RECORD NOS. 08-1970(L), 08-2196

In The

United States Court of Appeals

For The Fourth Circuit

DAVID R. STONE,

Plaintiff – Appellant,

v.

INSTRUMENTATION LABORATORY COMPANY; BRIAN DURKIN; ANN DEFRONZO; RAMON BENET,

Defendants – Appellees,

and

INSTRUMENTATION LABORATORY SPA,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLEES

Robert M. Shea
Scott J. Connolly
MORSE, BARNES-BROWN & PENDLETON, P.C.
Reservoir Place
1601 Trapelo Road
Waltham, Massachusetts 02451
(781) 622-5930

Counsel for Appellees

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-1970 Caption: David Stone v. Instrumentation Laboratory Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ann DeFronzo (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

s/ Brian D. Black (signature) 10/2/2008 (date)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-1970 Caption: David Stone v. Instrumentation Laboratory Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brian Durkin (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

s/ Brian D. Black (signature) 10/2/2008 (date)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-1970 Caption: David Stone v. Instrumentation Laboratory Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Instrumentation Lab. Co. (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☑ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations: Instrumentation Laboratory SpA

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

s/ Brian D. Black (signature) 10/2/2008 (date)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-1970 Caption: David Stone v. Instrumentation Laboratory Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ramon Benet (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

s/ Brian D. Black (signature) 10/2/2008 (date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITY

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the District of Maryland ("District Court") had subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331 as the complaint of Appellant, David R. Stone ("Stone"), to the District Court alleged that Defendants and Appellees, Instrumentation Laboratory Company ("ILC"), Brian Durkin, Ann DeFronzo, and Ramon Benet, violated the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2002) ("SOX").

This Court has jurisdiction of this appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The District Court entered its final order -- which made final the District Court's granting of Appellees' motion to dismiss on collateral estoppel grounds -- on October 17, 2008. Stone timely filed his notice of appeal on October 20, 2008.

STATEMENT OF THE ISSUES

I. Whether the District Court had authority to dismiss Stone's complaint by applying collateral estoppel, and to order the Department of Labor's Administrative Review Board ("ARB") to complete its review of Stone's case, where an Administrative Law Judge ("ALJ") issued a decision that Stone had not engaged in any protected activity under SOX, and where Stone had appealed the ALJ's decision to the ARB prior to filing his complaint in the District Court.

II. Whether the District Court correctly applied collateral estoppel to the ALJ's decision that Stone did not engage in any protected activity under SOX where the ALJ acted in a judicial capacity, resolved disputed issues of fact properly before her, and the parties had a full and fair opportunity to litigate the issue.

STATEMENT OF THE CASE

Stone's appeal challenges the District Court's determination that collateral estoppel applied to the ALJ's decision that Stone did not engage in protected activity under SOX.

On June 19, 2006, Stone filed a discrimination complaint against Appellees with the Regional Administrator for OSHA pursuant to SOX. Joint Appendix ("J.A") at 9. On January 3, 2007, the Regional Administrator of OSHA, acting for the Secretary of Labor, dismissed Stone's complaint on the grounds that he did not engage in protected activity under SOX. *Id*. This was the first dismissal of Stone's SOX complaint on the basis that he did not engage in protected activity under SOX. On January 31, 2007, Stone objected to the Secretary of Labor's preliminary order dismissing his complaint and requested a hearing before the ALJ. *Id.* at 45.

On March 1, 2007, Appellees filed a motion for summary decision with the ALJ. *Id*. Appellees requested that the ALJ dismiss Stone's complaint on the grounds that Stone could not make out a *prima facie* case of whistleblower

discrimination because he did not engage in activity protected by SOX. *Id*. On September 6, 2007, after the parties had exhaustively briefed the issues, the ALJ issued a 24-page decision and Order finding that Stone did not engage in any activity protected by SOX. *Id*. at 69. The ALJ granted Appellees' motion for summary decision and dismissed Stone's SOX complaint in its entirety. *Id*. This was the second dismissal of Stone's complaint due to his lack of protected activity under SOX.

On September 19, 2007, Stone filed a petition with the ARB, seeking review of the ALJ's dismissal of Stone's complaint. *Id*. at 98. The ARB issued a Notice of Appeal and Order Establishing Briefing Schedule on October 1, 2007. *Id*. On October 24, 2007, Stone moved to modify the ARB's briefing schedule so that he would have an additional six weeks to file his appeal brief with the ARB. The ARB allowed Stone's requested extension. *Id*. at 101.

Two weeks later, however, Stone filed a notice with the ARB stating his "intention to bring an action for *de novo* review in the appropriate district court of the United States." *Id*. at 104. On November 29, 2007, the ARB issued a Final Order Dismissing Stone's Appeal. *Id*. at 106.

On November 26, 2007, Stone filed suit in the District Court. *Id*. at 3. Because a legal issue dispositive of Stone's SOX claim -- that he had not engaged in protected activity under SOX -- had been fully adjudicated by the ALJ after

extensive litigation, Appellees moved the District Court on March 27, 2008 to dismiss Stone's Complaint based on collateral estoppel or for mandamus relief in the nature of an order to the ARB to complete its administrative review of the ALJ's decision within a specified time limit. *Id*. at 41.

On July 1, 2008, after extensive briefing by the parties, the District Court granted Appellees' motion to dismiss on the grounds that collateral estoppel applied to the ALJ's decision on the dispositive legal issue that Stone's written and oral communications to ILC were not protected under SOX. *Id*. at 161. The District Court ordered the ARB to reinstate Stone's ARB appeal by July 15, 2008, and to rule on the merits of Stone's appeal within 90 days of entry of the District Court's order. *Id*. at 170. The District Court did not enter final judgment at that time, but rather stayed and administratively closed the case. *Id*.

On July 14, 2008, the ARB: (1) reinstated Stone's appeal, and (2) established an expedited briefing schedule. *Id*. at 176.

On July 15, 2008, Stone filed with the District Court a motion to amend and certify for interlocutory appeal the Court's July 1, 2008 Order. *Id*. at 185. On July 29, 2008 Stone notified the ARB that he declined to file an appeal brief with the ARB. *Id*. at 176. On July 31, 2008, the ARB entered its Final Order of Dismissal, dismissing Stone's ARB appeal for failure to prosecute his case. *Id*. at 175.

On August 6, 2008, Appellees filed with the District Court notice of the ARB's Final Order of Dismissal. *Id*. at 186. The District Court did not enter final judgment after receiving notice of the ARB's Final Order of Dismissal. *Id*. at 187. On August 11, 2008, the District Court denied Stone's motion to certify for interlocutory appeal the District Court's July 1, 2008 Order. *Id*. at 186.

Although, no final decision had entered in the District Court, on August 28, 2008, Stone filed a Notice of Appeal with this Court pursuant to 28 U.S.C. § 1291 seeking review of the Court's July 1, 2008 and August 11, 2008 Orders. *Id*. (On August 28, 2008, Stone also filed a petition for review of the ARB's Final Order of Dismissal with this Court, which petition Stone has voluntarily dismissed and which is not part of this appeal. *Id*.)

On September 19, 2008, Stone filed a motion for entry of final decision with the District Court. *Id*. at 7. As grounds for this motion, Stone's counsel stated that a "final decision" was necessary "to perfect" Stone's notice of appeal to this Court and was necessary "to eliminate any doubt as to whether [this Court] has jurisdiction for the purposes of 28 U.S.C. § 1291." *Id*. On October 17, 2008, the District Court granted Stone's motion and issued a final decision. *Id*. at 183. Stone filed a notice of appeal on October 20, 2008, appealing the District Court's final decision. *Id*. at 190.

STATEMENT OF THE FACTS

Facts Concerning the Administrative Proceeding

Stone was terminated from his employment with Instrumentation Laboratory Company in March 2006. J.A. at 95. Stone's complaint to OSHA alleged that he was terminated by ILC in retaliation for raising concerns about or reporting deficiencies in internal controls. *Id.* at 69, 96. OSHA dismissed Stone's complaint on the grounds that he had not engaged in activity protected by SOX, finding that, even if Stone's allegations were true, his "alleged concerns [do] not fall into any protected activity category defined by [29 C.F.R.] Part 1980."[1] *Id.* at 95-97.

Appellees' motion for summary decision to the ALJ sought to dismiss Stone's SOX complaint on the grounds that he did not engage in activity protected by SOX. *Id.* at 70. Specifically, Appellees argued that Stone's communications regarding a work assignment at ILC did not definitively and specifically relate to any SOX listed law or rule. *Id.* Appellees relied on then recent decisions of the

[1] On January 29, 2007, Stone filed a second SOX complaint with OSHA alleging that Defendant Instrumentation Laboratory SpA ("IL SpA") and ILC "blacklisted" him in retaliation for filing his initial complaint alleging unlawful termination. *Id.* at 70. OSHA referred this second complaint to the ALJ, who issued an order on March 23, 2007 consolidating both of Stone's complaints. *Id.* After a full and fair opportunity to litigate the issues, the ALJ dismissed Stone's blacklisting complaint on the grounds that neither ILC nor IL SpA were employers covered by SOX at the time of the alleged blacklisting activity. *See id.* at 90-92. In his complaint filed with the District Court, Stone did not allege any blacklisting claims, and he has not contested the ALJ's decision to dismiss his blacklisting complaint. *Id.* at 10.

ARB, including *Platone v. FLYi, Inc.*, ARB No. 04-154 (Sept. 29, 2006), which delineated the types of conduct, communications and disclosures that constitute activity protected under SOX, and which make clear that the inquiry of whether the employee engaged in protected activity is focused on the employee's activity during his employment (and not the self-serving after-the-fact characterizations of the employee's activity made by complainants' counsel in SOX complaints.) *Id*. at 85.[2]

[2] On December 3, 2008, this Court affirmed the ARB's holding in *Platone* that the complainant had failed to establish a *prima facie* case of whistleblower discrimination. This Court upheld the ARB's determination that Platone did not engage in protected activity under SOX because her communications during employment did not definitively and specifically relate to any SOX listed law or rule. *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008). The ALJ dismissed Stone's complaint after making the same determination. J.A. at 91. Similarly, on August 5, 2008, this Court affirmed the ARB's finding that the complainant had not engaged in protected activity in *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). In an on-line publication, counsel for *amicus* National Whistleblower Legal Defense and Education Fund characterizes this Court's decision in *Platone* as "leaving corporate whistleblower Stacy Platone out in the cold," and further states that: "[t]he outcome in the *Platone* case exemplifies the way that the current ARB has undercut what Congress made clear in passing SOX and other whistleblower protections. Hopefully, President-elect Obama will move quickly to appoint new members to the ARB, and to the federal circuits courts of appeals, to protect working people and restore a sense of the law's true purpose." *See* http://www.whistleblowersblog.org/tags/platone/(last visited January 19, 2009). Respectfully, *amicus* lacks objectivity, and this Court should not give credit to its claim to a special ability to divine the intent of Congress concerning SOX.

After filing their motion for summary decision, on March 7, 2007, Appellees filed a motion for a protective order requesting that the ALJ stay discovery pending the ALJ's determination of Appellees' motion for summary decision. J.A. at 71. In a status conference with the ALJ on March 12, 2007, counsel for both Appellees and Stone agreed that Appellees would withdraw their motion for protective order and further agreed to stay discovery pending the ALJ's ruling on Appellees' motion for summary decision. *Id.*

During another phone status conference with the ALJ in March 2007, in connection with discussing his need to reschedule the hearing before the ALJ, counsel for Stone stated that Stone would be proceeding before the ALJ and would not be removing the case to federal court (although the 180-day limitation for the Department of Labor to issue a decision had already run at that time).[3] *Id.* at 53.

[3] In this case, the 180-day time period expired on or about December 19, 2006. Thus, Stone had a considerable amount of time -- nearly nine months in fact -- to remove the action to federal court before the parties exhaustively litigated the issues before the ALJ and she issued her decision and order dismissing Stone's SOX claims in September 2007. *Id.* at 52-53. Stone chose not to remove the case. Instead, he chose to proceed before the ALJ. Even after the ALJ ruled in Appellees' favor, Stone chose to file an appeal of the ALJ's decision with the ARB on September 19, 2007. *Id.* at 163. Indeed, Stone sought and obtained from the ARB an extension of time to file his appeal brief to the ARB. *Id.* at 50. Stone chose to seek an administrative remedy before the ALJ, did not like the result, and then sought to avoid the ALJ's dismissal on the merits by filing in the District Court.

Thereafter Stone substantially availed himself of the litigation mechanisms available to him before the ALJ.[4] *Id.* at 69-72.

In opposition to Appellees' motion for summary decision to the ALJ, Stone filed a 38-page brief, which attached Stone's and his counsel's declarations and 26 supporting exhibits. *Id.* at 46-47. Although Stone had agreed that it was proper to stay discovery pending the ALJ's decision on Appellees' motion for summary decision, Stone also filed a 10-page motion to stay consideration of [Appellees'] motion for summary decision and to permit discovery pursuant to Fed. R. Civ. P. 56(f). *Id.* at 71. (In the ALJ's decision, the ALJ indicated that Stone's filing of a Rule 56(f) motion was inconsistent with his agreement during the status conference to stay discovery pending the ALJ's ruling on Appellees' motion for summary decision. *Id.*)

On May 24, 2007, Appellees filed an opposition to Stone's motion to stay summary decision. *Id.* Among other things, Appellees argued that the documents Stone pointed to as evidence of his protected activity were in the record for summary decision, and that these documents showed that Stone did not engage in protected activity. *Id.* Appellees further argued that any evidence of Stone's

[4] Stone does not dispute that his counsel told the ALJ in March 2007 that Stone would proceed before the ALJ and would not be removing the case to federal court (although the 180-day period had already run). Stone attempts to dismiss this as the "routine expression of anticipated litigation strategy," which displays no regard for the substantial resources the ALJ and Department of Labor expended to provide Stone the opportunity to fully litigate his SOX claim.

protected activity was within his own personal knowledge -- making discovery unnecessary. *Id.* Moreover, Appellees argued that Stone's Rule 56(f) motion should be denied because Stone had failed to present by affidavit facts establishing the likelihood that contrary evidence necessary to overcome summary decision existed, and because Stone failed to provide specific reasons why such evidence could not be presented at that time. *Id.*

On May 31, 2007, Stone further supplemented his briefing to the ALJ by filing a 9-page reply to Appellees opposition to Stone's Rule 56(f) motion. *Id.* at 47. Then, on July 20, 2007, Stone again supplemented his prior briefing by filing with the ALJ a notice of supplemental authority, which Appellees opposed. *Id.* Finally, on August 6, 2007, Stone filed a 7-page reply brief further arguing why the ALJ should not grant summary decision. *Id.* In all, the briefs, declarations, supporting exhibits and documents Stone submitted to the ALJ to oppose Appellees' motion for summary decision totaled several hundred pages. *Id.*

On September 6, 2007, the ALJ issued a thorough and well-reasoned 24-page decision and order granting Appellees' motion for summary decision. *Id.* at 69-94. The ALJ dismissed Stone's SOX complaint and denied Stone's Fed. R. Civ. P. 56(f) motion to stay summary decision. *Id.* After viewing the evidence in the light most favorable to Stone, the ALJ made correct findings of fact and conclusions of law in determining that there was no genuine issue of material fact

with regard to whether Stone had engaged in protected activity. *Id.* Specifically, the ALJ found that Stone's written and oral communications to ILC did not show that he engaged in activity protected by SOX. *Id.* at 91.

The ALJ correctly examined the record evidence of Stone's statements, communications, and actions while he was employed by ILC. *Id.* at 86-88. Relying on the ARB's then recent decision in *Platone*, the ALJ summarized her findings of fact and rulings of law on the issue of whether Stone had engaged in protected activity under SOX as follows:

> None of Stone's e-mail messages, memos, or any of his statements regarding his own communications . . . provide specific information about a Sarbanes-Oxley listed category of shareholder fraud or securities or SEC regulations violations. Stone did not tell ILC officials of any concern that the changes he believed were necessary to the SAP data-base affected the financial condition of ILC. Nor do Stone's communications or disclosures to supervisors or others refer to concerns involving the Company's financial statements. The disclosures discuss a plan of action with respect to the GPO coding project rather than identifying concerns regarding shareholder fraud, or violations of SEC regulations. Nor do [Plaintiff's] e-mails or statements mention any concern that the inaccuracies in the SAP system . . . might have any impact on ILC's ability to accurately report revenues and liabilities as [Plaintiff] alleged in his complaint. **Although Stone's complaint to OSHA alleges that he provided information to management both orally and in writing about [ILC's] failure to maintain adequate internal accounting controls and in doing so he disclosed to management a violation of any rule or regulation of the SEC, his actual written and oral communications to Durkin and other ILC officials do**

> **not mention a concern about internal controls, violations of SEC rules or a concern that failing to track the administrative fees owed might interfere with the company's reporting responsibilities** . . . . As Platone instructs, it is the complainant's actual communications to the employer, or actions taken, prior to discharge that determine whether the complainant engaged in protected activity, rather than what is alleged in the complaint. Rather, Stone's disclosures and communications in several emails and in meetings raised concerns for possible violations of ILC contracts with its contract GPOs and not violations of rules of the SEC, or fraud against shareholders or inaccurate financial statements.
>
> Upon careful consideration of the parties' submissions and viewing the evidence in the light most favorable to the Complainant, I find that the Complainant's concerns with regard to the GPO coding project went to allegations of possible violations of the contracts ILC had with its contract GPOs, and not to federal law related to fraud against shareholders, or violations of SEC rules. **The Complainant's concerns about the coding of accounts and payment of administrative fees to contract GPOs, his communications to his supervisor, Durkin, and DeFronzo and others at ILC did not raise any concerns that definitively and specifically relate to a listed category of fraud or securities violations or violations of an SEC regulation under 18 U.S.C.A. § 1514A(a)(1).** Accordingly, I conclude that the Complainant has not established that there is a genuine issue of fact as to whether he engaged in protected activity. Therefore, [Defendants'] motion for summary decision on this issue is granted and the claim for unlawful termination is dismissed.

Id. at 88 (emphasis supplied).

Moreover, in denying Stone's Rule 56(f) motion, the ALJ ruled that no discovery was necessary because, to show that he engaged in protected activity, Stone needed to "describe or outline his own communications, statements or actions and show how those actions are protected under Sarbanes-Oxley, rather than focusing on ILC's alleged conduct." *Id.* at 84. Further, the ALJ reasoned that "[e]vidence of [Stone's] own conduct or statements is within [Stone's] personal knowledge." *Id.* The ALJ denied Stone's motion to stay summary decision because Stone failed to show by affidavit that there was any specific evidence he expected to obtain through discovery to show his protected activity, and failed to show that such evidence would preclude summary decision -- even though, as the ALJ noted -- any evidence relating to Stone's own actions was uniquely within Stone's knowledge. *Id.*

On September 19, 2007, Stone filed a petition with the ARB, seeking review of the ALJ's dismissal of his complaint. *Id.* at 49. On October 1, 2007, the ARB issued a notice of appeal and order establishing briefing schedule, which set a deadline of October 31, 2007 for Stone to file his initial brief with the ARB. *Id.* On October 24, Stone moved to modify the ARB's briefing schedule so that he would have an additional six weeks to file his brief with the ARB, which the ARB allowed. *Id.* However, two weeks later, on November 8, 2007, Stone filed a notice

with the ARB stating his "intention to bring an action for *de novo* review in the appropriate district court of the United States." *Id.*

On November 15, 2007, the ARB issued an Order to Show Cause, which under SOX's administrative regulations would allow Appellees to bring forth any evidence to show that Stone had acted in bad faith to delay the proceedings. *Id.* As Appellees had no evidence of Stone's bad faith, Appellees did not file an opposition. *Id*. On November 29, 2007, the ARB issued a final order dismissing Stone's appeal on the grounds that the ARB had not issued a final decision within 180 days of the date on which Stone filed the complaint and there was no showing that the Plaintiff had acted in bad faith to delay the proceedings. *Id*. at 106. The ARB cited 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.114(a), which states as follows:

> If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy.

Id.

Facts Concerning the District Court Proceeding

On November 26, 2007, Stone filed suit in the District Court. J.A. at 3. On March 27, 2008, Appellees moved the District Court to dismiss Stone's Complaint

on collateral estoppel grounds or for mandamus relief in the nature of an order to the ARB to issue a final decision by completing its administrative review of the ALJ's decision within a specified time limit. *Id*. at 4.

In support of its motion, Appellees argued to the District Court that the ALJ's decision on the dispositive legal issue that Stone did not engage in activity protected by SOX should be given preclusive effect because the ALJ had acted in a judicial capacity and had resolved disputed issues of fact properly before her, and because the parties had a full and fair opportunity to litigate. *Id*. at 51-67. Appellees argued that the District Court had the authority to dispose of Stone's case on collateral estoppel grounds and that SOX and its procedural regulations did not preclude the District Court from exercising its long-recognized power to prevent needless duplicative litigation by applying collateral estoppel. *Id.* Appellees relied on well-settled authority, discussed *infra*, holding that when an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (res judicata) on the basis of that administrative decision. *Id.* Appellees also relied on the Secretary of Labor's comments to the regulations under SOX and several district court decisions, discussed *infra*, that recognize the application of these principles to ALJ decisions under SOX. *Id*.

On July 1, 2008, after extensive briefing by the parties, the District Court granted Appellees' motion to dismiss and ordered the ARB to reinstate Stone's ARB appeal by July 15, 2008, and to rule on the merits of Stone's appeal within 90 days of entry of the District Court's order. *Id*. at 161-71.

Applying this Court's decisions in *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987), and *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) (quoting *U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)), the District Court reviewed the ALJ's decision and properly determined that collateral estoppel applied to Stone's claims. *Id.* at 166. Specifically, the District Court found:

> In this case, more than 180 days passed between the time Stone filed his complaint with the DOL and the Secretary issued a final decision. Thus, Stone was permitted to file suit in federal court. However, unlike the plaintiff in *Hanna*, Stone has received an ALJ decision that he has not engaged in protected activity under SOX and has appealed to the ARB before suit in this Court. Stone has also had an opportunity to fully litigate his claims, as he filed voluminous briefs, declarations and supporting exhibits in opposition to the [Appellees'] motion for summary decision, which were considered by the ALJ in [her] 24-page decision . . . . The ALJ correctly denied Stone's Rule 56(f) motion because discovery was not necessary to resolving the legal question whether he had engaged in protected activity under SOX. Stone only needed to describe his communications and statements and demonstrate that they were protected under SOX, rather than focus on the [Appellees'] alleged conduct. Because Stone could offer affidavits and exhibits to set

> forth his conduct, the ALJ correctly concluded that neither discovery nor a hearing was necessary.
>
> Stone's assertion that the ALJ's decision was not final for purposes of collateral estoppel is also without merit. The ALJ's adjudication of the case, *i.e.*, granting the [Appellees'] motion for summary decision, led to a final judgment on the merits . . . . As Stone has had a full and fair opportunity to litigate his claims before an ALJ, which resulted in a final judgment on the merits, it would be wasteful to relitigate these claims in this Court. Accordingly, the Defendants' motion to dismiss will be granted. The Court will stay these proceedings and issue a mandamus to the DOL to re-instate the proceedings within fourteen days and order the ARB to rule on the merits of Stone's appeal within 90 days of entry of this Order.

Id. at 168-69.

SUMMARY OF THE ARGUMENT

Because the ARB did not issue a final decision within 180 days of the filing of Stone's complaint with OSHA, Stone was able to file his SOX complaint in the District Court under 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.114(a). However, after Stone did so, the District Court had authority to apply collateral estoppel to the ALJ's decision that Stone did not engage in protected activity under SOX, and dismiss Stone's complaint. The language of SOX, the procedural regulations under SOX, and SOX's legislative history do not abrogate the District Court's long-recognized power to prevent needless duplicative litigation by applying collateral estoppel.

The district courts' authority to apply collateral estoppel to decisions of administrative agencies that have acted in a judicial capacity and have resolved disputed issues of fact properly before them where parties have had an adequate opportunity to litigate is well-established by precedent. The United States Supreme Court, this Court, and other federal circuit courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (res judicata) on the basis of such administrative decisions. Further, the District Court's decision to give preclusive effect to the ALJ's decision is supported by the Secretary of Labor's comments to SOX's regulations (which are accorded due deference by this Court), as well as several decisions of district courts applying SOX. These authorities correctly recognize that there is no indication that Congress intended to suspend the district courts' authority to apply preclusion principles to prevent the wasteful, duplicative litigation of issues decided by ALJs after extensive litigation in SOX cases.

Appellant contends that SOX mandates the re-litigation of the issue of Stone's protected activity in the District Court as if the ALJ had not fully adjudicated that issue after extensive litigation. Stone's contention is not supported by the language of SOX or any authority. Indeed, in reading into SOX's language an abrogation of the district courts' long-recognized power to apply collateral estoppel to administrative decisions, Stone advances an interpretation of

SOX that would lead to an absurd result: a requirement that district courts conduct duplicative and wasteful re-litigation of issues. This result would subject parties who prevail before ALJs more than 180 days after the complaint was filed to mandatory re-litigation of issues, as complainants would have a "second bite at the apple," or "do-over," in federal court regardless of the judicial quality of the ALJ's decision. Moreover, such a result would waste agency and judicial resources on time-consuming litigation that would be repeated in the district court if the complainant did not like the result he or she obtained before the Department of Labor.

Contrary to Appellant's opening brief and the brief of the *amici*, the interests of purported whistleblowers are not solely at stake in this appeal. The authority of the district courts to apply collateral estoppel protects the prevailing party in litigation before the administrative agency from the expense and vexation of multiple lawsuits, and also serves the public interest in preserving judicial resources by prohibiting subsequent suits involving the same parties making the same claims. To hold in this case that the District Court erred in applying collateral estoppel to the ALJ's decision would be absurd in light of the extensive litigation by the parties on this issue before the ALJ. There is no indication that Congress intended to strip the district courts of their long-recognized power to

apply preclusion principles to decisions of ALJs to prevent wasteful, duplicative litigation of previously adjudicated issues.

The District Court also committed no error in determining that the elements of collateral estoppel were met in this case. The District Court correctly determined that the dispositive issue of Stone's protected activity was finally adjudicated by the ALJ and that Stone had a full and fair opportunity to litigate that issue before the ALJ.

STANDARD FOR REVIEW

This Court reviews the application of collateral estoppel by the District Court *de novo*. *See, e.g.*, *Pueschel v. United States*, 369 F.3d 345, 354 (4th Cir. 2004) ("We review *de novo* a district court's application of the principles of *res judicata*."); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 703 (4th Cir. 1999); *Gray v. Farley*, 13 F.3d 142, 145 (4th Cir. 1993).

ARGUMENT

I. THE DISTRICT COURT HAD AUTHORITY TO APPLY COLLATERAL ESTOPPEL TO THE ALJ'S DECISION.

A. Collateral Estoppel Applies To Decisions Of Administrative Agencies Acting In A Judicial Capacity.

As this Court has explained, the doctrine of collateral estoppel "precludes relitigation of an issue decided previously in judicial *or administrative* proceedings . . . ." *Hagan v. McNallen*, 62 F.3d 619, 624 (4th Cir. 1995) (emphasis supplied);

Ramsay v. U.S. Immigration & Naturalization Serv., 14 F.3d 206, 210 (4th Cir. 1994) (collateral estoppel prevents "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate."); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006) ("[A]s we have observed, findings of fact made during administrative adjudications are to be accorded the same collateral estoppel effect they would receive if made by a court") (*citing Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997)).

The United States Supreme Court has held that collateral estoppel is appropriate in cases where, as here, an administrative agency has acted in a judicial capacity. *Univ. of Tenn. v. Elliot*, 478 U.S. 788 (1986). In *Elliot*, the Supreme Court held that an *unreviewed* state agency's factfinding was entitled to issue preclusion effect in a subsequent suit under 42 U.S.C. § 1983, and reiterated, affirming prior decisions (*e.g.*, *Utah Constr.*, 384 U.S. at 422), "that it is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity." 478 U.S. at 797. The Supreme Court noted that "giving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose." *Id.* at 798. Similarly, in *Utah Construction*, the Supreme Court held that, "when an

administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 384 U.S. at 422 (citations omitted).

This Court has consistently applied Supreme Court precedent to give issue and claim preclusion effect to administrative decisions. In *Layne v. Campbell County Dept. of Soc. Serv.*, for example, the plaintiff had brought a civil rights claim in federal court pursuant to 42 U.S.C. § 1983 against her former employer. 939 F.2d 217, 219 (4th Cir. 1991). The district court granted the defendants' motion to dismiss on the grounds that it was precluded from revisiting factual determinations concerning the reasons for the employee's termination by a state administrative panel's prior fact-finding. *Id.* at 217. This Court affirmed, citing the Supreme Court's rulings in *Elliot* and *Utah Construction*, and held that the state administrative panel's factfinding was entitled to preclusion. *Id.* at 219. Specifically, this Court found that the administrative panel had acted in a judicial capacity, resolved disputed issues of fact properly before it, and that the plaintiff had a fair opportunity to litigate before the panel. *Id.* at 219-20. Moreover, this Court rejected the plaintiff's argument that court review of the administrative panel's decision was necessary for preclusion to apply, reasoning: "[I]f the opportunity for . . . court review of adverse agency findings was always required . .

. then the principle of [*Elliot*] would be analytically and practically meaningless . . . . Clearly, that is not what was contemplated by the [Supreme] Court in [*Elliot*]."). *Id.* at 220.[5]

[5] Decisions of other circuit courts of appeal are similar. In *Wickham Contracting Co., Inc. v. The Bd. Of Educ. Of the City of New York*, the Second Circuit Court of Appeals concluded that a NLRB unfair labor practice determination by an ALJ was binding and thus precluded, under the doctrine of collateral estoppel, a subsequent lawsuit filed in federal court under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187. 715 F.2d 21 (2d Cir. 1983). In so holding, the Second Circuit relied on the test set forth in *Utah Construction* in concluding that the NLRB proceeding could have preclusive effect on a subsequent suit. *Id.* at 26. The court compared the NLRB proceeding with the Section 303 suit and concluded:

> The legal and factual issues in the administrative and judicial proceedings are, but for damages, absolutely identical since section 303 authorizes damage actions for violations of section 8(b)(4), the very issue of liability adjudicated by the Board. So long as particularized unfairness is not demonstrated, we perceive no reason to allow a union or employer who has lost an 8(b)(4) unfair labor practice proceeding before the Board to relitigate issues relating to liability. Since there is no reason to believe that legal results in section 303 actions will be superior to those arrived at in the administrative proceedings, or that inconsistent results before the different tribunals will increase procedural or substantive fairness, **the judicial and other resources consumed in relitigating such issues is pure waste**.

Id. (emphasis supplied). The Second Circuit also rejected the argument that the NLRB proceeding should not estop the federal proceeding because of the fact that there is no prehearing discovery in an NLRB action. *Id.* at 27.

Here, the District Court committed no error in deciding to apply collateral estoppel to the ALJ's decision. The ALJ was clearly acting in a judicial capacity in granting Appellees' motion for summary decision, and the District Court's finding that Stone had a full and fair opportunity to litigate the issue of his protected activity is amply supported by the record. J.A. at 69. Indeed, after viewing the evidence on the issue of protected activity under SOX in the light most favorable to Stone, and applying it to controlling decisions of the ARB in *Platone* (which this Court has affirmed), the ALJ granted Appellees' motion for summary decision (the equivalent of a Rule 56 motion for summary judgment). *Id*. In a lengthy and well-reasoned written opinion containing findings of fact and conclusions of law, the ALJ found that there could be no genuine dispute that Stone had not engaged in protected activity under SOX. *Id*. As protected activity was a required element of Stone's *prima facie* case, the ALJ dismissed Stone's claim. *Id*.

The record plainly shows that Stone had at his disposal -- and fully availed himself of -- all the protections and litigation mechanisms before the ALJ that he would have had in court. *Id*. Stone fully briefed the issues, submitted documentary evidence and affidavits, and moved to stay consideration pursuant to Fed. R. Civ.

P. 56(f) (but failed to carry his burden of showing why such a stay was necessary).[6] *Id*. As such, there is no question that the proceeding before the ALJ had the requisite judicial quality for collateral estoppel to apply.

B. Application Of Collateral Estoppel To The ALJ's Decision Is Supported By The Secretary Of Labor's Comments To The Regulations Governing SOX.

This Court gives deference to the Department of Labor's interpretation of SOX. As this Court stated in *Welch*:

> The Supreme Court has recognized that *Chevron* deference is appropriate when it appears from the "statutory circumstances that Congress would expect the agency to be able to speak with the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 229, (2001). The Court has instructed that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure" such as formal adjudication. *Id.* at 230 & n. 12. Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication, *see* 18 U.S.C. § 1514A(b), and the Secretary has delegated her enforcement authority to the

[6] As discussed supra, the ALJ correctly reasoned that "[e]vidence of [Stone's] own conduct or statements is within [Stone's] personal knowledge," and therefore a determination as to whether Stone engaged in activity protected by SOX -- the dispositive issue -- could be made without the need for any discovery. *Id*. at 82-90. Indeed, in his submissions to the ALJ, Stone took full opportunity to present his statements, communications, and actions. *Id*. For purposes of evaluating the motion for summary decision, the ALJ accepted Stone's factual assertions about his alleged protected activity. *Id*. However, the ALJ correctly determined that Stone's activity did not definitively and specifically relate to any of the listed categories of fraud or securities violations under SOX. *Id*.

> ARB, *see* 67 Fed.Reg. 64,272, 64,273 (Oct. 17, 2002). Thus, we afford deference to the ARB's interpretation of § 1514A of the Sarbanes-Oxley Act.

536 F.3d at 276 (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *see also Platone*, 548 F.3d at 322.

The Secretary of Labor's comments contained in the promulgation of the final regulations governing the whistleblower provisions of SOX fully support the District Court's application of collateral estoppel to the ALJ's decision. Indeed, the Secretary of Labor describes the exact duplicative litigation scenario that was before the District Court, and prescribes -- based on Supreme Court precedent referenced above -- the remedy applied by the District Court: application of collateral estoppel. *See* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52, 104, 52, 112 (Aug. 24, 2004) (codified at 29 C.F.R. § 1980). In relevant part, the Secretary of Labor's comments state:

> This provision [18 U.S.C. § 1514A(b)(1)] authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board. The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final

> decision from the Board, if that decision was issued more than 180 days after the filing of the complaint. **The Secretary believes that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation. The Secretary notes that the courts have recognized that, when a party has had a full and fair opportunity to litigate a claim, an adversary should be protected from the expense and vexation of multiple lawsuits and that the public interest is served by preserving judicial resources by prohibiting subsequent suits involving the same parties making the same claims.** *See Montana v. United States*, 440 U.S. 147, 153 (1979). When an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (res judicata) on the basis of that administrative decision. *See University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (*citing United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)). **Therefore, the Secretary anticipates that Federal courts will apply such principles if a complainant brings a new action in Federal court following extensive litigation before the Department that has resulted in a decision by an administrative law judge or the Secretary.** Where an administrative hearing has been completed and a matter is pending before an administrative law judge or the Board for a decision, a Federal court also might treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames.

Id. (emphasis supplied).

Moreover, the Secretary of Labor specifically stated that it did not include the preclusion principles in the SOX regulations because: "[SOX] did not delegate

authority to the Secretary to regulate litigation in the Federal district courts," which, of course, indicates that the federal District Courts' inherent power to apply preclusion principles was not abrogated in any way by the language of SOX. *See id.* As the Secretary's statements fully recognize, the District Court had authority to prevent duplicative litigation on the issue of Stone's protected activity by applying collateral estoppel to the ALJ's decision.

C. Application Of Collateral Estoppel To The ALJ's Decision Is Supported By District Court Opinions Under SOX.

The District Court correctly analyzed and applied two district court decisions recognizing the authority of district courts to apply collateral estoppel to ALJ decisions in SOX cases. In *Allen v. Stewart Enterprises, Inc.*, which the District Court applied as similar to Stone's case, the District Court for the Eastern District of Louisiana considered the defendants' collateral estoppel argument and granted *mandamus* relief by staying the federal court proceeding and ordering the ARB to complete its review of a SOX case where the complainants had sought to remove to federal court after receiving an unfavorable decision from an ALJ and after appeal briefs had been filed with the ARB. No. 05-4033 (E.D. La. Apr. 6, 2006).[7] Like Stone, the complainants in *Allen* sought to remove their claims to federal court, arguing that federal court jurisdiction was appropriate because more

[7] The Allen case is contained in the Joint Appendix at 109.

than 180 days had elapsed since the filing of the complaint and the ARB had not yet issued a final decision. *Id*. As here, the defendants in *Allen* moved for dismissal of the claim based on collateral estoppel, or, in the alterative, for *mandamus* to compel the ARB to complete its administrative review within an acceptable time frame. *Id*.

Holding that there was no indication that Congress intended the absurd result of allowing a complainant to re-litigate a case in its entirety after extensive administrative litigation, the court in *Allen* exercised its inherent authority to apply collateral estoppel, stay the federal action and issue mandamus to the DOL to reinstate the ARB process and rule on pending briefs. *Id*. Relying on the Secretary of Labor's comments, discussed *supra*, the court in *Allen* reasoned:

> Nothing in the legislative history or the comments contained in the promulgation of the final regulations governing SOX preclude the application of the above-mentioned judicial principles [*i.e.*, collateral estoppel and mandamus relief] . . . . While the granting of jurisdiction in [federal court] pursuant to SOX is clear, there is no indication that Congress intended for the . . . rules of law -- issue preclusion, collateral estoppel and the inherent right to stay an action pending an administrative decision -- be suspended . . . . **Clearly, to interpret the plain language of 28 U.S.C. §1514A(b)(1)(B) to mandate a res novo adjudication after such extensive litigation, that is simply to re-litigate this case in its entirety, would lead to an absurd result . . . . There is no provision in the statute or the regulations which even remotely evidences that Congress intended to prohibit the Court from exercising its long established powers**.

Id. at 113 (emphasis supplied). The court in *Allen* emphasized the judicial nature of the proceeding before the ALJ, noting that the ALJ had afforded the plaintiffs a full opportunity to litigate the issues, and that the ALJ had issued a "detailed 109 page" decision and order. *Id*.

The District Court correctly found Stone's case dissimilar to *Hanna v. WCI Cmtys., Inc.*, where the District Court for the Southern District of Florida denied the defendant's motion to dismiss the plaintiff's SOX case on collateral estoppel grounds because the plaintiff had not litigated his claims before an ALJ at all. *See* 348 F. Supp. 2d at 1322 (S.D. Fla. 2004). In *Hanna* (unlike Stone's case) no ALJ had decided a dispositive legal issue on the merits. Only OSHA's preliminary order had issued, and the plaintiff had not even begun the process of appealing OSHA's preliminary findings to the ALJ when he filed his case in federal court. As the district court in *Hanna* noted, under SOX's procedures, "it is only when a case reaches the administrative law judge that rules or principles designed to assure production of the most probative evidence will apply," and that "only the administrative law judge issues decisions that contain appropriate findings, conclusions, and an order pertaining to remedies. *Id.* (citing 29 C.F.R. § 1980.107, 109).

Appellant's brief fails to recognize that the court in *Hanna* agreed with the Secretary of Labor's concern about the potential for duplicative litigation in cases

where an ALJ had already decided an issue on the merits, and, also like the Secretary, agreed that the authority of district courts to apply collateral estoppel to prevent such duplicative litigation is well-established:

> As the DOL has recognized, applying 18 U.S.C. § 1514A(b)(1)(B) according to its plain meaning might indeed **lead to an absurd result** in cases where a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal Court while the case is pending on review by the Board.
>
> The DOL's comments exhibit an appropriate concern over the duplicative litigation that would necessarily occur if the district courts re-litigated whistle-blower cases after the DOL has already investigated the merits of the complaint.

Id. (emphasis supplied).

However, the court noted that *Hanna* did not present the problem of duplicative litigation because (unlike Stone's case): "Mr. Hanna had not already received a decision from an administrative law judge prior to filing his district court complaint." *Id.* Because Hanna "had not litigated his case in front of an administrative law judge" and had only received a preliminary finding from OSHA, the court found that litigation in the federal court would not be an absurd result. Again, the court indicated that the critical issue was whether the ALJ had issued a decision: "unlike the factual scenario for collateral estoppel outlined in OSHA's regulations, Mr. Hanna had not received a decision from an administrative law judge at the time he filed his federal complaint." *Id.*

As the District Court found, Stone's case is more similar to *Allen* and dissimilar to *Hanna* because the dispositive issue of Stone's protected activity under SOX was decided on the merits by the ALJ. J.A. at 168. Unlike Mr. Hanna, Stone had a full, fair and complete opportunity to brief the issues and litigate before the ALJ, including the mechanism of a Fed. R. Civ. P. 56(f) motion (the requirements of which Plaintiff could not meet).[8] *Id*.

[8] The only other SOX case to have addressed the issue also recognizes that nothing in SOX abrogates the district courts' authority to apply collateral estoppel to ALJ decisions. In *Barron Stone v. Duke Energy Corporation*, No. 03-256, 2004 WL 1834597, *1 (W.D.N.C. 2004), the District Court for the Western District of North Carolina concluded that granting *mandamus* relief would not be appropriate because the parties had not litigated before an ALJ at all. Nevertheless, the court in *Duke Energy*, citing the Secretary of Labor's comments, recognized its power to prevent duplicative litigation in cases where an ALJ has already decided the case on the merits:

> While [SOX] provides for a cause of action allowing the Court to hear the case under its federal question jurisdiction, it does not specifically limit the remedies available to the Court once it exercises jurisdiction. For example, the Secretary of Labor has opined, in a recent interim final rule, that a Court might, upon a finding that significant resources have been expended by the Department of Labor to adjudicate the dispute, and that findings of fact have been made after ample process, choose to exercise its discretion by issuing a writ of mandamus compelling the Secretary to complete the administrative proceeding. 29 CFR § 1980.114. Note that the statute specifically authorizes equitable remedies. So both mandamus and the stay Plaintiff seeks would be available remedies."

Id. (emphasis supplied).

D. Stone's Reading Into SOX A Mandate That The District Court Completely Re-Litigate The Issue Of Stone's Protected Activity Is Not Supported By Any Authority And Would Lead To An Absurd Result.

As recognized by the Secretary of Labor, the district courts in *Hanna* and *Allen*, discussed *supra*, and the District Court in this case, there is nothing in the language of SOX, the regulations under SOX, or SOX's legislative history to indicate that Congress intended to suspend the application of collateral estoppel to ALJ decisions. Indeed, in his Opposition brief to the District Court, Stone conceded -- as he had to -- that the District Court could exercise its inherent power to apply preclusion principles to prevent duplicative litigation: "Stone does not dispute this Court's inherent power to apply the doctrine of collateral estoppel to truly duplicative litigation." *See* J.A. at 125.[9]

18 U.S.C. § 1514A(b)(1) and 29 C.F.R. § 1980.114(a) provide that, because the ARB did not issue a final decision within 180 days of the filing of Stone's complaint with OSHA, Stone could file his SOX complaint in the District Court. He did so, seeking to avoid the ALJ's dismissal of his complaint and get a second

[9] In the District Court, Stone asserted that the re-litigation of whether he engaged in protected activity under SOX would not be duplicative, which completely ignores the nature of the litigation that occurred before the ALJ. *Id.* As the District Court found, a review of the ALJ's recitation of the procedural history before her, and her findings of fact and conclusions of law, shows that the dispositive issue of protected activity under SOX was fully litigated and decided on the merits.

bite at the apple, and subjecting Appellees to the prospect of vexatious and expensive re-litigation of the issue of his protected activity.

However, Stone provides no authority whatsoever to support his contention that the District Court did not have the authority to dismiss Stone's complaint by applying collateral estoppel to the ALJ's decision that Stone did not engage in protected activity under SOX.

The statutes and cases cited by Stone for the proposition that SOX's inclusion of the term "*de novo*" in 18 U.S.C. § 1514A(b)(1) required the District Court to re-try the issue of Stone's protected activity do not, in fact, support Stone's position. As discussed, *supra*, in *Hanna*, the district court did not apply collateral estoppel to OSHA's preliminary finding and instead determined that *de novo* review was appropriate because the matter had only been before OSHA and no ALJ had issued a decision. Indeed, the district court in *Hanna* emphasized:

> Mr. Hanna filed his district court complaint before the time had elapsed for seeking review of OSHA's preliminary findings in front of an administrative law judge. Under [SOX], it is only when a case reaches the administrative law judge that rules or principles designed to assure production of the most probative evidence will be applied . . . . Moreover, only the administrative law judge issues decisions that contain appropriate findings, conclusions, and an order pertaining to the remedies.

348 F. Supp. 2d at 1322. This language makes it clear that the *Hanna* court would have reached a different conclusion if, as here, a dispositive issue had been fully litigated before an ALJ.

Furthermore, this Court's decision in *Cross v. United States* is inapposite. 512 F.2d 1212, 1216 (4th Cir. 1975). In *Cross*, this Court interpreted the term "**trial** *de novo*" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(F), which provides: "[t]he reviewing court shall . . . set aside . . . findings . . . and conclusions found to be unwarranted by the facts to the extent that the facts are subject to **trial** *de novo* by the reviewing court." *Id*. This language, which provides for re-trial of issues, plainly is dissimilar to SOX. *See id*.

Similarly, Stone's attempt to find support in the Equal Employment Opportunity Act and Immigration Act for his contention that SOX suspends collateral estoppel in SOX cases is misplaced. First, unlike SOX, the Immigration Act of 1990 expressly provides for a **trial** *de novo*. 8 U.S.C. § 1421(c) provides that the district court "shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, *conduct a* ***hearing*** *de novo on the application*. (emphasis supplied). This language is different from what Congress included in SOX.

Second, it is well-settled that EEOC "no reasonable cause" determinations are not sufficiently judicial in nature to give parties a full and fair opportunity to

litigate. Compared to the proceeding before the ALJ in this case, EEOC proceedings are not substantially similar to court proceedings. To the contrary, EEOC reasonable cause determinations are substantially non-judicial in nature.

Among other things, such proceedings are non-adversarial, complainants have no right to a formal hearing, and parties are not represented by counsel. As such, Courts have not applied collateral estoppel to EEOC determinations. *See Layne,* 939 F.2d at 219 (Title VII's language and legislative history precluded application of preclusion); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973) ("The [EEOC] itself does not consider the absence of a 'reasonable cause' determination as providing employer immunity from similar charges in a federal court . . . and the courts of appeal have held that, in view of the large volume of complaints before the [EEOC] and the nonadversarial character of many of its proceedings, court actions under Title VII are *de novo* proceedings and . . . [an EEOC] 'no reasonable cause' finding does not bar a lawsuit in the case."); *E.E.O.C. v. Jacksonville Shipyards, Inc.*, 696 F. Supp 1438, 1441 (M.D. Fla. 1988) ("[the] EEOC's reasonable cause determination is not an adjudication of rights and liabilities; indeed, it is a non-adversar[ial] proceeding designed to notify an employer of [the] EEOC's findings . . . ."); *Allied Chemical v. Niagara Mohawk Power Corp*., 72 N.Y.2d 271, 276-77 (1988) (EEOC procedures are not "sufficient

both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired.").

Nor are EEOC determinations sufficiently final for collateral estoppel to apply. As this Court found in *Georator v. E.E.O.C.*, 592 F.2d 765, 768 (4th Cir. 1979): "No . . . finality exists with respect to the EEOC's determination of reasonable cause. Standing alone, it is lifeless, and can fix no obligation nor impose any liability on [the employer]. It is merely preparatory to further proceedings."[10]

Unlike Title VII, SOX specifically contemplates that the DOL will act in a judicial capacity and issue final determinations. *See* 29 C.F.R. § 1980.106; 29 C.F.R. § 1980.109-11; Unlike EEOC determinations of no reasonable cause, the proceedings before the ALJ in this case, which are detailed *supra* and which were considered by the District Court, plainly were judicial in nature and are worthy of collateral estoppel.

Finally, Stone's interpretation of SOX as requiring the District Court to disregard the ALJ decision is contrary to the rule in this Court that courts will not interpret a statute in a way that produces an absurd result. *See Aremu v. Dep't of*

[10] *Laber v. Harvey*, 438 F.3d 404, 420 (4th Cir. 2006), cited by Stone, is inapposite. *Laber* discusses the Supreme Court's holding in *Chandler v. Roudebush*, 425 U.S. 840 (1976), that district courts do not give deference to an EEOC finding of no reasonable cause. Unlike this case, this Court in *Laber* interpreted the phrase "**trial** *de novo*" used by the Supreme Court in *Chandler*.

Homeland Sec., 450 F.3d 578, 583 (4th Cir. 2006) (noting settled rule that a court should interpret statutes to avoid absurd results); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 n. 2 (4th Cir. 1999) (observing that court may look beyond plain meaning of statute where "a literal application of the statute would produce an absurd result").

Appellees expended substantial resources defeating the merits of Stone's complaint before the ALJ at the equivalent of summary judgment. The ALJ and the Department of Labor expended substantial resources providing Stone with a full and fair opportunity to litigate the dispositive issue of protected activity under SOX. It would be absurd to interpret SOX as mandating that Stone be allowed to litigate that issue again.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT COLLATERAL ESTOPPEL BARRED RELITIGATION OF THE ISSUE OF STONE'S PROTECTED ACTIVITY.

The District Court correctly applied the elements of collateral estoppel and found them met in this case. J.A. at 161. The specific elements of collateral estoppel are: (1) the issue precluded must be identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom estoppel is asserted must have had a full and fair

opportunity to litigate the issue in the previous forum. *Ramsay*, 14 F.3d at 210; *Sedlack v. Braswell Serv. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Virginia Hosp. Ass'n*, 830 F.2d at 1311.

Here, the dispositive issue in the prior case actually litigated before and determined by the ALJ -- specifically whether Plaintiff engaged in activity protected under SOX -- was identical to the issue presented in the District Court, and the ALJ's ruling on that issue was necessary and essential to the judgment. Indeed, the issue was dispositive of Stone's SOX claim because it is a required element of his *prima facie* case. The action before the ALJ also was actually litigated as, under *Utah Construction*, administrative proceedings have preclusive effect. There also can be no dispute that the ALJ acted in a judicial capacity and that the parties had a complete opportunity to litigate their claims.

The District Court's finding that Stone had an opportunity to fully litigate his claims is amply supported by the record. J.A. at 69, 161. As the District Court found, Stone filed voluminous briefs, declarations and supporting exhibits in opposition to Appellees' motion for summary decision, which were considered by the ALJ in her 24-page decision. *Id.* The District Court also correctly rejected Stone's contention that he was not afforded an adequate opportunity to litigate his claims because the ALJ dismissed his complaint without discovery and a hearing. *Id*. at 168. As the District Court reasoned, the ALJ correctly denied Stone's Rule

56(f) motion because discovery was not necessary to resolving the legal question whether he had engaged in protected activity under SOX. *Id*. Stone needed only to describe his communications and statements and demonstrate that they were protected under SOX, rather than focus on the Appellees' alleged conduct. *Id*. As the District Court found, because Stone could offer affidavits and exhibits to set forth his conduct, the ALJ correctly concluded that neither discovery nor a hearing was necessary. *Id*.

The District Court also correctly found meritless Stone's argument that the ALJ's decision was not final for purposes of collateral estoppel. *Id*. at 169. As the District Court reasoned, the ALJ's adjudication of the case, *i.e*., granting the Appellees' motion for summary decision led to a final judgment on the merits. *Id*.[11] That SOX's procedures provide for an appeal of an ALJ's decision to the ARB does not mean the ALJ's decision was not final for purposes of precluding re-litigation of the issue of Plaintiff's lack of protected activity. To the contrary, the law is clear that the ALJ's decision dismissing Plaintiff's SOX complaint was a final decision on the merits for purposes of collateral estoppel. *See, e.g., Adkins v. Allstate Ins. Co.*, 729 F.2d 974, 976 n. 3 (4th Cir. 1984) (recognizing that a summary judgment is a final disposition on the merits for purposes of preclusion); 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 4427 (2007) ("it

[11] Stone has recognized that Appellees' Motion for Summary Decision to the ALJ was "the equivalent of a Rule 56 motion for summary judgment." *Id*. at 15.

has become clear in the federal courts that *res judicata* ordinarily attaches to a final lower-court judgment even though an appeal has been taken and remains undecided"), *and* § 4434 ("Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability . . . [or to] issues that were decided only at the trial level and that remained open to later review and reversal.") (*citing Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) ("'Finality' in the context here relevant [applying the doctrine of issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.") (emphasis supplied).

CONCLUSION

The District Court committed no error in dismissing Stone's complaint by applying collateral estoppel to the ALJ's decision. The District Court had the authority to find, and properly found on the record, that Stone had a full and fair opportunity to litigate his claims before the ALJ, which litigation resulted in a final judgment on the merits. For all the foregoing reasons, Appellees respectfully request that the decision of the District Court granting Appellees' motion to dismiss be affirmed.

Respectfully submitted,

INSTRUMENTATION LABORATORY COMPANY, BRIAN DURKIN, ANN DEFRONZO, and RAMON BENET

By their attorneys,

/s/ Robert M. Shea
Robert M. Shea
Scott J. Connolly
MORSE, BARNES-BROWN & PENDLETON, P.C.
Reservoir Place
1601 Trapelo Road
Waltham, MA 02451
(781) 622-5930
(781) 622-5933

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*10,674*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2000*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: January 22, 2009

/s/ Robert M. Shea
Robert M. Shea

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of January, 2009, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Adam A. Carter
Robert S. Oswald
EMPLOYMENT LAW GROUP, PC
888 17th Street, NW, Suite 900
Washington, DC 20006
(202) 331-2883

Counsel for Appellant

Richard Renner
KOHN, KOHN & COLAPINTO, PC
3233 P Street, NW
Washington, DC 20006
(202) 342-6980

Counsel for Amici Curiae

/s/ Robert M. Shea
Robert M. Shea