



**Issue Date: 16 January 2020**

Case No.: 2019-SOX-00040

In the Matter of

**COLLEEN A. GRAHAM**  
Complainant

v.

**CREDIT SUISSE SECURITIES, et al.**  
Employer

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTIONS  
FOR DISMISSAL AND DENYING RESPONDENTS' MOTIONS FOR SUMMARY  
DECISION**

This matter arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud, Accountability Act of 2002, Title VII of the Sarbanes Oxley Act of 2002 (hereinafter, "SOX" or "the Act"), 18 U.S.C. § 1514A.

**I. BACKGROUND**

On July 30, 2019, this office received from Respondent Palantir Technology Inc. ("Palantir") a Motion for a Stay of the Case and for Dismissal or Summary Decision. On July 31, 2019, this office received from Respondent Signac LLC ("Signac") a Motion for a Stay of the Case and for Dismissal or Summary Decision. On July 31, 2019, this office also received from Respondents Credit Suisse Securities (USA) LLC and Credit Suisse First Boston Next Fund, Inc. (hereinafter the "Credit Suisse Respondents," "Credit Suisse" and "CSFB Next") a Motion to Stay and Motion to Dismiss.

On August 19, 2019, Complainant filed a Response to all Motions listed above.<sup>1</sup>

The undersigned initially scheduled the hearing in this matter to commence on December 16, 2019, in New York, New York. On September 12, 2019, the undersigned issued an Order granting the parties' joint motions to stay pending her decision on the Motions for Summary Decision and cancelled the December 16, 2019 hearing.

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<sup>1</sup> On August 8, 2019, Complainant submitted a Motion of Time to File a Response. The undersigned granted Complainant's request for an extension on August 14, 2019, extending the deadline for Complainant's response until August 19, 2019.

On August 27, 2019, the undersigned received Respondent Credit Suisse's Application for Leave to File Reply in Support of its Motion to Dismiss. On August 28, 2019, the undersigned received Complainant's Opposition to the Application. In a September 12, 2019 Order, the undersigned denied Respondent Credit Suisse's Application for Leave to File Reply in Support of its Motion to Dismiss.

## II. RESPONDENTS' MOTIONS AND COMPLAINANT'S RESPONSE

Respondent Palantir filed a Motion for Dismissal or Summary Decision.<sup>2</sup> Palantir, in arguing for its dismissal from the claim, asserted that the anti-retaliation provisions in Sarbanes-Oxley do not cover it because it is not a public company and Complainant's allegations do not arise out of work Palantir performed for a public company, including any subsidiary or affiliate of a public company. Palantir also argued, in the alternative, for summary decision in its favor.

The Credit Suisse Respondents filed a Motion to Dismiss and a Memorandum of Law in Support of their Motion to Dismiss. In their Memorandum of Law, the Credit Suisse Respondents argued that Complainant's complaints must be dismissed as a matter of law for three reasons: 1) neither of the Credit Suisse Respondents were Complainant's "employer" when Respondents allegedly retaliated against Complainant, 2) Complainant has failed to allege that Respondents engaged in any conduct that she reasonably believed constituted a violation of one of the enumerated fraud or securities laws set forth in 18 U.S.C. § 1514(A)(1), and 3) Complainant did not allege that she reported Respondents' purportedly illegal conduct to the appropriate individuals or entities required to state a claim under SOX.

Respondent Signac filed a Motion for Dismissal or Summary Decision. Signac joined in the Credit Suisse Respondents' Motion to Dismiss the case on the latter two independent reasons for dismissal.

Complainant filed an Opposition to Respondents' Motion for Dismissal or for Summary Decision. Complainant opposed the Respondents' Motions on the following grounds: 1) the Respondents incorrectly argue that SOX claims can only be stated against employers, 2) Complainant properly alleges her *prima facie* case, 3) the Complaint alleges that Complainant provided information to an appropriate party, 4) the Complaint alleges that Palantir is a covered entity under the statute, and 5) the Respondents had distorted interpretations of the Complaint.

## III. SARBANES-OXLEY ACT

"Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to detect and punish corporate fraud." Griffo v. Book Dog Books, LLC, ARB No. 2018-0029, ALJ No. 2016-SOX-00041, slip op. at 3 (May 2, 2019). Section 806, the employee-protection provision of the SOX, generally prohibits covered publicly traded companies from retaliating against

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<sup>2</sup> Respondent Palantir, as well as the other Respondents, also had Motions to Stay included as part of these filings. The undersigned has addressed these Motions already in her September 19, 2019 Order. She will thus omit further reference to the Motions to Stay.

employees because they provide information or assist in investigations related to the categories listed in the SOX whistleblower statute.<sup>3</sup>

[T]o prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action.

Sylvester v. Parexel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039 and 045, 2011 DOL Ad. Rev. Bd. LEXIS 47, 2011 WL 2165854, PDF at 9-10 (ARB May 25, 2011) (*en banc*); see Perez v. Citigroup, Inc., ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 4 (ARB Sept. 30, 2019) (citing Prioleau v. Sikorsky Aircraft Corp., ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011)). However, even “[i]f the employee proves these elements, the employer may avoid liability if it can prove ‘by clear and convincing evidence’ that it ‘would have taken the same unfavorable personnel action in the absence of the [protected] behavior.’” Poli v. Jacobs Engineering Group, Inc., ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012)). The legal burdens of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 apply in deciding SOX complaints.

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<sup>3</sup> Perez v. Citigroup, Inc., ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 4 (ARB Sept. 30, 2019); Griffo, ARB No. 2018-0029, slip op. at 3. 18 U.S.C. § 1514A provides:

(a) Whistleblower Protection for Employees of Publicly Traded Companies. -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-

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV 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, when the information or assistance is provided to or the investigation is conducted by-

(A) a Federal regulatory or law enforcement agency;

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

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

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

#### IV. DISCUSSION

##### A. Are Respondents Palantir, Credit Suisse, and CSFB Next Entitled to Dismissal From the Claim?

To qualify as a covered employer subject to suit under SOX, a company must either: (i) have “a class of securities registered under section 12 of the Securities Exchange Act of 1934”; (ii) be “required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company”; (iii) be a “nationally recognized statistical rating organization”; or (iv) be an “officer, employee, contractor, subcontractor or agent of [a publicly traded company] or nationally recognized statistical organization.” 18 U.S.C. § 1514A.

To state a whistleblower retaliation claim under SOX, complainants must allege “an employer-employee relationship between the retaliator and the whistleblower,” as all of “Section 1514A’s enforcement procedures and remedies contemplate that the whistleblower is an employee of the retaliator.” Lawson v. FMR LLC, 571 U.S. 429, 442–43 (2014); see also Turin v. AmTrust, ARB No. 17-004, OALJ No. 2010-SOX-018, 2017 WL 2222627, at \*3 (ARB Apr. 20, 2017) (“[W]hether the complainant is an employee...lies at the very heart of a SOX complaint.”)

Complainant, in her Complaint, stated that she served as Signac’s Chief Supervisory Officer and a member of its Board of Managers from “on or about February 29, 2016 to on or about July 27, 2017.” (Complaint at 3.) She also stated that, prior to her employment with Signac, Credit Suisse employed her “for more than twenty years serving in a number of senior level management positions, including heading Compliance for the Americas and acting as the Chief Control Officer of its investment bank.” (Id.) Respondents do not dispute Complainant’s employment with Signac, nor do they dispute her prior employment with Credit Suisse.

##### 1. Has Credit Suisse Established that it is Not a Covered Employer?

In her Complaint, Complainant alleges that she remains an “employee” of Credit Suisse for the purposes of SOX “because the relevant regulations define an ‘employee’ as ‘an individual presently or formerly working for a covered person,’” citing to 29 C.F.R. § 1980.101 (f) and (g). (Complaint at 4.) The Credit Suisse Respondents, however, assert that “the plain meaning of that language is that it applies to an employee who files as a SOX claim against her **last** employer **after** the employee has been terminated.” (Emphasis in original.) (Credit Suisse Motion at 7.)

18 U.S.C. § 1514A is ambiguous on its face as to whether “former employees” are included within the definition of “employees” as used therein. The implementing regulations, meanwhile, specifically define “employee” to include “an individual presently or formerly working for a covered person.” 29 C.F.R. § 1980.101.

The Board has recognized that both pre-discharge filings and post-discharge filings can constitute SOX-protected activity. See Levi v. Anheuser Busch Inbev, 2014 WL 4050091, at \*2, 2014 DOLSOX LEXIS 42, at \*5 (ARB July 24, 2014) (“[Complainant’s] *post-discharge filings* with OSHA of the whistleblower complaints constitute SOX-protected activity...The ALJ erred

in limiting his consideration of whistleblower activity only to [complainant's] actions occurring prior to his discharge from employment.”) (Emphasis in original). The Board, however, has reinforced that, relating to the requirement that a complainant suffer an “unfavorable personnel action,” “with the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, while the complainant is an employee of the respondent.” Harvey v. Home Depot, Inc., 2004 WL 5840204, at \*3–4, 2004 DOLSOX Lexis 47, at \*1–11 (ALJ May 28, 2004); see also Pittman v. Siemens AG, 2007 DOLSOX LEXIS 56, at \*16–17 (ALJ July 26, 2007) (“Since Complainant was not an employee at the time of the alleged adverse action, this claim is not covered under SOX.”)

All of the adverse actions that Complainant has alleged took place after her employment had ceased with Credit Suisse and she had begun working for Signac. (See Complaint.) As such, even if assumed true, most of Complainant’s assertions in her complaint could not constitute “adverse personnel actions” under SOX, as Credit Suisse did not employ her at the time of the instances of retaliation. She did allege in her complaint, however, that Credit Suisse “interfered with a significant employment opportunity being extended to Graham by the financial institution.” (Complaint at 10.) Following the Board’s exception for “blacklisting or other active interference with subsequent employment,” there still remains a factual question as to whether Credit Suisse is a covered employer in this matter under SOX.

2. Have Palantir and CSFB Next Established That They Are Not Covered Employers?

Both Complainant and Employer Palantir, in their respective Response and Motion, focus on whether or not Palantir meets any of the qualifications to be a covered employer under 18 U.S.C. § 1514A that would subject Palantir to Sarbanes-Oxley’s Anti-Retaliation provisions. This, however, is not the heart of the issue. First, Palantir, as an alleged retaliator, must have had an employer-employee relationship with Complainant to be a “covered employer” in the claim. Alternatively stated, before evaluating whether Palantir is a “covered employer” under SOX, the undersigned must first determine whether Palantir employed Complainant. The same inquiry is necessary for CSFB Next. Complainant has not alleged that she ever had a direct employer-employee relationship with Palantir or CSFB Next. Rather, in her Complaint, Complainant lists CSFB Next and Palantir as the financial sponsors and principal equity stakeholders of Signac, wherein each owned fifty percent of Signac voting rights. The Complaint asserts that Palantir and CSFB Next are “covered persons” under SOX because Palantir and CSFB Next are “Managers of Signac, who together undertook the retaliatory actions complained of herein.” (Complaint at 4.)

While the Second Amended and Restated Limited Liability Company Agreement of Signac, LLC, a Delaware Limited Liability Company (“Signac LLC Agreement” or “LLC Agreement”) substantiates Palantir and CSFB Next as financial sponsors and principal equity stakeholders of Signac, it does not substantiate Complainant’s claim that Palantir or CSFB Next were ever “Managers” of Signac. Palantir and CSFB Next are both Members of Signac with

each holding a fifty percent Class B Percentage Interest. (LLC Agreement, Schedule I.) “Member,” as defined in the LLC Agreement:

means, as applicable, the Class A Members, the Class B Members and the Class C Members<sup>4</sup> admitted as members of the Company on the date hereof and any Person admitted to the Company as an Additional Member or a Substitute Member pursuant to the provisions of this Agreement, each in its capacity as a member of the company.

(LLC Agreement, Exhibit A.)

“Manager,” as defined in the LLC Agreement, “has the meaning set forth in Section 8.1”:

Except as otherwise required by Law or this Agreement (including Article IX), the board of managers of the Company (“the Board”) shall have full, exclusive and complete authority to manage and control the business and affairs of the Company Parties, to make all decisions affecting the business and affairs of the Company parties and to take actions as it deems necessary or appropriate to accomplish the purposes of the Company Parties. Each member of the Board (a “Manager”) shall be deemed a “manager” within the meaning of the Act. The Board must act as a board, and no individual Manager, as such, shall have any authority to bind or act for, or assume any obligation or responsibility on behalf of, the Company unless expressly authorized to do so by the Board acting within the Requisite Authority in accordance with this Agreement.

(LLC Agreement, Exhibit A & Section 8.1.)

Under the terms of the LLC Agreement, the Board initially consisted of four managers. (LLC Agreement, Section 8.2.): Complainant (CSO Manager), Sean Hunter (CIO Manager), Matthew Long (Palantir Manager), and Lara Warner (Credit Suisse Manager). (LLC Agreement, Exhibit D.) The election procedure for Managers contained within the LLC Agreement is as follows:

The Board shall initially consist of four (4) managers. The Managers shall be elected by the vote of a majority of the Class B Units; provided that certain Members shall waive their right to designate individuals for election to the Board and certain individuals shall have the automatic right to be designated for election to the Board, in each case, as set forth in Section 8.2(b)<sup>5</sup> and each Class B

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<sup>4</sup> Under the LLC Agreement, Complainant is a Class C Member of Signac. (LLC Agreement, Schedule II.) In addition to being a Class C Member, the LLC Agreement also describes Complainant as Manager and Officer of Signac, as discussed below. (LLC Agreement, Exhibit D & Exhibit E.)

<sup>5</sup> Section 8.2(b) governs Designations:

The Members acknowledge and agree that (w) the Palantir Member shall be entitled to designate one (1) individual for election to the Board (the ‘Palantir Manager’), (x) the Credit Suisse Member shall be entitled to designate one (1) individual for election to the Board (the ‘Credit Suisse

Member hereby agrees to vote all of its Class B Units to elect those individuals that are designated pursuant to Section 8.2(b).

(LLC Agreement, Section 8.2(a)) (Emphasis in Original.)

The parties do not appear to contest that Signac employed Complainant, and the agreement propounds an employment relationship between Signac and Complainant as its Manager and Officer. The status of Palantir and CSFB Next as Class B Members of Signac, however, does not inherently make Complainant their employee.

Signac is a Delaware Limited Liability Company. (Id.) Limited Liability Corporations, under the Delaware Limited Liability Company Act, are separate legal entities that continue as separate legal entities “until cancellation of the limited liability company’s certificate of formation.” Del. Code tit. 6, § 18-201. Signac is thus, under its incorporation as a Limited Liability Company, a separate legal entity from Palantir and CSFB Next, even though Palantir and CSFB Next are Members of Signac.

While the Limited Liability structure exists to shield its members from liability, it does not entirely preclude an adjudicator from finding liability on the part of its members. Under Delaware law, a court may pierce the corporate veil of an entity “where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner.” Geyer v. Ingersoll Publications Co., 621 A.2d 784, 793 (Del. Ch. 1992) (citing Mabon, Nugent & Co. v. Texas Am. Energy Corp., Del. Ch., C.A. No. 8578, Berger, V.C. (Jan. 27, 1988), Mem. Op. at 6, 1988 WL 5492).

The Joint Employer Doctrine also exists within the whistleblower context. The Joint Employer Doctrine applies to independent legal entities that jointly handle important aspects of their employer-employee relationship.<sup>6</sup> Griffin v. Sirva, 835 F.3d 283, 292 (2d Cir. 2016) (citing Clinton’s Ditch Coop. Co. v. N.L.R.B., 778 F.2d 132, 137 (2d Cir. 1985)).<sup>7</sup> To consider two separate entities as a single employer under the Joint Employer doctrine, courts have looked to the following four factors: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and common ownership of financial control. Id. (citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995)). “Although no one factor is determinative...control of labor relations is the central concern.” Murray v. Miner, 74 F.3d. 402, 404 (2d Cir. 1996).

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Manager’), (y) the individual that is at this time serving as CSO shall, during such time, be automatically designated for election to the Board (the ‘CSO Manager’) and (z) the individual that is at any time serving as CIO shall, during such time, be automatically designated for election to the Board (the “CIO Manager”); provided that the foregoing designation rights be subject to [Provisions provided at Section 8.2(b)(i)–(vi)].

<sup>6</sup> See also N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1122 (3d Cir. 1982) (citing N.L.R.B. v. Checker Cab Co., 367 F.3d 692 (6th Cir. 1966)).

<sup>7</sup> Complainant worked in New York, so jurisdiction of this case falls within the U.S. Court of Appeals for the Second Circuit. See 18 U.S.C. § 1514A(b)(1).

Additionally, adjudicators have found that there can be individual liability for individuals and entities beyond just the entity that employed the claimant. In Leznik v. Nektar Therapeutics, Inc., ALJ No. 2006-SOX-00093 (Nov, 16, 2017), for example, Judge William Dorsey noted that the “SOX Act imposes individual liability when a decision maker retaliates against an employee because she engaged in protected conduct... Individual liability must be predicated on retaliatory intent that contributed to the decision to take an unfavorable personnel action; it need not be the sole factor that motivated the named individual.” Id. Additionally, in a District Court Order, Judge Joseph C. Spero found that a director may be held individually liable as an “agent” under SOX. Wadler v. Bio-Rad Laboratories, Inc., No. 15-cv-2356, at \*5 (N.D. Cal. Oct. 23, 2015).

These situations and theories, however, are all inapplicable or distinguishable from the situation present in this matter, given Palantir and CSFB Next’s status as Members of the LLC, as compared to Signac, which actually employed Complainant. Complainant has not made an argument under a veil piercing theory, nor do the facts of this case support the application of one, as there have been no assertions of fraud or Signac being a “mere instrumentality or alter ego” of either Palantir or CSFB Next.

Complainant also has not argued that either Palantir or CSFB Next are Joint Employers with Signac, nor, following the four factors denoted above, do the facts of this matter support such a finding. As demonstrated above, Palantir and CSFB Next are Members of Signac, not Managers. As Members, Palantir and CSFB Next do have the ability to elect the Members to the Board, but the LLC Agreement gives “full, exclusive and complete authority to manage and control the business and affairs of Signac” to the Board and delegates the day-to-day operations of the company to the CSO and to other Officers of the company. Those day-to-day operations include the hiring and firing of employees.<sup>8</sup> (LLC Agreement, Sections 8.1 & 9.2.) Nothing in the LLC Agreement, nor in the record as a whole, establishes that Palantir or CSFB Next, as Members of Signac, have any direct control over its operations, management, labor relations, or finances. At most, the record establishes that these entities had indirect control over Signac through its ability to elect Signac’s Members. This link is too attenuated to give Palantir or CSFB Next “control” over Signac as Joint Employers.

It is this same attenuated link between Palantir and CSFB Next’s limited role as Members that makes the facts of this matter distinguishable from the supervisors and directors that other adjudicators have found to be individually liable under SOX. Both supervisors and directors of a corporate board play an active role in the management and control of a corporate entity’s operations. Palantir and CSFB Next merely elected the individuals responsible for doing so. Mann v. United Space Alliance, LLC, ALJ No. 2004-SOX-15 (Feb. 18, 2005) further supports the proposition that an individual or entity’s control over an LLC gives rise to liability, and where an LLC is not subject to the internal controls of its owners it is a separate and distinct

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<sup>8</sup> The Officers of Signac at the time of the LLC Agreement were Complainant as the CSO and Sean Hunter as the CIO. (LLC Agreement, Exhibit E.) There is an exception carved out in the hiring and firing authority officers under Section 9.2(a)(iv) of the LLC agreement, where the hiring and firing of Officers occupying senior management positions requires approval of the Board acting by Super Majority Vote pursuant to Section 8.4. As established above, the Board, as of the time of the enactment of the LLC Agreement, consisted of the four Members enumerated in Exhibit D of the LLC agreement.

entity from its owners.<sup>9</sup> As Palantir and CSFB Next do not “control” Signac, they cannot have liability imputed to them through Complainant’s employment with Signac.

Complainant’s employment with Signac thus does not translate to employment with either Palantir or CSFB Next. As Palantir and CSFB Next did not employ Complainant; they are not proper respondents in this matter.

### 3. Conclusion: Dismissal of Respondents

The undersigned dismisses Palantir and CSFB Next from the claim, but finds it improper to dismiss Credit Suisse from the claim at this stage.

#### **B. Are the Respondents Entitled to a Dismissal of the Claim?**

##### 1. Legal Standard

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“Rules”), at 29 C.F.R. Part 18, Subpart A, a party “may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” 29 C.F.R. § 18.70(c). The regulations at 29 C.F.R. § 1980.101, *et seq.*, and the Act do not clarify the procedure for addressing a motion to dismiss. However, the Administrative Review Board (“ARB”), the Circuit Courts of Appeals, and the Federal Rules of Civil Procedure provide insight into the issue.<sup>10</sup>

Rule 12(b) of the Federal Rules of Civil Procedure addresses motions to dismiss. Specifically, Rule 12(b) covers, *inter alia*, motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. A motion to dismiss is a facial challenge, focusing “solely on the allegations in the complaint, its amendments, and the legal arguments the parties raised—not whether evidence exists to support such allegations.” *Id.* at \*6 (citing Neuer v. Bessellieu, ARB No. 07-036, ALJ No. 2006-SOX-132, slip. op. at 4 (ARB Aug. 31, 2009)). In fact, the consideration of evidence

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<sup>9</sup> In Mann, one of the questions that Judge Craft addressed was whether the Act covered USA, an LLC; and whether the Act covered Boeing or Lockheed Martin, corporate entities, as owners of USA. Judge Craft acknowledged that she identified no cases under SOX that addressed the LLC situation, but found in the parent-subsidary context that shared management, unity of operations, and control were the key factors in determining whether the Act covered both the parent company and the subsidiary. Judge Craft concluded that there was no evidence that USA employees were subject to the internal controls of either of the two owners, nor was it an inseparable, integral part of either owner; and thus USA operated as a separate and distinct entity from either of its owners. Judge Craft held that, as neither Lockheed Martin nor Boeing exercised control over USA in the same way they would a subsidiary, she could not impute coverage under the Act to USA simply because the Act would cover its corporate owners if they had engaged in the conduct the complainant had alleged in this case. She concluded that the Sarbanes-Oxley did not cover USA, and that Boeing and Lockheed Martin could not be held liable for any violation of the Act by USA.

<sup>10</sup> The Federal Rules of Civil Procedure apply in any situation not provided for or controlled by the Rules, or a governing statute, regulation, or executive order. 29 C.F.R. § 18.10(a).

marks the material difference between a motion to dismiss a complaint based on a “facial challenge at the initial stages and a motion for summary decision.” See *id.*; compare also 29 C.F.R. § 18.70(c) with 29 C.F.R. § 18.72(a), (c).

The Administrative Review Board (“ARB” or “Board”) has explained that “SOX claims are rarely suited for Rule 12 dismissals,” because they involve inherently factual issues such as reasonable belief.” *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, slip op. at 13 (May 25, 2011). The Board has reasoned that because “federal litigation materially differs from administrative whistleblower litigation within the Department of Labor...a different legal standard for stating a claim” is required in cases pending before the agency. *Evans v. Env’t’l Protection Agency*, ARB No. 08-059, slip op. at 6 (Jul. 31, 2012) (citing *Sylvester*, ARB No. 07-123, slip op. at 12–13).

Unlike litigation arising in federal district court, “[a] SOX claim begins with OSHA, where ‘no particular form of complaint’ is required.” *Sylvester*, ARB No. 07-123, slip op. at 12 (quoting 29 C.F.R. § 1980.103(b)). Thus, the heightened pleading standard established in federal courts does not apply to SOX claims initiated with OSHA. *Id.* Instead, to survive a motion to dismiss, a complainant must provide “fair notice” of Complainant’s claim. *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, slip op. at 6 (Feb. 25, 2013) (citing *Evans*, ARB No. 08-059). A complainant’s fair notice encompasses: “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.” *Evans*, ARB Case No. 080-059, slip op. at 11. This “is not a demanding standard.” *Gallas v. Med. Ctr. of Aurora*, ARB Nos. 15-076/16-012, slip op. at 10 (Apr. 28, 2017).

## 2. Discussion

In her Complaint, Complainant cited her refusal to participate in Credit Suisse and Palantir’s conduct that she reasonably believed violated security laws. She asserted that she “refused to distort facts related to the recognition of revenue by Signac, Credit Suisse and Palantir, revenue which would have been deemed critical for Palantir relating to its widely rumored intention to go public.” (Complaint at 1.) She alleged that she was “retaliated against for having made complaints protected by SOX.” (Complaint at 11.) Viewing these allegations as true, they sufficiently show “some relatedness” to laws “relating to fraud against shareholders.”

The Complaint is also sufficient to encompass “some facts about the adverse action.” Complainant alleges that after she “objected and refused to distort the facts,” Credit Suisse and Palantir engaged in retaliatory behavior that included “excluding her from relevant communications and meetings, making thinly veiled threats of termination and withholding her discretionary bonus for 2016,” along with other further allegations of escalating retaliation. (See Complaint at 6–11.) Viewing these allegations as true, they sufficiently show “some facts about the adverse action.”

The Complaint also provides “a general assertion of causation.” In her complaint, she asserts that Respondents “retaliated against [her] for having made complaints protected by

SOX.” (Complaint at 11.) This is an assertion that provides a general causal link between alleged protected activity and alleged retaliation. It is thus sufficient to show “a general assertion of causation.”

Finally, the Complaint provides a “description of the relief that is sought.” Her Complaint provides a section dedicated to the relief she is seeking in this matter. (See Complaint at 11–12.) This sufficiently describes the relief she seeks.

As the Complaint encompasses the four elements necessary to provide “fair notice” of her claim, the undersigned finds that the Complaint is sufficient to survive a motion to dismiss. The undersigned accordingly finds that the Respondents are not entitled to have their Motions to Dismiss granted.

### **C. Are the Respondents Entitled to Summary Decision?**

#### **1. Legal Standard**

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges<sup>11</sup> state:

A party may move for summary decision, identifying each claim or defense—or the 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. The judge should state on the record the reasons for granting or denying the motion.

29 C.F.R. § 18.72.

In considering a motion for summary decision, a judge must view the evidence, along with all reasonable inferences, in the light most favorable to the nonmoving party. Perez v. Citigroup, Inc., ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 4 (ARB Sept. 30, 2019); Saporito v. Central Locating Services, Ltd., ARB No. 05-004, ALJ No. 2001-CAA-13, 2006 WL 535427, \*3 (ARB Feb. 28, 2006) (citing Friday v. Northwest Airlines, Inc., ARB No. 03-132, ALJ Nos. 03-AIR-19, 2003-AIR-20, slip op. at 3 (ARB July 29, 2005)). Further, the judge must accept the nonmoving party’s evidence without making credibility determinations or weighing the evidence. Webb v. Carolina Power & Light Co., 1993-ERA-00042, slip op. at 3 (Sec’y July 14, 1995).

To avoid summary decision, the non-moving party must rebut the motion and evidence presented by the moving party with evidence sufficient to create a genuine issue of material fact. That rebuttal, or answer, ‘may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.’

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<sup>11</sup> 29 C.F.R. Part 18, subpart A.

Perez, ARB No. 2018-0031, slip op. at 3 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)).

## 2. Discussion

Respondents Palantir and Signac moved for Summary Decision. The undersigned, however, has dismissed Respondent Palantir from this matter, as discussed above, so it is unnecessary to consider its Motion for Summary Decision, as it is no longer part of the claim.<sup>12</sup> Signac, while it did request summary decision, did not make an argument for why it is entitled to summary decision. Rather, it merely restates the standard for summary decision<sup>13</sup> before proceeding to argue why it is entitled to the dismissal of Complainant's claim. Motions to dismiss and motions for summary decision are two separate and distinct motions under the Rules of Practice and Procedure and should not be conflated. As Respondent Signac has failed to demonstrate that summary decision is proper, the undersigned must deny its Motion.

## V. ORDER

The undersigned grants the requests of Respondents Palantir and CSFB Next to be dismissed from this claim, as they are not proper Respondents in this action under 18 U.S.C. § 1514A, but denies Respondent Credit Suisse's request to be dismissed. The undersigned also denies the Respondents' Motions to Dismiss and Motions for Summary Decision.

In **fourteen days** from the date of this Order, the parties are to present the undersigned with proposed dates for hearing.

**SO ORDERED.**

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey

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<sup>12</sup> The Credit Suisse Respondents did not move for summary decision, but, rather, only moved for dismissal, which the undersigned found to be improper, as discussed *supra*.

<sup>13</sup> Signac's sole reference in its argument to summary decision is its statement that "[the court] may also grant summary disposition at any time, so long as it finds 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)."