



Issue Date: 09 February 2018

Case No.: 2016-SOX-00032
OSHA CASE No.: 3-1760-16-017

In the Matter of:

DOUGLAS DENNENY,
Complainant,

v.

MBDA, INC., et al.,¹
Respondent.

CORRECTED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION^{2,3}

¹ Respondent clarified in its Initial Statement that while Complainant's *Complaint for Relief* purports to include "MBDA" as a second defendant and characterizes it as "MBDA Missile Systems," there exists no corporate entity with either name. According to Respondent, Complainant's employer was MBDA, Inc. and no other corporate entity has been named, served or is otherwise properly before the OALJ. *Resp. Initial Statement* at 1. In response, Complainant stated that, on Respondent's website, MBDA, Inc. and MBDA refer to the company for branding purposes as "MBDA Missile Systems." *Complainant's Opposition to Respondent's Motion for Entry of a Protective Order Staying Discovery*. Both Complainant and Respondent use "MBDA, INC., et al" in their captions. As discussed *infra*, Complainant has failed to establish a claim against any MBDA affiliates.

² On February 1, 2018, this Court issued *Decision and Order Granting Respondent's Motion for Summary Decision*, which, because of an administrative error, did not include appeal rights. To correct this error, this Court is issuing *Corrected Decision and Order Granting Respondent's Motion for Summary Decision*. Accordingly, the date of the issuance of the corrected decision and order will serve as the date in determining the timeliness of a petition for appeal.

³ Also, the February 1, 2018, *Decision and Order Granting Respondent's Motion for Summary Decision* stated that Respondent did not file a reply memorandum in support of its motion for summary decision. Respondent did, in fact, file a *Reply Memorandum in Support of Respondent's Motion for Summary Decision* ("*Resp't Reply*") on October 17, 2017. Due to an administrative error, *Resp't Reply* was not entered into OALJ's Case Tracking System, nor was it placed in the case file. Accordingly, I did not have actual notice of *Resp't Reply* when issuing my February 1, 2018 Order. Counsel for Respondent provided me with a copy of *Resp't Reply* on February 5, 2018. A review of the document does not lead me to alter my analysis, though I do make the following correction:

The February 1, 2018, *Decision and Order Granting Respondent's Motion for Summary Decision* at 2-3 reads, in part, as follows:

On August 31, 2017, I received *Respondent's Motion for Summary Decision and a Memorandum in Support of Respondent's Motion for Summary Decision* ("*Resp't Mem.*"). Complainant through counsel filed *Complainant Douglas Denny's Opposition to Respondent's Motion for Summary*

This claim has been brought under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX,” or the “Act”). Section 806, codified at 18 U.S.C. § 1514A, is the “whistleblower provision” which provides protection to employees against retaliation by certain persons covered under the Act for engaging in specified protected activity. Actions brought under this statute are governed by the rules set forth in 29 C.F.R. Part 1980, as well as the general procedural rules in 29 C.F.R. Part 18.

RELEVANT PROCEDURAL BACKGROUND

On October 29, 2015, Douglas Denny (“Complainant”) filed a Complaint for Relief with the Occupational Safety & Health Administration (“OSHA”) against MBDA, Inc., *et. al* (“Respondent”). In his Complaint, Complainant alleged that Respondent retaliated against him for engaging in protected activity, in violation of SOX. *Complaint for Relief* at 19, ¶¶ 70-72. In brief, Complainant alleged that Respondent mistreated Complainant, accused Complainant of wrongdoing, non-selected Complainant for the CEO position, and ultimately terminated Complainant in retaliation for allegedly disclosing that two of Respondent’s executives were misleading the Board of Directors by providing them with false and misleading economic information that constituted fraud. *Complaint for Relief* at 11, 13-15, 17-19.

The Secretary of Labor, through the Regional Administrator for OSHA, Region III, conducted an investigation of Complainant’s complaints. On April 7, 2016, OSHA dismissed Complainant’s complaint based on the following conclusions: (1) Respondent is not a SOX-covered employer within the meaning of 18 U.S.C. § 1514A; (2) the public entities, which Respondent does have a contract with and are covered under SOX did not direct or control Respondent’s employment decisions, including the decision to take adverse action against

Decision (“C. Reply”) on September 14, 2017. On September 18, 2017, Respondent filed a *Motion for Leave to Submit Reply Memorandum in Support of Respondent’s Motion for Summary Decision*. While I granted this motion on October 2, 2017, Respondent did not file a reply brief. The parties submitted, *inter alia*, a *Joint Stipulation of Agreed Facts (“Joint Stipulations”)* on September 26, 2017 in anticipation of a hearing. On October 2, 2017, I issued an order, over Complainant’s objections, continuing the hearing until I ruled on the motion for summary decision.

The *Corrected Decision and Order Granting Respondent’s Motion for Summary Decision* at 3 reads, in part, as follows:

On August 31, 2017, I received *Respondent’s Motion for Summary Decision* and a *Memorandum in Support of Respondent’s Motion for Summary Decision (“Resp’t Mem.”)*. Complainant through counsel filed *Complainant Douglas Denny’s Opposition to Respondent’s Motion for Summary Decision (“C. Reply”)* on September 14, 2017. On September 18, 2017, Respondent filed a *Motion for Leave to Submit Reply Memorandum in Support of Respondent’s Motion for Summary Decision*, which I granted. The parties submitted, *inter alia*, a *Joint Stipulation of Agreed Facts (“Joint Stipulations”)* on September 26, 2017 in anticipation of a hearing. On October 2, 2017, I issued an order, over Complainant’s objections, continuing the hearing until I ruled on the motion for summary decision. On October 17, 2017, Respondent filed *Reply Memorandum in Support of Respondent’s Motion for Summary Decision*.

Complainant; and (3) “the contracts and subcontracts between Respondent and publicly-traded companies do not appear to amount to a relationship that is substantial enough to afford whistleblower protection to an employee of Respondent.” *OSHA Findings* at 4.

On April 27, 2016, Complainant timely filed his objections to the OSHA findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). This matter was assigned to the undersigned and, pursuant to a *Notice of Assignment and Notice of Hearing and Prehearing Order* issued on July 5, 2016, a hearing was scheduled for January 10, 2017, in Washington, D.C.

On July 21, 2016, Respondent’s counsel filed *Respondent’s Motion to Dismiss and/or for Summary Decision* and a *Memorandum in Support of Respondent’s Motion to Dismiss and/or for Summary Decision*. In its filings, Respondent argued that it was not subject to SOX jurisdiction because it is not a publicly owned company and because Complainant’s alleged protected activity was unrelated to contracts between Respondent and any public company.

On November 22, 2016, I issued an *Order Denying Respondent’s Motion to Dismiss and/or for Summary Decision and Order Reinstating Discovery* (“Nov. 22, 2016 Order”). That order stated in pertinent part, “I find that at this time, I cannot make a determination as to the precise nature of Respondent’s contracts with publicly-held companies because the record before me contains a number of disputed factual issues There is insufficient evidence in the record at this time to make a determination as to whether Complainant’s whistleblowing activities fall within the standard of ‘protected activity’ as set forth in the statute.” *Nov. 22, 2016 Order* at 12. That order also cancelled the January 10, 2017 hearing and directed the parties to propose new dates for the proceeding.

On January 26, 2017, I issued an order rescheduling the hearing for October 17, 2017. The deadline for filing dispositive motions was August 18, 2017. I subsequently granted a *Joint Motion for Extension of Time to File for Summary Decision* and extended the filing deadline to August 31, 2017.

On August 31, 2017, I received *Respondent’s Motion for Summary Decision* and a *Memorandum in Support of Respondent’s Motion for Summary Decision* (“Resp’t Mem.”). Complainant through counsel filed *Complainant Douglas Denny’s Opposition to Respondent’s Motion for Summary Decision* (“C. Reply”) on September 14, 2017. On September 18, 2017, Respondent filed a *Motion for Leave to Submit Reply Memorandum in Support of Respondent’s Motion for Summary Decision*, which I granted. The parties submitted, *inter alia*, a *Joint Stipulation of Agreed Facts* (“*Joint Stipulations*”) on September 26, 2017 in anticipation of a hearing. On October 2, 2017, I issued an order, over Complainant’s objections, continuing the hearing until I ruled on the motion for summary decision. On October 17, 2017, Respondent filed *Reply Memorandum in Support of Respondent’s Motion for Summary Decision*.

STANDARD OF REVIEW

Motions for summary decision before OALJ are governed by 29 C.F.R. § 18.72, which mirrors Federal Rule of Civil Procedure 56. OALJ’s regulation provides in pertinent part that

“[a] party may move for summary decision, identifying each claim or defense - or part of each claim or defense - on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a). A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable finder of fact could return a verdict for the nonmoving party. *Saporito v. Cent. Locating Servs., Ltd.*, No. 05-004, ALJ No. 2004-CAA-00013, slip op. at 4 (ARB Feb. 28, 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In other words, if the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular materials in the record. 29 C.F.R. § 18.72(c)(1)(i). When determining whether there is a genuine issue of material fact, the court must view all evidence and factual inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

FACTUAL BACKGROUND

Respondent MBDA, Inc. is a privately-held Delaware corporation with its headquarters in Arlington, Virginia. *Joint Stipulations* at 1. Respondent “is a wholly-owned subsidiary” of MBDA UK, Limited, which is also privately-held. *Id.* Neither Respondent nor MBDA UK, Limited has “securities in the hands of [the] public.” *Id.* It is undisputed that Respondent “has two contracts with The Boeing Corporation, which is publically traded (NYSE: BA).” *Id.* Under the first contract, Respondent produces and delivers Diamond Back Wing Assembly Kits, which attach to missiles to extend their range. *C. Reply* at 4; *Resp’t Mem.* at 6. Under the second contract, Boeing subcontracted with Respondent to purchase three Brimstone II missiles on behalf of the U.S. Navy as part of a feasibility study. *C. Reply* at 5; *Resp’t Mem.* at 7.

Complainant began working for Respondent in 2009 as its Vice President for Government Relations, though his title changed shortly thereafter to Vice President of Communications and Vice President for Small Weapons Programs. *Joint Stipulations* at 1-2. Complainant initially reported to Respondent’s then CEO, Jerry Agee. *C. Reply* at 3; *Resp’t Mem.* at 4. “In the spring of 2011, John Pranzatelli became Chief Operating Officer. Thereafter [sic], Denny reported to Pranzatelli.” *Joint Stipulations* at 2. Complainant’s title expanded to Vice President of Business Development, Government Relations and Communications in February 2012. *Id.*

The following incidents, roughly organized in chronological order, form the basis of Mr. Denny’s complaint.

SABER

Respondent developed the SABER munitions program to market to the United States Army. *C. Reply* at 5; Complainant Exhibit (“CX”) 17 at 4; *Resp’t Mem.* at 9, 23. It is undisputed that Respondent did not contract with a publicly-traded company to sell SABER, though Complainant alleges he “believed” Respondent “was having discussions with publically

[sic] traded entities . . . about selling SABER.”⁴ *C. Reply* at 5; *Resp’t Mem.* at 9; CX 2 at 134:12-17.

According to Complainant, “SABER had limited customer interest and was not a good investment.” *C. Reply* at 5. Beginning in 2011, Complainant states that he “repeatedly advised” Mr. Pranzatelli and Mr. Agee that SABER was not commercially viable. *Id.* According to Complainant, he attended a board meeting in July 2012 where Pranzatelli “misstated SABER’s performance” to the CEO of Respondent’s parent company, which was “spending millions per year funding [Respondent’s] engineering of SABER.” *Id.*

Respondent denies that Pranzatelli and Agee made misstatements. In the alternative, Respondent contends that “even if misstatements were made, Denny has provided no evidence that he complained about the alleged misstatements.” *Resp’t Mem.* at 24. Finally, Respondent argues that Complainant “admits . . . such misstatements did not affect any publicly traded company . . .” *Id.* at 9; Respondent Exhibit (“RX”) 1 at 137:3-11.

2013 Board Appointments

“In early 2013, Pranzatelli was selected as president of MBDA, Inc., and MBDA, Inc.’s Board of Directors appointed Pranzatelli as a member of the Board.” *Joint Stipulations* at 2. “In the fall of 2013, MBDA, Inc.’s Board of Directors appointed Denny as a member of the Board.” *Id.* CEO Agee retired later that year. “Effective November 1, 2013, Scott Webster became MBDA, Inc.’s interim CEO.” *Id.*

Redstone Arsenal Lease

The parties do not dispute that Respondent leased facilities at the Redstone Arsenal in Huntsville, Alabama from the United States Army. *Id.* The Army provided notice on September 10, 2014 that it was terminating Respondent’s lease. *Id.* Respondent vacated the Redstone Arsenal in April 2015. *Id.*

It is also undisputed that the United States Navy contracted with Boeing, and Boeing subcontracted with Respondent to purchase three Brimstone II missiles as part of a feasibility study to analyze whether the missiles could be integrated with the F/A-18E/F Super Hornet aircraft. *C. Reply* at 5; *Resp’t Mem.* at 7.

Complainant alleges that Respondent “had been representing that it was going to produce Brimstone at the Redstone Arsenal.” *C. Reply* at 5. According to Complainant, “[t]he key lynchpin [to Brimstone] was using the Redstone facility” because Respondent did not have another suitable facility within the United States for manufacturing explosive devices. *C. Reply* at 5-6; RX 2 at 88:19-20. Complainant alleges that Respondent’s ability to fulfill the Boeing subcontract could have been “negatively impact[ed]” when the Army terminated the Redstone lease. *C. Reply* at 6.

⁴ Complainant also “believed that Respondent[] had publically [sic] traded subcontractors for SABER development . . .” *C. Reply* at 5. Complainant has not put forth evidence that Respondent actually subcontracted with privately-held companies to develop SABER.

Complainant further alleges that Mr. Pranzatelli and Scott Webster, Respondent's then interim-CEO, "had been keeping the information about the termination of the Redstone Arsenal [lease] from" Respondent's board. *C. Reply* at 6.⁵ Complainant asserts:

In or about October 2014, Denny reported to [Respondent's board and senior executives of Respondent's parent company] that [Respondent] no longer had access to and no longer owned the Redstone Arsenal and could no longer carry out its plan to build Brimstone missile[s], which could negatively impact [Respondent's] ability to fulfill its contract with Boeing, and therefore Boeing's ability to fulfill its contract with the US government.

Id. at 5-6.⁶

Respondent alleges that it "did not have its contract with Boeing for the Brimstone II feasibility study (through the Navy's prime contract with Boeing) in place at the time the Redstone Arsenal lease was terminated." *Resp't Mem.* at 11; RX 1 at 156:14-157:8. According to Respondent, it entered into the contract with the Navy through Boeing in February 2015, several months after the Army provided notice of the lease termination. *Id.* at 25; RX 1 at 156:14-157:8. Respondent also alleges that unless the Redstone facility underwent significant modifications, it was not capable of manufacturing Brimstone II missiles at the time the lease was terminated, thus undermining Complainant's argument that the Redstone Arsenal was the "lynchpin" to manufacturing Brimstone II missiles. *Resp't Mem.* at 25. According to Respondent, it made arrangements to utilize another facility to manufacture the missiles after the Army provided notice of the lease termination. *Id.* Respondent asserts that the cancellation of the Redstone lease "had no impact" on the feasibility study because the Navy still purchased the Brimstone II missiles from Respondent (through Boeing) and there was no risk that the Navy would cease to purchase F-18 fighters from Boeing under the prime contract even if the Navy chose not to use the Brimstone II missiles. *Id.* at 25-26. Finally, Respondent disputes that Complainant raised the Redstone Arsenal lease termination during the October 2014 board meeting as Complainant's comments are not in the board's official minutes. *Id.* at 10; RX 1 at 96:3-97:13; RX 8.

Orbital ATK

The companies Roxell and ATK both produce motors that can power missiles. *C. Reply* at 6; *Resp't Mem.* at 14. The original Brimstone missile used a motor manufactured by ATK, while Brimstone II used a Roxell motor. *C. Reply* at 6; *Resp't Mem.* at 13. Complainant favored the Roxell motor because he believed it met the technological specifications for Brimstone II. *Id.*

⁵ Complainant's reply brief cites CX 2 at 82:8-84:2, 87:3-89:1, 149:8-150:6, in support of this assertion. However, Complainant did not include those pages of the deposition in the exhibit.

⁶ Complainant again cites CX 2 at 82:8-84:2, 87:3-89:1, 149:8-150:6 in support of his assertion but failed to include the relevant pages.

In April 2014, “ATK publicly announced its merger with Orbital Sciences to become Orbital ATK.” *Joint Stipulations* at 2. On the same day the Orbital ATK merger became public, Scott Webster, who at that point was Respondent’s interim-CEO and Chairman, “disclosed by email to MBDA’s Board that he would be on the Board of Orbital ATK.”⁷ *Id.*

Complainant alleges he became concerned about the potential of a conflict of interest shortly after the Orbital ATK merger was announced. Specifically, “[i]n the same April 29, 2014 email where Webster announced [the merger], Webster stated, ‘I’m excited about new partnering opportunities this could create between MBDA and Orbital ATK – two companies at strategic crossroads.’” *C. Reply* at 6-7; CX 22. Complainant interpreted this statement to mean that Webster “hoped that MBDA would partner with Orbital ATK for rocket motors.” *C. Reply* at 7.

John Pranzatelli became CEO of Respondent on November 1, 2014; Webster continued to serve as Chairman of Respondent’s Board. *Joint Stipulations* at 2. The Orbital ATK merger became effective on February 9, 2015. *Id.*

“On April 20, 2015, the U.S. Navy issued a request for information ([“RFI”]) for ‘an Air-to-Ground Missile (AGM) with a Multi-Mode Seeker for the F/A-18E/F Super Hornet aircraft.’” *Id.* at 3. According to Complainant, the RFI was for a “Brimstone-like missile and [was] colloquially [] referred to as the Brimstone RFI.” *C. Reply* at 7. Respondent does not dispute that Brimstone II broadly met the requirements of the RFI.

On April 21, 2015, an Orbital ATK vice president forwarded Pranzatelli (and copied Webster) a link to the RFI along with the following message:

I assume this is in regard to a DMB-like weapon and is related to the study contract you have with PMA-242, correct? If so and if you need any assistance, customer, intel, etc., let me know. I am still hopeful we can find a way to collaborate together at some point.

CX 23 at MBDA 000234. Pranzatelli forwarded this email to Complainant and board member Richard Cappo along with the comment, “ATK must be a little hungry.” *Id.* Complainant responded to Pranzatelli and Cappo with the following message:

I think Scott [Webster] may have a conflict of interest if he is our Chairman and also on the Board and with Orbital ATK. Can we have him present when we discuss our RFI response/Brimstone/partnering? Maybe he is excluded from that part of the board discussions? Just thinking out loud. I assume he has a large stock position with ATK Orbital? Obviously a delicate subject, but I don’t think you can compartment these things off and the emails below show how there could be a problem with having him in the room during our discussions.

Joint Stipulations at 3; CX 23 at MBDA 000233. Pranzatelli responded, “[g]ood point, thanks for the reminder. I know Scott is aware of & sensitive to the general topic. We will cross that bridge before too long.” *Resp’t Mem.* at 9; CX 23 at MBDA 000233.

⁷ Prior to the merger, Webster sat on the board of Orbital Sciences. *Id.*

Complainant alleges that Respondent “began having strategy meetings to consider replacing the Roxell rocket motor with an Orbital ATK rocket motor” in the spring of 2015. *C. Reply* at 8; CX 2 at 108:1-109:17. Complainant further alleges that he “verbally warned Pranzatelli that [he] planned on raising Webster’s conflict of interest at MBDA’s board meeting on May 7, 2015.” *C. Reply* at 9; CX 2 at 122:1-22. Respondent terminated Complainant on May 7, 2015 before the start of the board meeting. *Id.*; *Joint Stipulations* at 3.

Respondent relies on several facts to argue that it never considered replacing the Roxell motor in Brimstone II with an Orbital ATK motor. First, Respondent contends it “showed . . . no interest” in response to the April 21, 2015 email from Orbital ATK’s vice president. *Resp’t Mem.* at 13; RX 6 at 39:13-40:21. Second, Respondent asserts that the Orbital ATK motor failed to meet the specifications of the RFI, making it technologically impossible to switch the motors. *Resp’t Mem.* at 14; RX 6 at 29:14-17. Third, Respondent’s Vice President of Engineering and Program Development “was not aware of any program of record Orbital ATK had to develop a new motor.” *Resp’t Mem.* at 14; RX 6 at 29:13-17. Finally, Respondent contends that it treated the possibility of conflicts seriously as soon as Webster announced the merger and that Pranzatelli “did not think Denny did anything wrong by raising” Webster’s potential conflicts of interest. *Resp’t Mem.* at 14; RX 2 at 59:15-17.

Complainant’s Termination

When CEO Agee retired in 2013, Complainant and Pranzatelli both sought the CEO position. *C. Reply* at 3; *Resp’t Mem.* at 15. Complainant alleges that he and Pranzatelli “did not get along due to personality conflicts beginning in roughly 2013.” *C. Reply* at 3. Complainant further alleges that Pranzatelli made unfounded accusations against him during this period. *Id.* at 4; CX 14.

When Pranzatelli became CEO in November 2014, he “expected Denny to resign.” *Resp’t Mem.* at 15; RX 2 at 72:12-15.

“In March, 2015, Pranzatelli advised Denny that he was outsourcing MBDA, Inc.’s government relations function and removing that function from Denny’s job responsibilities.” *Joint Stipulations* at 2-3. “On May 7, 2015, MBDA, Inc. terminated Denny’s employment.” *Id.* at 3. Respondent held a board meeting that same day, shortly after Complainant’s termination. *C. Reply* at 12; *Resp’t Mem.* at 13.

Complainant asserts that his termination was tied directly to his alleged protected activity, especially his late April warning that he would raise Webster’s potential conflicts of interest at the May 7, 2015 board meeting. In support of this argument, Complainant asserts that the HR Director for Respondent’s parent company was “unaware of any issues that might warrant Denny’s termination” as of April 8, 2015. *C. Reply* at 9; CX 1 at 95:21-96:21. Complainant also asserts that “[a]round April 16, 2015, Pranzatelli had not decided to terminate Denny.” *C. Reply* at 10; CX 3 at 81:16-82:4. According to Complainant, he never received “any discipline, reprimand, [or] negative performance evaluation.” *C. Reply* at 11; CX 3 at 90:7-91:3. Complainant also alleges that Respondent “gave multiple differing explanations for” his termination. *C. Reply* at 11; CX 3 at 116:19-117:1. According to Complainant, these facts

establish that he was terminated for engaging in protected activity (principally, though not exclusively, for attempting to raise conflict of interest concerns with the board).

Finally, Complainant alleges that Pranzatelli discussed the Brimstone II rocket and Navy RFI at the May 7, 2015 board meeting while in the presence of Webster. *C. Reply* at 12-13; *CX* at 29.

Respondent contends that Pranzatelli “made the decision to terminate Denny on or about 10 days prior to Denny’s April 21, 2015 email.” *Resp’t Mem.* at 16; *RX 2* at 60:2-7; 80:9-81:5. According to Respondent:

Pranzatelli terminated Denny because he had become more difficult to manage and increasingly disgruntled, he was resistant to other people’s opinions, he had made negative comments about Pranzatelli, and objected to direction from Pranzatelli. Denny’s reaction to being divested of the government relations function was an important factor in the decision. Denny was unable to integrate other people’s opinions into decision-making, which had gone on for a long time and had become worse after Pranzatelli outsourced government relations.

Resp’t Mem. at 17 (internal citations omitted); *RX 2* at 60:13-19, 115:18-116:15, 121:4-22. Respondent also alleges that “[t]here was no discussion at the May 7, 2015 board meeting of any suppliers for motors for the Brimstone II missile.” *Resp’t Mem.* at 13; *RX 2* at 140:11-14.

CONTENTIONS OF THE PARTIES

Respondent’s Contentions

Respondent argues Mr. Denny’s complaint does not fall under the scope of § 1514A. Respondent notes that “[i]t is [u]ndisputed that MBDA is [n]ot a [p]ublicly [t]raded [c]ompany.” *Resp’t Mem.* at 19. Thus, any SOX jurisdiction must be derived from Respondent’s status as a contractor to a publicly-traded company. *Id.* at 20.

Respondent argues that privately-held contractors of publicly-held companies are subject to § 1514A only under narrow circumstances. *Id.* According to Respondent, the Supreme Court has held that § 1514A protects the employees of privately-held contractors only “for reporting alleged fraud by the publicly traded entity.” *Id.* (citing *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014))⁸ (emphasis in original). Respondent further argues that subsequent federal district court decisions have affirmed that § 1514A does not protect complaints “unrelated to shareholder fraud” made by the employees of private contractors. *Id.* at 21 (quoting *Lawson*, 134 S. Ct. at 1172-1173). Specifically, Respondent argues that “[a] private company’s fraudulent practices do NOT become subject to § 1514A merely because that company incidentally has a contract with a public company.” *Id.* at 22 (quoting *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015)).⁹ Rather, “the specific shareholder fraud contemplated by SOX is that in

⁸ For a full discussion of *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), see *Applicable Law, infra*.

⁹ For a full discussion of *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015), see *Applicable Law, infra*.

which a public company . . . makes *material misrepresentations about its financial picture in order to deceive its shareholders.*” *Id.* (quoting *Gibney v. Evolution Mktg. Research, LLC*, 25 F.Supp. 3d 741, 748 (E.D. Pa. 2014)¹⁰ (emphasis in original)).

Respondent argues that summary decision is appropriate because Complainant’s alleged protected activity is too attenuated from any potential harm to the shareholders of a public company.

Turning to Complainant’s specific allegations, Respondent contends that it is undisputed that no contract existed to sell SABER to a publicly-traded company. *Id.* at 23-24. While Respondent does not concede that Pranzatelli and Agee made misstatements about the profitability of SABER, it argues that Complainant “admits that any [alleged] misstatements did not affect any publicly-traded company in the United States.” *Id.* at 24; RX 1 at 137:3-11. Accordingly, Respondent contends that Complainant’s allegations regarding SABER fall outside the scope of SOX.

Respondent also argues that the Redstone Arsenal lease termination did not materially affect any publicly-traded company. *Resp’t Mem.* at 25. While Respondent does not dispute that it considered using the Redstone Arsenal to produce Brimstone II missiles for Boeing, it argues the lease termination had “no impact” on Boeing. *Id.* First, Respondent contends it is undisputed that Boeing signed a contract for Brimstone II missiles several months after the Army cancelled the lease. *Id.* Second, Respondent notes that it had secured an alternate facility “that could have been modified to manufacture Brimstone Missiles.” *Id.* Finally, Respondent argues that Denny himself admits that Boeing would have continued to receive business from the Navy even if Boeing decided not to use the Brimstone II missile, as the Navy had a contract with Boeing to buy F-18s and would continue to buy F-18s from Boeing even if they chose not to use the Brimstone II missiles. *Id.* at 26. On the basis of these facts, Respondent argues any alleged misstatements about the Redstone Arsenal lease did not harm Boeing’s shareholders.

Respondent also relies on case law to argue that § 1514A does not protect whistleblowing related to *potential* conflicts of interest. Instead, Respondent contends that SOX covers only employees who report concrete actions that result from actual conflicts of interest. *Id.* at 27-28. Respondent argues that no actual conflict of interest existed because Webster did not take affirmative steps in furtherance of Orbital ATK’s business interests. In particular, Respondent emphasizes that Webster did not chair a board meeting where “the subject of the RFI response/Brimstone/partnering was actually discussed.” *Id.* Respondent alternately argues that even if a conflict of interest existed, such a conflict would not “adversely affect the financial condition of a public company.” *Id.* at 28. For reasons discussed in the preceding paragraph, Respondent argues that Boeing was not at risk of losing business from the Navy, nor would its shareholders be harmed by any potential conflict of interest. *Id.* at 29. Respondent also reiterated that it was technologically impossible to use an Orbital ATK motor in the Brimstone II missile because the motor “did not comply with the technical requirements of the RFI.” *Id.* at 28. Finally, Respondent contends that Complainant’s allegations do not establish how any potential conflict of interest would amount to Boeing itself committing fraud. *Id.*

¹⁰ For a full discussion of *Gibney v. Evolution Mktg. Research, LLC*, 25 F.Supp. 3d 741, 748 (E.D. Pa. 2014), see *Applicable Law, infra*.

Complainant's Contentions

Complainant argues for a more expansive interpretation of *Lawson*. *C. Reply* at 28. Specifically, Complainant argues that § 1514A protects whistleblowing related to actions by private contractors that negatively affect the profit of a public company. *Id.* Complainant contends that *Gibney* and *Anthony* are “non-controlling” and “persuasive” authority that should not be followed because they improperly limit *Lawson*’s holding to cases arising out of the mutual fund industry. *Id.* at 28-29. Complainant further contends that even if *Gibney* and *Anthony* correctly relied on unique characteristics in the mutual fund industry to limit *Lawson*’s holding, similar characteristics are present in Respondent’s industry that warrant extension of § 1514A liability. *Id.* at 30.

With respect to SABER, Complainant argues that he “believed” Respondent “had publically [sic] traded subcontractors for SABER development [and that] MBDA was having discussions with publically [sic] traded entities, like Boeing, about selling SABER.” *Id.* at 35-36. Complainant argues that the alleged misstatements of Pranzatelli and Agee constituted “fraud that could have an impact on the publicly traded companies that Respondent[] had contracts with and did business with.” *Id.* at 35.

Complainant argues that when Pranzatelli and Webster allegedly hid the termination of the Redstone Arsenal lease from the Board, they perpetrated a fraud that threatened to harm Boeing. *Id.* at 36. Specifically, Complainant argues that Respondent had been representing to Boeing throughout the negotiation process that the missiles would be produced at Redstone. RX 1 at 156:19-21. According to Complainant, the lease termination “could negatively impact MBDA’s responsibility to fulfill its contract with Boeing,” thus causing harm to Boeing’s shareholders. *C. Reply* at 36.

Complainant argues the alleged Orbital ATK conflict of interest similarly could cause harm to Boeing and its shareholders:

Because of the insular nature of . . . internal MBDA discussions, Boeing would have no way of knowing, absent complaints from MBDA employees, like Denny, that the Brimstone II missile it contracted to sell to the United States Navy was fitted with a certain brand of rocket motors by its subcontractor MBDA not because the rocket motors were the best and most suitable, but rather because MBDA colluded with Orbital ATK to place rocket motors on that would allow Webster to profit the most due to his conflict of interest at the expense of Boeing’s shareholders who undoubtedly would want to know if the missiles they are selling to the United States are subpar.

Id. at 31.

Complainant also argues that SOX jurisdiction is appropriate because other subsidiaries of Respondent’s parent company have contracts with publicly-held companies and operate along with Respondent as a “single integrated enterprise.” *Id.* at 31.

APPLICABLE LAW

The relevant section of the statute provides:

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

18 U.S.C. § 1514A(a) (emphasis added).

The Supreme Court had occasion to review this provision in *Lawson*. In *Lawson*, a publicly-held mutual fund had no employees of its own and instead outsourced its day-to-day operations to privately-held contractors. Employees of two contractors brought SOX claims against their respective employers alleging that the companies engaged in unlawful retaliation. Petitioners argued SOX prohibited privately-held contractors from retaliating against their own employees. Respondents argued SOX only prohibited private contractors from retaliating against the employees of publicly-held companies.

The Supreme Court held that the plain language of § 1514A “shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.” *Lawson*, 134 S. Ct. at 1161. The Court, however, left one important question unanswered: what type of shareholder harm must the employee of a private contractor allege in order to state a claim under SOX?

The *Lawson* plurality declined to articulate an outer-bound for § 1514A because it determined the allegations at issue in the case “fall squarely within Congress’ aim in enacting § 1514A.” *Id.* at 1173. Of particular note, one petitioner “raised concerns about certain cost accounting methodologies, believing that they overstated expenses associated with operating the mutual funds.” *Id.* at 1164. The plurality agreed that such a practice “directly implicates the funds’ shareholders” because “[b]y inflating its expenses, and thus understating its profits [the private contractor] could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds.” *Id.* at 1173 (quoting Brief for Petitioners at 3). It was this particular theory of “pass-through” harm to shareholders that a federal district court limited solely to the realm of the mutual fund industry. *See Gibney*, 25 F.Supp. 3d 741.

The plaintiff in *Gibney* reported that his privately-held employer fraudulently billed a publicly-held contracting client. *Gibney* at 742. The court held that the particular misconduct

alleged by the plaintiff did not cause the type of shareholder harm SOX was designed to protect against:

Plaintiff has not alleged that he blew the whistle on fraud committed *by* [the public company] (either acting on its own or acting through contractors like [the private contractor]). Rather, Plaintiff is alleging that [the private contractor] committed fraud *against* [the public company]. Thus, based on Plaintiff's allegations, [the public company] is the victim of fraud rather than its perpetrator. Nothing in the text of § 1514A or the *Lawson* decision suggests that SOX was intended to encompass *every* situation in which any party takes an action that has some attenuated, negative effect on the revenue of a publicly-traded company, and by extension decreases the value of a shareholder's investment.

Id. at 747-748 (emphasis in original).

The court acknowledged that parallels existed between the overbilling at issue in *Gibney* and the inflated expenses at issue in *Lawson*. *Id.* at 747 (“[the private company] would effectively be double billing [its publicly-held client]. These inflated costs would ultimately be paid by [the public company’s] shareholders, as in [*Lawson*]”). The court nevertheless held that so-called “pass-through” harm to shareholders violates § 1514A only within the “peculiar structure” of the mutual fund industry because “all of the potential whistleblowers” are employed by a private company. *Id.*; *see also Id.* at 748 (“[a]ccordingly, the Court does not believe SOX was intended to reach the type of scenario at issue here: where there are allegations of fraudulent conduct between two companies who are party to a contract, and one of those companies just happens to be publicly-held”). According to *Gibney*, “the specific shareholder fraud contemplated by SOX is that in which a public company — either acting on its own or acting through its contractors — makes material misrepresentations about its financial picture in order to deceive its shareholders.” *Id.* at 748.

Another important limitation was articulated in *Anthony*. The plaintiff in that case worked for the privately-held contractor of a publicly-held mutual fund. She alleged discrimination after reporting what she believed to be violations of SEC rules committed by representatives of her employer. In dismissing the plaintiff's case, the *Anthony* court noted:

Plaintiff's allegations appear superficially similar to the *Lawson* plaintiffs' allegations insofar as they also involve the unique structure of the mutual fund industry. However, unlike the *Lawson* plaintiffs, who were providing advisory and management services directly to mutual funds, Plaintiff nowhere alleges that she was providing services to the [public company].

Anthony, 130 F. Supp. 3d at 652. The *Anthony* court held § 1514A is restricted “to situations where a contractor employee is functionally acting as an employee of a public company, and in that capacity, is a witness to fraud by the public company.” *Id.* at 652.

Subsequent decisions have followed *Gibney* and *Anthony*. *See Limbu v. UST Glob., Inc.*, No. CV 16-8499 DMG (JPRx), 2017 U.S. Dist. LEXIS 101382, at *9 (C.D. Cal. 2017) (“To

qualify as a contractor under the Act's whistleblower protection provision, the contractor must provide services to the publicly-traded company, and the unlawful conduct must occur in the course of such provision of services"); *Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 U.S. Dist. LEXIS 40165, at *10-11 (N.D. Tex. Mar. 21, 2017) (applying the standard articulated in *Gibney*); *Tellez v. OTG Interactive, LLC*, No. 15 CV 8984-LTS, 2016 U.S. Dist. LEXIS 131463, at *9 (S.D.N.Y. Sep. 26, 2016) (applying the standard articulated in *Anthony*).

A single case appears to allow for pass-through harm to shareholders, but the court held that any such allegation must be "objectively reasonable." *Westawski v. Merck & Co.*, 215 F. Supp. 3d 412, 429 (E.D. Pa. 2016) (dismissing case pursuant to motion for summary judgment).

DISCUSSION

SABER

Complainant has failed to establish that a material factual dispute exists surrounding SABER. In his deposition, Complainant admits that Respondent did not contract with a publicly-held company to sell SABER. CX 2 at 134:15-17 ("Q: Did [Respondent] have a contract with any publicly-traded company to purchase SABER?; A: No"). At most, Complainant alleges that he "believed" Respondent had publicly-traded subcontractors for developing SABER and that Respondent engaged in discussions with publicly-traded companies about selling SABER. *C. Reply* at 35-36.

Complainant has not put forth any evidence that Respondent actually hired publicly-traded subcontractors for SABER development. Moreover, Complainant has not articulated any particular harm befallen on the shareholders of these alleged subcontractors. Complainant's principal concern with SABER was that Respondent continued to invest in a program with no customer interest. *C. Reply* at 5. Under this rationale, Respondent's alleged subcontractors would profit from Respondent's ill-advised decision to continue funding SABER. One company profiting from the poor decisions of another is not the danger § 1514A was designed to protect against.

Likewise, mere discussions with publicly-held companies are not enough to establish jurisdiction under SOX. The plain language of the statute provides that "contractors" of publicly-held companies are subject to liability. In the absence of a contract, Respondent cannot be a contractor. While Respondent had contracts with Boeing at the time it allegedly engaged in less than honest discussions about selling SABER, SOX only covers fraud that arises within the context of performing contractual obligations. *Reyher v. Thornton*, No. 16-1757, 2017 U.S. Dist. LEXIS 104070, at *17-18 (E.D. Pa. July 6, 2017) ("A purported whistleblower employed by a private company cannot invoke the protections of section 1514A simply because her employer happens to contract with public companies on matters unrelated to the alleged whistleblowing"). The potential sale of SABER occurred outside the scope of Respondent's contracts with publicly-held companies. As a matter of law, Complainant's SABER allegations are not covered by § 1514A.

Redstone Arsenal Lease

Construing the facts of the Redstone Arsenal lease in the light most favorable to Complainant results in the following scenario: Respondent represented to Boeing during contract negotiations that three Brimstone II missiles would be built at the Redstone Arsenal facility. Redstone was the only U.S. based facility on which Respondent could produce the missiles. When the lease was terminated, Pranzatelli and Webster hid that information from Respondent's Board. The lease termination "could negatively impact MBDA's responsibility to fulfill its contract with Boeing," though Boeing ultimately signed the contract months after the lease was terminated. *C. Reply* at 36.

Under § 1514A(a)(1), an employee must report conduct he "reasonably believes constitutes a violation of section 1341[mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Complainant has not alleged that he reasonably believed one of these enumerated crimes had occurred. Rather, he has alleged that the lease termination could result in Respondent not being able to perform its contractual obligations. Mere contract violations are not sufficient to establish jurisdiction under SOX. *Accord Tellez*, No. 15 CV 8984-LTS, 2016 U.S. Dist. LEXIS 131463 at *9 (denying defendant's motion to dismiss where plaintiff alleged not just that defendant breached a contract, but also that it committed wire fraud in the course of breaching the contract). As a matter of law, Complainant's Redstone Arsenal allegations are not covered by § 1514A.

Orbital ATK

As a threshold matter, my review of Complainant's Orbital ATK allegations is limited to the effect a conflict of interest would have on Respondent's contract to produce three Brimstone II missiles for Boeing. Respondent did not have a contract in place with a publicly-traded company to bid on the Navy's RFI at the time Complainant allegedly engaged in protected activity. Accordingly, any allegation that Respondent was changing the Brimstone II motor to bid on the RFI falls outside the scope of § 1514A. Furthermore, Complainant does not allege that Respondent violated mail fraud, wire fraud, bank fraud, securities fraud, or any rule or regulation of the Securities and Exchange Commission in connection with its Orbital ATK dealings. Therefore, by the terms of § 1514A(a)(1), my review is further limited to the question of whether Complainant reasonably believed fraud had been perpetrated against Boeing's shareholders in connection with the feasibility study contract.

Complainant's Orbital ATK allegations fail for several reasons. First, it is not possible for a reasonable fact finder to conclude that Respondent was conspiring with Orbital ATK to replace Brimstone II's motor. Second, even if Complainant could establish the necessary factual predicate for his case, his complaint relies on a theory of pass-through harm that most federal courts have concluded does not apply outside the context of the mutual fund industry. Finally, Complainant's allegations of non-monetary harm to Boeing's shareholders do not, as a matter of law, amount to violations of § 1514A(a)(1). I will elaborate on each of these points in turn.

According to Complainant, Respondent engaged in fraud by attempting to replace Brimstone II's Roxell motor with an Orbital ATK motor. However, even when construing all

inferences in the light most favorable to Complainant, a reasonable finder of fact could not conclude that Respondent was seeking to change Brimstone II's motor. Complainant cites the following comment from Webster's email announcing the Orbital ATK merger as evidence that Webster intended to leverage his position as Respondent's Chairman to improperly promote Orbital ATK's motors: "I'm excited about new partnering opportunities this could create between MBDA and Orbital ATK – two companies at strategic crossroads." CX 22. However, in that same email, Webster stated:

Of course, we will carefully examine any areas that might present a conflict-of-interest potential for me. These appear minor (both to Orbital and outside counsel), not immediate (the deal would close and become effective no sooner than October), and, to the extent mitigation may be required, manageable.

Id. Complainant also cites the April 21, 2015 email from Orbital ATK's vice president to Pranzatelli to support his allegations. However, the email appears to be related to the Navy RFI, not Respondent's existing contract with Boeing. Moreover, Pranzatelli openly acknowledged the need to protect against any conflicts of interest that might arise from Webster's involvement: "[g]ood point, thanks for the reminder. I know Scott is aware of & sensitive to the general topic. We will cross that bridge before too long." CX 23 at MBDA 000233. Finally, Complainant has not put forth any evidence other than his own assertions that Respondent held meetings about replacing the Roxell motor with an Orbital ATK motor. In short, there is no evidence Respondent contemplated using an Orbital ATK motor to fulfill the Boeing contract, even when construing all inferences in the light most favorable to Complainant.

Assuming *arguendo* that Complainant's allegations are true and Respondent was actively seeking to replace Brimstone II's motor, Complainant still cannot establish as a matter of law that § 1514A affords relief. Complainant's case is based on the "pass-through" theory of harm discussed in *Gibney* in which a publicly-held company is "the victim of fraud rather than its perpetrator." *Gibney* 25 F.Supp. 3d at 747-748. Specifically, Complainant alleges that Boeing might unwittingly provide the U.S. Navy with subpar missiles as a direct result of Webster's conflict of interest, thus exposing Boeing to monetary harm. Federal district courts have overwhelmingly held that § 1514A is not designed to protect against pass-through harm outside the context of the mutual fund industry. *See id.*; *see also Reyher*, No. 16-1757, 2017 U.S. Dist. LEXIS 104070 at *17-18; *Brown*, No. 4:16-CV-884-A, 2017 U.S. Dist. LEXIS 40165, at *8-9. I find these decisions persuasive in this matter.

Complainant compares the defense industry to the mutual fund industry in an attempt to argue that pass-through harm should be recognized in the instant case. However, these attempts are unpersuasive because the defining feature of the mutual fund industry that allows for protection against pass-through harm is that publicly-held mutual funds often have no employees of their own and instead rely entirely on private contractors. *Id.* *Gibney* 25 F.Supp. 3d at 747. This particular circumstance is not present in the instant case. Therefore, Complainant's allegations of pass-through harm to Boeing's shareholders do not, as a matter of law, amount to a § 1514A violation.

Finally, Complainant alleges that Respondent's actions could result in non-monetary harm to Boeing — namely that Boeing would be an unwitting partner in defrauding the U.S. Navy. However, in an analogous case, a court held that such harm was too remote to be covered by § 1514A. *Brown*, No. 4:16-CV-884-A, 2017 U.S. Dist. LEXIS 40165 at *10-11. The defendant in that case was a private company that serviced mortgages on behalf of public companies. The plaintiff alleged that the defendant engaged in a series of fraudulent actions in the course of fulfilling its contractual duties. The plaintiff further alleged that by failing to disclose those fraudulent actions to the public companies, the defendant “caused those public companies to materially misstate their financial statements” and defraud “government entities.” *Id.* at *10. The court held that the plaintiff’s “allegations of fraud [were] too far removed from potentially harming the shareholders of a public company to be covered under § 1514A . . . Expanding whistleblower protection as plaintiff requests would transform SOX into a general anti-retaliation statute, which it is not.” *Id.* at *10-11. (internal citations omitted). Similarly, Complainant’s arguments that Respondent caused Boeing to defraud the federal government are too attenuated from shareholder harm to fall under the scope of § 1514A.

Respondent’s Parent Company and Affiliates

Complainant also argues SOX applies because Respondent’s parent company and the parent company’s subsidiaries have contracts with publicly-held companies and operate as a single integrated enterprise. Specifically, Complainant alleges several affiliates held contracts with Lockheed Martin and that an Italian affiliate held a contract with ATK and later Orbital ATK. However, “[a] purported whistleblower employed by a private company cannot invoke the protections of section 1514A simply because her employer happens to contract with public companies on matters unrelated to the alleged whistleblowing.” *Reyher*, No. 16-1757, 2017 U.S. Dist. LEXIS 104070, at *17-18; *see also See Limbu*, No. CV 16-8499 DMG (JPRx), 2017 U.S. Dist. LEXIS 101382, at *9 (C.D. Cal. 2017) (“To qualify as a contractor under the Act’s whistleblower protection provision, the contractor must provide services to the publicly-traded company, and the unlawful conduct must occur in the course of such provision of services.”). Complainant has not explained how any of his allegations relate to the provision of services under the contracts alleged to belong to Respondent’s affiliates. Thus, even if Respondent and these associated companies constituted a single integrated enterprise, there still would be no basis for Complainant to bring an action under § 1514A.

ORDER

For the forgoing reasons, Respondent’s motion for summary decision is **GRANTED**. This matter is **DISMISSED**.

SO ORDERED.

LARRY S. MERCK
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).