Mexico. See id. at 18–19. Respondent wrote further that Citigroup did not control his employment at Servicios Ejecutivos. See id. at 19 (citing Ulrich v. Moody's Corp., No. 13-CV-00008 (VSB), 2014 U.S. Dist. LEXIS 138082, at \*1 (S.D.N.Y. Sep. 30, 2014) (a complainant cannot overcome an

extraterritoriality issue even assuming that individuals within the United States orchestrated the termination)).

Respondent maintained that Complainant did not report violations of U.S. securities or financial disclosure laws. See id. at 20–21. Respondent argued that Section 806 only applies to a violation of federal law. See id. at 20 (citing Villanueva, 743 F.3d at 109–10). Complainant’s alleged protected activity, Respondent argued, did not concern “violations of U.S. laws or financial documents filed with the SEC.” Id. at 20. Complainant’s report concerned conduct in Mexico, including certain “operational risks” at Seguros Banamex, the issuance of insurance without original documents, and the “failure to comply with FATCA.” Id. Respondent emphasized Complainant’s assertion that he never communicated a concern about money laundering. Id. at 21 (citing Tr. at 38–39).

Respondent argued that even if Complainant’s complaint was not extraterritorial in nature, Citigroup was not Complainant’s employer. See id. at 21–22. Respondent cited Lawson v. FMR LLC, 134 S. Ct. 1158 (2014), to argue that Section 806 is limited to prohibiting retaliations that “an employer takes against its *own* employees.” See id. at 22 (citing Lawson, 134 S. Ct. at 1166). Respondent also noted that Congress referred to the relationship between a proper complainant and respondent as an “employer-employee relationship.” Id. Respondent highlighted the text of the Act, which requires a respondent to be “a person with supervisory authority over the employee . . . .” Id. (quoting 18 U.S.C.S. § 1514A). Respondent noted that Complainant only named one employer—Citigroup, and that Citigroup is the “indirect U.S. parent of [Complainant’s] Mexican employer, Servicios Ejecutivos.” Id. Respondent also highlighted that Citigroup had “no knowledge of [Complainant’s] alleged protected activity or took a single adverse employment action against him.” According to Respondent, the ARB in Zinn v. American Commercial Lines Inc., ARB No. 13-021, ALJ No. 2009-SOX-025, at 5 (ARB Dec. 17, 2013) ruled that a proper SOX complainant must establish that the respondent took an unfavorable employment action against the complainant. Id. at 23. Respondent also cited the “general principle” of employment law that a parent company is not ipso facto liable for the actions of its subsidiary. See id. (citing Perez v. H&R Block, Inc., ALJ No. 2009-SOX-0042 at 4 (ALJ Dec. 1, 2009)). Respondent continued that a SOX whistleblower must show that a respondent had knowledge of the alleged protected activity. See id. (citing Fredrickson v. The Home Depot U.S.A., ARB No. 07-100, ALJ No. 2007-SOX-00013, at 7-9 (ARB May 27, 2010)). Respondent reasoned that it had no knowledge of Complainant’s complaints and played no role in his termination. See id. “No one outside of Seguros Banamex was even involved in the discussions with respect to [Complainant’s employment], let alone the decision to offer [Complainant] the opportunity to resign.” Id. (citing to Tr. at 45–46, 192–93, 209, 317–18, 501). Finally, Respondent said that Complainant could not establish that a joint employer relationship existed between Seguros Banamex and Citigroup, because Citigroup did not exercise day-to-day control over Complainant’s work product. See id. at 24–25 (citing Williams v. Lockheed Martin Energy Systems, Inc., ARB No. 98-059, ALJ No. 1995-CAA-00010, at 11–12 (ARB Jan. 31, 2001)).

Respondent argued in the alternative that, even if Complainant established standing, he is unable to show that he engaged in protected activity and that his protected activity contributed to his alleged termination. See id. at 25–30. Respondent averred that none of Complainant’s

complaints dealt with any of the laws covered by SOX. See id. at 26 (citing Exhibit I to the Kaufman Declaration). Specifically, Complainant’s July 2013 feedback meeting;<sup>13</sup> his May 2014 “special exceptional” audio conference;<sup>14</sup> his May 26, 2014 email to Lopez Gasca;<sup>15</sup> and his July 2014 self-evaluation<sup>16</sup> concerned only his personal compensation, not conduct implicating a violation of one of the actions enumerated in § 1514A(a)(1). See id. at 27. Respondent further argued that because Complainant’s alleged protected activity involved a violation of Mexican laws, it would not implicate a violation of one of the actions enumerated in § 1514A(a)(1). See id. at 28.

Respondent continued that Complainant did not have a subjective and objective belief that his discussion in April 2013 with Aladro Ezquerra concerning the \$1.8 million transaction constituted a protected activity. See id. at 28–29. Even though Complainant averred that the transaction would come to the concentration account without a name, Respondent noted that the transfer included the name of the customer that sent the \$1.8 million. See id. at 29 (citing Tr. at 464, 474–79). Complainant, according to Respondent, “concluded that there must be something illegal occurring due to the confidentiality of the account, which was ‘such a secret that almost nobody was allowed to have the number.’” Id. (citing Tr. at 411.) Respondent cited Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008) for the principle that a protected activity cannot occur when a complainant “could have ascertained” whether his alleged belief was true, but failed to take such steps.

Finally, Respondent stated that Complainant is unable to establish that his alleged protected activity was a contributing factor in his termination. See id. at 29–30. Respondent averred that Complainant could only show through temporal proximity that the alleged protected activity correlated with his termination. See id. at 30. Respondent highlighted the fourteen-month gap between his alleged protected activity and his termination, and argued that this was too long a period to establish causation through temporal proximity. Id. Respondent further asserted that Complainant’s use of his corporate credit card to charge personal expenses was a “legitimate intervening factor that would defeat any tenuous temporal proximity that may exist.” Id. at 30.

**Complainant’s Memorandum of Law in Opposition to Respondent’s Motion for Summary Decision – July 19, 2016**

Complainant argued, generally, that he successfully made his prima facie case. First, he averred that he engaged in protected activity. Specifically, he “orally reported information to Aladro Ezquerra that he believed showed money laundering was occurring at Banamex USA through the concentration account and that the concentration account was kept confidential and secretive.” See Complainant’s Opp. at 9 (citing Tr. at 8–12, 28–30, 40–41, 309, 464–65, 488).

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<sup>13</sup> See Tr. at 193–94; Exhibit I to the Kaufman Declaration.

<sup>14</sup> See Tr. at 28–32; Exhibit F to the Kaufman Declaration.

<sup>15</sup> See Tr. at 40–42; Exhibit E to the Kaufman Declaration.

<sup>16</sup> See Tr. at 173, 451–55; Exhibit H to the Kaufman Declaration.

He noted that Respondent did not deny that Complainant made such reports to Aladro Ezquerra. See id. Complainant also made statements concerning his commitment to shareholders. See id. (citing Tr. at 148, 243). Complainant alleged that his beliefs of money laundering were reasonable due to “well-publicized reports involving anti-money laundering deficiencies at Banamex USA.” Id. at 9-10 (citing Exhibit 1 to the Kunder Declaration; Exhibit 2 to the Jimenez Perez Declaration). In April 2013, Banamex USA allowed people to move dollars to PPB policies. See id. at 10 (citing Exhibit 3 to the Jimenez Perez Declaration). Banamex USA also allowed individuals to transfer money from other banks through its concentration account across the U.S.-Mexican border without having accounts with Banamex USA. See id. at 10 (citing Tr. at 11–13).

In June 2013, a non-customer of Banamex USA moved \$77,000 from Bank Santander through the Banamex USA concentration account and into a PPB policy. See id. at 10. Complainant and Aladro Ezquerra became “very alarmed.” Id. (citing Tr. at 9, 462–63). Respondent required anti-money laundering training and Aladro Ezquerra complied with the policy. See id. at 11 (citing Tr. at 63; Exhibit 2 to the Kunder Declaration). The policy specifically listed “concentration accounts” as a product that is at a “high risk” for money laundering. See id. Complainant allegedly reported his concerns about the Banamex USA concentration account to Respondent in May and June 2013 during audio conferences held on Monday mornings. See id. (citing Tr. at 8–11). Specifically, Complainant said there was “switching of numbers” between the number of the account holder when the amount was deposited and the account number when it was removed from the concentration account. Id. Complainant also told Aladro Ezquerra that the Banamex concentration account sounded illegal because of its confidentiality and because money could not be kept in the account for more than twenty-four hours. See id. (Tr. at 9–10, 410–11). On March 18, 2014, Aladro Ezquerra’s “back office” sent a reminder to Complainant and others that the concentration account must remain “the most confidential possible,” which was written in bold, large letters. See id. at 12 (citing Exhibit 6 to the Jimenez Perez Declaration).

On April 29, 2014, Complainant sent an email to Aladro Ezquerra, where he raised more concerns about the Banamex USA concentration account. See id. at 13 (citing Exhibit 9 to the Jimenez Perez Declaration). Complainant allegedly sent this email after “news of a new intergovernmental agreement subscribed between Mexico and the United States to comply with” the FATCA. Id. Complainant asked Aladro Ezquerra if Banamex USA’s concentration account (when used to transfer dollars from USA to PPB) complies with FATCA, “or if it may create risk for the client or for us in the future . . . .” See id. (citing Exhibit 9 to the Jimenez Perez Declaration). Aladro Ezquerra responded with a reiteration of the limitations the company set in 2012 for transferring dollars from Banamex USA to PPB, see id. at 10, and concluded: “Do I make myself clear?” See id. at 14 (citing Exhibit 9 to the Jimenez Perez Declaration; Tr. at 19).

At his deposition, Complainant discussed a May 2014 special audio conference that he requested, which included members from the legal and compliance departments. See id. (citing Tr. at 28–32.) Complainant averred that numerous individuals were modifying transfer documents throughout the transfer process. See id. at 14–15 (citing Tr. at 29–32.) Complainant’s counsel noted that, although Complainant knew that minutes of the meeting existed, Respondent did not provide such documents during discovery. See id. at 15 (citing

Exhibit F to the to the Kaufman Declaration). Complainant also discussed issues concerning his rate of compensation. See id.

On May 25, 2014, Complainant allegedly raised his concerns to Lopez Gasca about the legality of the concentration account, as well as his concerns about his bonus compensation. See id. (citing Tr. at 40–41; Exhibit 10 to the Jimenez Perez Declaration). Complainant told Lopez Gasca that he let Aladro Ezquerra “know of my concern, and he says everything is in order.” See id. at 16 (citing Exhibit 10 to the Jimenez Perez Declaration). Complainant highlighted that Lopez Gasca denied that Complainant raised concerns about any fraud or illegality during his conversation with Complainant, which Complainant avers creates a factual dispute necessary to resolve at trial. See id. at 16.

Complainant argued that he made his reporting in good faith. He analogized his case to Wiest v. Lynch, 710 F.3d. 121 (3d Cir. 2013). Complainant averred that his reporting was objectively reasonable because “there were public reports of money laundering being the focus of investigations by at least two U.S. federal government agencies, the FDIC and the Department of Justice, and the conduct about which Complainant was providing information involved money laundering.” Id. Complainant also allegedly held a subjective belief concerning his commitment to Respondent’s shareholders and felt that it was “improper” to keep the concentration account so confidential. See id. at 17 (Tr. at 148, 243; Paragraph 3 to the Jimenez Perez Declaration).

Complainant averred that Aladro Ezquerra began to take adverse actions against him in July 2013. See id. at 12. Aladro Ezquerra removed three offices from Complainant’s supervision and “as a result lost a bonus equal to about \$20,000.” See id. (citing Tr. at 192–93, 247). Additionally Aladro Ezquerra made insulting and rude remarks to Complainant. See id. (citing Tr. at 20, 43–45, 207–08, 317, 492–93). On May 30, 2013, Aladro Ezquerra suggested to Complainant that he leave the company. Complainant argued that Aladro Ezquerra’s decision to take offices away from Complainant’s supervision in July 2013 was an adverse employment action. See id. at 19.

Complainant alleged that Respondent committed an adverse employment due to his protected activity. See id. at 17–20. First, Complainant noted the July 23, 2014 email that Aladro Ezquerra sent to Human Resources where he stated that Complainant’s termination was the result of “threats regarding the use of confidential information.” See id. at 17 (citing Exhibit 6 to the Kundar Declaration, Ex. 6; CX 24). Second, Complainant raised the temporal connection between his August 6, 2014 termination and his alleged protected activities. Complainant noted three specific protected activities including an April 29, 2014 email about FATCA, the May 2014 audio conference, and the information provided to Lopez Gasca around May 26, 2014. See id.

Complainant argued that the email that Aladro Ezquerra sent Complainant about tardiness on May 26, 2014 was pretext for his firing. See id. at 17–18 (citing Exhibit E to the Galvan Rangel Declaration). Complainant received three emails from a year prior to the May 26, 2014 email where Respondent raised the issue of his lateness. Complainant noted that the tardiness situation—which was “resolved”—“suddenly mattered, and mattered gravely” enough

to justify Complainant's firing. See id. at 18. Aladro Ezquerro communicated his reasons for Complainant's termination to Polanco Ibanez on June 5, 2014. See id.

Complainant's counsel said that the debt Complainant incurred went to purposes such as buying and remodeling a home, and purchasing three plots of land and a car. See id. at 19 (citing to Tr. at 90–91). Complainant's counsel also noted that Complainant received harassing calls from debt collectors beginning in July 2013. See id. at 20.

Complainant posited that his claim involves a domestic, not extraterritorial, application of SOX's whistleblower provision. See id. at 20–25. The money laundering concerns that allegedly comprise the substance of Complainant's protected reporting were of immediate national concern. See id. at 21. Complainant cited to the closing of Banamex USA and payment of a \$140 million fine in July 2015 due to deficiencies in Banamex USA's money laundering protocols. See id. (citing Exhibit 8 to the Jimenez Perez Declaration; Exhibit 4 to the Kunder Declaration).

Complainant also argued that Complainant's claim falls within SOX's focus. See id. at 22–25. He allegedly asserted a domestic claim “because all the conduct relevant to SOX's focus of preventing and uncovering financial fraud in order to protect U.S. shareholders and U.S. financial markets occurred in the United States.” Id. Complainant's reporting involved potential fraud and money laundering concerning the concentration account of Banamex USA, “a California bank that served as the U.S. banking arm of Banco Nacional de Mexico.” See id. at 22 (citing Exhibit 13 to the Jimenez Perez Declaration). Referring to Citigroup's Global Anti-Money Laundering Policy, Complainant proffered that Citigroup was concerned with money laundering within its consolidated subsidiaries such as Servicios Ejecutivos. See id. at 23 (citing Exhibit 2 to the Kunder Declaration). Complainant concluded that because his claim “fits within SOX's focus, the fact that ‘other conduct occurred abroad’ does not render his claim extraterritorial.” Id. (citing RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016)). The fact that the specifics of Complainant's job occurred abroad was immaterial, Complainant asserted, because SOX “is not a labor or employment statute—it is an anti-fraud statute concerned with corporate transparency.” Id. (quoting Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432 (S.D.N.Y. 2013)). The relevant inquiry, according to Complainant, is “whether a whistleblower retaliation claim . . . helps uncover U.S.-based fraud that affects U.S. shareholders.” Id. at 24.

Complainant attempted to distinguish the cases Respondent relied upon in its Motion for Summary Decision. Notably, Complainant discussed Villanueva v. Core Laboratories NV, Saybolt de Colombia Limitada, Case No. 09-108, 2011 WL 7021145 (ARB Dec. 22, 2011), the underlying facts of which, according to Complainant, solely involved violations of Colombian laws and did not concern U.S. shareholders. See id.<sup>17</sup> Complainant made the policy argument that Respondent's “cramped interpretation of Section 806 [is] inconsistent with . . . current

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<sup>17</sup> In support of this argument, Complainant also cited to Ulrich v. Moody's Corp., No. 13-CV-00008 (VSB), 2014 WL 4977562 (S.D.N.Y. Sep. 30, 2014); Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006); Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 179 (2d Cir. 2014); and Cedeno v. Castillo, 457 F. App'x 35 (2d Cir. 2012).

corporate reality. In today's world, civil whistleblower claims against a sprawling multinational like [Respondent] will likely involve at least some non-U.S. aspects." Id. at 25.

Complainant averred that he properly named the Respondent, because "publicly-traded parent companies are answerable for whistleblower retaliation taken against employees of the parent companies' [sic] consolidated subsidiaries." Id. He averred that the Dodd-Frank amendments to SOX and case precedent deem that "whistleblowers [are] employees of the parent companies for the purpose of applying SOX's protections." Id. Complainant cited Morefield v. Exelon Services, Inc., Case No. 2004-SOX-00002, 2004 WL 5030303 (OALJ Jan. 28, 2004), which purportedly involved a whistleblower who was an employee of "a subsidiary of a subsidiary of a publicly traded company." Id. at 26. The ALJ in Morefield treated the complainant as "inseparable from [the parent company] for purposes of evaluating the integrity of its financial information," because SOX "pay[s] no heed to the technicalities of internal corporate veils." Id. (quoting Morefield at \*3). Complainant noted Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), which held in dicta that an employee of a subsidiary may constitute an "employee" under the Act. See id. at 26–27 (citing to 433 F.3d at 6). According to Complainant, the ALJ in Walters v. Deutsche Bank AG, Case No. 2008-SOX-00070, 2009 WL 6495755 (ALJ Mar. 23, 2009) adopted the Carnero ruling to determine that "a whistleblower working in one of Respondent's operating units within a non-publicly traded, consolidated subsidiary of a subsidiary of a subsidiary within Deutsche Bank AG's corporate family" was a covered employee under the Act. See id. at 27 (quoting Walters, at \*13–20).

Complainant's counsel looked to the Dodd-Frank Amendments to the Act as well as Leshinsky v. Telvent GIT, S.A., which interpreted such amendments, to assert that parent companies are liable for the actions of their subsidiaries under Section 806 of the Act. See id. at 27–28 (citing 873 F. Supp. 2d 582 (S.D.N.Y 2012)). The Leshinsky court concluded that SOX was "intended to provide protection for whistleblowers at all levels of a public company's corporate structure, and not solely those who were employed directly by the public entity itself." Id. (quoting 873 F. Supp. 2d at 598). In this way, Leshinsky dictates that a parent company is liable for the valid whistleblower claim of its subsidiaries. See id. at 28 (citing 873 F. Supp. 2d at 605 ("A whistleblower statute that protects investors in [the parent company] would be concerned not so much with who made the day-to-day employment decisions, but rather with decisions that affect the value of the company.")). Complainant raised two "DOL cases"<sup>18</sup> to support the proposition that the Leshinsky court's pronouncement supports the goal of SOX to protect investors of publicly traded companies. See id. at 29. Complainant argued that the two cases that Employer raised to support its contention that Complainant improperly named Respondent<sup>19</sup> did not concern the issue of parent/subsidiary liability. Complainant further stated that in a case involving parent companies and its consolidated companies, a Complainant does not need to show the direct involvement of the parent, because it would "compromise the purposes [of Section 806] at a very fundamental level." See id. at 30 (citing Zinn, 2013 WL

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<sup>18</sup> Johnson v. Siemens Bld. Techs., Inc., Case No. 08-032, 2011 WL 1247202, at \*10 (ARB Mar. 31, 2011); Spinner v. Landau and Associates, LLC, Case Nos. 10-111, 10-115, 2012 WL 1999677, at \*10 (ARB May 31, 2012).

<sup>19</sup> Zinn v. Am. Commercial Lines Inc., Case No. 13-021, 2013 WL 6979720 (ARB Dec. 17, 2013); Wainscott v. Pavco Trucking Inc., Case No. 05-089, 2007 WL 3286332 (ARB Oct. 31, 2007).

6979720 at \*5 (quoting Walters, 2009 WL 6495755 at 11)). To shield a parent company from liability, Complainant argued, would mitigate the goal of SOX to protect U.S. shareholders. See id. at 30–32 (“Congress enacted Section 806 to ensure that public companies could not escape liability by hiding behind corporate veils and internal machinations”) (Citing Lawson, 134 S. Ct. 1158 for the proposition that the Supreme Court has expanded, not narrowed, the scope of liability and allegedly allows for publicly-traded companies to be held directly liable for whistleblower retaliation taken against employees of their consolidated subsidiaries).

Complainant argued in the alternative that Respondent had extensive control and involvement with Complainant’s employment, so it is liable. See id. at 32-34. Complainant was subject to many of Respondent’s policies, training manuals, online training courses, and procedures concerning anti-money laundering efforts. See id. at 32 (citing Exhibits 2, 11, 12, 13, and 14 to the Kunder Declaration). Complainant averred that Respondent’s anti-money laundering policies were the basis for his protected activity and that Respondent’s credit card policy was only a pretext for his retaliation. See id. (citing Resp’t’s Br. at 8; Exhibit 15 to the Kunder Declaration.) Complainant and his managers had email addresses ending in “@citi.com.” See id. at 33 (Exhibit 15 to the Jimenez Perez Declaration). Complainant received a “Citi anniversary” email signed by “Citi’s” CEO on his third anniversary with the company; he received nothing from Servicios Ejecutivos. See id. (citing Exhibit 16 to the Kunder Declaration). Complainant also alleged an “intermingling” between Respondent, Servicios Ejecutivos, and Banco Nacional de Mexico, S.A. See id.

**Respondent’s Reply Memorandum in Further Support of Its Motion for Summary Decision—August 31, 2016**

Respondent first argued that Section 806 of the Act does not extend to Complainant’s claim. Complainant is a non-U.S. citizen who lived and worked for a Mexico-based company and reported to supervisors in Mexico. Resp’t’s Reply Br. at 2. Complainant allegedly did not report his protected activity to anyone in the U.S. Id. Respondent averred that the Villanueva and Dos Santos cases stood for the premise that, although SOX had the general focus of forestalling corporate fraud, SOX’s whistleblower provision had the specific focus of protecting employees. Id. (citing Villanueva, ARB No. 09-108, ALJ No. 2009-SOX-00006 at 9–10; Dos Santos, ALJ No. 2012-AIR-00020, at \* 16–17). According to Respondent, the Dos Santos court found that a proper SOX claimant must fall within the general focus of the statute, as well as the specific statutory provision, which here involves “labor elements.” See id. at 4. Respondent concluded that because Complainant’s employer, the location of his employment, and the location of the decision to terminate him came from a locus extraterritorial from the United States, the undersigned should dismiss Complainant’s claim. See id. at 4–5. Respondent averred that Complainant incorrectly employed the case RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016) for the principle that “he can state a domestic claim based solely on the location of the conduct he allegedly reported.” Id. at 5.

Respondent further argued that Complainant’s alleged protected activity was not domestic in nature, because he did not provide information about domestic conduct. See id. at 6–9. Respondent asked the undersigned to disregard all of the “context and circumstances” that Complainant alleged surrounded his purported protective activity. Id. at 7. Complainant’s

allegations regarding his concerns surrounding the concentration account, according to Respondent, do not relate to a domestic violation of one of the laws specifically enumerated in Section 806. Id. Complainant's April 29, 2014 email to Aladro Ezquerro also purportedly did not relate to any domestic conduct. Id. Respondent stated that "Complainant's argument that his reference to some unspecified 'regulations' could mean something other than the [new intergovernmental agreements] or FATCA is not a reasonable reading of the email and undermined by his own testimony." Id. at 8 (citing Tr. 38–39.) Complainant's alleged reporting of "problems with documentation" within the May 2014 audio conferences, according to Respondent, also did not implicate anything outside of how Complainant "and his colleagues in Mexico were activating and operating PPB policies in Mexico." Id. (citing Tr. at 29–30.)

Respondent continued that the undersigned should dismiss Citigroup as a respondent. See id. at 9–13. Respondent averred that the record contains no evidence that Citigroup ever controlled Complainant. Citigroup did not hire Complainant; it did not provide him with an employment agreement, work location, reporting structure, or performance reviews. See id. at 9. Citigroup also did not allegedly terminate Complainant. Id. Complainant's submission of Citigroup's policies and training documents, according to Respondent, are undermined due to the fact they entered through Complainant's counsel's declarations, not his own. Id. at 10. Complainant's email address and use of Citigroup's online portal to access paystubs, Respondent asserted, does not establish control. Id.

Respondent argued that Section 806 "does not establish direct parent liability." Id. at 11–13. Respondent noted that the Dodd-Frank amendments created protection for employees whose employers are subsidiaries of public company, but argued, "nowhere . . . does the statute provide that the *parent company* is directly liable for the subsidiary's conduct." Id. at 12 (emphasis in the original). Respondent also emphasized the "general principle of corporate law" that a parent company is not liable for the acts of its subsidiaries. Id. at 11 (citing to United States v. Bestfoods, 524 U.S. 51, 61 (1998)).

Finally, Respondent proffered that Complainant has failed to make a prima facie case. See id. at 13–18. Respondent argued that Complainant's "alleged reports did not pertain to any of the laws covered by SOX, that his communications were sufficient to rise to the level of protected activity, and that he lacked an objectively and subjectively reasonable belief of a covered violation." Id. at 14. Respondent averred that Section 806 does not "cover" federal statutes prohibiting money laundering, so Complainant's reporting of money laundering concerns does not rise to the level of protected activity under the Act. See id. at 15 (citing 18 U.S.C § 1514(a)). Because Complainant did not blow the whistle on any fraud, Respondent argued, Complainant did not conduct any protected activity. See id. Respondent further argued that Complainant did not hold a reasonable belief that his reporting constituted protected activity. See id. at 16–17. Finally, Respondent wrote that Complainant has not shown that his protected activity was a contributing factor in his termination. See id. at 17–18. Respondent noted Complainant's alleged abuse of his corporate credit card, and stated that Complainant's actions represented an intervening event. Id. at 17.

**Complainant's Surreply in Further Opposition to Respondent's Motion for Summary Decision—September 13, 2016**

Complainant argued that he has submitted “powerful evidence” of Citigroup’s control in the following ways: (1) Citigroup’s policies and training programs; (2) Citigroup’s paystub portal; (3) employment anniversary emails; (4) Citigroup’s employee evaluation forms; (5) “@citi.com” communications systems used by Complainant and his managers, and (6) Polanco Ibanez’s reporting to Citigroup in New York. See Comp’t’s Surreply at 1. Policies, Complainant stated, “are for control.” Id. Such policies controlled Servicios Ejecutivos’s actions and show Citigroup’s control over Complainant. Id. at 2. Complainant alleges he received training to follow such policies. Id. (citing Tr. at 63.) Complainant noted the connection between the fine levied directly on Banamex USA (indirectly on Citigroup’s shareholders) and the concentration accounts and “rapid movement of money” that constitutes the alleged misconduct, which provoked Complainant to blow the whistle. See id. Complainant also emphasized that the “Citi Expense Management Policy” was the “pretext” used to justify his termination. Id. Complainant alleged that his whistleblowing, which included Banamex USA’s confidential concentration account and rapid movement of money through that account, cost Citigroup’s shareholders millions of dollars. Id. at 3. Complainant’s statements about the concentration account “constituted a threat to confidential information;” Aladro Ezquerra, Lopez Gasca, and Polanco Ibanez each knew of Complainant’s alleged protected activity. See id. (citing Exhibit 6 to the Jimenez Perez Declaration concerning Aladro Ezquerra’s instruction to keep the concentration account “the most confidential possible”).

**IV. LEGAL STANDARD**

The purpose of summary decision is promptly to dispose of actions in which the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.72; see also Federal Rules of Civil Procedure 56(c).<sup>20</sup> An issue is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998); Oliphant v. Simboski, No. 3:03cv2038 (SRU), 2005 U.S. Dist. LEXIS 5353, at \*4 (D. Conn. Mar. 31, 2005). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The substantive law governing the case will identify those facts that are material and “only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 294 (E.D.N.Y. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). If no material factual issues are present, a party moving for summary decision is entitled to a judgment as a matter of law. 29 C.F.R. 18.72(a).

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<sup>20</sup> “The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.” 29 C.F.R. § 18.10(a).

The party moving for summary decision carries the burden of proof. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because the burden is on the moving party, the evidence presented is construed in favor of the party opposing the motion, who receives the benefit of all favorable evidentiary inferences. See id. The non-moving party must set forth specific facts showing that there is a genuine issue for trial. See Anderson, 477 U.S. at 248. In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. See Adler, 144 F.3d at 671. “One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and . . . [the rule] should be interpreted in a way that allows it to accomplish this purpose.” Celotex Corp., 477 U.S. at 323–24.

## V. FACTS PRESENTED IN LIGHT MOST FAVORABLE TO COMPLAINANT

Complainant is a citizen of Spain and Venezuela. (Tr. at 147.) At all times relevant to his complaint, Complainant’s employer was Servicios Ejecutivos, a company incorporated under the laws of Mexico. (Tr. at 327–28; Exhibit C to the Kaufman Declaration.) Servicios Ejecutivos is a subsidiary of Seguros Banamex, S.A. de C.V., Integrante del Grupo Financiero Banamex. (See Tr. at 164—66; CX-82.) Seguros Banamex is a Mexican insurance company and has a primary office in Mexico City. See Declaration of Lopez Gasca, ¶¶ 1–2; Exhibit H to the Galvan Rangel Declaration. Seguros Banamex is, itself, a subsidiary of another Mexican company, Grupo Financiero Banamex, S.A. de C.V (hereinafter, “Grupo Financiero”). (CX-82.) Each of the foregoing companies is a subsidiary of the named Respondent, Citigroup”. Respondent is a Delaware corporation headquartered in New York City. (CX-82.) Respondent publicly trades its securities on the New York Stock Exchange and registers them under section 15(d) of the Securities Exchange Act of 1934. See id.; 18 U.S.C. § 1514A. Citigroup includes Servicios Ejecutivos and Seguros Banamex in its consolidated financial statements. See Exhibit C to the Kaufman Declaration.

According to Complainant, Servicios Ejecutivos hired him in 2011 to serve as a “divisional coordinator for special advice in charge of the central division with customer service, PPB.” (Tr. at 149); see also Declaration of Galvan Rangel, ¶ 6. PPB stands for “Plan Patrimonial Banamex,” and refers to “one of the insurance plans offered by Seguros [Banamex].” Complainant’s Memorandum of Law at 4. As a sales manager, Complainant solicited the opening of new PPB accounts and Seguros Banamex insurance policies. (Tr. at 156, 188.) Complainant managed offices throughout Mexico. See, e.g., Declaration of Lopez Gasca, ¶ 9 (stating that Aladro Ezquerria reassigned the offices located in the cities of Aguascalientes, Pachuca, and Celaya); Exhibit O to the Kaufman Declaration. Complainant’s pre-employment interview with Servicios Ejecutivos took place in Mexico. (Tr. at 155.) Complainant’s employment agreement with Servicios Ejecutivos was written in Spanish and contemplated that Complainant would be paid in Mexican pesos. See Exhibit A to the Galvan Rangel Declaration. The agreement required Complainant to travel throughout Mexico. Id. The agreement made frequent references to Mexico’s “Federal Labor Law,” and Respondent agreed to register Complainant with the Instituto Mexicano del Seguro Social—the Mexican Social Security Institute. Id. Servicios Ejecutivos also agreed to train Complainant. The agreement further provided Servicios Ejecutivos the power to fire Complainant, “according to the needs of the Company [Servicios Ejecutivos].” Id.

Servicios Ejecutivos required Complainant to provide monthly progress reports to his superiors. Complainant initially reported to Jose Antonia Ezquerra Fernandez, deputy director for specialized advice, “Citigroup Seguros Banamex.” (Tr. at 164.) Aladro Ezquerra became Complainant’s boss in December 2011. (Tr. at 165.) Aladro Ezquerra’s direct supervisor was Lopez Gasca, “commercial director for Citigroup Seguros Banamex.” In May 2014, Complainant began to work for Hector Campos Vara (hereinafter, “Campos Vara”). (Tr. at 170.) Polanco Ibanez was CEO of Seguros Banamex. (Tr. at 165.) Aladro Ezquerra, Lopez Gasca, and Polanco Ibanez each worked in Mexico; however, Polanco Ibanez frequently travelled to Citigroup’s headquarters in New York City. (Tr. at 165–66.) Complainant never traveled to the United States as part of his business duties. (Tr. at 334.)

Complainant identified a number of alleged protected activities. In a July 2014 “self-evaluation” conducted on the “Citi For You” online portal, Complainant complained to Campos Vara of the “irregularity” of certain documents and the “operating risks” they caused. (Tr. at 172–75.) At his deposition, Complainant could not initially recall which operating risks he mentioned in his self-evaluation. (Tr. at 173–74.) Complainant later testified that he referred to a \$1.8 million USD deposit and a \$77,000 deposit into a “concentration account,” as well as the “lack of consistency regarding photocopies of the documentation, when we finally received the original document.” (Tr. at 174.) Complainant also made similar complaints to Lopez Gasca in a May 25, 2014 email. (Tr. at 178.)

Complainant’s alleged protected activities centered on a “concentration account”<sup>21</sup> that Banamex USA maintained in the United States, and that dealt in U.S. dollars. (Tr. at 23.) Banamex USA is a California corporation and is a subsidiary of Citigroup. See Exhibit C to the Kaufman Declaration. Banamex USA styles itself as the “U.S. banking arm of Banco Nacional de Mexico,” which it abbreviates to “Banamex.” (CX-38.) Banco Nacional de Mexico and Seguros Banamex are separate subsidiaries of Grupo Financiero Banamex, which is itself a subsidiary of Citigroup. See Exhibit C to the Kaufman Declaration. (Relationships illustrated below in Figure 1.)

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<sup>21</sup> According to the Federal Financial Institutions Examination Council (Bank Secrecy Act/ Anti-Money Laundering InfoBase); concentration accounts are “internal accounts established to facilitate the processing and settlement of multiple or individual customer transactions within the bank, usually on the same day.” See [https://www.ffiec.gov/bsa\\_aml\\_infobase/pages\\_manual/OLM\\_075.htm](https://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_075.htm) (accessed January 17, 2017).

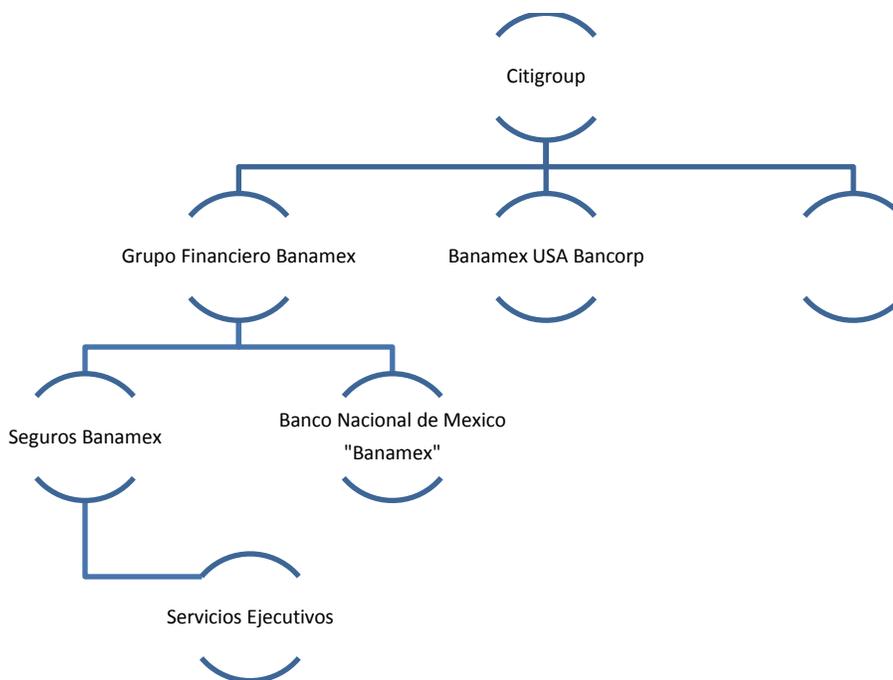


Figure 1.

Complainant was concerned about the secrecy surrounding Banamex USA’s concentration account. (Tr. at 462.) He also questioned how, when a client made a deposit into the concentration account, the deposit would appear elsewhere with a completely different policy number. (Tr. at 10; 29–30.) Complainant expressed his concerns about this “high risk” to Aladro Ezquerra. (Tr. at 18; 31.) Complainant said that his concerns dealt with FATCA, tax legislation, or tax evasion. (Tr. at 8.) Aladro Ezquerra emailed Complainant and his coworkers in April 2013 about a change in policy concerning the concentration account. (See Tr. at 11; Exhibit 3-4 to the Jimenez Perez Declaration.) Complainant made numerous complaints in May and June 2013, because he wanted to “do[] the right job.” (Tr. at 12–20.)

In May or June 2014, Complainant told Aladro Ezquerra about a \$1.8 million USD transfer, which traveled through the concentration account without any identifying details. (Tr. at 474.) Complainant testified that he reported “irregular[ities] of business with Seguros Banamex [because Seguros Banamex used] the concentration account with Banamex United States by sending money underhandedly to PPB policies in Mexico, and [because Seguros Banamex facilitated] the violation of the law.” (Tr. at 309.) Banamex USA styled itself as the “U.S. banking arm of Banco Nacional de Mexico.” (CX-38). Like Seguros Banamex, Banamex USA also abbreviated its name to “Banamex.” (CX-38.) Complainant was concerned about potential money laundering, but he never “wrote . . . down” such concerns, because he would never have used such direct language to his employer. (Tr. at 38–39; 410.) On May 23, 2014, Complainant also told Lopez Gasca, Aladro Ezquerra’s supervisor, about his concerns. (Tr. at 40.) While working for Servicios Ejecutivos, Complainant received policies from Citigroup concerning money laundering and fraud. See Exhibit 2 and Exhibit 14 to the Kunder Declaration.

Complainant's compensation primarily came from performance incentives. (See Tr. at 192; Exhibit C to the Galvan Rangel Declaration.) Seguros Banamex included the performance of the offices under Complainant's supervision to calculate Complainant's bonus. Seguros Banamex removed five offices from Complainant's supervision, which he felt was "punishment" for his complaints concerning the concentration accounts and other alleged operative risks. (Tr. at 284–290.) Complainant estimated that he lost thirty-five to forty percent of his team, so his production and therefore bonus decreased as a result. (Tr. at 193.)

On August 6, 2014, Complainant met with Aladro Ezquerria in Mexico City. (Tr. at 226.) Aladro Ezquerria, an attorney named Jose David Soto Luna, and Complainant discussed the outstanding balance on Complainant's corporate credit card. (Tr. at 228–29; 365.) In exchange for a severance check, Complainant resigned from his position at Seguros Banamex. (Tr. at 240, 334.) Complainant's voluntary resignation was drafted in Spanish and explicitly stated that Complainant's employer was "Servicios Ejecutivos Banamex." See Exhibit I to the Galvan Rangel Declaration. Complainant signed his "voluntary resignation" letter in Mexico City. *Id.* Exhibits K and L to the Galvan Rangel Declaration included his settlement agreement, dated August 6, 2014. Complainant received an amount in pesos and the issuer of the check was "Banco Nacional De Mexico, S.A. Member of Grupo Financiero Banamex." See Exhibit M to the Galvan Rangel Declaration. Complainant's settlement agreement contemplated that Complainant would only receive his compensation after "approval by the Federal District Local Labor Board." See Exhibit K to the Galvan Rangel Declaration. Complainant acknowledged that any personnel decision would require the approval of Galvan Rangel ("human resources"), Lopez Gasca, and Polanco Ibanez. (See Tr. at 304; Galvan Rangel's Declaration at ¶ 1.) The human resources department of Seguros Banamex controls all personnel decisions for Seguros Banamex. See Galvan Rangel's Declaration at ¶ 1. Complainant's settlement agreement included references to the Mexican Federal Employment Act. Galvan Rangel declared that Citigroup is not involved in the employment decisions of either Seguros Banamex or Servicios Ejecutivos. (Galvan Rangel's Declaration at ¶ 5.) On August 5, 2014, Complainant received an email from Michael Corbat, General Director of "Citi" that congratulated Complainant on "reaching your Citi anniversary number 3."

On January 20, 2015, Complainant filed a timely complaint with OSHA, under the Act. On March 9, 2015, OSHA dismissed Complainant's complaint, finding "there is no indication that the U.S. parent was involved" because the alleged "adverse action took place in Mexico at the hands of Complainant's Mexican supervisors."

## VI. DISCUSSION

The Respondent argues that this tribunal should grant its Motion for Summary Decision for three reasons. First, Congress did not intend for SOX to apply to events substantially occurring outside the borders of the United States and the facts of Complainant's complaint necessitate extraterritorial application of the Act. Second, Respondent argues that Citigroup did not have the requisite control over Complainant's work activities to be his employer. Finally, even if Complainant is able to show domestic conduct, he is unable to prove his prima facie case by a preponderance of the evidence. Because Complainant's complaint requires an

extraterritorial application of the Act, this tribunal **GRANTS** Respondent’s Motion for Summary Decision.<sup>22</sup>

Respondent’s argument goes to the issue of subject-matter jurisdiction. Subject-matter jurisdiction “refers to a tribunal’s ‘power to hear a case.’” Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010) (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006)); see Sylvester v. Parexel Int’l LLC, ARB No. 07- 0123, ALJ Nos. 2007-SOX-00039 & -00042 (ARB May 25, 2011), \*21; see FRCP Rule 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action”). In Morrison, the Supreme Court addressed subject-matter jurisdiction as it relates to the application of federal law to matters arising substantially outside the territorial borders of the United States—“extraterritoriality.” The Court found that § 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) does not provide a cause of action to foreign complainants suing foreign and U.S. defendants for securities fraud allegedly committed on foreign exchanges. The Court applied the “‘long standing principle of U.S. law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” Id. at 255 (quoting EEOC v. Arabian Am. Oil Co. 499 U.S. 244, 248 (1991)). This principle rises to the level of a canon of statutory interpretation. See id. (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)). “Thus, ‘unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.’” Id. (quoting Aramco, 499 U.S. at 248). This presumption is rebutted only when the statute evinces a “clear indication of extraterritoriality.” Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2014) (quoting Morrison, 561 U.S. at 255). When a statute is silent on extraterritorial application, “it has none.” Morrison, 561 U.S. at 255.

It is settled law that Congress did not intended SOX’s whistleblower provision to apply to extraterritorial matters. In Villanueva v. Core Laboratories NV, ARB Case No. 09-198 (ARB December 22, 2011), *aff’d* Villanueva v. U.S. Dep’t of Labor, 743 F.3d 103 (5th Cir. 2014), the Administrative Review Board conducted a comprehensive review of the Act’s statutory framework and legislative history in light of Morrison and determined that SOX “does not allow for its extraterritorial application.” Villanueva, ARB Case No. 09-198 at 12; see also, Nielsen v. Aecom Technology Corp., ALJ No. 2012-SOX-00013; Ulrich v. Moody's Corp., No. 13-CV-00008 (VSB), 2014 U.S. Dist. LEXIS 138082, at 23\* (S.D.N.Y. Sep. 30, 2014). The Villanueva majority dismissed the complainant’s complaint as extraterritorial, because “the essential events [of the case] occurred” abroad.<sup>23</sup> Villanueva, ARB Case No. 09-198 at 9.

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<sup>22</sup> Because this tribunal does not have the power to adjudicate Complainant’s complaint, it is improper to consider Employer’s argument that Complainant is unable to make out a prima facie case under Section 806. This Decision and Order does consider Respondent’s argument regarding “control” over Complainant’s work activities, but only insofar as it supports the finding that the complaint is an improper request to extend the Act extraterritorially.

<sup>23</sup> The complainant in Villanueva was a Colombian citizen working in Colombia for a Colombian subsidiary of a Dutch parent company. He complained of improper transactions between that company and a company in the Dutch Antilles, which Villanueva believed resulted in a violation of Colombian tax law. Villanueva blew the whistle to, *inter alia*, a superior who worked in Texas. The ARB determined that the conduct was extraterritorial despite the whistleblower's argument that “the allegedly fraudulent

The Villanueva court further held that, where the focus of the statute strongly correlates to the “essential events” of the case, concerns relating to the extraterritorial application of the statute are abrogated, as if the events occurred within the United States.<sup>24</sup> Id.; see also RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016). The Villanueva court found that the primary focus of the SOX Act, generally, was “to prevent and uncover corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws.” Id. at 10–11 (citing to Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002); and Title VIII—Corporate and Criminal Fraud Accountability, Sections 801–807); see also Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432 (S.D.N.Y. 2013).

Notably, the Villanueva majority also found that “within the context of SOX, Section 806 has the additional focus of protecting employees who suffer an adverse action for reporting allegations of financial fraud committed by their employer.” Villanueva, ARB No. 09-108 at 10 n.22 (citing, in part, to Signing Statement of the President of the United States, H.R. 3763, 38 Weekly Compilation of Presidential Documents 1286 (July 30, 2002), which stated that the “legislative purpose of section 1514A of Title 18 of the U.S. Code, enacted by Section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations”). The Villanueva majority, therefore, found that although SOX’s general focus concerned battling corporate fraud, the specific focus of Section 806 was to protect whistleblowers from their specific employer’s retaliatory actions. See Villanueva, ARB No. 09-108 at 10; 10 n.22. Nevertheless, the Villanueva majority decided the case only on the “locus of the fraud Villanueva reported,” because the “facts weigh so heavily” in favor of a finding that Villanueva’s reporting was extraterritorial, based on that factor alone. Id. at 10.

Other courts have emphasized the centrality of this factor, uniformly dismissing SOX complaints where the locus of the adverse action occurred abroad. See, e.g., Talisse, OALJ No. 2008-SOX-00074 (dismissing, in part, because the decision to terminate complainant was made in Japan); Liu Meng-Lin, 763 F.3d at 179 (“complainant’s employers decided, apparently in China and/or Germany, to terminate his employment.”); Ede, ARB Case No. 05-053 (“[S]ubstantial evidence supports [the administrative law judge’s] finding” that the Act does not cover employees who, *inter alia*, “were subject to adverse actions that occurred outside the United States”); cf. O’Mahoney, 537 F.Supp.2d at 514 (S.D.N.Y. 2008) (denying a motion to dismiss, in part, because the alleged adverse action arose in New York City); Penesso, OALJ

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scheme he disclosed and the retaliatory termination of his employment were perpetrated by American executives of [the company] within the United States.” Complainant’s foreign employer fired him overseas and wrote his termination letter in Spanish. The Court held in dicta that even assuming the executive in Texas made the decision to fire Villanueva, he still proved “no connection” with the United States. Villanueva, ARB Case No. 09-198 at 6.

<sup>24</sup> For example, in Morrison, the Court found that Congress sought to regulate domestic transactions when passing the Exchange Act. Because the statute’s aims are to protect parties in relation to domestic transactions, § 10(b) only applied to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.” Morrison, 561 U.S. at 266. The dispute in Morrison concerned securities fraud allegedly committed on foreign exchanges. Therefore, the Supreme Court found that the Exchange Act did not reach such “wholly” extraterritorial matters and it affirmed the dismissal of petitioner’s complaint. See id. at 273.

Case No. 2005-SOX-00016 (denying a motion to dismiss, in part, when “respondent admitted in its response to the first pre-hearing order that at least one of the alleged retaliatory actions . . . took place in the United States”).

The Villanueva majority recognized, however, that in addition to the “locus of the fraud” factor, certain “labor elements can also play a role in determining whether or not events alleged in a complaint would require extraterritorial application of Section 806.” ARB No. 09-108 at 10. In a lengthy footnote, the Court explained:

In assessing whether a complainant’s claims would require extraterritorial application of Section 806, [1] the location of the protected activity would be a factor (which is indeed the driving factor in this case), [2] the location of the job and the company the complainant is fired from, [3] the location of the retaliatory act, and [4] the nationality of the laws allegedly violated that the complainant has been fired for reporting—all of these are indeed a focus of the Section 806 component of SOX.

Id. at 10 n.22 (numbering added). The Villanueva majority declined to decide the case based on the foregoing “labor elements,” only because the “facts [of the case] weigh so heavily” in favor of a finding that Villanueva’s reporting was extraterritorial, based on the locus of the fraud factor alone. As a result, the ARB affirmed the dismissal of Villanueva’s claim as extraterritorial.

Writing in dissent, Judge E. Cooper Brown argued that the majority gave short shrift to the factors it discussed in footnote 22. See id. at 25 (Brown, J., dissenting). Judge Brown expanded on the majority’s footnote and advanced five substantive reasons as to why the facts of Villanueva’s case, in his opinion, warranted reversal of the ALJ’s decision to dismiss. See id. at 19–30. Specifically, Judge Brown discussed: (1) the domestic nature of the alleged fraud or wrongful conduct that Villanueva reported; (2) the location of the protected activity, including the individuals Villanueva notified of the alleged wrongdoing; (3) the domestic nature of Villanueva’s employment relationship; (4) the location of the adverse employment action, which Judge Brown recognized as the “most important[] for analytical purposes under Morrison”; and (5) whether the Department of Labor or United States courts could enforce a judgement over the parties. Id. at 20, 22–29. In this way, Judge Brown’s reasoning mirrors the elements of a prima facie SOX case, and also includes one prudential concern. See Prioleau, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011). Because the foregoing “relevant factors necessary for establishing a judiciable complaint under Section 806 [were] domestic in nature,” Judge Brown concluded that Villanueva’s claim did not require an extraterritorial application of the Act and he dissented from the majority’s decision to dismiss Villanueva’s complaint. Id. at 20.

Court precedent aside from Villanueva also warrants dismissal of Complainant’s claim as extraterritorial. Courts have applied numerous factors to determine whether a SOX claim involves domestic conduct; the most salient of which include: (1) the complainant’s citizenship; (2) the complainant’s usual place of work; (3) the nationality of complainant’s direct employer; (4) the locus of the adverse action; (5) the locus of the alleged misconduct; and (6) the locus of the protected activity. An analysis of other court precedent further shows that Complainant’s

claim necessarily involves an extraterritorial application of the Act and that this tribunal lacks the power to adjudicate Complainant's complaint.

A. Adjudication of Complainant's Complaint Requires an Extraterritorial Application of Section 806

Whether this tribunal applies the single-factor approach taken by Villanueva majority or considers the multiple factors discussed in Judge Brown's dissent, summary decision is warranted. Applying the Villanueva labor elements to the totality of the circumstances surrounding Complainant's employment relationship with Servicios Ejecutivos reveals that adjudication of Complainant's complaint requires an extraterritorial application of Section 806.

Based on the Complainant's testimony, the undersigned has assumed the following facts to be true:

- Complainant's alleged protected activity took place in Mexico (Tr. at 18-31);
- Complainant blew the whistle to his Mexican supervisors concerning the conduct of his Mexican employer (Tr. at 18, 31, 40, 309, 474);
- Servicios Ejecutivos, located in Mexico, retaliated against Complainant when it removed five (Mexican) offices from his supervision and when it forced him to sign the letter of resignation (Tr. at 240, 284-90, 327-34);
- At all times relevant to his complaint, Complainant lived and worked in Mexico (Tr. at 327-28);
- Complainant's employment agreement and severance agreement were drafted in Spanish and executed under the auspices of several Mexican government bodies See Exhibit A to the Galvan Rangel Declaration; Exhibit I to the Galvan Rangel Declaration; and
- Complainant never traveled to the United States for business (Tr. at 334).

1. *The only connection Complainant has to the U.S. is that his employer made use of a concentration bank account in the U.S.*

Here, Complainant reported his concerns about two allegedly fraudulent activities: (1) Banamex USA's and Servicios Ejecutivos's use of a concentration account, and (2) Servicios Ejecutivos's use of allegedly improper record keeping techniques to document certain transactions. (See, Tr. at 10, 18-31 23, 172-78, 309, 462-74.) Complainant testified that he reported "irregular[ities] of business with Seguros Banamex [because Seguros Banamex used] the concentration account with Banamex United States by sending money underhandedly to PPB policies in Mexico, and [because Seguros Banamex facilitated] the violation of the law." (Tr. at 309.) Similar to Villanueva, Complainant's allegations of fraud center on the activities of a foreign entity. See Villanueva, ARB No. 09-108 at 13.

The concentration account that both Servicios Ejecutivos and Banamex USA used to perpetrate the alleged fraud was maintained in the United States and dealt in U.S. dollars. (Tr. at 23.) However, Complainant made his complaints about the account in Mexico, to his Mexican co-workers. Even assuming that the locus of the wrongdoing occurred in the U.S., there is no indication that Complainant ever blew the whistle to representatives of Banamex USA, or that anyone at Banamex USA had any knowledge of Complainant's purported protected activity. Servicios Ejecutivos (Seguros Banamex) and Banamex USA are, at most, sister companies,<sup>25</sup> incorporated in Mexico and California, respectively, but with the same corporate parent, Citigroup.<sup>26</sup> In addition, Complainant admitted that he never raised his various concerns about Banamex USA to the SEC or to any other U.S. governmental agency. (See Tr. at 147; Exhibit C to the Kaufman Declaration.)

Unlike Villanueva, where the complainant blew the whistle to U.S. officials of the company allegedly engaged in fraud, here Complainant blew the whistle only to his own superiors who worked in Mexico. Complainant's superiors, moreover, did not work for the U.S. company allegedly engaged in fraud; they worked for the sister company in Mexico. (Tr. at 147; 170–78.) Therefore, unlike in Villanueva, no U.S. actor had knowledge of Complainant's alleged protected activity. See Villanueva, ARB No. 09-108 at 29 n.80 (Brown, J. dissenting) (acknowledging that if Villanueva had not blown the whistle to his employer in Houston, then he would not have dissented from the majority's decision to dismiss Villanueva's claim). Thus, the lack of a domestic connection in the current matter weighs in favor of dismissing Complainant's complaint as extraterritorial.<sup>27</sup>

The location of the events surrounding Villanueva's alleged protected activity also supports a finding of extraterritoriality. See id. at 10 (majority opinion) (listing the “location of the protected activity” as a “labor element” that related to Section 806's specific focus). Writing

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<sup>25</sup> According to one treatise, “sister companies” are “those with a common owner, which may be a parent corporation with multiple (brother-sister) subsidiaries.” Arthur Pinto and Douglas Branson, Understanding Corporate Law 61 (3d ed. 2009).

<sup>26</sup> Complainant emphasized that, on its website, Banamex USA styles itself as the “U.S. banking arm of Banco Nacional de Mexico,” which it abbreviates to “Banamex.” (CX-38.) Exhibit C to the Kaufman Declaration shows that Banco Nacional de Mexico is, again, a sister corporation to Servicios Ejecutivos (Seguros Banamex). The record is silent as to the relationship – either organizational or contractual – that provoked Banamex USA to call itself the “U.S. banking arm of Banco Nacional de Mexico”; nevertheless, since Complainant submitted evidence only of a bare connection between the two companies, this tribunal is not obligated to view this piece of evidence in a light favorable to Complainant. Accordingly, this tribunal does not find that a substantial relationship existed between Banamex USA and Seguros Banamex, other than that they shared the same corporate parent, Citigroup. (See also Figure 1.)

<sup>27</sup> Complainant's second allegation of fraud related to the improper documentation of certain transactions at Seguros Banamex. However, Complainant did not allege that such activities concerned any entity aside from his Mexican employer, Servicios Ejecutivos. Because this allegation does not involve a U.S. actor, the fraud that Complainant alleged concerning Servicios Ejecutivos' internal protocols does not rise to the level of domestic conduct.

in dissent, Judge Brown noted that Villanueva had raised his concerns to officials in the U.S. and in Colombia; however, he found “the only communiques that qualify as protected activity are those brought to the attention of the officials in” the U.S., because only such officials had supervisory authority over Complainant. Villanueva, ARB No. 09-108 at 28 (Brown, J., dissenting) (citing to 18 U.S.C. § 1514A(a)(1)(C) which protects whistleblowers who provide information to “a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover, or terminate misconduct)”); see also 29 C.F.R. § 1980.101 (defining “covered employee” under SOX as “an individual whose employment could be affected by a company or company representative”). Judge Brown recognized the connection between Villanueva’s alleged protected activity and U.S. actors and reasoned that this nexus showed domestic conduct. Here, Complainant never blew the whistle to Banamex USA or Citigroup. (Tr. at 147.) Rather, all of his alleged protected activity involved notifying his Mexican supervisors about his concerns involving the concentration account and internal documentation issues he observed occurring at Servicios Ejecutivos. Complainant’s protected activity under SOX would include only his whistleblowing to his direct supervisors, all of whom were foreign actors working in Mexico. (See Tr. at 304; Galvan Rangel’s Declaration at ¶ 1.) Notably, although his alleged protected activity involved the actions of Banamex USA, Complainant never blew the whistle to an individual involved with Banamex USA. Complainant even admitted at his deposition that he never expressed his various concerns to anyone at Banamex USA or to any U.S. governmental agency. (Tr. at 147.)

Other courts have also considered where the protected activity occurred when opining on extraterritoriality. See, Liu Meng-Lin, 763 F.3d at 179 (“The facts alleged in the complaint reveal essentially no contact with the United States regarding either the wrongdoing or the protected activity.”); Carnero v. Boston Scientific Corp., 433 F.3d 1, 6 (1<sup>st</sup> Cir. 2006) (“[I]f Carnero’s whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, he might well have a potential claim under the whistleblower protection provision of the Sarbanes-Oxley Act”); Penesso, OALJ Case No. 2005-SOX-00016 (denying a motion to dismiss when “much of the protected activity” occurred in the United States).

Here, Complainant’s alleged protected activity involved telling his direct supervisors in Mexico his concerns about a U.S. sister company’s concentration account and his concerns about his Mexican employer’s documentation practices. All of Complainant’s direct supervisors worked in Mexico; Complainant did not allege that he ever shared his concerns with the U.S. sister company or any U.S. governmental agency. (Tr. at 147.) Complainant conducted all of his protected activity in Mexico when he shared his concerns with his Mexican supervisors.

## 2. The Alleged Misconduct Took Place in Mexico

Courts have looked to the locus of the alleged misconduct when rendering a decision on whether a particular claimant raises domestic or extraterritorial conduct. See, Liu Meng-Lin, 763 F.3d at 179 (dismissing when the alleged misconduct of receiving bribes and kickbacks occurred abroad); Talisse, OALJ No. 2008-SOX-00074 (dismissing, in part, because complainant blew the whistle on misconduct occurring overseas). Here, Complainant blew the whistle on his Mexican employer’s documentation protocols, which he felt involved misconduct.

Complainant's claim also involved his discussions with his Mexican supervisors about Banamex USA's actions, which Complainant felt involved money laundering. Assuming, *arguendo*, that the misconduct that Complainant discussed with his superiors about Banamex USA involved "fraud against [Citigroup's] shareholders,"<sup>28</sup> this fact would weigh toward a showing that Complainant's complaint involved domestic conduct. However, this tribunal makes note of Justice Scalia's recognition in Morrison, that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266, (emphasis in the original); see also Ulrich, 2014 U.S. Dist. LEXIS 138082 ("In short, simply alleging that some domestic conduct occurred cannot support a claim of domestic application because it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.") (quoting Liu Meng-Lin, 763 F.3d at 179); Complainant's Opposition to Resp't's Motion for Summary Decision at 25 (recognizing that "[i]n today's world, civil whistleblower claims against a sprawling multinational like [Respondent] will likely involve at least some non-U.S. aspects.") Although this tribunal recognizes that Complainant's allegations of money laundering by Banamex USA is at least suggestive of domestic conduct, it does not outweigh the other factors showing that Complainant's case requires an extraterritorial application of Section 806.

Again, the Beck case is instructive because it involved the dismissal of a foreign employee of a foreign subsidiary of Respondent, Citigroup. The court dismissed the claim in Beck even though the complaint alleged U.S. fraud. The Beck court reasoned that such considerations did not "alter the foreign nature of the employment relationship." Beck, OALJ No. 2006-SOX-00003 at \*9. As discussed above, Complainant's employment relationship solely involved foreign connections. Complainant is a Venezuelan and Spanish citizen, living in Mexico, who worked there for a Mexican subsidiary of Citigroup. His employment agreement and termination agreement were both drafted in Spanish, executed under the auspices of the Mexican government, and included provisions about Mexican employment laws. Complainant's employer paid him in Mexican pesos and his severance check was provided in Mexican pesos and issued from a Mexican bank account. See O'Mahoney, 537 F. Supp. 2d at 514 (S.D.N.Y. 2008) (denying a motion to dismiss, in part, because Complainant was paid in U.S. dollars by a U.S. subsidiary of a foreign company); see also Beck, OALJ No. 2006-SOX-00003 at \*2 (dismissing a complaint even when complainant's compensation was determined "via a global review process managed by Citigroup, Inc. out of New York and his compensation included Citigroup, Inc. stock options"). Here, Complainant's alleged protected activity involved blowing the whistle to his Mexican supervisors concerning the actions of Banamex USA as well as Seguros Banamex's internal record keeping policies. Following Beck, this complaint fails because of the entirely "foreign nature" of Complainant's employment relationship. Beck, OALJ No. 2006-SOX-00003 at \*9; see also Talisse, OALJ No. 2008-SOX-00074 (dismissing, in part, because the alleged wrongdoing occurred abroad); Liu Meng-Lin, 763 F.3d at 177, 185

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<sup>28</sup> Section 806 prohibits retaliation when an employee blows the whistle on actions reasonably perceived to constitute "fraud against shareholders." Complainant provided no evidence, argument, or authority that money laundering falls into the prohibited activities at § 1514A(a)(1). However, without rendering a conclusion of law, this tribunal will presume that Complainant's allegations concerning the concentration account involved actions that related to "fraud against shareholders."

(dismissing complaint, in part, because the alleged wrongdoing involved foreign actors); Villanueva, ARB No. 09-108 at 10 (dismissing the case based on “the locus of the [domestic] fraud Villanueva reported”); Ulrich, 2014 U.S. Dist. LEXIS 138082 (dismissing, in part, because the alleged wrongdoing occurred abroad). Even assuming that Complainant’s allegations of fraud against Banamex USA implicated a domestic connection, the foreign nature of the remainder of Complainant’s case – especially his employment relationship – outweighs this slight nexus to the United States; thus, the totality of the evidence still preponderates toward dismissal.

### 3. *The alleged retaliatory acts all occurred in Mexico*

Another “labor element” that the majority in Villanueva discussed concerns the location of the retaliatory act. The record shows that the complained of adverse actions all occurred in Mexico. Other Courts have also looked to where the adverse action occurred. In SOX claims, the location of the adverse action is typically where the employer’s retaliatory acts occurred, or the location from which the employer purportedly authorized the retaliatory action. Courts have uniformly dismissed SOX complaints where the locus of the adverse action occurred abroad. See, Liu Meng-Lin, 763 F.3d at 179 (“[C]omplainant’s employers decided, apparently in China and/or Germany, to terminate his employment.”); O’Mahoney, 537 F. Supp. 2d at 514 (S.D.N.Y. 2008) (denying a motion to dismiss, in part, because the alleged adverse action arose in New York City); Ede, ARB Case No. 05-053 (“[S]ubstantial evidence supports [the administrative law judge’s] finding” that the Act does not cover employees who, *inter alia*, “were subject to adverse actions that occurred outside the United States”); Talisse, OALJ No. 2008-SOX-00074 (dismissing, in part, because the decision to terminate complainant was made in Japan); Penesso, OALJ Case No. 2005-SOX-00016 (“[R]espondent admitted in its response to the first pre-hearing order that at least one of the alleged retaliatory actions . . . took place in the United States.”)

Here, the record viewed in the light most favorable to Complainant does not show that anyone other than his direct Mexican employers played a role adversely affecting Complainant’s employment. (See Tr. at 40, 284–90, 193, 226–40, 395.) Complainant alleged that his Mexican employer reduced the number of offices he supervised and forced him to resign. The offices were all in Mexico. The supervisor who made the decision to reduce his supervisory responsibilities was Aladro Ezquerro. The meeting at which Complainant resigned took place in Mexico. In late July 2014, Aladro Ezquerro wrote that August 1, 2014 represented an appropriate termination date, because Complainant returned from vacation that day. Claudio Elizabeth Gallardo Soto of Seguros Banamex wrote further that Complainant’s dismissal would occur on August 6, 2014 in Mexico City. See Exhibit H to the Galvan Rangel declaration. Furthermore, the record does not show that any U.S. entity had knowledge of Claimant’s alleged protected activity. Because the record is silent as to the culpability of any U.S. entity in the alleged adverse action contained in Complainant’s complaint, this factor weighs heavily against a finding that Complainant’s case involves domestic conduct.<sup>29</sup> Because the alleged retaliatory

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<sup>29</sup> Although this tribunal does not take OSHA’s findings into account when rendering its decision, OSHA’s March 9, 2015 “Secretary’s Findings” dismissed Complainant’s complaint, “because the adverse action took place in Mexico at the hands of Complainant’s Mexican supervisors and there is no indication that the U.S. parent company was involved.” See Exhibit R to Kaufman’s Declaration.

actions took place in Mexico and no U.S. actor participated in the alleged adverse activities, his complaint requires an extraterritorial application of the Act, and this tribunal lacks the authority to try Complainant's complaint.

#### 4. *Complainant is not a U.S. Citizen*

A number of courts discussed a SOX complainant's citizenship as a factor within their decision to dismiss a complainant's claim as extraterritorial. The clear trend is to weigh this factor in favor of dismissal when the complainant is not a U.S. citizen. See, Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 179 (2d Cir. 2014); Beck v. Citigroup, OALJ No. 2006-SOX-00003 (Aug. 1, 2006). Some courts have even dismissed a complainant's claim when the complainant was a U.S. citizen, but the totality of evidence showed a definite foreign connection. See, Ulrich v. Moody's Corp., No. 13-CV-00008 (VSB), 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sep. 30, 2014); Talisse v. UBS, OALJ No. 2008-SOX-00074 (Jan. 8, 2008). But see Penesso v. LCC International, Inc., OALJ Case No. 2005-SOX-00016 (Mar. 4, 2005) (denying a motion to dismiss, in part, because the complainant was a U.S. citizen).<sup>30</sup> Here, Complainant was a citizen of Venezuela and Spain. (Tr. at 147.) Complainant lived in Mexico at all times relevant to his claim. Accordingly, Complainant's foreign citizenship and foreign residency weighs in favor of a dismissal of his claim as an extraterritorial application of SOX.

#### 5. *Complainant Worked Only in Mexico*

Courts have also taken the complainant's place of work into consideration when rendering opinions on the extraterritoriality of a SOX claim. See, Liu Meng-Lin, 763 F.3d at 183 (dismissing a SOX complaint from a worker employed in China); Ulrich, 2014 U.S. Dist. LEXIS 138082 (dismissing a U.S. citizen employed in Hong Kong); Talisse, OALJ No. 2008-SOX-00074 (dismissing in part because the complainant worked in Japan); Beck, OALJ No. 2006-SOX-00003 (dismissing in part because the putative complainant worked in Germany); Ede v. Swatch Group, OALJ No. 2004-SOX-00068 (Jan. 14, 2005) (holding that "the whistleblower provision of the Act applies only to employees working within the United States") *aff'd* Ede v. Swatch Group, ARB No. 05-053 (Jun. 27, 2007);. Here, Complainant was a non-U.S. citizen who worked exclusively in various offices located in Mexico. See Exhibit O to the Kaufman Declaration (stating that Aladro Ezquerro assigned Complainant to Mexican offices in Leon, Irapuato, San Luis Potosi, and the offices of Banca Privada of the Centro-Leon Division in Aguascalientes and San Luis Potosi). Complainant testified, moreover, that he never traveled to the United States for business purposes. (Tr. at 334.) Finally, in his employment agreement with Servicios Ejecutivos, Complainant granted his consent "to be transferred from the office or workplace where he works to any other throughout the Mexican Republic." Exhibit A to the Galvan Rangel Declaration. The employment agreement does not mention any possibility of work in the U.S. Accordingly, the location of Complainant's work also weighs in favor of dismissal.

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<sup>30</sup> The parties in this case reached a settlement agreement before final adjudication.

6. *Complainant's Direct Employer was Mexican*

Another factor that courts consider when approached with an extraterritoriality issue is the nationality of the putative complainant's employer. The clear trend is to dismiss when Complainant's direct employer is a foreign entity. *See, Liu Meng-Lin*, 763 F.3d at 177, 185 (dismissing in part because Complainant worked for a Chinese subsidiary of a German company); *Ulrich*, 2014 U.S. Dist. LEXIS 138082 (dismissing when complainant worked for a "Hong Kong company"); *O'Mahoney v. Accenture Ltd*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (denying a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6), in part because Complainant's direct employer was a U.S. subsidiary of a foreign company).<sup>31</sup> Notably, at least one administrative law judge dismissed a claim where a U.S. citizen worked for a U.S. company but at an overseas location. *See Talisse*, OALJ No. 2008-SOX-00074. The facts of Complainant's case demonstrate a simple application of this factor: Complainant's direct employer was *Servicios Ejecutivos*—a company incorporated in Mexico under Mexican laws. In accord with the number of other courts that have dismissed SOX complaints when the complainant's direct employer was not a U.S. company, this factor favors dismissal of Complainant's claim.

The *Beck* case, OALJ No. 2006-SOX-00003, also involved Citigroup—Complainant's putative employer—as a respondent. The Administrative Law Judge in *Beck* dismissed the complaint for lack of jurisdiction finding that the complainant's "employment relationship" was not domestic in nature. Beck was a German national and his direct employer was a foreign subsidiary of Citigroup. He primarily worked in Germany but traveled to the U.S. and had frequent contacts with U.S. citizens, including some of his direct supervisors. Beck's paychecks came from the foreign subsidiary, but Citigroup's global review process determined his compensation and complainant also received Citigroup stock options. Similar to Beck, Complainant's direct employer was a foreign subsidiary of Citigroup. Notably, Beck had considerably more contacts with the United States than Complainant did. Beck traveled to the U.S. and had U.S. supervisors, and the ALJ still dismissed the complaint. By contrast, all of Complainant's supervisors worked in Mexico (and were likely Mexican nationals), and Complainant never traveled to the United States for business. (Tr. at 334.) Moreover, Complainant's foreign employer paid his severance check in Mexican pesos and a Mexican bank issued the check. *See Exhibit M* to the Galvan Rangel Declaration. Citigroup did not create Complainant's compensation system—it was a product of Seguros Banamex, a Mexican company. *See Exhibit C* to the Galvan Rangel Declaration. Because Complainant asserts even fewer domestic connections than found in *Beck*, Complainant's claim also requires dismissal for lack of subject-matter jurisdiction.

7. *Enforcement of a remedy would involve extraterritorial reach by the Office of Administrative Law Judges*

Finally, the *Villanueva* majority and Judge Brown's dissent each discussed the prudential concern over enforcement of a putative SOX complaint within their analyses of whether a

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<sup>31</sup> The facts of Complainant's case present the inverse of the ones found in *O'Mahoney*; rather than working for a US subsidiary of a foreign company, Complainant worked for the foreign subsidiary of a US company. Thus, Complainant's direct employer is foreign.

claimant raises a domestic or extraterritorial claim. See Villanueva, ARB No. 09-108 at 11 (“Enforcing compliance or punishing noncompliance with Colombian financial laws necessarily implicates extraterritorial enforcement”); Id. at 29; see also Carnero v. Boston Scientific Corp., 433 F.3d 1, 9 (1st Cir. 2006) (holding that Section 806 does not have extraterritorial effect, partially through a recognition that “Congress has made no provision for possible problems arising when [the U.S. Department of Labor] seeks to regulate employment relationships in foreign nations, nor has Congress provided the DOL with special powers and resources to conduct investigations abroad.”) Judge Brown convincingly identified the enforcement issue not as one concerning the nationality of the laws allegedly violated, but “whether the agency and the courts have the authority to enforce any relief that is ordered upon a determination that Section 806 was violated, and whether a party aggrieved by a final decision of the ARB could obtain court review of that decision.” Villanueva, ARB No. 09-108 at 29 (Brown, J., dissenting) (citing to 18 U.S.C. 1514A(b)(2)(A) which refers to the enforcement procedures of AIR 21, 49 U.S.C. § 42121(b)(4)). The enforcement procedures of AIR 21 afford appellate rights in the court of appeals: (1) in which the “violation, with respect to which the order was issued” allegedly occurred, or (2) where the complainant resided.<sup>32</sup> The presumptive remedy under the Act is “reinstatement with the same seniority status that the employee would have had but for the discrimination.” 18 U.S.C. § 1514A(c)(2). Because enforcement of Complainant’s claim requires either the U.S. Department of Labor or the U.S. Circuit Courts to reach into Mexico to reinstate his employment, the record, again, demonstrates that Complainant’s complaint requires an extraterritorial application of Section 806.

8. *Conclusion: An application of the factors discussed in the relevant case law shows that Complainant’s complaint requires an extraterritorial application of Section 806*

The protections at Section 806 of the Act do not extend to extraterritorial conduct. The preponderant evidence viewed in a light most favorable to Complainant demonstrates that his allegations do not involve domestic conduct. Notably, Complainant—a foreign national employed by a Mexican subsidiary of Citigroup—claims to have blown the whistle to a number of his foreign supervisors. The record shows that non-U.S. agents of Complainant’s foreign employer decided to terminate Complainant and that this decision arose in Mexico. Finally, even assuming that Complainant could make his prima facie case, Complainant’s claim would require the U.S. Department of Labor to create a remedy affecting a foreign employment relationship. Therefore, this tribunal must grant Respondent’s Motion for Summary Decision. Section 806’s lack of extraterritorial reach does not permit the U.S. Department of Labor to adjudicate Complainant’s claim, which overwhelmingly involves foreign connections.

B. Citigroup exercised no control over Complainant’s employment

The record is silent as to any direction or control that Citigroup—the U.S. parent company—exercised over Complainant’s day-to-day employment. Notably, Judge Brown’s dissent cautioned, “[a] SOX complainant’s employment relationship should not be ignored.”

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<sup>32</sup> At all times relevant to Complainant’s complaint, he lived in Mexico. See Exhibit Q to Kaufman’s Declaration (stating that Complainant is a resident of Guanajuato, Mexico). Thus, the forum where Complainant resides mandates an extraterritorial application of the Act.

Villanueva, ARB No. 09-108 at 25 (citing to 29 C.F.R. § 1980.101, which defines a “covered employee” under SOX as “an individual whose employment could be affected by a company or company representative”). Judge Brown discussed Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), where the court found that a foreign citizen employed in Latin America by a Latin American subsidiary of a publicly traded U.S. company could not bring a claim under SOX due to the “over-arching employment relationship” that Complainant alleged against his employer’s U.S. parent. Judge Brown distinguished Carnero from the facts in Villanueva because in the latter case, the U.S. parent “exercised virtually complete control” over its subsidiary. Id. at 26. Judge Brown noted that U.S. based officers hired and fired Villanueva, and that the U.S. based parent signed all contracts and accessed all accounts concerning the Latin American subsidiary. Judge Brown emphasized that “the signature of executives based in Houston [were] required on account checks.” Id., at 27.

The totality of facts describing Complainant’s over-arching employment relationship shows that Citigroup had much less control over Complainant’s employer—Servicios Ejecutivos—than the U.S. parent exercised over Villanueva’s employer. Notably, Complainant’s Mexican employer interviewed, hired, and fired him in Mexico. (Tr. at 149, 226.) Complainant’s Mexican employer also devised and implemented his compensation system. See Exhibit C to the Galvan Rangel Declaration. Complainant reported directly to his Mexican supervisors concerning the Mexican insurance products he sold. (Tr. at 164–65.) Complainant’s resignation agreement was drafted in Spanish and referenced Mexican labor laws. See Exhibit I to the Galvan Rangel Declaration. Furthermore, Servicios Ejecutivos provided the cash that Complainant received as part of his resignation in Mexican pesos. See Exhibits K and L to the Galvan Rangel Declaration. The check was drafted from a Mexican account of a Mexican subsidiary (Banamex) and drawn from an account with a Mexican bank (Banco Nacional de Mexico, S.A.). See id. Thus, Complainant’s “over-arching employment agreement” did not show any of the domestic connections that Judge Brown observed in Villanueva. Citigroup had no internal control over the day-to-day operations of Servicios Ejecutivos, as contrasted with the U.S. parent company in Villanueva. This lends further weight to a finding that Complainant’s complaint requires an extraterritorial application of Section 806.

Importantly, Complainant did not allege that the adverse action he suffered involved decision making or other specific action by any U.S. officer or U.S. entity. Citigroup from time to time issued certain policies to Complainant’s employer such as a corporate credit card policy,<sup>33</sup> Citigroup’s “Global Anti-Money Laundering Policy,”<sup>34</sup> and Citigroup’s “Fraud Management Policy and Standards.”<sup>35</sup> Complainant used certain work functions that Citigroup developed such as an “@citi.com” email address,<sup>36</sup> online training courses,<sup>37</sup> and a portal for

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<sup>33</sup> Exhibit D to the Galvan Rangel Declaration.

<sup>34</sup> Exhibit 2 to Kundar’s Declaration.

<sup>35</sup> Exhibit 14 to Kundar’s Declaration.

<sup>36</sup> Exhibit 15 to Jimenez Perez’s Declaration.

<sup>37</sup> See Tr. at 63.

performing various activities including drafting self-evaluations.<sup>38</sup> However, those factors do not show the requisite control needed to demonstrate that Citigroup had any role in the alleged adverse action. See Cnty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (“control” is the most important consideration when determining whether an employment relationship exists). The facts that Complainant raised in his brief to assert control by Citigroup are incidental to Complainant’s employment relationship, and do not demonstrate the requisite day-to-day control needed to establish Citigroup as Complainant’s employer. Indeed, Complainant testified that Aladro Ezquerro’s decisions concerning the assignment of personnel required the approval of Lopez Gasca and Polanco Ibanez, and the approval of human resources (all of whom were foreign actors working in Mexico for Seguros Banamex). (See Tr. at 304; Galvan Rangel’s Declaration at ¶ 1.)<sup>39</sup> Following the Villanueva majority, then, if a foreign citizen employed in a foreign country by a foreign subsidiary of a publicly traded U.S. company whose firing was the result of the actions of **U.S. actors** cannot prove a domestic connection under SOX, then surely the record here—where Claimant had a similar employment relationship to Villanueva’s—**but where no U.S. actor had a role in the adverse actions**, does not demonstrate a domestic employment relationship sufficient to find liability under Section 806.

C. Conclusion: The Record Shows that Complainant’s Complaint Requires an Extraterritorial Application of Section 806; therefore, this Tribunal has no Power to Adjudicate the Claim and Must Grant Respondent’s Motion for Summary Decision

The totality of the circumstances surrounding this claim—when viewed in a light most favorable to Complainant—demonstrates an employment relationship consisting almost entirely of foreign connections. When viewed as a whole, Complainant asserts insufficient domestic connections to avoid dismissal on extraterritoriality grounds. For example, Complainant’s Venezuelan and Spanish citizenship weighs against a domestic connection. Seguros Ejecutivos hired Complainant to work in Mexico and although his job requirements involved travel around Mexico, his job included no business travel to the United States. Complainant’s direct employer—Servicios Ejecutivos—is a Mexican subsidiary of Seguros Banamex, which is in turn a Mexican subsidiary of Grupo Financiero Banamex, S.A. de C.V., a Mexican subsidiary of a

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<sup>38</sup> See Tr. at 171–72.

<sup>39</sup> In his brief, Complainant raised the case Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432 (S.D.N.Y. 2013) to assert the point that “Dodd-Frank amended [§ 1514A] to clarify that it protects employees of *subsidiaries* of public companies—not just those employed directly by public companies.” See Complainant’s Memorandum of Law in Opposition to Respondent’s Motion for Summary Decision at 27–28 (emphasis in Complainant’s brief). Although the quote from Leshinsky is accurate, it is inapposite. Leshinsky did not discuss the issue of extraterritoriality and so did not address the subject central to this analysis—whether this tribunal has subject matter jurisdiction over Complainant’s claim. See Morrison, 561 U.S. at 254 (Subject-matter jurisdiction refers to a tribunal’s “power to hear a case”). Likewise, Morefield v. Exelon Services, Inc., Case No. 2004-SOX-00002, 2004 WL 5030303 (OALJ January 28, 2004) did not involve the issue of extraterritoriality.

Delaware holding company called “Citicorp (Mexico) Holdings LLC.” See Exhibit C to the Kaufman Declaration. Moreover, Mexico was the locus of the adverse employment action, because Complainant’s Mexican employer allegedly reduced the number of Mexican offices Complainant supervised and because Complainant signed his severance agreement in Mexico City. Finally, Complainant’s protected activity took place in Mexico when he allegedly blew the whistle to his Mexican direct supervisors about certain activities related to his Mexican employer and a U.S. sister company. In other words, Complainant’s employment relationship was entirely foreign.

Allowing Complainant’s claim to continue also raises the possibility that, if Complainant were successful at hearing, the United States Department of Labor would issue an order with the presumed remedy of requiring Complainant’s foreign employer to reinstate him to his former position. Dismissing Complainant’s complaint precludes the possibility that a United States agency would interfere in a clearly foreign employment relationship. Therefore, prudential concerns also weigh toward dismissing Complainant’s complaint. See RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

The isolated fact that the alleged misconduct involved an account located in the U.S. does not outweigh the other factors demonstrating that adjudication of Complainant’s claim would require an extraterritorial application of Section 806. Here, Complainant, a foreign national located outside the U.S., asserts that he engaged in protected activity with his direct Mexican employer, who, because of the protected activity took adverse employment actions against Complainant in Mexico. This tribunal holds that Complainant’s case, regardless of where the alleged fraudulent activity arose, does not involve a domestic application of Section 806. Since it is well-settled that SOX’s whistleblower provision has no extraterritorial reach, Villanueva, ARB Case No. 09-198 at 12, Respondent has satisfied its burden to show that no genuine issue of material fact exists as to whether this tribunal is the correct forum to litigate Complainant’s claim. It is not. Consequently, this tribunal must dismiss Complainant’s complaint for lack of subject-matter jurisdiction.

### **ORDER**

Respondent’s Motion for Summary Decision is GRANTED. The complaint of Antonio Jose Jimenez Perez against Citigroup is DISMISSED.

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey

## **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](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 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).