UNITED STATES COURT OF APPEALS
for the
FOR THE FIRST CIRCUIT

Case Nos. 04-2291 and 04-1801
(consolidated)

RUBEN CARNERO,
PLAINTIFF - APPELLANT,

- v. -

BOSTON SCIENTIFIC CORPORATION,
DEFENDANT - APPELLEE.

Appeal from the United States District Court
For the District of Massachusetts

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is a consolidated appeal from final orders of the district court dismissing two related cases arising from the same factual circumstances and involving the same parties, plaintiff-appellant Ruben Carnero and defendant-appellant Boston Scientific Corporation ("BSC").

In Case No. 04-2291, the district court granted BSC's motion to dismiss Mr. Carnero's federal whistleblower claim under the Sarbanes-Oxley Act by issuing a Memorandum of Decision dated August 27, 2004. *See* Tab A.[1] The district court had subject matter jurisdiction over the action pursuant to 15 U.S.C. § 1514A(b)(1)(B) because the Secretary of Labor had not issued a final determination of Mr. Carnero's administrative proceeding under the Sarbanes-Oxley Act within 180 days of his commencement of that proceeding. On September 22, 2004, Mr. Carnero filed a Notice of Appeal of the district court's August 27, 2004 decision. The appeal is timely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure because the Notice of Appeal in this civil case was filed within 30 days of the district court's decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the August 27, 2004 decision is a final order or judgment that disposes of all parties' claims in Case No. 04-2291.

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[1]The district court's decisions that have been appealed are annexed as an Addendum to this brief at Tabs A through C pursuant to Local Rule 28(a)(1).

In Case No. 04-1801, the district court granted BSC's motion to dismiss Mr. Canrero's state-law employment termination claims on *forum non conveniens* or comity grounds by issuing a one paragraph handwritten endorsed Order dated March 25, 2004. *See* Tab B. The district court had diversity jurisdiction over those claims pursuant to 28 U.S.C. § 1332(a)(2) because Mr. Carnero is a citizen of Argentina and BSC is a citizen of Delaware and Massachusetts. On April 25, 2004, Mr. Carnero filed a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure to alter or amend the district court's March 25, 2004 Order. Mr. Carnero's Rule 59 motion was timely pursuant to that rule because it was filed within 10 days of the March 25, 2004 Order. On May 13, 2004, the district court denied Mr. Carnero's Rule 59 motion by issuing an endorsed Order. *See* Tab C. On June 14, 2004, Mr. Carnero filed a Notice of Appeal of the district court's decisions granting defendant's motion to dismiss and denying Mr. Carnero's Rule 59 motion. The appeal is timely because (i) pursuant to Rule 4(a)(4)(A)(iv) of the Federal Rules of Appellate Procedure, the time to appeal the district court's March 25, 2004 Order did not begin to run until the district court issued its order denying Mr. Carnero's Rule 59 motion; and (ii) pursuant to Rule 4(a)(1), the Notice of Appeal was filed with 30 days of the district court's May 13, 2004 Order denying the Rule 59 motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1291

because the district court's March 25, 2004 and May 13, 2004 Orders constitute final orders or judgments that dispose of all parties' claims in Case No. 04-1801.

STATEMENT OF ISSUES

1. Whether Congress intended the whistleblower provision of the Sarbanes-Oxley Act to protect reports of accounting misconduct made by overseas employees of companies subject to the Act?

2. Alternatively, whether Congress intended the whistleblower provision to protect reports of misconduct made by overseas employees who either (i) are required to travel frequently to the United States in order to meet with, and report to, their supervisors; (ii) are directly supervised and controlled by U.S. supervisors; or (iii) make reports of corporate misconduct directly to U.S. supervisors?

3. Whether the record supports the district court's factual findings that plaintiff "had no contact with the defendant in Massachusetts" and "defendant [did not] in any way direct or control plaintiff [in his employment]."

4. Whether the district court's one paragraph decision dismissing plaintiff's state law claims on grounds of *forum non conveniens* or comity is sufficient for meaningful appellate review?

SCOPE OF REVIEW

Issues 1 and 2 present issues of law that are subject to *de novo* review. *Doyle v. Hasbro*, 103 F.2d 186, 190 (1st Cir. 1996).

Issue 3 challenges the district court's factual findings, which should be reversed upon a finding of clear error. *American Cyanamid v. Capuano*, 381 F.3d 6, 21 (1st Cir. 2004).

Issue 4 challenges a discretionary decision of the district court that should be reversed on a finding of abuse of discretion. *See*, *e.g.*, *Veranda Beach Club v. Western Surety*, 936 F.2d 1364, 1370 (1st Cir. 1991).

STATEMENT OF THE CASE

This is an appeal of the district court's dismissal of plaintiff Ruben Carnero's state and federal wrongful termination claims against defendant Boston Scientific Corporation ("BSC"). Mr. Carnero, who worked for BSC in various senior management positions for over six years, claims that he was terminated in retaliation for reporting to his supervisors that the company's Latin American business units were engaged in accounting misconduct by improperly inflating sales figures.

Mr. Carnero asserted a federal claim under the whistleblower provision of the Sarbanes-Oxley Act, which prohibits companies listed on U.S. securities

exchanges from retaliating against employees who report accounting misconduct or other types of shareholder fraud. The district court granted BSC's motion to dismiss that claim on the ground that Congress did not intend the statute to protect reports of misconduct made by overseas employees of companies listed on U.S. securities exchanges. Tab A (August 27, 2004 Memorandum of Decision dismissing Sarbanes-Oxley claim).

Mr. Carnero also asserted various state law claims, including claims for breach of contract and retaliatory termination. The district court granted BSC's motion to dismiss those claims on grounds of *forum non conveniens* or comity, finding in a one paragraph handwritten decision that Mr. Carnero "had no contact with [BSC] in Massachusetts" and that BSC did not "in any way direct or control" Mr. Carnero's employment. Tab B (March 25, 2004 endorsed Order dismissing state law claims).

Mr. Carnero filed a Rule 59 motion to vacate the dismissal of his state law claims on the grounds that the district court's factual findings were contrary to the undisputed evidence that (i) Mr. Carnero had almost daily contact with BSC's Massachusetts headquarters during his six years of employment; (ii) he traveled frequently to Massachusetts in order to meet with and report to his supervisors; and (iii) BSC at all times supervised, directed and controlled Mr. Carnero's

employment from its Massachusetts headquarters. The district court denied that motion in an endorsed Order without any comment or analysis. Tab C. (May 13, 2004 endorsed Order denying Rule 59 motion).

Mr. Carnero now appeals the district court's dismissal of both his federal and state claims.[2]

STATEMENT OF FACTS

A. Mr. Carnero's Employment with BSC.

Most of the facts regarding the history of Mr. Carnero's employment with BSC are undisputed, although the parties contest how those facts should be characterized and their significance. BSC is a publicly traded corporation listed on the New York Stock Exchange with headquarters in Natick, Massachusetts. A-7

[2]Mr. Carnero's state and federal claims were asserted in separate lawsuits because the Sarbanes-Oxley Act required Mr. Carnero initially to bring his whistleblower claim before the Department of Labor. After the DOL failed to reach a final determination of that claim within 180 days, Mr. Carnero had the right pursuant to the Act to bring the claim in the district court for *de novo* review, which he did in a separate lawsuit. Mr. Carnero moved to consolidate both lawsuits in conjunction with his Rule 59 motion seeking to vacate the district court's dismissal of his state law claims, which the district court denied. This Court granted Mr. Carnero's motion to consolidate his appeals of the district court's decisions dismissing both lawsuits. *See*, *infra*, at Statement of Facts § F, for a complete description of the procedural history of Mr. Carnero's DOL proceeding and his subsequent efforts to consolidate his federal and state claims before the district court.

(DOL Complaint) at ¶ 3.[3] It is a leading manufacturer of medical equipment and conducts business operations throughout the world. *See*, *e.g.*, A-259 (BSC Code of Conduct page listing 42 foreign locations as of October 2000).[4]

Between 1997 and 2002, Mr. Carnero worked for BSC in a variety of senior management positions, including Latin American Business Development Director, Country Manager for Argentina and Country Manager for Brazil. A-337 (State Law Complaint) at ¶ 6.[5] Although Mr. Carnero worked primarily in Latin America, BSC does not dispute that "BSC employees at its headquarters in Natick, Massachusetts made all of the significant decisions regarding the terms and conditions of [Mr. Carnero's] employment." A-180 (Carnero Dec.) at ¶ 4.[6]

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[3]Citations to the record are to the Appendix, which consists of 401 consecutively numbered pages in two volumes. Volume 1 comprises pages 1 through 331; volume 2 comprises pages 332 through 401.

[4]The evidence before the district court consisted of declarations submitted by the parties and annexed exhibits. A complete description of that evidence is set forth in the Addendum to this brief at Tab D pursuant to Local Rule 28(a)(4).

[5]Mr. Carnero verified the allegations set forth in his complaints. A-179 (Carnero Dec.) at ¶ 2.

[6]BSC did not submit any declarations or other evidence contesting the facts regarding Mr. Carnero's employment set forth in his declarations. The only declaration submitted by BSC regarding Mr. Carnero's employment is the Ziemke Declaration, which was submitted prior to, and does not necessarily conflict with, Mr. Carnero's declarations. *See* Tab D (index of record evidence).

Nor does BSC dispute that its Massachusetts employees (i) interviewed and hired Mr. Carnero, A-180-183 (Carnero Dec.) at ¶¶ 4-10; (ii) supervised and directed his activities, A-183 (*id.*) at ¶ 11; (iii) required him to travel frequently to Massachusetts to meet with and report to his supervisors, *id.*, and (iv) traveled to Brazil to fire him in August 2002, A-189-190 (*id.*) at ¶¶ 23-24. Throughout his employment, Mr. Carnero received excellent performance evaluations from headquarters staff. A-189 (*id.*) at ¶ 22. He also regularly received awards under BSC's Stock Option Plan, which are reserved for BSC's senior management employees "who demonstrate the greatest potential for long term effect upon the value and success of the business." A-227-237 (letters awarding stock options to Mr. Carnero); A-221-226 (Stock Option Plan). The Stock Option Plan is a written agreement between BSC and Mr. Carnero that provides for the application of Massachusetts law. A-225 (Stock Option Plan choice of law provision).

Although BSC required Mr. Carnero to execute written employment contracts with its Argentine and Brazilian subsidiaries and was paid by those subsidiaries, the parties disagree as to the significance of those facts. BSC asserts that Mr. Carnero was employed solely by BSC's foreign subsidiaries and any oral agreement that Mr. Carnero had with BSC simply provided that he would be employed by BSC's subsidiaries. A-381 (Transcript of January 7, 2004 oral

argument ("Tr.") at 21:6-25. Mr. Carnero counters that the purpose of the local employment agreements was for BSC to comply with local employment regulations and that the agreements do not reflect the reality that BSC controlled and directed his employment from its Massachusetts headquarters. A-182-183 (Carnero Dec.) at ¶ 10; A-384-285 (Tr. at 25:22 – 26:24).[7]

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[7]Mr. Carnero points to a variety of documents and undisputed facts to support his contention that his acceptance of BSC's offer of employment gave rise to a verbal employment relationship directly with BSC. For example, the twelve letters Mr. Carnero received from BSC awarding stock options are written on BSC stationery and refer to him as an employee. A-227-237. In addition, the letter extending BSC's initial employment offer is written on BSC stationary and sets forth all of the material terms of Mr. Carnero's employment, including his compensation expressed in U.S. dollars. A-42-44. Mr. Carnero contends, and BSC does not dispute, that at the time he accepted BSC's offer, BSC told him that he would be required to enter into written employment agreements with BSC's local subsidiaries in order to comply with local employment regulations. A-183 (Carnero Dec. at ¶ 12). That contention is consistent with BSC's offer letter, which states that the offer is contingent on Mr. Carnero's signing an employment agreement with BSC's Argentine subsidiary "and perhaps other Boston Scientific affiliates." A-44.

When Mr. Carnero was transferred to Brazil, he received a letter offering him the job of Country Manager for Brazil "on behalf of Boston Scientific Corporation." A-187 (Carnero Dec.) at ¶ 18; A-52 (offer letter). He also received a "Boston Scientific Corporation Interoffice Memorandum" confirming his Brazilian assignment on "behalf of Boston Scientific Inter-Continental," a BSC subsidiary headquartered in Massachusetts that was responsible for all of BSC's operations outside of the United State, Europe and Japan. A-187 (Carnero Dec.) at ¶ 18; A-54 (BSC Interoffice Memo). Although that memorandum states that it does not "create a contract of employment," it confirms that Mr. Carnero would "continue to be an *at-will employee of Boston Scientific* under the terms and conditions of [his] original employment with the company." A-187 (Carnero Dec. at ¶ 19); A-59 (BSC Interoffice Memo).

B. Mr. Carnero's Reports of Accounting Fraud.

In mid 2000, Mr. Carnero became aware of false invoices and inflated sales figures in BSC's operations in Argentina. A-340-341 (State Law Complaint) at ¶ 17. Pursuant to BSC's Code of Ethics, Mr. Carnero reported the problem to BSCs General Manager for Latin America, Juan Pedro Ziemke, who told Mr. Carnero that he would handle the problem. A-341 (*id*.) at ¶ 18; A-253 (relevant provisions of BSC Code of Ethics). Shortly thereafter, Mr. Carnero was transferred to Brazil. A-186 (Carnero Dec.) at ¶ 16.

In August 2000, the SEC determined that BSC's Japanese business units had engaged in misconduct similar to that being reported by Mr. Carnero. *See In re Boston Scientific Corporation*, Administrative Proceeding No. 3-10272, SEC Accounting and Auditing Enforcement Release No. 1295 (SEC August 21, 2000) (BSC had incorporated false sales and earnings data from its Japanese subsidiary) (available on lexis at 2000 SEC LEXIS 1705 (August 21, 2000)).

In December 2000, Mr. Carnero continued to learn of false invoices and inflated sales in Argentina from other BSC employees, whom he refered to Ziemke. A-341 (State Law Complaint) at ¶ 18. In March 2001, Mr. Carnero became aware of false invoices in Brazil. A-341-342 (*id*.) at ¶ 19. As Country

Manager for Brazil, he reversed the false invoices and reported that the false sales problem had spread from Argentina to Brazil. *Id*.

When no action was taken in response to Mr. Carnero's reports, he reported the false sales problem to BSC's senior manager for Corporate Analysis and Control, Arthur Gates, who agreed that there was mismanagement in the Latin American sales area. A-342 (*id*.) at ¶ 20. Later that year, Mr. Carnero learned that other BSC employees had made false allegations accusing him of engaging in unethical conduct. A-342-343 (*id*.) at ¶ 21. Although he requested an investigation into those false allegations, BSC took no action. *Id*.

In 2002, Mr. Carnero continued to press for an investigation into the false sales problem and the false accusations against him. In April, Mr. Ziemke confronted Mr. Carnero with a December 1999 letter purportedly signed by Mr. Carnero that appeared to violate BSC policy and raised ethical concerns. A-343 (*id*.) at ¶ 22. Mr. Carnero had never seen the letter before, which contained a forgery of his signature. *Id*. Mr. Carnero reported the incident to BSC headquarters and demanded a meeting on the false sales problem and the escalating incidents apparently designed to discredit him. *Id*; A-188-189 (Carnero Dec.) at ¶ 21.

In May, 2002, Mr. Carnero met with BSC's General Manger for Latin America, Canada and South Africa, David McFaul, to press for an investigation into the false sales problem, the attempts to discredit Mr. Carnero and the forged letter. A-189 (Carnero Dec.) at ¶ 22; A-343 (State Law Complaint) at ¶ 23; A-175-176 (Carnero Sup. Dec.) at ¶¶ 2-3. McFaul directed in-house counsel Ty Edmonson to investigate and report the results to Mr. Carnero. *Id*.

C. The August 8, 2002 Termination.

On August 8, 2002, Mr. Carnero was unexpectedly called to a meeting at a hotel in Sao Paulo, Brazil with McFaul, Edmonson and two other BSC senior headquarters executives based in Natick Massachusetts. Mr. Carnero expected that he would be informed of the results of Ty Edmonson's investigation into his reports of accounting fraud. A-344 (State Law Complaint) at ¶ 24; A-189 (Carnero Dec.) at ¶ 23. Instead, McFaul and his colleagues told Mr. Carnero that he was being terminated "without cause" for differences in "management style." A-344 (State Law Complaint) at ¶ 24; A-189 (Carnero Dec.) at ¶ 24. Mr. Carnero was required to sign a letter acknowledging that he had been terminated from BSC's Brazilian subsidiary. A-190 (Carnero Dec.) at ¶ 24. He was told to vacate his office immediately. *Id*. at ¶ 25. The following day, McFaul circulated a Boston Scientific Interregion Memo to all BSC Intercontinental Staff Members announcing Mr. Carnero's departure and acknowledging his

contributions to BSC and the "strong financial results" that he achieved as manager of the "Brazilian team." A-262 (August 9, 2002 Interregion Memo).

D. The April 3, 2003 Termination.

Under Argentine law, employees who are terminated without cause are automatically entitled to statutory termination benefits based on the employee's salary and years of service. A-208 (declaration of plaintiff's expert on Argentine law, Dr. Mario Ackerman ("Ackerman Dec.")) at ¶ 20.[8] Since Mr. Carnero was still an employee of BSC's Argentine subsidiary, he expected to receive formal notice of his termination and his entitlement to statutory termination benefits pursuant to Argentine law. A-191 (Carnero Dec.) At ¶ 27. Mr. Carnero never received such notice, however, even though the parties were actively negotiating Mr. Carnero's claims arising from his termination. *Id*. at ¶ 29. Those negotiations broke down in March 2003 when BSC refused to consider Mr. Carnero claims of accounting fraud and unethical conduct. *Id*. Since Mr. Carnero still had not

[8]Dr. Ackerman is the Chairman of the Labor Law Faculty of the University of Buenos Aires School of Law, a regular consultant to a United Nations organization that promotes international recognition of labor rights and a former advisor on Labor Law to the Argentine House of Representatives. A-198 (Ackerman Dec.) at ¶ 1; A-302-305 (Ackerman resume). BSC did not retain an independent expert on Argentine law, although it submitted declarations from its Argentine counsel, Carlos Dodds, regarding Argentine legal issues. A-62-73, 69-73 and 398-399 (Dodds declarations).

received notice of his termination from BSC's Argentine subsidiary, however, he could not claim statutory termination benefits under Argentine law. A-191-192 (*id.*) at ¶ 30. In order to force the issue, Mr. Carnero sent a telegram demanding either statutory termination benefits under Argentine law or job reinstatement. *Id.*; A-272 (Carnero's March 19, 2003 telegram).

In response, BSC's Argentine subsidiary offered to reinstate Mr. Carnero in a job, but at a salary level determined by the Argentine peso rather than the U.S. dollar. A-244 (BSC's March 25, 2003 telegram). Since the peso had experienced a dramatic devaluation over the two years Mr. Carnero had been working for BSC in Brazil, the offer represented a pay cut of more than two thirds of his previous salary. A-192 (Carnero Dec.) at ¶ 31 n. 4.

When Mr. Carnero did not report for work, BSC sent him a telegram on April 3, 2003 stating:

> we hereby terminate the employment relationship by your exclusive fault and responsibility.

A-276 (BSC's April 3, 2003 telegram).

E. The Argentine Conciliation Proceeding and BSC's Defamation Suit.

By manufacturing a dispute over Mr. Carnero's compensation, BSC shifted the burden of proving that Mr. Carnero's termination was "without cause" to Mr.

Carnero. A-208-209 (Ackerman Dec.) at ¶ ¶ 20-21. In order to meet that burden and preserve his rights, Mr. Carnero commenced a conciliation proceeding in Argentina. A-209-210 (*id.*) at ¶ 22; A-191 (Carnero Dec.) at ¶ 32.

Mr. Carnero then retained U.S. counsel to pursue his claims arising from his reports of accounting fraud and unethical conduct. On May 9, 2003, Mr. Carnero's U.S. counsel sent a letter to BSC asserting a claim for retaliatory termination based on those reports and offering to engage in settlement negotiations. A-195 (Bolatti Dec.) at ¶ 3. Although Mr. Carnero's U.S. counsel agreed to BSC's request for more time to investigate and respond to the charges, BSC instead used the additional time to prepare and file a defamation lawsuit in Argentina asserting that the allegations in the May 9, 2003 letter from Mr. Carnero's U.S. counsel to BSC constituted defamation for which Mr. Carnero is liable. A-195-197 (*id.*) at ¶ ¶ 4-7. The Argentine court summarily denied BSC's *ex parte* application for an order restraining Mr. Carnero from commencing litigation in the United States, finding that the defamation claim lacked merit and acknowledging Mr. Carnero's absolute right to sue BSC

> before administrative and legal agencies that control the activities carried out by [BSC] . . . here[] or *in any other jurisdiction.*

A-217 (Ackerman Dec.) at ¶ 36; A-307 (Argentine decision) (emphasis added).

F. Procedural History of the U.S. Litigation.

1. The DOL Administrative Proceeding.

On July 2, 2003, Mr. Carnero filed an administrative complaint before the Department of Labor pursuant to the whistleblower provision of the Sarbanes-Oxley Act. A-7-22 (DOL Complaint). The DOL regulations for handling such claims contemplate that an investigation and preliminary determination will be issued within 60 days of the filing of the complaint. 29 C.F.R. Part 1980.105(a). After a preliminary decision is made, the complainant may request a hearing before an administrative law judge. *Id*. at Parts 1980.106 and 1980.107. Before the DOL issues a final determination, the parties may appeal the decision of the administrative law judge to the Administrative Review Board. *Id*. at Part 1980.110. The DOL has 180 days in which to complete this process and issue a final decision before the complaint has the right under the Act to bring the claim in district court for de novo review. *Id*. at Part 1980.114(a).

The DOL did not follow its guidelines with respect to Mr. Carnero's claim. Instead, the DOL took no action for over five months. On December 15, 2004, just two weeks before the expiration of the 180 day period in which the DOL had exclusive jurisdiction over Mr. Carnero's claim, the DOL issued a preliminary decision dismissing the claim. A-143-144. The preliminary decision determines

that BSC is covered by the Sarbanes-Oxley Act since it is a public company listed on the New York stock exchange. A-143 (at 3rd unnumbered paragraph). The preliminary decision concludes, however, that the statute does not cover Mr. Carnero's whistleblower claim because (i) Congress did not intend the statute to apply to reports of misconduct by employees who work outside of the United States; and (ii) Mr. Carnero worked outside of the United States. *Id*. (at 4th unnumbered paragraph). In reaching its conclusion that the Act does not protect reports of misconduct from employees working outside of the United States, the DOL applied the judicially created presumption described in *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), that Congress does not intend its laws to apply extraterritorially unless a contrary intent appears. *Id*.

The DOL took no further action on the claim before its 180 day period of exclusive jurisdiction expired. After Mr. Carnero filed his Sarbanes-Oxley claim in the district court, the DOL determined that it no longer had jurisdiction over Mr. Carnero's claim and therefore dismissed the administrative claim without issuing a final decision. A-165-166.

2. The Federal Lawsuits.

In August 2003, while Mr. Carnero's Sarbanes-Oxley claim was still pending before the Department of Labor, he commenced a lawsuit in the district

court asserting his state law claims against BSC. BSC moved to dismiss those claims on grounds of *forum non conveniens* or comity. During the briefing of that motion, which extended through December 2003, Mr. Carnero notified the district court of the pendency of his Sarbanes-Oxley claim and the increasingly likely possibility that he would be able to bring that claim in district court if the DOL failed to issue a final determination prior to the expiration of its 180 day period of exclusive jurisdiction. On December 31, 2003, less than one week before oral argument was scheduled on BSC's motion to dismiss the State Law Action, BSC notified the district court of the DOL's preliminary decision, asserting that Mr. Carnero's Sarbanes-Oxley claim lacked merit pursuant to the DOL's preliminary decision.

On January 7, 2004, oral argument was held on BSC's motion to dismiss. Shortly prior to the afternoon hearing, Mr. Carnero filed his Sarbanes-Oxley claim as a separate lawsuit before the district court. He notified the district court of the filing and responded to BSC's arguments that his Sarbanes-Oxley claim lacked merit in light of the DOL's preliminary decision. A-145-148 (Mr. Carnero's January 7, 2004 letter to the district court). At oral argument, BSC notified the district court that it intended to move to dismiss Mr. Sarbanes-Oxley claim and Mr. Carnero's counsel verbally requested that the claims and BSC's motions to

dismiss be consolidated. A-387 (Tr. at 28:14-15). The district court denied that request, stating that it would deal with BSC's motion to dismiss Mr. Carnero's state law claims separately. A-388 (Tr. at 29:1-5).

In late January 2004, BSC moved to dismiss Mr. Carnero's Sarbanes-Oxley claim. By the Spring of 2004, the motion had been briefed and the district court thereafter denied the parties' request for oral argument. A-2 (docket entry dated May 13, 2004 recounting prior notice that the district court would decide BSC's motion to dismiss on the papers).

On March 25, 2004, the district court granted BSC's motion to dismiss the state law claims in a one paragraph handwritten endorsed Order. Tab B. The Order neither addresses the standards for dismissal under the doctrines of *forum non conveniens* and comity nor discusses any of the factual evidence submitted by Mr. Carnero. *Id*. The Order makes the factual findings that Mr. Canero "had no contact with the defendant in Massachusetts" and "defendant [did not] in any way direct or control plaintiff [in his employment]." *Id*.

Mr. Carnero thereafter filed a Rule 59 motion seeking to vacate the March 25, 2004 endorsed order on the ground that the district court's factual findings were contrary to Mr. Carnero's unopposed evidence that he had substantial and frequent contact with BSC's Massachusetts headquarters and that BSC had

directed and supervised his employment at all times. A-392-397.[9] The district court denied that motion in an endorsed Order dated May 13, 2004 which does not include any comment or analysis. Tab C.[10]

On August 27, 2004, the district court issued a Memorandum of Decision granting BSC's motion to dismiss Mr. Carnero's Sarbanes-Oxley claim. Tab A.

SUMMARY OF ARGUMENT

1. The district court erred as a matter of law in holding that Congress did not intend the whistleblower provision of the Sarbanes-Oxley Act to apply to reports of accounting misconduct made by employees working outside of the United States. The express language of the statute applies to any "employee" of companies subject to the Act. In holding that Congress nevertheless intended to restrict the term "employee" to employees working within the United States, the district court relied on the judicially created presumption described in *Foley Bros.*

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[9]At the January 7, 2004 oral argument, the district court indicated that it had not seen any of the declarations or exhibits that had been submitted on Mr. Carnero's behalf in opposition to BSC's motion to dismiss, including Mr. Carnero's declaration and the declaration of his expert on Argentine law, Dr. Mario Ackerman. A-369-370 (Tr. at 10:6 – 11:9). Although Mr. Carnero's counsel offered to provide the district court with another copy of that evidence, it declined the offer. *Id*.

[10]Mr. Carnero's Rule 59 motion also sought to consolidate the state law action with his Sarbanes-Oxley action, which was still pending at that time. A-391-397.

v. Filardo, 336 U.S. 281 (1949), that Congress is normally concerned with domestic matters and does not intend its laws to apply extraterritorially.

The *Foley* presumption does not apply, however, where Congress has expressed its intent that the legislation in question should have extraterritorial reach. Federal courts have long held that Congress intends legislation in certain areas of the law, including antitrust regulation, trademark protection and securities regulation, such as the Sarbanes-Oxley Act, to have the extraterritorial reach, even if the particular statute in question does not expressly address the issue of extraterritoriality. Extraterritorial application of these laws is necessary to further their purposes and Congress legislates in these areas knowing that federal courts have consistently given these laws extraterritorial reach.

Congress enacted the Sarbanes-Oxley Act in response to widespread corporate accounting scandals that weakened *worldwide* investor confidence in U.S. securities markets. The Act has been described as among the most far-reaching securities legislation since the New Deal. Almost all of the provisions of the Act, including the whistleblower provision, apply to publicly traded companies listed on U.S. securities exchanges. Such companies include hundreds of foreign companies, many of which have few if any employees working within the United States. Regulating the foreign operations of these companies, both foreign and

domestic, is essential to Act's purpose of protecting investors in U.S. securities markets.

Although the Act does not explicitly state that its provisions apply to such foreign companies, the SEC has nevertheless recognized that Congress intended the Act to apply to foreign companies and has issued numerous regulations to that effect. In promulgating those regulations, the SEC has expressly determined that extraterritorial application:

> comports both with the plain language of the . . . statutory sections, which applies broadly to issuers [listed on U.S. exchanges], as well as the overarching purpose of the Sarbanes-Oxley Act, which is to restore investor confidence in U.S. financial markets, *regardless of the origin of the market participants*.

SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (emphasis added).

In the decisions that apply *Foley*, giving extraterritorial effect to the statute in question was unnecessary to achieve the statute's purpose and would have resulted in consequences that Congress clearly did not intend. In contrast, restricting the Sarbanes-Oxley Act to the regulation of purely domestic conduct would insulate the foreign operations of U.S. and foreign companies listed on U.S. securities exchanges from regulation and thereby frustrate the Act's purpose of

protecting investors in U.S. securities markets as well as the integrity of those markets. This is particularly true in an era where companies listed on U.S. securities exchanges derive a substantial portion of their revenues from overseas operations.

For these reasons, any interpretation of the Sarbanes-Oxley Act that restricts its scope to exclusively domestic conduct must be rejected as inconsistent with the plain meaning of the Act, its purpose and legislative history and the long line of federal court decisions holding that U.S. securities laws have extraterritorial reach.

2. Even if this Court should determine that Congress did not intend the whistleblower provision of Sarbanes-Oxley to protect reports of misconduct made by employees who work exclusively outside of the United States, the district court's decision should be reversed because Mr. Carnero worked at least part of the time within the United States and made reports of corporate misconduct directly to BSC employees in the United States. Mr. Carnero's work for BSC within the United States is undisputed and should be deemed sufficient for application of the Sarbanes-Oxley whistleblower provision, even if this Court should determine that Congress did not intend the Act to protect reports by employees who work exclusively outside of the United States.

3. The district court's dismissal of Mr. Carnero's state law claims should be reversed because the factual findings on which the district court based that decision are not supported by any evidence in the record. The district court based its decision on the finding that Mr. Carnero "had no contact with the defendant in Massachusetts" and "defendant [did not] in any way direct or control plaintiff [in his employment]." Tab B. Those findings are directly contrary to the undisputed evidence that Mr. Carnero had substantial contact with BSC's headquarters in Massachusetts and that BSC directed and controlled his employment at all times.

4. The district court's one paragraph handwritten endorsed Order granting of BSC's motion to dismiss Mr. Carnero's state law claims on *forum non conveniens* and comity grounds should be reversed because the decision is insufficient for meaningful appellate review. The decision neither addresses the legal standards for granting such a motion to dismiss nor discusses any of the factual or legal arguments submitted by Mr. Carnero in opposition to the motion.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING THE SARBANES-OXLEY WHISTLEBLOWER CLAIM.

A. Congress Intended the Statute to Protect Reports of Accounting Misconduct Made by Overseas Employees.

The district court recognized that the *Foley* presumption against extraterritoriality does not apply where the language of the statute, the statutory "scheme," the legislative intent or administrative interpretations indicate that Congress intended the statute to have extraterritorial reach. *Carnero v. BSC*, 2004 Dist. LEXIS 17205, *3-4 (D. Mass. 2004); Tab A at 2-3 (quoting *Foley*, 336 U.S. at 287-288). Indeed, the Supreme Court has repeatedly held that judicially created presumptions regarding Congressional intent, such as the *Foley* presumption, do not apply where a contrary intent either appears from "specific language or specific legislative history" or is "'fairly discernable' in the detail of the statutory scheme" *Bowen v. Michigan Academy*, 476 U.S. 667, 673 (1986) (quoting *Block v. Community Nutrition*, 467 U.S. 340, 351 (1984) (presumption in favor of judicial review of administrative rulings overridden by specific Congressional intent)).

As set forth below, Congress' intent that the Sarbanes-Oxley Act should apply extraterritorially is clearly reflected in (1) the plain meaning of the statutory language; (2) the long history of extraterritorial application of U.S. securities laws; (3) the express purpose of the Act and its legislative history; and (4) SEC regulations and administrative interpretations holding that the Act applies extraterritorially.

1. The Plain Meaning of the Statute Reflects an Extraterritorial Intent.

Like many of the other provisions of the Sarbanes-Oxley Act, the whistleblower provision explicitly applies to companies

> 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).

SOX § 806, 18 U.S.C. § 1514A(a). Such companies, which are listed on U.S. securities exchanges, include "foreign private issuers," foreign companies that voluntarily submit to U.S. securities regulations in order to gain access to investors in the U.S. capital markets. The SEC's website lists hundreds of such companies as of December 31, 2003.[11]

[11] *See* [copy of SEC website].

The plain meaning of the statute therefore applies to foreign companies, many of which may have few if any employees in the United States. Although the statute does not explicitly distinguish between U.S. and foreign companies listed on U.S. securities exchanges, Congress chose to define the statute's scope by using a precise and highly technical specification that unambiguously includes foreign companies. Congress certainly knew that its technical specification of the statute's scope would include foreign companies, since such foreign companies have been regulated by the SEC and subject to its regulations for decades. By choosing to define the statute's scope in that way, Congress clearly expressed its intent for the statute to apply extraterritorially.

The Supreme Court has held that the *Foley* presumption does not apply where, as here, Congress chooses non-boilerplate language that clearly brings foreign conduct within the scope of the statute. In *EEOC v. Arabian American Oil*, 499 U.S. 244 (1991) ("*Aramco*"), Chief Justice Rehnquist distinguished the "boilerplate" commerce clause language used in Title VII from the uniquely broad commerce clause language in the Lanham Act. 499 U.S. at 252. In so doing, the Chief Justice reaffirmed the Court's rejection of the *Foley* presumption in *Steel v. Bulova*, 344 U.S. 280, 286 (1952), which held that the Lanham Act applies

extraterritorially even though it does not include express statutory language to that effect. *Id*.[12]

Finally, in promulgating regulations implementing other provisions of the Sarbanes-Oxley Act , the SEC has determined that the plain meaning of almost identical language defining the scope of those sections reflects a Congressional intent in favor of extraterritorial application. *See*, *infra*, at Argument § I.A.4.

2. The Foley Presumption Does Not Apply to Securities Laws Because They Have Been Traditionally Applied Extraterritorially

The *Foley* presumption against extraterritoriality does not apply to securities legislation, which has traditionally been given extraterritorial reach, even though the federal securities laws are couched in general terms that do not specifically refer to conduct occurring outside the United States. *See*, *e.g*, *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.) (holding that the Securities Exchange Act of 1934 applies extraterritorially even though it "is silent as to its extraterritorial application"), *cert*. *denied*, 112 S. Ct. 638 (1991); *SEC v. Tome*, 833 F.2d 1086,

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[12]The district court erred in reasoning that Congress would have distinguished between foreign and U.S. employees in the whistleblower provision if it had intended the statute to apply to employees working overseas. Tab A at 3; A-330. Because Congress knew that the statute applied to foreign companies, its failure to distinguish between foreign and U.S. employees implies that Congress intended to cover both classes of employees.

1087-88 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018 (2d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988); *Grunenthal v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain v. Pacific Oilseeds*, 592 F.2d 409 (8th Cir. 1979); *United States v. Cook*, 573 F.2d 281, 283-84 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978); *See also* Restatement (Third) Foreign Relations Law of the United States, § 416, comment a (1987).[13]

The Sarbanes-Oxley Act has been described as the most far-reaching securities legislation since the New Deal.[14] In enacting the Act, Congress certainly

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[13]Federal courts have also rejected application of the *Foley* presumption in other areas of the law, including antitrust laws, commodities regulation and trademark protection, that have traditionally been given extraterritorial scope. *See, e.g.*, *United States v. Nippon Paper*, 109 F.3d 1, 3-4 (1st Cir. 1997) (declining to follow *Aramco* presumption in deciding question of extraterritorial application of the Sherman Act in light of the long history of federal court decisions enforcing antitrust laws abroad) (citing, *inter alia*, *Hartford Fire v. California*, 509 U.S. 764 (1993), and *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa")); *Steele v. Bulova*, 344 U.S. 280 (1952) (declining to apply Foley presumption to Lanham Act); *Spindelfabrik v. Schubert*, 903 F.2d 1568, 1577 (Fed. Cir. 1990) (patent laws); *Update v. Modiin Publ*, 843 F.2d 67, 73 (2d Cir. 1988) (copyright law).

[14]*See* Securities Law Alert published on the website of the law firm of Greenberg Traurig describing the Sarbanes-Oxley Act as the "most sweeping set of changes to U.S. federal securities laws since the New Deal." (available at [copy of website]); *see also* SEC Release Nos. 33-8177; 34-47235 (at § I), 68 F.R. 5110 (January 31, 2003) (describing the Act as effecting "sweeping corporate disclosure and financial reporting reforms).

was aware that securities laws have traditionally been given such extraterritorial reach. The *Foley* presumption therefore does not apply and, in the absence of any contrary indication, the Act must be interpreted to have the same extraterritorial scope as other securities laws.

Federal court decisions that have applied the *Foley* presumption involve legislation, unlike the Sarbanes-Oxley Act, whose purpose is to regulate *domestic* conditions prevailing within the United States. The federal "Eight Hour Law" at issue in *Foley*, for example, was enacted in response to domestic conditions existing within the United States, including high unemployment rates, the influx of cheap foreign labor and existing labor conditions *in this country*. 336 U.S. at 286-87. In holding that Congress did not intend the law to apply extraterritorially, the Supreme Court focused on the fact that the statutory language could not be consistently interpreted to cover U.S. citizens working abroad without also covering *foreign citizens working abroad*. *Id*. at 289-90. Because neither the purpose of the statute nor its legislative history suggested that Congress intended such a result, the Court concluded that Congress did not intend the statute to apply extraterritorially.

Labor legislation was also at issue in the Supreme Court's decision in *EEOC v. Arabian American Oil*, 499 U.S. 244 (1991) ("*Aramco*"), which applied

the *Foley* presumption to conclude that Congress did not intend Title VII's employment protection to apply extraterritorially to a U.S. citizen working overseas for a U.S. company. In so holding, the Court focused on the fact that a contrary holding would necessarily subject *foreign companies* that employ U.S. citizens abroad to Title VII's regulations, a result that could not be reconciled with either the statute's purpose or its legislative history. *Id*. at 255. Accordingly, like the Eight Hour law in *Foley*, Title VII could not be interpreted to have extraterritorial scope without resulting in clearly unintended consequences.

The distinguishing features of statutes to which the *Foley* presumption has been applied are that (i) extraterritorial application is unnecessary in order to achieve the statute's purpose; and (ii) extending extraterritorial reach to the statute results in clearly unintended consequences. Neither feature is present with respect to the Sarbanes-Oxley Act. On the contrary, restricting the Sarbanes-Oxley Act to the regulation of purely domestic conduct would insulate the foreign operations of foreign and U.S. companies listed on U.S. securities exchanges from regulation and thereby frustrate the Act's purpose of protecting investors in, and the integrity of, U.S. securities markets.

3. Extraterritorial Application of the Statute Will Advance its Underlying Purpose.

The widely recognized purpose of the Sarbanes-Oxley Act was to protect shareholders of companies listed on U.S. securities exchanges and to restore investor confidence in U.S. capital markets, which had been damaged by a string of unprecedented corporate accounting scandals. *See*, *e.g.*, SEC Release Nos. 33-8177; 34-47235 (at § I), 68 F.R. 5110 (January 31, 2003) (recognizing that accounting scandals "undermined" investor confidence in the U.S. financial markets and that Sarbanes-Oxley was enacted to restore that confidence). Congress included the whistleblower provision in order to encourage disclosure of accounting misconduct and other shareholder fraud. One of the drafters of the provision, Senator Leahy, has explained that the provision:

> was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try *to protect investors and the market*.

See 149 Cong. Rec. S1725-01 (statement of Sen. Leahy) (reproduced at A-155-163) (emphasis added).

This statutory purpose of encouraging disclosure of corporate misconduct is served equally by protecting reports of such misconduct made by employees working within the United States as well as employees working outside of the

United States. Even prior to the enactment of Sarbanes-Oxley, the SEC recognized that corporate accounting fraud in the overseas business units of companies listed on U.S. securities exchanges could have far reaching effects on investors. *See, e.g., In the Matter of Caterpillar, Inc.*, Exchange Act Release No. 34-30532, Accounting and Auditing Enforcement Release No. AE-363 (SEC March 31, 1992) (landmark SEC enforcement action involving accounting fraud in Caterpillar's Brazilian subsidiary). Indeed, BSC itself was subject to SEC enforcement for accounting fraud in its Japanese business units. *See In re Boston Scientific Corporation*, SEC Administrative Proceeding File No. 3-10272, Accounting and Auditing Enforcement Release No. 1295 (SEC August 21, 2000) (imposing cease-and-desist Order based on finding that BSC had incorporated false sales and earnings data from its Japanese subsidiary) (available on Lexis at 2000 SEC LEXIS 1705 (August 21, 2000).

This Court has recognized that *Foley* does not apply, even where the statutory language is unclear as to extraterritorial scope, where, as here, restricting the statute's territorial scope to conduct occurring exclusively within the United States would frustrate the clear purpose of the statute. *United States v. Leon*, 270 F.3d 90, 93 (1st Cir. 2001) (declining to follow *Foley* where its application could not have been consistent with the Congressional purpose of the immigration

statute at issue). Here, restricting application of the Sarbanes-Oxley whistleblower statute to employees working within the United States would effectively eliminate any benefits that the provision would otherwise have in promoting the disclosure of accounting misconduct and other shareholder fraud within the non-U.S. operations of both U.S. and foreign companies listed on U.S. securities exchanges. Since such operations significantly contribute to the financial performance of companies listed on U.S. securities exchanges, such a restrictive interpretation would frustrate the clear purpose of the statute and is contrary to the express intent of Congress.

4. The SEC has Consistently Interpreted the Sarbanes-Oxley Act to Apply Extraterritorially.

The Sarbanes-Oxley Act requires the SEC to promulgate interpreting regulations under several of the sections of the Act, including the sections regarding insider trading (section 306) and the sections relating the composition of corporate audit committees and the adoption of Codes of Ethics (sections 406 and 407). None of these statutory provisions explicitly refer to the Act's extraterritorial scope. Like the whistleblower section (section 806), these sections apply to companies listed on U.S. securities exchanges. *See* §§ 306(a)(1), 406 and 407 (provisions of these sections apply to "issuers"); SOX § 2(a)(7) (defining

"issuer" to include any company whose securities are "registered under section 12 of the [Securities Exchange] Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)").[15]

Notwithstanding the fact that these statutory sections do not distinguish between U.S. and foreign companies, the SEC has promulgated regulations explicitly subjecting foreign companies that are listed on U.S. securities exchanges to these sections of the Act. In promulgating its regulations under Sections 406 and 407, the SEC explained:

> We have determined to include foreign private issuers within the scope of the final rules implementing Sections 406 and 407. Their inclusion comports both with the plain language of the above statutory sections, which applies broadly to issuers, as well as with the overarching purpose of the Sarbanes-Oxley Act, which is to restore investor confidence in U.S. financial markets, *regardless of the origin of the market participants.*

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[15]The definition of "issuer" pursuant to Section 2(a) of Sarbanes-Oxley Act is slightly broader than the companies subject to the whistleblower section. In addition to the companies subject to the whistleblower section, "issuers" are defined to include any company "that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn." SOX § 2(a)(7). Congress may have excluded such companies from the whistleblower section because they have not yet become listed on a U.S. securities exchange and may be subject to strict prohibitions against public disclosures.

SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (emphasis added).[16]

Similarly, in promulgating its regulations implementing Section 306's enhanced insider trading restrictions, the SEC concludes that the plain meaning of the statutory language mandates application of the sections extraterritorially to foreign companies:

> Accordingly [based on the statute's definition of the companies subject to the Act], Section 306(a) and [its implementing regulation] apply to the directors and executive officers of domestic issuers [and] foreign private issues . . .
>
> While some commenters questioned the application of Section 306(a) to foreign private issues, *the statute, by its terms, applies to these issuers.*

SEC Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) at § II.B (emphasis added).

Although these regulations implement provisions of the Sarbanes-Oxley Act other than the whistleblower section, their inclusion of foreign companies is based

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[16]In holding that Sections 406 and 407 of the Sarbanes-Oxley Act apply extraterritorially, the SEC explicitly rejected objections that those sections would "overlap or conflict with the audit committee requirements and corporate governance code of ethics provisions in the issuer's home jurisdictions." *Id*. The SEC held that the importance of extraterritorial application to give effect to the statute's purpose trumped any concern over conflicting foreign regulations. *Id*.

on virtually identical language as used in the whistleblower section. In particular, all of these statutory sections apply to companies whose securities are

> 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) (15 U.S.C. 78o(d).

Compare SOX § 2(a)(7) (defining "issuer") *with* SOX § 806 (defining companies subject to the whistleblower section).[17]

The analogy between Section 306(a) and the whistleblower section is even more striking. Both sections explicitly apply to individuals who work for the companies that fall with the statute's scope. Section 306(a) applies to "directors or executive officers" of such companies whereas the whistleblower section applies to "employees" of such companies. In determining that Section 306(a) applies to the directors and executive officers of foreign companies, the SEC confirmed that Congress did not intend to artificially limit the territorial scope of terms such as

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[17]Both definitions include the language quoted in the text, although the whistleblower definition includes the bracketed language. The other differences between the definition used in the whistleblower section and the definition used in the other sections (i) in place of the term "issuer" which is used in the other sections and is defined in the Securities Act of 1934, the whistleblower definition uses the undefined and broader term, "company"; and (ii) the definition in the other sections include companies that have not yet been listed on a U.S. securities exchange but have registered under the Securities Act of 1933. *See*, *infra*, at n. 15. Neither difference is significant, since foreign companies are clearly included within both definitions.

"director," "executive officer," or "employee" after expressly including foreign companies within the scope of the Act.[18]

Finally, while the DOL, rather than the SEC, is charged with promulgating regulations implementing the whistleblower section there is no statutory or administrative reason to distinguish between the extraterritorial application of the virtually identical statutory language.[19]

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[18]The SEC has also interpreted Sections 307 and 802 of the Sarbanes-Oxley Act to apply, respectively, to foreign attorneys and foreign accounting firms, even though those statutory provisions are silent with respect to their extraterritorial effect. *See* SEC Exchange Act Release Nos. 33-8185, 34-47276, IC-25929, 2003 SEC LEXIS 256 (January 29, 2003) (foreign attorneys subject to Section 307); SEC Release Nos. 33-8180, 34-47241, IC-25911, FR-66, 2003 SEC LEXIS 196, *5 (January 24, 2003) (foreign accountants subject to Section 802). The SEC's extraterritorial interpretation of Section 802 is especially significant since that section is within the same Title of the Act as the whistleblower provision, Title XIII dealing with "Corporate and Criminal Fraud Accountability."

[19]The DOL's administrative guidelines under the whistleblower section do not address the issue of extraterritoriality. In promulgating those regulations, the DOL rejected requests to exclude foreign companies or overseas employees from the regulations, however, stating that the purpose of the guidelines was not to provide statutory interpretation. 69 F.R. 52104, 52105 (at § IV) (August 24, 2004).

B. Alternatively, Congress Intended the Statute to Protect Reports of Misconduct Made by Employees Who Have Significant Contact with the United States.

Even if the Court concludes that Congress did not intend the whistleblower provision to protect reports of misconduct made by employees who work exclusively outside of the United States, it is undisputed that Mr. Carnero's work responsibilities required him frequently to travel the United States in order to meet with and report to his supervisors. *See*, *supra*, at Statement of Facts § A. It is also undisputed that Mr. Carnero made his reports of misconduct to U.S. citizens employed by BSC within the United States. *Id.* Mr. Carnero made some of his reports of misconduct while he was physically within the United States. A-175-176 (Carnero Sup. Dec.) at ¶ 3 (describing meeting in Miami, Florida).

In light of these strong contacts between Mr. Carnero's reports of corporate misconduct and the United States, the whistleblower provision of Sarbanes-Oxley need not be interpreted to have extraterritorial reach in order for it to apply to Mr. Carnero's reports of misconduct. Because Mr. Carnero's job required him frequently to travel to the United States and because his reports of corporate misconduct were made to his supervisors at BSC's Massachusetts – U.S. employees who work within the United States. For these reasons, the

whistleblower provision of Sarbanes-Oxley applies to Mr. Carnero's claim, even if the provision is interpreted not apply to protect reports of misconduct made by employees who work exclusively overseas.

II. THE DISTRICT COURT'S DISMISSAL OF THE STATE CLAIMS SHOULD BE REVERSED AND REMANDED.

A. The District Court's Findings of Fact are Not Supported by the Record.

A district court's findings of fact are clearly erroneous and should be reversed if they are not supported by substantial evidence in the record. *See American Cyanamid v. Capuano*, 381 F.3d 6, 21 (1st Cir. 2004). Here, the district court supported its dismissal of Mr. Carnero's state law claims based on two factual findings, neither of which is supported by any evidence in the record. In particular, the district court found that Mr. Carnero

> had no contact with the defendant in Massachusetts [and] defendant [did not] in any way direct or control plaintiff [in his employment].

Tab B (handwritten endorsed Order).

The uncontested record evidence establishes just the opposite. Mr. Carnero states in his declaration:

> Throughout my employment for BSC, BSC employees at its headquarters in Natick, Massachusetts made all of the

> significant decisions regarding the terms and conditions of my employment. . .
>
> Throughout my . . . employment with BSC:
>
> (i) my job performance was evaluated by BSC employees based at the Natick [Massachusetts] headquarters;
>
> (ii) I was required to travel regularly to the Massachusetts headquarters to meet with and report to supervisors based there;
>
> (iii) I regularly communicated with BSC headquarters by phone, in writing and in person regarding my job duties and I received job directions and instructions from them;
>
> (iv) my job assignments, reassignments, transfers and terms and conditions of employment were decided by BSC employees based in Massachusetts.

A-180 and 183 (Carnero Dec.) at ¶¶ 4 and 10.

Mr. Carnero's testimony regarding these issues is uncontested. BSC never submitted any evidence to contradict his statements set forth above. Indeed, the only declaration that BSC submitted addressing Mr. Carnero's employment is the declaration of one of Mr. Carnero's supervisors, Juan Ziemke. A-35-41. The

Ziemke declaration, which was submitted before Mr. Carnero submitted his declaration, is not inconsistent with Mr. Carnero's testimony.

Since the uncontested record evidence cannot be reconciled with the district court's factual findings, those findings must be reversed.[20]

B. The District Court's Decision is Insufficient for Meaningful Appellate Review.

This Court has clearly emphasized the importance of trial court decisions that set forth sufficient detail in order to permit meaningful appellate review:

> [I]f our multi-tiered adjudicative system is to function smoothly, a trial court must provide an adequate record for appellate review. For that reason, *we repeatedly have emphasized the value of statements explaining the legal basis for a nisi prius court's decision, whether or not required by some rule.* Although busy trial judges need not write lengthy opinions in every case – a lucid explanation from the bench or a brief memorandum of decision almost always will do – *they should take reasonable steps to ensure that the parties and the appellate courts will be able to glimpse the foundation on which their rulings rest.*

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[20]The district court may not have access to Mr. Carnero's declaration through some court administration error. Even though voluminous declarations and exhibits were submitted on Mr. Carnero's behalf, *see* docket entry 11 at A-333, the district court indicated at the January 7, 2004 oral argument on BSC's motion to dismiss that it had not seen any of that evidence. A-369-370 (Tr. at 10:6 – 11:9). Although Mr. Carnero raised that issue on his Rule 59 motion, the district court denied that motion without any comment or analysis. *See* Tab C.

Grossman v. Berman, 241 F.3d 65, 68 (1st Cir. 2001) (emphasis added) (citing *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103, 105 n. 3 (1st Cir. 1991). *See also Francis v. Goodman*, 81 F.3d 5, 7-8 (1st Cir. 1996) (notwithstanding its last sentence, Fed. R. Civ. P. 52(a) requires district courts to make specific findings of fact and conclusions of law on motions to dismiss for lack of subject matter jurisdiction). *Media Duplication v. HDG Software*, 928 F.2d 1228, 1237 (1st Cir. 1991) ("district court's bare, unexplained denial of the motion to dismiss for lack of subject matter jurisdiction does not provide a basis to evaluate the factual grounds for its decision").

In this case, the only source for discerning the basis of the district court's decision is the one paragraph handwritten endorsed Order granting BSC's motion to dismiss. Tab B. The decision does not specifically address any of the three separate grounds raised by BSC's motion: (i) the comity doctrine; (ii) the *forum non conveniens* doctrine; and (iii) lack of diversity jurisdiction because another foreign party, BSC's Argentine subsidiary, is an indispensable party. A-78-79. The decision does not discuss legal standards or relevant factors for applying the doctrines of comity and *forum non convenines*. Nor does the decision address the parties' competing arguments regarding BSC's contention that its Argentine subsidiary was a necessary party.

The only factual findings set forth in the district court's decision are the erroneous findings that Mr. Carnero "had no contact with the defendant in Massachusetts [and] defendant [did not] in any way direct or control plaintiff" in his employment. *See*, *supra*, at Argument § II.A (establishing that those factual findings are contrary to the undisputed record evidence). The decision does not cite, refer to or discuss any of the factual allegations set forth in the two declarations submitted by Mr. Carnero or the declaration from one his supervisors submitted by BSC. Nor does the decision discuss any of the parties' assertions regarding Argentine law or the parties' Argentine litigation as set forth extensively in the declaration of Mr. Carnero's Argentine legal expert, Dr. Mario Ackerman, and the three declarations submitted by BSC's Argentine lawyer, Carlos Dodds. *See* A-198-220 (Ackerman Dec.); A-62-73 and 398-399 (Dodds Decs.).

The district court also does not set forth any analytical support for its legal conclusion that "the facts on which plaintiff relies establish only that he worked for several South American subsidiaries of defendant in South America." As set forth in the preceding section, the district court's two mistaken findings of fact do not support the conclusion. The district court does not address the uniform U.S. case law establishing that control over employment decisions is the critical factor in determining whether an employment relationship exists. *See*, *e.g.*, *Romano v.*

U-Haul, 233 F.3d 655, 666 (1st Cir. 2000) (finding parent company was employer for Title VII claim).

Nor does the district court address the relevant conclusions of Mr. Carnero's expert on Argentine law, Dr. Mario Ackerman. Dr. Ackerman, who is the Chairman of the Labor Law Faculty at the University of Buenos Aires School of Law, offers a detailed analysis in support of his conclusions that Argentine law would recognize a direct employment relationship between Mr. Carnero and BSC and that Argentine choice of law rules would select U.S. law to govern that relationship. A-198-199 (Ackerman Dec.) at ¶¶ 2(i) and 2(iii) (listing opinions); A-200-207 (setting forth analysis). Dr. Ackerman also concluded that Mr. Carnero has no adequate remedy for retaliatory termination in Argentina since Argentine law does not recognize such a claim or provide any remedy for it. A-207-208 at ¶ 19. The district court does not address any of Dr. Ackerman's conclusions.[21]

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[21]BSC did not retain an independent expert on Argentine law to address these issues. In response to Dr. Ackerman's declaration, BSC submitted a supplemental declaration from its Argentine counsel, Carlos Dodds. A-69-73 (Dodds Sup. Dec.). Although Mr. Dodds disagrees with some of Dr. Ackerman's conclusions regarding the parties' Argentine litigation, he does not specifically address Dr. Ackerman's conclusion that Mr. Carnero has an employment relationship directly with BSC that is governed by U.S. law. *See*, e.g., A-71-73 (id.) at ¶¶ 15-21 (concluding that an Argentine court would apply Argentine law to

(continued...)

Because March 25, 2004 endorsed Order dismissing Mr. Carnero's state law claims is insufficient for meaningful appellate review, the decision should be reversed and remanded to the district court.

CONCLUSION

The district court's decision dismissing Mr. Carnero's federal claim under the whislteblower provision of the Sarbanes-Oxley Act should be reversed. The district court's decision dismissing Mr. Carnero's state law claims should be reversed and remanded.

Dated: December 13, 2004

Respectfully submitted,

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[21](...continued)
Mr. Carnero's written employment agreement with BSC's Argentine subsidiary, but failing to address Dr. Ackerman's conclusions that Mr. Carnero also had an employment relationship directly with BSC and that Argentine choice of law rules would select U.S. law to govern that relationship).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7(B) because this brief contains 10,440 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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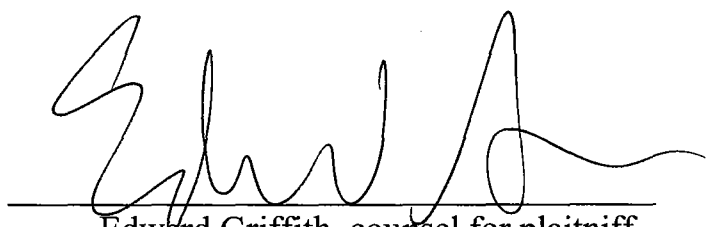
Dated: December 13, 2004



Edward Griffith, counsel for plaitniff-appellant Ruben Carnero