



Issue Date: 30 April 2018

CASE NO.: 2017-SOX-00032

In the Matter of

CHRISTOPHER LEWIS,
Complainant,

v.

WELLS FARGO BANK, N.A. AND
ROBERT ROSZKOS,
Respondents.

**DECISION AND ORDER APPROVING
REVISED SETTLEMENT AGREEMENT
AND
DENYING MOTION TO SEAL**

This case involves the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the “Sarbanes-Oxley Act” or “SOX”) and the corresponding regulations of the Secretary of Labor published at 29 C.F.R. Part 1980. Attorney David deRubertis represents Complainant. Attorneys Michele Maryoff and Ashley Allyn represent Respondents.

On April 10, 2018, the parties submitted a Joint Motion for Approval of Confidential Settlement Agreement and to Dismiss Action with Prejudice along with a redacted copy of the executed Settlement Agreement. The parties requested approval of the Settlement Agreement in accordance with 29 C.F.R. § 1980.111(d)(2). Respondents also filed an Unopposed Motion to Seal Confidential Settlement Agreement, along with an unredacted copy of the Settlement Agreement. After my law clerk contacted the parties regarding paragraph 7 of the proposed Settlement Agreement, on April 27, 2018, the parties filed an addendum that revised paragraph 7 of the Settlement Agreement, narrowing the scope of persons and entities that Complainant was agreeing to release from liability. This order refers to the Revised Settlement Agreement, which consists of the Settlement Agreement submitted on April 10, 2018, with paragraph 7 revised per the addendum submitted on April 27, 2018, which is incorporated into the final agreement.

Approval of Revised Settlement Agreement

In accordance with 29 C.F.R. § 1980.111(d)(2), I reviewed the unredacted proposed Settlement Agreement that was attached to the parties’ Motion to Seal, along with the addendum

revising paragraph 7 (combined, “Revised Settlement Agreement”). The parties’ proposed Revised Settlement Agreement resolves all issues in this matter. The Revised Settlement Agreement is appropriate in form and substance and details the respective duties and obligations of the parties pursuant to the agreement.

The Revised Settlement Agreement includes a general release of liability which resolves matters and potential matters under a multitude of state and federal laws other than SOX. My authority over settlement agreements is limited to the statutes that are within my jurisdiction, and I have restricted my review of the Revised Settlement Agreement to ascertaining whether its terms fairly, adequately, and reasonably settle this SOX case. *See Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-7, slip op. at 3 (ARB Jan. 31, 2011). Accordingly, my approval extends only to the terms of the Revised Settlement Agreement pertaining to Complainant’s SOX case.

Paragraph 18 contains a choice of law provision naming the State of California as the law which shall govern interpretation of the Settlement Agreement, without regard to the conflict of law provisions thereof. The choice of law provision shall be construed as not limiting the authority of the Secretary of Labor or any federal court. *See Phillips v. Citizens Ass’n for Sound Energy*, 1991-ERA-00025, slip op. at 2 (Sec’y Nov. 4, 1991); *Anderson*, ARB No. 10-070, slip op. at 4.

As construed, and after carefully considering the terms of the Revised Settlement Agreement, I find that the terms and conditions appear to be fair, adequate, and reasonable. *See Carciro v. Sodexo Alliance, S.A.*, ARB No. 09-067, ALJ No. 2008-SOX-012, slip op. at 2 (ARB Sept. 30, 2010); 29 C.F.R. § 1980.111(d)(2). I further find that the Revised Settlement Agreement is not contrary to the public interest. The terms and conditions of the Revised Settlement Agreement are incorporated by reference into this Decision and Order and are hereby adopted and approved.

Motion to Seal

Respondent argues that the agreement should be placed under seal because: 1) the parties have agreed keep the agreement confidential and private; 2) making the settlement terms public could harm Wells Fargo by disclosing the terms under which it is willing to settle certain claims; 3) keeping the agreement confidential protects Complainant’s personal and private information; 4) disclosure would discourage settlement; and 5) the information Respondents would redact is exempt from disclosure under the Freedom of Information Act (“FOIA”) under the “trade secrets and commercial or financial information” exemption.

The files maintained by this Office are subject to disclosure under the provisions of FOIA, unless an exemption applies. 5 U.S.C. § 552; *Johnson v. U.S. Bancorp*, ARB No. 13-014, 13-046, ALJ No. 2010-SOX-00037, slip op. at 3 (ARB July 22, 2013); *see also Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 12 (ARB June 19, 2008) (noting that there is “no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to [FOIA] unless the record qualifies for an exemption to such disclosure.”). Exemption 4 covers two categories of information: (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. 5 U.S.C. § 552(b)(4). Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The Department of Labor has regulations that govern the FOIA process, and exemptions are determined at the time of the request, not at the time of the filing of

the agreement. 29 C.F.R. Part 70; *Johnson*, ARB No. 13-014, slip op. at 2. Therefore, since no FOIA request has yet been made, “it would be premature to determine whether any of the exemptions in the FOIA would be applicable.” *McDowell v. Doyon Drilling Servs., Ltd.*, ARB No. 97-053, ALJ NO. 96-TSC-00008, slip op. at 3 (ARB May 19, 1997); *see also Bettner v. Crete Carrier Corp.*, ARB No. 07-093, ALJ No. 2007-STA-033, slip op. at 3, n.11 (ARB Sept. 27, 2007) (ALJ could not decide that settlement contained commercial or financial information that fell within the FOIA’s trade secrets exemption from disclosure because no FOIA request had yet been filed). Further, “no assurances of confidentiality can be given in advance of an FOIA request because an agency promise of confidentiality [cannot] in and of itself defeat the right of disclosure.” *Jordan*, ARB No. 06-105, slip op. at 12 (citation omitted).

Respondents’ arguments in its Motion to Seal are more properly considered as arguments against disclosure under FOIA. Because no request has yet been made for disclosure under FOIA, the Motion to Seal is denied as premature.

However, noting that Respondents objects to disclosure, the Revised Settlement Agreement, the original proposed Settlement Agreement, and Respondents’ proposed redacted Settlement Agreement are hereby ordered to be placed in a sealed and separate envelope, clearly marked with notice that the parties object to disclosure and seek the procedures of 29 C.F.R. § 70.26 prior to any release of information. This procedure is in accordance with the precedent of the Administrative Review Board. *See Davis v. Ecoscape Solutions Group*, ARB No. 08-098, ALJ NO. 2008-STA-048, slip op. at 2-3 (ARB Jul. 31, 2008).

ORDER

1. The Revised Settlement Agreement is approved.
2. The following notice will be place prominently in the case file:

NOTICE TO THE DOL FOIA OFFICE: In the event that this settlement agreement is the subject of a FOIA request, Respondent asserts that the settlement agreement is exempt from production under FOIA Exemption 4. Respondent requests notice and an opportunity to object to any FOIA production of the settlement agreement. *See* 29 C.F.R. § 70.26

3. This matter is dismissed with prejudice. All dates are vacated.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge