No. 04-2291 and 04-1801
(consolidated)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RUBEN CARNERO,
Plaintiff/Appellant
v.
BOSTON SCIENTIFIC CORPORATION
Defendant/Appellee

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE, BOSTON SCIENTIFIC CORPORATION AND ADDENDUM PURSUANT TO FED. R. APP. 28(f)

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CORPORATE DISCLOSURE STATEMENT

Appellee, Boston Scientific Corporation ("BSC"), submits this Corporate Disclosure Statement pursuant to F.R.A.P. 26.1 and 28(a)(1). BSC has no parent corporation and no publicly-held company holds 10% or more of its stock.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

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-appellee Boston Scientific Corporation ("BSC").

In Case No. 04-2291 (the "SOX Complaint"), the District Court granted BSC's motion to dismiss Carnero's federal whistle blower claim under the Sarbanes-Oxley Act ("SOX") by issuing a Memorandum of Decision dated August 27, 2004. *See* Tab A of Appellant's Brief. The District Court had subject matter jurisdiction over the action pursuant to **18 U.S.C. § 1514A(b)(1)(B)**. On September 20, 2004, Carnero appealed the District Court's decision. The appeal is timely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to **28 U.S.C. § 1291**.

On March 25, 2004, the District Court granted BSC's motion to dismiss Carnero's state-law claims in Case No. 04-1801 (the "State Law Complaint"). Carnero argued that the District Court had diversity jurisdiction over those claims pursuant to **28 U.S.C. § 1332(a)(2)** because Carnero is a citizen of Argentina and

BSC is a citizen of Delaware and Massachusetts.[1] On April 5, 2004, 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. On May 13, 2004, the District Court denied Carnero's Rule 59 motion. On June 14, 2004, Carnero appealed both District Court decisions granting defendant's motion to dismiss and denying Carnero's Rule 59 motion. The appeal is timely. This Court has jurisdiction pursuant to **28 U.S.C. § 1291** because the District Court's orders constitute final orders or judgments that dispose of all parties' claims in Case No. 04-1801.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly dismissed Carnero's SOX Complaint because the protections of Section 806 do not apply extraterritorially to employment actions taken against non-U.S. citizens working overseas.
2. Whether Carnero's SOX Complaint was timely filed with the U.S. Department of Labor within 90-days of when he was on notice of the alleged retaliatory employment action.

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[1] In its Motion to Dismiss Carnero's State Law Complaint, BSC argued that Boston Scientific Argentina is an indispensable party that could not be joined without destroying the District Court's diversity jurisdiction.

3. Whether the District Court properly dismissed Carnero's State Law Complaint for failing to state any claims against BSC because it related entirely to an Argentinean citizen's employment with BSC's subsidiaries in Latin America.

4. Whether the dismissal of the State Law Complaint can and should be affirmed because BSA is an indispensable party which cannot be joined without destroying the diversity jurisdiction of the federal courts.

5. Whether the dismissal of the State Law Complaint can and should be affirmed based on the principles of international comity and the doctrine of *forum non conveniens*.

STANDARD OF REVIEW

The District Court's decisions to grant BSC's two motions to dismiss are subject to *de novo* review. ***Murphy v. United States***, 45 F.3d 520, 522 (1st Cir. 1995). The District Court's interpretation of any statute or regulation is also subject to *de novo* review. ***Strickland, et al. v. Comm'r, Maine Dep't of Human Servs.***, 96 F.3d 542 (1st Cir. 1996). When conducting *de novo* review, this Court may affirm on any independently sufficient ground. ***Badillo-Santiago, M.D. v. Naveira-Merly***, 378 F.3d 1, 5 (1st Cir. 2004) ("We review *de novo* the district

court's grant of the defendants' motions to dismiss and may affirm on any independently sufficient ground.").

STATEMENT OF THE CASE

I. The State Law Complaint

On August 8, 2003, Carnero filed an action in the District Court (the "State Law Complaint" or "State Law Action"). **App.** 332.[2] In the State Law Complaint, Carnero claimed that BSC violated an oral, at-will employment contract with Carnero by terminating his employment in Latin America in retaliation for Carnero's reports of billing irregularities in Latin America. On September 15, 2003, BSC moved to dismiss the State Law Complaint. **App.** 332. BSC argued that the State Law Complaint should be dismissed because BSC's subsidiary, Boston Scientific Argentina ("BSA"), was an indispensable party that could not be joined in the State Law Action under Fed. R. Civ. P. 19 without destroying the District Court's diversity jurisdiction. **App.** 78. Alternatively, BSC argued that principles of international comity and the doctrine of *forum non conveniens* required the dismissal or stay of the action because Carnero's factual allegations had already been raised in Argentina, where he initially invoked the judicial process to pursue his rights. *Id.* On March 25, 2004, the District Court granted BSC's motion and dismissed the

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[2] Citations to "App.__" are to the Appendix.

State Law Complaint. **App.** 391. On June 14, 2004, Carnero appealed the District Court's decision.

II. The SOX Complaint

On July 2, 2003, Carnero filed a claim with the Department of Labor ("DOL") against BSC alleging that BSC violated Section 806 of the Sarbanes-Oxley Act ("SOX") when it terminated his employment in Latin America. **App.** 5, ¶6. On December 19, 2003, the DOL issued a preliminary ruling that it did not have jurisdiction to investigate Carnero's allegation of retaliatory discharge because Section 806 did not apply extraterritorially to foreign nationals working overseas. **App.** 314-315. On January 7, 2004, Carnero sought *de novo* review of the claim that he brought with the DOL (the "SOX Complaint"). **App.** 4-6. On January 27, 2004, BSC moved to dismiss the SOX Complaint, arguing that Section 806 does not apply extraterritorially to a non-U.S. citizen working overseas. Alternatively, BSC moved for summary judgment because Carnero missed his filing deadline with the DOL. **App.** 23-41. On August 27, 2004, the District Court granted BSC's motion to dismiss, agreeing that Section 806 does not apply extraterritorially to a foreign national working overseas. **App.** 328-331. On September 20, 2004, Carnero appealed the District Court's decision.

III. Consolidation of the State Law Complaint and the SOX Complaint

On October 15, 2004, Carnero moved to consolidate the appeals of the State Law Complaint and the SOX Complaint. His motion was granted by this Court on November 3, 2004. Carnero now appeals the decisions to dismiss both the State Law Complaint and the SOX Complaint.

STATEMENT OF FACTS

The following statement of facts is intended to clarify and supplement Carnero's statement of facts, particularly with respect to the following issues which are germane to his appeal and the dismissal of his complaints: (1) the locus of his employment relationship; and (2) the timeliness of his SOX complaint. This statement of facts is based on undisputed documentary evidence and Carnero's own allegations or declarations. BSC accepts Carnero's allegations and declarations for the purposes of the Court's review only and contends that even if Carnero's allegations are accepted as true, BSC is entitled to judgment as matter of law.

I. The Parties

Carnero is a citizen of Argentina and is listed on Argentina's national registry as being domiciled in Buenos Aires. **App.** 24, ¶3. BSC is a Delaware corporation with its principal place of business in Natick, Massachusetts. BSC is a party in the State Law Action, the SOX Action, and the Argentinean Action. Boston Scientific

Argentina S.A. ("BSA") is a subsidiary of BSC. It is an Argentinean corporation with its principal place of business in Buenos Aires, Argentina. BSA is a party in the Argentinean Action, but neither of the U.S. actions. **App.** 23-24, ¶¶1-2.

II. Carnero's Employment with BSA

On January 31, 1997, BSA offered Carnero a position of employment in Argentina (the "BSA Offer Letter"). **App.** 36, ¶3. The BSA Offer Letter provides that Carnero's vacations, holidays and benefits would be provided pursuant to Argentine law. **App.** 42-49. The BSA Offer Letter was negotiated in Singapore and over the telephone between Argentina and Massachusetts. **App.** 180-181.

Shortly thereafter, Carnero entered an employment agreement with BSA (the "BSA Agreement"). **App.** 36, ¶4. The BSA Agreement supercedes all former agreements between Carnero and BSA. **App.** 51. It provides that Carnero will be stationed at BSA's headquarters in Buenos Aires and be paid in Argentine pesos. **App.** 45-46. The BSA Agreement also provides that BSA may terminate Carnero's employment "according to and under the circumstances set forth by Argentine labor regulations." **App.** 49, ¶13.4. The BSA Agreement was entered into in Argentina and provides that it will be governed by Argentine law. **App.** 51, ¶17.

Between February 1, 1997, and late 2000, Carnero rendered services for BSA pursuant to the BSA Agreement. Initially, Carnero worked as the Country Manager

for Argentina. In 1999, Carnero served as Latin America Business Development Director. In that position, he continued to be employed by BSA and his principal office continued to be in Buenos Aires. **App.** 36, ¶5.

Carnero alleges that in the summer of 2000, he became aware that "certain Argentine customers had objected to receiving invoices for medical equipment that they had not agreed to purchase." **App.** 11, ¶13-14. Carnero claims that he reported his concerns to his supervisor, Juan Pedro Ziemke, in Argentina. *Id.*

III. Carnero's Brazilian Assignment

On June 25, 2001, Boston Scientific Do Brasil Ltda. ("BSB") offered Carnero an assignment as Country Manager for BSB. Carnero received a letter that set forth the basic terms for his assignment at BSB (the "BSB Offer Letter"). **App.** 36, ¶6. He also received a document setting forth the specific terms and conditions that would govern the Brazilian assignment (the "BSB Assignment Memorandum"). **App.** 36, ¶7. Neither the BSB Offer Letter nor the BSB Assignment Memorandum purports to supercede the BSA Agreement. **App.** 52-60. Indeed, it is undisputed that at all times during the BSB assignment, Carnero remained an employee of BSA. **App.** 37, ¶9.

On June 26, 2001, Carnero signed an agreement with BSB entitled "Contrato de Trabalho." **App.** 37, ¶8. This agreement, written in Portuguese, provides that it will be interpreted according to the laws of Brazil. **App.** 37, ¶8. Carnero's

employment relationship with BSA was then suspended, but not terminated, so that he could continue to be an employee of BSA during the period that he was assigned to perform services for BSB. **App.** 37, ¶9. Thereafter, from around July 2001 to August 8, 2002, Carnero performed services for BSB under the terms of the BSB Assignment Memorandum. *Id.*

Carnero alleges that in early March 2001, he learned of "similar fictitious sales in Brazil." **App.** 12, ¶15. He claims to have taken "immediate action to reverse the sales" in Brazil. **App.** 12, ¶15. He allegedly reported his concerns to Ziemke in Argentina. *Id.* Carnero also claims to have reported his concerns to Arthur Gates, BSC's Senior Manager for Corporate Analysis and Control, when Gates was in Brazil on business, even though "Latin American employees" advised Carnero not to speak with Gates. *Id.*; **App.** 342, ¶20.

Carnero further alleges that, during a training seminar in Argentina, efforts were made to discredit him and to implicate him in some of the practices to which he was objecting, all of which occurred in Argentina and Brazil. **App.** 342, ¶21. In addition, Carnero alleges that in April 2002, Ziemke, based in Argentina, questioned Carnero about a letter apparently written by Carnero to an Argentinean client. **App.** 343, ¶22. A month later in Mexico City in May 2002, Carnero claims that he met with David McFaul, who was the General Manager for Latin America, Canada and

South Africa, and one of BSC's in-house lawyers, Ty Edmonson, and showed McFaul and Edmonson the letter. **App.** 343, ¶23. Carnero claims he asked about the investigation into the billing issues in Argentina and Brazil. *Id.* Finally, Carnero claims that in July 2003 [sic],[3] he attended a meeting in Miami, Florida at which he met Edmonson and asked about the status of the investigation in Latin America. **App.** 175-176, ¶3.

IV. The Termination of Carnero's Employment

On August 8, 2002, Carnero's assignment in Brazil was terminated. **App.** 37, ¶10. Carnero claims that he understood his August 8, 2002 termination to be a termination from all three entities, stating that "it was clear to [him] that BSC intended to terminate [him] not only from [his] current assignment as BSC's Country Manager for Brazil but from any position for BSC in any other capacity." **App.** 190, ¶25. *See also* **App.** 191, ¶27 ("Mr. McFaul made it clear that BSC intended to terminate me from any job capacity for BSC . . . ."); **App.** 190, ¶26 (asserting that the August 9, 2002 memorandum "clearly states that my 'future pursuits' would no longer be within the BSC organization.").

Upon terminating Carnero's assignment, BSB paid Carnero the sums it owed him pursuant to Brazilian labor laws and the "Contrato de Trabalho". **App.** 37, ¶10.

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[3] Carnero was terminated in August 2002. Therefore, the Miami meeting must have occurred in July 2002, not July 2003.

However, Carnero attempted to negotiate with BSB for additional severance. **App.** 37, ¶11. These negotiations, which lasted from August 2002 to March 2003, did not result in an agreement. *Id.*

When the negotiations with BSB failed, on March 19, 2003, Carnero sent a telegram to BSA asking for severance indemnities under Argentine labor law. The telegram claimed that if the indemnities were not paid, Carnero would consider himself to have been terminated without just cause. **App.** 37-38, ¶¶12 & 12(a). BSA received this telegram on March 21, 2003. **App.** 38, ¶12(b).

On March 25, 2003, BSA sent Carnero a response to his March 21st telegram. In that response, BSA declined to pay him severance indemnities, yet offered to reinstate him to a position similar to that which he had held before his Brazilian assignment with the same monthly salary of $15,000 Argentine pesos. BSA indicated that the reinstatement would be effective on April 1, 2003. **App.** 38, ¶12©).

On March 26, 2003, Carnero (who had not waited for a response from BSA), sent BSA another telegram, stating "Due to your silence I consider myself terminated without just cause". **App.** 39, ¶12(d). In response, BSA reiterated its offer to resume his employment on April 2, 2003. BSA further stated that if Carnero did not accept BSA's offer by April 2, 2003, BSA would consider him to have resigned voluntarily.

App. 39, ¶12(e). Carnero did not respond by April 2, 2003. **App.** 39, ¶12(e). Carnero alleges that BSC's offer to pay him in pesos instead of dollars was a "sham" that caused a materially adverse change in the terms and conditions of his employment. **App.** 192 ¶31. On April 3, 2003, BSA sent a ministerial letter confirming that Carnero's failure to accept BSA's offer by April 2, 2003 had resulted in his termination. **App.** 39-40, ¶12(f). Carnero claimed that he had been involuntarily terminated. **App.** 40, ¶12(g).

V. The Argentinian Action

Shortly thereafter, Carnero filed a request for mediation in Argentina against BSA. **App.** 63 ¶6. In his request for mediation, Carnero sought "outstanding salaries, seniority, payment in lieu of prior termination notice, whole month base salary pay, overtime compensation, accrued thirteenth salary, accrued vacations, damages, moral damages, moving expenses, air tickets, travel expenses, stock option rights, application of Law 25,561 and its amendments, application of Law 25,323." **App.** 63 ¶6. On April 28, 2003, Carnero, BSA and BSC participated in a mediation session.**App.** 63 ¶9. During that session Carnero extended his claims to BSC. **App.** 63 ¶9.

On June 12, 2003, BSA, BSC, and Carnero participated in a mediation settlement hearing in Buenos Aires. **App.** 64 ¶11. At that session, BSA and BSC

presented counterclaims against Carnero to (1) restrain him from asserting that BSC and BSA had engaged in unlawful billing practices; and (2) force him to accept certain labor certificates that BSA was required to provide to Carnero upon his resignation but that Carnero had refused to accept. **App.** 64 ¶11. During that session, the Argentinean mediator concluded that BSA, BSC and Carnero could not reach a settlement regarding their claims and closed the mediation proceedings.

On June 20, 2003, BSC and BSA filed the Argentinean Action with the Argentinean Labor Court. **App.** 64 ¶12. In that Action, BSC and BSA set forth the events leading up to Carnero's voluntary resignation from employment with BSA and alleged that Carnero had baselessly accused BSA and BSC of billing irregularities, damaging BSA's and BSC's reputations. BSC and BSA also asked the Argentinean court to accept judicial deposit of the labor certificates that Carnero had refused. **App.** 64 ¶12. BSC and BSA sought damages in the amount of $30,000 Argentinean pesos. **App.** 64 ¶12. The Argentine judge accepted jurisdiction over the case and ordered Carnero to answer the Argentinean complaint. **App.** 70 ¶¶9 and 10. Thereafter, as set forth more fully above in the Statement of the Case, Carnero filed the State Law Action and filed the SOX Complaint.

On September 2, 2003, Carnero filed an answer to the Argentinean Complaint. **App.** 64 ¶15. In that Answer, Carnero claims, among other things, that (1) he was

employed by BSC, not exclusively by BSA; (2) that BSC controls BSA and its other subsidiaries and is therefore liable for BSA's actions; (3) that he did not defame BSC and BSA by reporting billing irregularities; and (4) that the District Court of Massachusetts is the more appropriate forum for the parties' litigation. **App.** 64 ¶15.

SUMMARY OF ARGUMENT

The District Court properly granted BSC's motion to dismiss Carnero's SOX Complaint because Section 806 of SOX does not apply extraterritorially to Carnero, an Argentine citizen who worked for an Argentine company in Argentina. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" ***EEOC v. Arabian Am. Oil Co.***, 499 U.S. 244, 248 (1991) (hereinafter *"Aramco"*) quoting ***Foley Bros. Inc. v. Filardo***, 336 U.S. 281, 285 (1949). The District Court's decision to grant BSC's motion to dismiss Carnero's SOX Complaint correctly articulated and applied the relevant legal standards set forth in *Aramco* and its progeny, and Carnero has failed to establish that the District Court erred. He cannot overcome the *Aramco* presumption because Congress did not clearly express any intent to apply Section 806 to non-U.S. citizens working overseas. Moreover, the statute as a whole, the legislative history, the Department

of Labor's ("DOL") interpretations of Section 806 and policy considerations all mandate the application of the presumption.

BSC's motion to dismiss presented the District Court with alternative grounds for dismissal: Carnero did not meet the 90-day deadline for filing a timely complaint with the DOL. In the event the First Circuit elects to apply Section 806 extraterritorially to Carnero's employment in Latin America, the Court can and should affirm based on this alternate ground.

The District Court properly granted BSC's motion to dismiss the State Law Complaint because the claims asserted therein relate entirely to Carnero's employment with BSC's subsidiaries in Latin America. On the facts established by Carnero's complaint, the court correctly found that there was no basis for Carnero's claims under Massachusetts law because all of the events that gave rise to Carnero's claims (his employment, the alleged billing irregularities, his reports of alleged billing irregularities, his termination, all communications regarding his termination, etc.) occurred in Argentina or Brazil and therefore are governed by Argentinean or Brazilian law. Accordingly, the dismissal of the State Law Complaint was entirely appropriate and should not be overturned.

BSC's Motion to Dismiss Carnero's State Law Complaint also presented the court with alternative grounds for dismissal: (1) BSA is an indispensable party that

could not be joined without destroying the District Court's diversity jurisdiction and (2) the State Law Complaint should be dismissed (or stayed pending the outcome of the parallel Argentinean Action) under the doctrines of international comity and *forum non conveniens*. The First Circuit can and should affirm the District Court based on these alternate grounds.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED CARNERO'S SOX COMPLAINT BECAUSE CARNERO HAS NO STANDING TO SUE UNDER SECTION 806 OF SOX

A. The District Court's Decision Correctly Articulates the *Aramco* Presumption: Unless Congress Expressed a Clear Intention to Apply Section 806 Extraterritorially, the Protections of Section 806 May Not Be Extended to Foreign Nationals Working Overseas

The District Court correctly articulates the legal principles governing Carnero's Section 806 claim. "[I]t is well-established that Congressional legislation is meant to apply within the United States, absent any evidence of contrary intent." **App.** 329. *See also* ***Aramco***, 499 U.S. at 248, quoting ***Foley Bros.***, 336 U.S. at 285 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"). This presumption against extraterritorial effect is based on "a number of reasons, including 'the commonsense notion that Congress generally legislates with domestic concerns in mind.'" **App.** 329, quoting ***Smith v. United***

States, 507 U.S. 197, 205 n.5 (1993). The District Court also recognized that the presumption against extraterritoriality serves the policy interest of avoiding conflict with foreign law, which would have been present in this case because the reinstatement remedy that Carnero sought under SOX is not available under Argentinean law. **App.** 330. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." ***Aramco***, 499 U.S. at 248. The requirement of a clear statement of Congressional intent is especially necessary when extraterritorial application of the statute in question would violate the laws of another nation because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." ***Murray v. Schooner Charming Betsy***, 6 U.S. 64, 118 (1804).

Because there is an assumption that Congress legislates with knowledge of the presumption against extraterritoriality, Congress must clearly express an affirmative intention to extend statutory coverage outside of the United States. ***Aramco***, 499 U.S. at 248. Thus, as the District Court properly concluded, "the language of the law is examined to determine whether there is 'any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control.'" **App.** 329 quoting ***Foley Bros***., 336 U.S. at

285. This examination involves consideration of (1) the statute as a whole; (2) the legislative history; and (3) interpretations of the agency authorized to interpret and implement the relevant statute. **App.** 330, citing ***Foley Bros.***, 336 U.S. at 286. The burden is on the plaintiff to overcome the presumption against extraterritoriality. ***Labor Union of Pico Korea, Ltd. v. Pico Products, Inc***., 968 F.2d 191, 194 (2nd Cir. 1992) (citing *Aramco*).

B. The District Court's Decision Correctly Applies The Relevant Factors Governing The *Aramco* Presumption

The District Court thoughtfully applied all of these factors to conclude that the protections of Section 806 do not apply to Carnero, a non-U.S. citizen working overseas. The District Court first examined the statutory language as a whole and correctly determined that "nothing in [Section 806] remotely suggests that Congress intended it to apply outside of the United States. No distinction is drawn between overseas employees and domestic employees." **App.** 330. The District Court noted that the "absence of such distinction suggests that the law is to be applied only within the United States." *Id; see also* ***Foley Bros***., 336 U.S. at 286 (the fact that Congress did not distinguish between aliens and citizens of the United States in the definition of employee "indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress," which did not include Iraq and Iran). The District Court also

recognized that Section 806's open-ended and nonspecific reference to "employee" was insufficient to establish that Section 806 applied to foreign employees. **App.** 331; ***Aramco*** at 255-256 and n.* (Title VII's definition of employee as "an individual employed by an employer" does not mean that foreign citizens constitute employees).

Second, the District Court examined the legislative history and determined that "the protection of workers is a particularly local matter, and nothing in the legislative history supports plaintiff's assertion that the language of Section [806] protecting an 'employee' was meant to include all employees wherever they may work." **App.** 331. Third, the District Court correctly concluded that there are no relevant "administrative interpretations of the law during its development phase," but that the preliminary determination of the agency charged with interpreting Section 806—the Department of Labor—supports the conclusion that Section 806 does not apply extraterritorially to a non-U.S. citizen working overseas. *Id.* Indeed, the DOL has twice ruled that Section 806 does not extend to foreign nationals working overseas. *See* **App.** 314-315; ***Concone v. Capital One Financial Corp***., DOL ALJ, No. 2005-SOX-00006, December 3, 2004 (attached at the Addendum hereto).

C. Carnero Fails To Establish That The District Court Erred

1. The Boilerplate Language That Carnero Cites Is Insufficient To Establish That Congress Affirmatively Intended To Extend The Protections Of Section 806 To Foreign Nationals Working Overseas

Carnero argues that the plain meaning of Section 806 reflects an intent to apply Section 806 extraterritorially. Specifically, Carnero states that this Court can infer Congressional intent to regulate foreign nationals working outside of U.S. territory because Section 806 applies to companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . or that [are] required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . ." **Appellant's Brief** p. 26; **18 U.S.C. §1514A(a)**.

This statutory language defines covered companies in general terms, but does not address extraterritoriality with any specificity. Indeed, it does not even use the word "foreign," and does not mention "foreign companies," "foreign nationals," or non-U.S. citizens. Moreover, the language identifies only the companies that are covered, but does not define which *employees* of these companies are entitled to the protections of Section 806. That some foreign companies may be covered is not dispositive of which employees Congress intended to cover because a company incorporated overseas could easily have employees located within the United States

just as a company incorporated in the United States could have employees based outside the United States.

Indeed, the Supreme Court rejected an analogous argument in *Aramco* that Title VII should apply extraterritorially to "employees" working overseas because Title VII was intended to cover employers that are "engaged in an industry affecting commerce." ***Aramco***, at 249. The Supreme Court emphasized that the term "commerce" was insufficient to establish Congressional intent to apply Title VII extraterritorially, especially given that the Court had previously held that statutes covering commerce between "any of the States or territories and any foreign nation or nations" did not "definitely disclose an intention to give it extraterritorial effect." ***Aramco***, at 251 citing ***New York Central R. Co. v. Chisholm***, 268 U.S. 29, 31 (1925) (Federal Employers' Liability Act does not apply extraterritorially). The language regarding companies in Section 806, like the "commerce" language in *Aramco,* is therefore insufficient to establish a Congressional intent to apply the protections of Section 806 to employees working overseas.

Section 806 simply protects "employee[s]" of a company with registered securities from retaliation for whistleblowing. **18 U.S.C. § 1514A**. Section 806 does not define the term "employee" to include foreign nationals. In fact, neither Section 806 nor any other provision of SOX contains any definition of "employee" nor any

statement that Section 806 is intended to apply extraterritorially. The protection of undefined "employee[s]" in Section 806 is boilerplate terminology, and thus does not reflect the specific intention by Congress to cover foreign nationals working abroad that is needed to overcome the presumption against extraterritorial coverage. *See, e.g.*, ***Aramco*** at 255-256 and n.* (Title VII's definition of employee as "an individual employed by an employer" does not mean that foreign citizens constitute employees). As the District Court correctly noted, the fact that Congress did not distinguish between aliens and citizens of the United States in the definition of employee "indicates that Congress intended it to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress." ***Foley Bros.***, 336 U.S. at 286;**App.** 330. Such places do not include Argentina or Brazil.

Had Congress intended Section 806 to extend to such employees, it would have done so explicitly. Congress knows how to give extraterritorial scope to the coverage of a statute. *See, e.g.*, **29 U.S.C. § 630(f)** (for purposes of the ADEA, employee includes "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country");[4] **42 U.S.C. § 2000e(f)** (Title VII)

[4] After several circuits held that the ADEA did not apply overseas, Congress amended § 11(f) to specifically state that the term "'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."

and **42 U.S.C. § 12111(4)** (ADA) (apply "[w]ith respect to employment in a foreign country . . . [to] an individual who is a citizen of the United States"); the Logan Act, **18 U.S.C. § 953** (applying Act to "[a]ny citizen . . . wherever he may be . . ."). Congress' choice not to exercise its legislative authority to define the term "employee" in Section 806 to include extraterritorial coverage even for American citizens working in a foreign country precludes a finding that Carnero, an Argentine working in Argentina, is entitled to the protections of Section 806.

2. Carnero Ignores Relevant Sections of SOX That Demonstrate That Congress Chose Not To Extend The Protections Of Section 806 To Foreign Nationals Working Abroad

The conclusion that Congress did not intend Section 806 to apply to foreign nationals working overseas emerges clearly when SOX is read as a whole. First, in Section 1107 of SOX, Congress elected to amend an existing statute that has explicit extraterritorial application by making it a criminal offense to retaliate against individuals who provide "a law enforcement officer any truthful information relating to a commission or a possible commission of a Federal offense." **18 U.S.C. § 1513(e)**.[5] That Congress took care to give extraterritorial application to the criminal sanction in Section 1107 for retaliation against a specific and narrow type of whistle

[5] Section 1107 amended **18 U.S.C. § 1513**, which addresses retaliation against a witness, victim or informant. In **18 U.S.C. § 1513(d)**, Congress states "[t]here is extraterritorial Federal jurisdiction over an offense under this section."

blowing activity to law enforcement officers but did not do so in Section 806 evidences a Congressional intent to apply the civil whistle blower protections only to U.S. citizens working within the United States. *See* ***Field v. Mans***, 516 U.S. 59, 67 (1995) ("an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."). Indeed, the DOL has recently ruled that Congress' failure to state explicitly that Section 806 applies extraterritorially—while doing so for violations of Section 1107—reveals a clear intention not to extend Section 806 extraterritorially. ***Concone***, DOL ALJ, No. 2005-SOX-00006, December 3, 2004.

Second, Congress failed to provide any mechanisms for overseas enforcement of Section 806 and failed to address the subject of conflicts with foreign laws and procedures. Had Congress intended Section 806 to apply to foreign nationals working abroad, it certainly would have addressed these issues. For example, when Congress amended the ADEA to apply to U.S. citizens working abroad, it specifically addressed potential conflicts with foreign law by providing that an employer could engage in practices that would normally violate the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located." **29 U.S.C. § 623(f)(1)**. Section

806 contains no such effort to harmonize its procedures with the countervailing policies, laws and procedures of foreign sovereigns. As a result, if Section 806 were deemed to apply to a foreign citizen employed abroad, it would likely conflict with foreign laws and policies, resulting in undesired international discord. *See supra* Part I(A) (discussing public policy reasons for declining to apply statutes extraterritorially). *See also* **App.** 330 (noting that extending Section 806 to Carnero may result in conflict with foreign laws).

3. Because Section 806 Is A Statute Regulating Employment, Carnero's Assertions About Extraterritorial Application Of Securities Laws Are Inapposite

Carnero's assertion that the Aramco presumption does not apply to Section 806 because "SOX is a securities law" is wholly without merit.[6]

(a) Section 806 Regulates Employment

Section 806 is a statute that governs the employment relationship. The stated purpose of Section 806 is to "provide whistle blower protection to employees of publicly traded companies." **148 Cong. Rec. S7418** (daily ed. Jul. 26, 2002) (statement of Sen. Leahy). To provide this protection, Section 806 prohibits certain acts that are exclusively *employment*-related. *See* **18 U.S.C. § 1514A(a)** (stating that a company cannot "discharge, demote, suspend, threaten, harass, or in any other

[6] The Supreme Court has never held that the *Aramco* presumption does not apply to securities laws.

manner discriminate against an employee in the terms and conditions of employment"). Likewise, the remedies Section 806 provides are exclusively concerned with making the employee whole from the *employment*-related harm. *See* **18 U.S.C. § 1514A(c)** (providing for reinstatement with the same seniority status that the employee would have had, but for the discrimination; back pay, with interest; and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees).

Congress implicitly recognized that Section 806 should be treated as a labor provision (and not a securities provision) when it authorized the DOL—not the SEC—to interpret and enforce it. *See* **18 U.S.C. § 1514A(b)**. Moreover, Congress specifically provided for Section 806 to amend 18 U.S.C. 73, which is a criminal statute. **18 U.S.C. § 1514A(a)**. In contrast, Congress elected to place the majority of the other provisions of SOX into the Securities Exchange Act of 1934 (15 U.S.C. 78). *See, e.g.,* Titles II, III, IV, V, and VI of SOX. That Congress intentionally elected not to codify Section 806 within the context of the Securities Exchange Act of 1934 further demonstrates that Congress recognized that Section 806 was not a securities regulation, but instead was a regulation of employment.

Finally, Congress explicitly required that Section 806 should be treated differently than the rest of SOX when it required Section 806 to be governed by the

procedures established by the Aviation Investment Reform Act for the 21st Century ("AIR") (*see* **18 U.S.C. § 1514A(b)(2)(A)**). When courts and the DOL analyze claims under AIR, they engage in the *McDonnell Douglas* burden shifting analysis undertaken in the employment context. *See, e.g.*, ***Lawson v. United Airlines, Inc.***, Decision and Order Granting Relief, 2002-AIR-6 (ALJ December 20, 2002) (applying *McDonnell Douglas* analysis to AIR whistle blowing claim); ***Halloum v. Intel Corp.***, Recommended Decision and Order, 2003-SOX-7 (ALJ March 4, 2004) ("As in AIR 21 . . . cases, the Secretary will dismiss a complaint brought under the Act's whistle blower provisions if a complainant fails to make the prima facie showing which closely parallels the test developed under Title VII of the Civil Rights Act of 1964, as amended" citing ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802). Since Congress is presumed to have knowledge of interpretations of existing laws when enacting new laws, it can be presumed that Congress knew that by making the AIR complaint procedures applicable to Section 806, it would follow that Section 806, like AIR, would be analyzed as an employment regulation. *See, e.g.*, ***INS v. Phinpathya***, 464 U.S. 183, 200 (1984) ("Of course, when Congress enacts a new law that incorporates language of a pre-existing law, Congress may be presumed

to have knowledge of prior judicial interpretations of the language and to have adopted that interpretation for purposes of the new law.").[7]

(b) The *Aramco* Presumption Applies To Statutes Governing Labor Conditions

The Supreme Court has consistently declined to give extraterritorial effect to statutes that would reach and regulate the employment relationship of employees working outside of the United States. *See, e.g.*, ***Foley Bros.***, 336 U.S. at 286 (declining to apply the Eight Hour Law to work performed in foreign countries in part because "[a]n intention . . . to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose"); ***McCulloch v. Sociedad Nacional de Marineros de Honduras***, 372 U.S. 10, 21 (1963) (declining to extend NLRA to foreign crew on foreign vessel in American waters in part because of the possibility of "international discord"); ***Benz v. Companio Naviera Hidalgo***, 353 U.S. 138, 147 (declining to apply LMRA to foreign seamen on foreign vessel in United States waters because "[f]or us to run interference in such a delicate field of international relations there

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[7] Similarly, it may be presumed that Congress knew that, after AIR amended the Air Carriers Access Act ("ACAA"), the ACAA was held not to apply extraterritorially. *See* ***Alino v. Aerovias de Mexico, SA***, 129 F. Supp.2d 1341, 1345 (S.D. Fla. 2000). By making the AIR complaint procedures applicable to Section 806, it would follow that Section 806, like AIR and the ACAA, would not apply extraterritorially.

must be present the affirmative intention of the Congress clearly expressed."); *see also* ***Pfeiffer v. WM. Wrigley Jr. Co.***, 755 F.2d 554 (7th Cir. 1985) (declining to apply ADEA to American employee employed by American employer overseas).[8]

The policy considerations that underlie the Supreme Court's decisions declining to apply employment statutes extraterritorially apply with equal force to Section 806. If Section 806 were found to apply to Carnero and his claims in this case, any judicial ruling would apply to an Argentine citizen working in Argentina for an Argentine company, thereby directly interfering with a domestic employment relationship. As the District Court noted, "the protection of workers is a particularly local matter," and the application of Section 806 overseas "may conflict with foreign laws, which is especially likely in this case where plaintiff seeks to be reinstated to his job" and "has already invoked Argentinean law in support of his cause." **App.** 330. Without evidence of a clearly expressed Congressional intent to do so, which Section 806 does not contain, this Court should not interpret Section 806 to apply in a way that creates the possibility for excessive interference with the labor relations of a foreign nation. *See* ***Foley Bros.***, 336 U.S. at 286 ("An intention so to regulate

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[8] Congress later passed the **Older Americans Act Amendments** of 1984, Pub.L 98-459, 98 Stat. 1767, which extended the protections of the ADEA to U.S. citizens employed abroad by American corporations or their subsidiaries.

labor conditions [in Iran] which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.").

4. Carnero Is Unable To Present Any Clear And Unambiguous Legislative History That Suggests A Congressional Intent To Extend Section 806 Extraterritorially

Carnero argues that Congressional intent to apply Section 806 extraterritorially can be implied from a comment by Senator Leahy that Section 806 "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." **Appellant's Brief**, p. 32. This argument highlights the weakness of Carnero's position. Senator Leahy's statement makes no specific reference to extending Section 806 to foreign citizens working abroad. In fact, when read in context, it is clear that Senator Leahy was addressing the question of whether the protections of Section 806 extend to an individual who reports fraud or securities law violations to any member of Congress, as opposed to a member of Congress that is conducting an investigation of said fraud or violations. **App.** 155-163. Senator Leahy's comments had nothing to do with extraterritoriality. Indeed, his vague, general and isolated statement about the broad sweep of Section 806 cannot be tied to any specific statutory language extending Section 806 to foreign nationals and is therefore entitled to no weight in this Court's analysis. *See, e.g.*, ***Public Empl. Retirement Sys. of***

Ohio v. Betts, 492 U.S. 158, 168 (1989) (legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute), superseded by statute on other grounds by 29 U.S.C. § 621; ***Chandler v. Roudebush***, 425 U.S. 840, 858 n. 36 (1976) (report of a joint conference committee of both Houses of Congress or the report of a Senate or a House committee, is accorded more weight than the remarks even of the sponsor of a particular portion of a bill on the floor of the chamber); ***United States v. Int'l Union United Automobile Aircraft and Agricultural Implement Workers of America***, 352 U.S. 567, 585-586 (1957) (same).

Relying on legislative history that is not specific to Section 806's regulation of employment, Carnero argues that the legislative history reveals that failing to extend Section 806 to foreign nationals is contrary to SOX's underlying purpose. This argument is better addressed to Congress, with whom the authority lies to state expressly that Section 806 should protect foreign citizens working outside the Unites States. Indeed, the *Aramco* presumption is intended to keep the judicial branch from making policy judgments that are best left to the Congress to avoid statutory constructions that would raise serious questions regarding separation of powers, because "the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside

both the institutional competence and constitutional prerogatives of the judiciary." Curtis A. Bradley, ***Territorial Intellectual Property Rights in an Age of Globalism***, 37 Va. J. Int'l L. 505, 516 (1997). *See also* ***Benz***, 353 U.S. at 146-147 (1957) ("[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.").

5. Carnero's Reliance On SEC Interpretations Of Wholly Irrelevant Sections Of SOX Is Misplaced Because Congress Specifically Authorized The DOL, Not The SEC, To Interpret And Enforce Section 806, And The DOL Has Declined To Extend Section 806 Extraterritorially

Carnero's reliance upon the SEC's interpretations of other, wholly irrelevant sections of SOX is entirely misplaced because the SEC is not authorized to interpret or enforce Section 806. Congress authorized the DOL—not the SEC--to adjudicate cases under Section 806. **18 U.S.C. § 1514A(b)**. The DOL has twice declined to extend Section 806 to cover foreign citizens working abroad.

When directly presented with the issue of whether Section 806 applies extraterritorially in this case, the DOL explicitly invoked the presumption against extraterritoriality in *Foley Bros.* and concluded that "nothing in the language of [Section 806] indicates that Congress intended the anti-retaliation provision in Title

VIII to extend to employees of covered companies or their contractors or subcontractors during their employment outside the United States." **App.** 314-315.

The DOL has recently issued a second ruling which affirms the position that Section 806 does not apply to non-U.S. citizens working overseas. See ***Concone v. Capital One Financial Corp.***, DOL ALJ, No. 2005-SOX-00006, December 3, 2004. In *Concone,* an Italian citizen was employed by subsidiaries of Capital One in the United Kingdom and Italy. Concone alleged that he notified Capital One of "accounting irregularities" and was thereafter terminated in retaliation for the report. In concluding that Section 806 did not extend to a foreign national working overseas, the DOL relied heavily upon the fact that Congress took care to give extraterritorial application to the criminal sanction in Section 1107 but did not do so in Section 806. In addition, the DOL emphasized that statutes should not be applied in a manner inconsistent with foreign law and concluded that Concone's requested remedy could conflict with the laws of England and Italy.

The DOL's decisions in both *Concone* and *Carnero* effectively state the DOL's reasonable position on the issue of extraterritorial scope. Both decisions are the result of a formal adjudicative process that was both fair and deliberate. In such circumstances, the DOL's decisions are entitled to appropriate deference. *See* ***United States v. Mead Corp.***, 533 U.S. 218, 230 (2001) (where there is "a relatively

formal administrative procedure tending to foster the fairness and deliberation that should underlie" a ruling having the force of law, courts should assume that Congress intended any administrative action taken in the course of exercising this authority to have the "effect of law" and defer to the agency's interpretation where that interpretation is reasonable).

Consistent with its decisions in *Concone* and *Carnero*, the DOL also declined to extend Section 806 extraterritorially when it promulgated rules governing claims under Section 806. The DOL's regulations define employee as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." **29 C.F.R. § 1980.101**, "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" (hereinafter the "DOL Regulations"). This boilerplate definition of an employee does not specifically include foreign citizens. *Cf.* ***Aramco***, 499 U.S. at 255-256 and n.* (Title VII's definition of employee as "an individual employed by an employer" does not mean that foreign citizens constitute employees). Moreover, other provisions of

the DOL Regulations indicate that the DOL understands Section 806 to apply only within the United States:

1) The judicial enforcement section refers only to judicial enforcement "in the United States district court for the district in which the violation was found to have occurred." **29 C.F.R. § 1979.113**. The DOL made no provision for a violation involving a foreign citizen employee working overseas.

2) The judicial review section refers only to appellate review in the circuit in which the violation allegedly occurred or in which the plaintiff resided. *Id.* at **§ 1979.112**. Again, this would not cover review by a foreign citizen outside the United States.

3) Plaintiffs can file Section 806 complaints "with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed." No provision was made to establish a place where foreign citizens working overseas could file a complaint. *Id.* at **§ 1979.103(c)**.

6. Contrary To Carnero's Contentions, Congress Did Not Intend The Protections Of Section 806 To Apply To "Employees Who Have Significant Contact With The United States"

Because Carnero cannot overcome the application of the *Aramco* presumption to Section 806, he tries to avoid it as applied to his specific employment situation with BSC by asserting that he had "significant contact with the United States." **Appellant's Brief**, p. 39. This dubious assertion has no relevance to the issue of extraterritoriality, however, because any contact he had in the United States is incidental to the subject matter of his claim, which is his termination in Latin America for billing irregularities occurring and reported in Latin America. The undisputed facts establish that Carnero is an Argentine citizen living in Brazil; the locus of Carnero's employment was in Latin America for Latin American corporations; all of the alleged billing irregularities occurred in Latin America; all of Carnero's alleged reports of those irregularities occurred in Latin America and, most importantly, the alleged unlawful retaliatory termination occurred in Latin America. As set forth above, Congress never intended the protections of Section 806 to reach employment actions that occurred overseas.

II. THE DISTRICT COURT COULD HAVE DISMISSED CARNERO'S SOX COMPLAINT BECAUSE IT WAS UNTIMELY

BSC also argued to the District Court that the SOX Complaint should be dismissed because Carnero missed his filing deadline. The District Court could have dismissed based on this alternative ground. Therefore, even if this Court concludes that Carnero has standing to sue under Section 806, this Court can and should affirm the dismissal of his SOX Complaint on this alternative ground. ***United States v. Puerto Rico***, 287 F.3d 212 (1st Cir. 2002) (even though Court of Appeals does not accept district court's ratio decidendi, Court of Appeals may affirm district court's judgment on any independent ground that is apparent in record); ***S.E.C. v. Sargent***, 229 F.3d 68-75 (1st Cir. 2000) ("We are not restricted to reviewing only those grounds explicitly addressed by the district court in its ruling; rather, we may affirm the judgment on any independently sufficient ground squarely presented to us and to the district court."); ***Badillo-Santiago, M.D. v. Naveira-Merly***, 378 F.3d 1, 5 (1st Cir. 2004) ("We review de novo the district court's grant of the defendants' motions to dismiss and may affirm on any independently sufficient ground.").

A. BSC Is Entitled To Judgment As A Matter Of Law Because Carnero Missed His Filing Deadline

1. Section 806 Statute of Limitations

Section 806 requires that a plaintiff file a complaint with the DOL within 90 days of the alleged retaliatory event. **18 U.S.C. § 1514A(b)(2)(D)**; *See also* **29 C.F.R. § 1980.103** and **49 U.S.C. § 42121(b)(1)** (AIR procedures applicable to Section 806 pursuant to Section 806(b)(2)(A)). A plaintiff must comply with this requirement in order to file a civil action. **18 U.S.C. § 1514A(b)(1)(A) and (B)**. Under ***Delaware State College v. Ricks***, 449 U.S. 250 (1980), and its progeny, this 90-day period begins when the alleged retaliatory decision has been made and communicated to the plaintiff. *See also* **29 C.F.R. § 1980.103** (applying *Ricks* rule to filings under Section 806).

2. Carnero Claims He Was Terminated On August 8, 2002

Carnero admits that he understood his August 8, 2002 termination to be a termination from all three entities (BSA, BSC and BSB), because "it was clear to [him] that BSC intended to terminate [him] not only from [his] current assignment as BSC's Country Manager for Brazil but from any position for BSC in any other capacity." **App.** 190, ¶25. *See also* **App.** 191, ¶27 ("Mr. McFaul made it clear that BSC intended to terminate me from any job capacity for BSC . . . ."); **App.** 190, ¶26

(asserting that the August 9, 2002 memorandum "clearly states that my 'future pursuits' would no longer be within the BSC organization.").[9]

Since Carnero unequivocally admits that he understood that he was fully terminated from BSB, BSA and BSC on August 8, 2002, his understanding that an adverse and retaliatory employment action had occurred triggered the statute of limitations. This required him to file his DOL complaint within 90 days, or by November 8, 2002. **18 U.S.C. § 1514A(b)(2)(D)**; ***Ching v. Mitre Corp.***, 921 F.2d 11 (1st Cir. 1990) (holding that statute of limitations began to run on the date that the plaintiff formed a belief that he was being terminated and not on the later day when he received a formal notification of his termination). Carnero missed this deadline by eight months. Accordingly, his DOL complaint is time-barred.

3. Even If Carnero Was Not Fully Terminated Until April 2003, He Missed The Filing Deadline

As set forth above, on March 19, 2003, Carnero sent a telegram to BSA seeking severance indemnities in accordance with Argentinean law and threatened to bring a claim for unjust termination if he did not receive them. **App.** 37-38, ¶¶12 & 12(a). On March 25, 2003, BSA responded to Carnero's telegram and offered him a position similar to that which he had had prior to being assigned to BSB. **App.** 38,

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[9] Carnero's actions in seeking severance indemnities from BSA and BSB further demonstrate that he believed he had been terminated from BSB, BSA and BSC. *See* **App** 191, ¶29-30.

¶12(c). BSA informed him that the reinstatement would occur on April 1, 2003. **App.** 38, ¶12(c). On March 26, 2003, Carnero informed BSA that he considered himself terminated. **App.** 39, ¶12(d). ("Due to your silence I consider myself terminated without just cause."). BSA responded by reiterating its March 25, 2003 offer to reinstate him and gave him until April 2, 2003 to accept that offer. Carnero considered BSA's offer to reinstate him with a salary of $15,000 pesos per month to be a sham that caused a materially adverse change in the terms and conditions of his employment and refused to accept employment based on that change. **App.** 345, ¶28; **App.** 15-16, ¶22-23. BSA stated that if Carnero did not accept the offer "we shall consider that the relationship has been terminated by your exclusive fault." **App.** 39, ¶12(e). Carnero did not respond on April 2, 2003. On April 3, 2003, BSA sent a ministerial letter confirming that Carnero's failure to accept BSA's offer by April 2, 2003 had resulted in his termination. **App.** 39-40, ¶12(f).

The foregoing facts demonstrate that if Carnero did not already understand that he was terminated from his position with all entities on August 8, 2002, then his employment with BSA ended at least as early as March 26, 2003—the day on which he informed BSA he "considered himself terminated." *See, e.g.*, ***Flaherty v. Metromail Corp.***, 235 F.3d 133, 138 (2nd Cir. 2000) (in constructive discharge case, the employee's claim accrues on the date the employee provides definite notice

of her intention to resign). Accordingly, pursuant to **18 U.S.C. § 1514A(b)(2)(D)**, Carnero was required to file his complaint with the DOL within 90 days of March 26, 2003, or by June 24, 2003. Carnero's July 2, 2003 filing thus missed the filing deadline.

Under no circumstances can Carnero establish that he was terminated later than April 2, 2003. BSA informed Carnero that he had to respond by April 2, 2003 or he would be terminated. **App.** 39, ¶12(e). Carnero believed the offer was a sham and considered it a retaliatory change in the terms and conditions of his employment. **App.** 345, ¶28; **App.** 15-16, ¶22-23. Therefore, when Carnero elected not to respond on April 2, 2003, he knew that he had been terminated. At that point, the termination decision had been made and communicated to him, and thus the limitations period had commenced. *See* ***Delaware State College v. Ricks***, 449 U.S. 250 (1980). If it is determined that Carnero's employment did not end until April 2, 2003 (the day by which he was required to respond to BSA in order to accept the proposed reinstatement), Carnero would have been required to file his DOL complaint by July 1, 2003, which he likewise failed to do. BSA's subsequent April 3rd telegram confirming his resignation was merely ministerial and did not extend the limitations period for an additional day. *See, e.g.*, ***Everett v. Cobb County School Dist.***, 138 F.3d 1407, 1410 (11th Cir. 1998) (statute of limitations began when May

31, 1994 decision was made and communicated to plaintiff, not on June 6, 1994 when plaintiff received letter confirming May 31, 1994 decision).

III. THE DISTRICT COURT PROPERLY DISMISSED CARNERO'S STATE LAW COMPLAINT BECAUSE THE DECISION WAS WELL-GROUNDED IN FACT

A. Carnero's State Law Claims

Carnero's State Law Complaint contains eight counts, which his attorney conceded amount to the same claim: that BSC breached an alleged oral, at-will employment contract with Carnero by terminating his employment in retaliation for reporting certain billing irregularities in Latin America. **App.** 376-78.

B. The District Court's Dismissal of Carnero's State Law Complaint Was Well-Grounded

The District Court's dismissal of Carnero's State Law Complaint reflects the well-grounded conclusion that it did not state any claims against BSC because it relates entirely to Carnero's employment with BSC's subsidiaries in Latin America. As his complaint acknowledged, Carnero is an Argentine citizen domiciled in Buenos Aires who had an employment contract with BSA, an Argentine company. The BSA Agreement, which was appended to the complaint, provided that Carnero would be stationed at BSA's headquarters in Buenos Aires and be paid in Argentine pesos. The BSA Agreement was entered into in Argentina, was expressly governed by Argentine law and superceded all former agreements with Carnero. On the facts

established by Carnero's complaint, the District Court correctly found that Carnero had no claim under Massachusetts law because all of the events that gave rise to Carnero's claims in this case (his employment, the alleged billing irregularities, his reports of alleged billing irregularities, his termination, all communications regarding his termination, etc.) occurred in Argentina or Brazil and therefore are governed by Argentinean or Brazilian law. There is simply no basis for Carnero's claims against BSC under Massachusetts law because Massachusetts law should not and will not ever apply to his claims.

Carnero's attack on the District Court's decision is based on the fact that the court overlooked his contention that he had some contacts with Massachusetts. These contacts are immaterial, however, because even if considered they do not provide a basis for Carnero to bring a claim under Massachusetts law because the locus of his employment and his employment contract was Argentina. Accordingly, the dismissal of the State Law Complaint was entirely appropriate and should not be overturned.

IV. THE DISTRICT COURT HAD INDEPENDENTLY SUFFICIENT GROUNDS FOR DISMISSING THE STATE LAW COMPLAINT

Even if this Court determines that the rationale underlying the District Court's decision was incorrect, BSC's Motion to Dismiss Carnero's State Law Complaint also presented the District Court with alternative grounds for dismissal: (1) Carnero

failed to join an indispensable party that could not be joined without destroying the District Court's diversity jurisdiction; (2) dismissal or stay (pending the resolution of Carnero's employment claims in Latin America) was warranted under the doctrines of international comity and *forum non conveniens*. **App.** 80-100. The District Court could have appropriately dismissed the complaint under these alternative legal doctrines, and this Court can and should affirm the District Court based on these grounds. *See supra* Part II.

A. The District Court Could Have Dismissed The State Law Complaint Because BSA Is An Indispensable Party That Could Not be Joined Without Destroying The District Court's Diversity Jurisdiction[10]

Rule 19(a) of the Federal Rules of Civil Procedure requires a person to be joined as a party if (a) complete relief cannot be accorded without the absent person or (b) the absent person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may impair or impede the persons' ability to protect that interest.

Carnero's claims in the State Law Action involve Carnero's employment with and termination of employment with BSA under his employment agreement with BSA. BSA is a separate legal entity from BSC. BSA was Carnero's employer at the

[10] Permitting Carnero to amend his State Law Complaint to add a SOX claim to obtain federal question jurisdiction would be futile for the reasons set forth above.

time he terminated his employment and was the only employer that was a party to his written employment agreement. Finally, employees of BSA (not BSC employees) communicated with Carnero regarding his termination of employment from BSA. **App.** 37-40, ¶12. Carnero's State Law Complaint seeks reinstatement (**App.** 357), so complete relief to Carnero cannot be accorded in BSA's absence, and BSA's rights under its employment agreement would be impaired if the State Law Action were permitted to proceed without it. BSA is therefore an indispensable party. *See* ***Ayala-Gerena v. Bristol Myers-Squibb Co***., 95 F.3d 86 (1st Cir. 1996).

BSA could not be joined in the State Law Action without destroying the District Court's jurisdiction because BSA and Carnero are both foreign citizens. It is well-established that, in order to establish diversity jurisdiction, no plaintiff can be a citizen of the same state as any of the defendants. *See* **28 U.S.C. § 1332**; ***Ruhrgas AG v. Marathon Oil Co***., 526 U.S. 574, 580 (1999) citing ***Strawbridge v. Curtiss***, 7 U.S. (3 Cranch) 267 (1806). This rule applies with equal force when both the plaintiff and the defendant are foreign citizens. ***Ruhrgas AG***, 526 U.S. at 580. Accordingly, if BSA were joined as a party, as it must be, diversity would be incomplete because Carnero (the plaintiff) and BSA (a defendant) are both foreign citizens. ***Iraola & CIA, S.A. v. Kimberly-Clark Corp***., 232 F.3d 854 (11th Cir.

2000) (Argentinean plaintiff would destroy diversity if it included as a defendant a company that was owned by a citizen of Argentina).

If a necessary party cannot be joined, as in this case, "the court shall determine [by considering four factors] whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus being regarded as indispensable." **F.R.C.P. 19(b)**. All of the Rule 19(b) factors support the conclusion that BSA is indispensable: (1) Judgment rendered in BSA's absence would be prejudicial to BSA; (2) the District Court cannot shape the relief to avoid that prejudice; (3) judgment rendered in BSA's absence will be inadequate; and (4) Argentina provides an even more appropriate and fully adequate and convenient forum in which Carnero may pursue his claims against BSC and BSA. Therefore, pursuant to Rule 19, dismissal of the State Law Action is appropriate.

B. The District Court Could Have Relied Upon The Doctrine Of International Comity To Justify The Dismissal Of The State Law Complaint

"Federal courts have the inherent power to stay an action based on the pendency of a related proceeding in a foreign action." ***Goldhammer and DD UK v. Dunkin' Donuts Co***., 59 F. Supp.2d 248, 251 (D. Mass. 1999). Under the international comity doctrine, courts consider the following factors to determine

whether to grant a stay because of parallel litigation in a foreign forum: (1) similarity of parties and issues involved in the foreign litigation; (2) the promotion of judicial efficiency; (3) adequacy of relief available in the alternative forum; (4) issues of fairness to and convenience of the parties, counsel and witnesses; (5) the possibility of prejudice to any of the parties; and (6) the temporal sequence of the filing of the actions. ***Goldhammer***, at 252-53. *See also* ***Caspian Investments, Ltd. v. Vicom Holdings, Ltd.***, 770 F. Supp. 880, 886 (S.D.N.Y. 1991) (dismissing federal action pending Irish litigation). All of these factors warranted dismissal or a stay of the State Law Action.

1. The Parties And Issues In The Argentinean Action And The State Law Action Are Similar

BSC and Carnero are both parties in both the Argentinean Action and the State Law Action. That BSA is an additional party in the Argentinean Action does not impact the international comity analysis. *See also* ***Caspian Investments, Ltd.***, 770 F. Supp. at 884.

The issues in the State Law Action and the Argentinean Action overlap substantially. Carnero effectively commenced the Argentine proceedings by seeking severance indemnities and other relief through mediation on the basis that he was unlawfully terminated in Argentina. BSA and BSC sued, claiming that Carnero's assertion that his alleged reporting of billing irregularities led to his discharge was

defamatory. They also alleged that Carnero voluntarily resigned from employment at BSA and refused to accept the labor certificates that BSA attempted to serve upon him pursuant to Argentinean law. When that suit was filed, the full range of factual issues that Carnero sought to present to the District Court in the State Law Action were brought together. Indeed, in Carnero's answer to BSA and BSC's Argentine complaint, Carnero disputed BSC's version of events, asserting that (a) he was employed by BSC, not BSA; (b) he did not unlawfully refuse the labor certificates BSA presented to him; (c) he reported billing irregularities as required by BSC's Code of Ethics; (d) those billing irregularities existed; (e) his reports of those irregularities were not defamatory; (f) he was terminated without cause for reporting those irregularities; and (g) he received no termination compensation as required by Argentine law. **App.** 70, ¶7.

The issues raised in both the State Law and Argentinean Actions require a determination of the relationship between BSC, BSA and Carnero; what accusations Carnero made regarding alleged unlawful billing practices; whether certain agreements existed governing Carnero's employment and termination from employment; whether the terms of those agreements were satisfied; whether Carnero resigned or was wrongfully terminated; and whether parties acted in bad faith in the performance of their contractual duties or in terminating the agreements.

Accordingly, the issues in the Argentinean and State Law Actions are sufficiently similar to have warranted dismissal of the later-filed State Law Action.

2. Deference To The Argentinean Court Would Be Fair And Convenient To All Parties, Counsel, And Witnesses And Would Not Prejudice Any Of Them

Deference to the Argentinean Action would be fair and convenient to all parties and witnesses. First, all of the parties are Argentinean or have submitted to Argentinean jurisdiction. Second, as set forth above, all of the events, witnesses and documents are located in or occurred in Latin America. **App.** 11-14.

It would be expensive and impractical for the District Court to adjudicate an action where even the plaintiff admits that most of the events that he claims led to his termination occurred in the southern hemisphere, most of the relevant documents are written in Spanish or Portuguese, and most of the employees and witnesses involved are located in Argentina. It is clear that the interests of fairness and judicial economy are best served by permitting the Argentinean Action to proceed to judgment while this case was dismissed. *See, e.g.*, ***Evergreen Marine Corp.*** *v. Welgrow Int'l, Inc.*, 954 F. Supp. 101, 104-5 (S.D.N.Y. 1997) (according comity to Belgium proceeding because (a) disputed events occurred in Belgium; (b) witnesses and evidence were easier to secure in Belgium; (c) agreement was formed in Belgium; and (d) both parties did business in Belgium).

3. Staying Or Dismissing The State Law Action Would Promote Judicial Efficiency

(a) The Argentinean Court Has Accepted Jurisdiction

Carnero's legal claims in Latin America are well underway and have moved towards adjudication. The Argentine court has accepted jurisdiction over the Argentinean Action, and the case is proceeding into its evidentiary stage. **App.** 70, ¶9-12. Judicial efficiency would clearly militate against reinstituting the State Law Action. Allowing the State Law Action to recommence would be unnecessarily duplicative and consume "a great amount of judicial, administrative, and party resources." ***Goldhammer***, at 254, quoting ***EFCO Corp. v. Aluma Systems, USA***, *Inc.*, 983 F. Supp. 816, 824 (S.D. Iowa 1997).

(b) The Argentinean Forum Is More Appropriate Because The District Court And The Argentine Court Must Apply Argentine Law To Resolve The Dispute

Both the Argentine and Massachusetts courts will apply Argentine law to resolve the issues in this case.

(I) The District Court

When confronted with a conflict between two bodies of law, the District Court sitting in diversity jurisdiction must follow Massachusetts choice of law principles. ***Dunfey v. Roger Williams Univ.***, 824 F. Supp. 18, 20 (D. Mass. 1993); *see also* ***Klaxon Co. v. Stentor Electric Mfg. Co.***, 313 U.S. 487, 496-97 (1941) (choice of

law is a matter of substantive law and, citing ***Erie Railroad v. Tompkins***, 304 U.S. 64, 74-77 (1938) a federal court must follow the conflict of laws principles of the state in which it sits).

Carnero does not and cannot dispute that Argentinean law governs his contract with BSA because the parties selected Argentinean law as the governing law. The parties' choice of Argentinean law is plainly appropriate because the contract was formed in Argentina, negotiated in Argentina, performed in Argentina, and entered into by BSA (an Argentinean entity) and Carnero (an Argentinean citizen). *See, e.g.*, ***Shipley Co., LLC v. Kozlowski***, 926 F. Supp. 28, 29-30 (D. Mass. 1996) (enforcing the parties' choice of law for an employment agreement based on Restatement (Second) of Conflict of Laws (Restatement") § 187).[11]

Argentine law also governs the alleged "oral at-will employment agreement" between Carnero and BSC. Under Massachusetts choice of law principles, the law of the state with the "most significant relationship to the transaction [or occurrence] and the parties" generally governs the claim. ***Bushkin Associates, Inc. v. Raytheon Co.***, 473 N.E.2d 662, 669 (1985). Relevant contacts include the place of

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[11] **Restatement §187** states that the parties' choice of law should apply unless "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) the application of the law of the chosen state would be contrary to a fundamental policy of a state with a materially greater interest in the determination of the particular issue. . . ."

contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality and place of incorporation of the parties. **Restatement § 188(2)**. These factors demonstrate a more significant relationship with Argentina than Massachusetts: the "agreement" was negotiated in Singapore and over the telephone between Argentina and Massachusetts and performed primarily in Argentina by an Argentine citizen on behalf of an Argentine company. *See supra*, Statement of Facts, Parts II and III. The mere fact that Carnero had intermittent contact with Massachusetts through an occasional telephone call and/or business trip hardly means he was performing his contract in Massachusetts. *See* **Restatement § 196** ([T]he place where the major portion of the services is to be rendered . . . is the contact that will be given the greatest weight in determining . . . the state of the applicable law.").

Massachusetts courts also consider "choice-influencing factors," which include (1) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (2) the basic policies underlying the particular field of law; and (3) the ease in the determination and application of the law to be applied. **Restatement § 188(2)**; ***Tidemark Bank for Savings, F.S.B. v. Morris***, 1995 WL 368418, **1 (1st Cir. June 19, 1995) (applying Section 188).[12]

[12] The other choice influencing factors are (1) the needs of the interstate and international system; (2) the protection of justified expectations; (3) certainty,

Given Argentina's strong public policy in protecting employees who are discharged without cause, these factors plainly favor Argentine law governing this dispute. *See* Part IV(B)(3).

Argentinean law also governs Carnero's tort claims because a tort claim is governed by the law of the state with the most significant relationship to the event and the parties, considering (a) where the alleged injury occurred; (b) where the conduct causing the injury occurred; (c) the domicile of the parties and (d) the place where the parties' relationship is centered. **Restatement § 145(2)**; **Restatement § 150**.[13] Since Carnero's alleged injuries occurred in Argentina, any BSC or BSA action occurred in Argentina, Carnero is a resident of Argentina and his relationship with BSC and/or BSA was centered in Argentina, Argentinean law must apply.

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predictability and uniformity of result and (4) the relevant policies of the forum. Restatement § 188. Plainly, all of these factors weigh in favor of dismissing this action. First, applying Massachusetts law to an Argentine employment dispute could result in undesired international discord. *See infra* Part I(A) and (B). Second, given that Carnero performed almost all of his services in Argentina, neither party could have reasonably expected that Massachusetts law applied, particularly since his employment agreement with BSA specified that Argentine law would govern. Third, retaining this action creates a risk of inconsistent judgments because the Argentine court is proceeding with the case. Finally, Argentine policy favors retention of employment cases.

[13] **Restatement § 150** states: "When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state."

Given the citizenship of the parties and the locus of the events giving rise to the litigation, Carnero cannot claim a right to have Massachusetts law applied to his claims. As Justice Holmes observed:

> [I]t should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle in their affairs and remitted them to the place that established and would enforce their rights.

Cuba Railroad Co. v. Crosby, 222 U.S. 473, 480 (1912).

(ii) The Argentine Court

An Argentine court will certainly apply Argentine law to resolve this dispute. Section 3 of the Argentina Employment Contract Law states that Argentine law "shall govern all matters or issues involving the validity of, and the rights and duties of the parties to an employment agreement executed within the Argentine territory or in a foreign country, provided it is performed in the Argentine Republic." **App.** 71, ¶16. Argentine courts have unanimously held that Section 3 applies if the services under an employment relationship were rendered in Argentina, even when the place of execution of the agreement and the place of performance differ. *See, e.g.*, ***Antoñanzas, Eduardo L. v. Duperial S.A***, DT, 1997-A-73 – ED, Buenos Aires Appellate Labor Court, Division VI, 1996/03/25, 172-169 ("If the place of execution of the contract and the place of performance of the services are different and the parties do not state otherwise . . . the law of the place where the services were

performed prevails."). The fact that Carnero rendered occasional services outside of Argentina does not alter the mandatory application of Argentine law. *Corning* ***Rodrigo H. v. United Press International and other LNL***, Buenos Aires Appellate Labor Court, Division 1, 9/13/2002, 2003-01 (Argentine law must apply to a dispute between an employee who rendered services for a multinational company, traveled to several countries in the region, and had regional responsibility); **App.** 72, ¶17.[14]

Since Argentinean law will apply, the Argentinean Action is the more appropriate forum for resolving the parties' disputes. Allowing the State Law Action to continue would have required the District Court to analyze and interpret Argentinean labor law and to translate documents written in Spanish and Portuguese. It is far less burdensome and more efficient and logical to have the Argentinean court apply and interpret its own statutes and legal principles in its own language. Moreover, if the State Law Action had been permitted to continue, there would have been a risk of inconsistent judgments. *See* ***Goldhammer***, 59 F. Supp.2d at 254 (dismissing Massachusetts case in favor of English case in part due to risk of

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[14] In addition, Argentine courts have consistently held that Argentine law applies if services are rendered in Argentina -- even if the employee received instructions from officers residing in a different country. *See* ***Antoñanzas, Eduardo L. v. Duperial S.A.***, DT, 1997-A-73 -ED, 172-169, Buenos Aires Appellate Labor Court, Division VI, 1996/03/25 ("To determine the applicability of Section 3 of the Employment Contract Law, only the law of the place where the services are rendered is relevant. The place where orders and instructions are delivered is not relevant.") (emphasis added).**App.** 72 ¶17.

inconsistent decisions). As noted above, the Argentinean and State Law Actions arise out of the same transaction or occurrence. The risk of inconsistent decisions is self-evident.

4. The Argentinean Forum Would Provide The Parties With Adequate Relief

Because Carnero was the party that initially invoked the jurisdiction of the Argentinean judicial system through mediation, he cannot now claim that the Argentinean judicial system will be inadequate. ***Caspian Investments***, 770 F. Supp. at 885. In any event, the Argentinean judicial system is structured after the United States judicial system, and guarantees due process to all parties and requires equal treatment under the law. **App.** 66, ¶¶21, 23. The parties are permitted to file pleadings, serve interrogatories, request documents, take depositions, question witnesses, retain and question expert witnesses, and submit written briefs to the court. **App.** 66-67, ¶¶24-33. These procedures ensure that Carnero, BSC and BSA will receive a just and fair outcome in Argentina. Indeed, courts have not hesitated to accord comity to Argentinean proceedings. *See, e.g.*, ***Trion Container Int'l, v. Cinave, S.A.***, 1997 WL 634308 (E.D. La. Oct. 27, 1997) (according comity to Argentina's bankruptcy proceedings); ***Primesource Holdings Ltd. v. Compañía Argentina de Navegación Interoceánica S.A.***, 1997 WL 800830 (E.D. La. Dec. 31, 1997) (according comity to Argentina's bankruptcy/reorganization proceedings).

Moreover, Carnero would not be able to raise any different claims or obtain any additional remedies in Massachusetts than he could in Argentina because the substantive law of Argentina would apply to all of Carnero's claim even if litigated in Massachusetts. *See supra* Part IV(B)(3). Even if this Court were to compare the adequacy of Argentinean substantive law to Carnero's theoretical rights under Massachusetts law, it would discover that Argentine law permits Carnero to assert claims for breach of contract, wrongful termination, tortious interference with contractual relations, and defamation. **App.** 64-65, ¶16. That Carnero may not have access to all of the remedies he has in the United States is not the issue. *See, e.g.*, ***Dragon Capital Partners LP v. Merrill Lynch Capital Svcs., Inc***., 949 F. Supp. 1123, 1129 (S.D.N.Y. 1997) ("*Dragon Capital*"). The District Court was not required to permit Carnero to proceed in the forum that provides him with the greatest relief, but only to determine whether he will have access to a forum that provides adequate relief. *Id.*

5. The Argentinean Case Was Filed First

When a foreign action is pending, priority is generally given to the first suit filed. ***Goldhammer***, 59 F. Supp. at 255; ***Dragon Capital***, 949 F. Supp. at 1128. The sequence of these actions certainly favors a stay of the State Law Action because the Argentinean Action was filed before the State Law Action was filed, and

it was served before the State Law Action was served. Indeed, Carnero commenced the process of seeking relief through the Argentinean judicial system in April 2003, when he filed a request for mediation. By invoking the protection of the Argentinean judicial system, he implicitly acquiesced to its jurisdiction over him and recognized that it was a convenient forum for him. That Carnero was the first party to invoke the Argentinean forum adds significance to the "first-filed" factor. *See* ***Caspian Investments***, 770 F. Supp. at 885 (deference to the first-filed suit is more important when the same plaintiff initiated both suits).

C. The District Court Could Have Relied Upon Principles Of *Forum Non Conveniens* To Justify The Dismissal Of The State Law Complaint

The doctrine of *forum non conveniens* provided an alternative basis for the District Court to decline jurisdiction over Carnero's complaint and to dismiss the State Law Action. A court has broad discretion to decline jurisdiction "where an alternative forum is available in another nation which is fair to the parties and substantially more convenient for them or the courts." ***Mercier v. Sheraton Int'l, Inc***., 981 F.2d 1345, 1349 (1st Cir. 1992). In a *forum non conveniens* analysis, courts typically consider three factors: (1) the availability and adequacy of the alternative forum; (2) the private interests involved; and (3) the public interests involved. ***Mercier***, 981 F.2d at 1349-1354. When the doctrine of forum non

conveniens is viewed in conjunction with the international comity analysis undertaken above, it is clear that the District Court had ample alternative grounds for dismissing the State Law Complaint.

1. Adequacy and Availability of Alternative Forum

The facts of this case clearly demonstrate that Argentina is an adequate alternative forum for the purposes of the forum non conveniens inquiry. An alternative forum is considered "available" if the defendants are amenable to process in the alternative forum. *See* ***Piper Aircraft Co. v. Reyno***, 454 U.S. 235, 254 n.22 (1981). As previously noted, BSA and BSC have already submitted to jurisdiction in Argentina, and the Argentinean court has accepted jurisdiction over the Argentinean Action. Moreover, the Argentinean judicial system would provide the parties with more than an adequate opportunity to litigate their claims. *See supra* Part IV(B)(4); **App.** 66-67, ¶¶24-33.

2. The Private Interests

In weighing the private interests at play in a forum non conveniens analysis, courts generally consider several factors including: the relative ease of access to sources of proof; the availability of compulsory process and the cost of securing the attendance of witnesses; and all other practical problems that make trial of a case easy, expeditious and inexpensive. ***Mercier***, 981 F.2d at 1354. As noted above, all

of those factors cut strongly against proceeding with this litigation in Massachusetts.[15]

3. The Public Interests

The public interest analysis also weighs heavily in favor of Argentina. "Public interest factors relevant to the forum non conveniens determination include court congestion, the local interest in having localized controversies decided at home, the unfairness of imposing the burden of jury service on citizens in a forum unrelated to the dispute, and the appropriateness of trying a case in a forum which is familiar with the law to be applied." ***Dragon Capital***, 949 F. Supp. at 1131. This is a localized controversy that Argentina has an interest in deciding within Argentina: BSA has its principal place of business in Argentina, Carnero resides there, any breach of contract or tortious conduct that occurred took place in Argentina, and all alleged injuries or damages were incurred in Argentina. Moreover, it would be unfair to ask

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[15] The District Court was not required to retain the State Law Action in order to accord deference to the Plaintiff's choice of forum. While there is a strong presumption in favor of a plaintiff's choice of forum, it has also been held that the "presumption applies with less force when the plaintiff or real parties in interest are foreign." ***Piper***, at 255. In this case, it is difficult to see how Carnero's choice of a forum thousands of miles from the BSA office where he worked is a choice of convenience. Furthermore, Carnero initially chose the Argentinean forum when he pursued mediation in Argentina. *See also* ***Cuba Railroad Co. v. Crosby***, 222 U.S. 473, 480 (1912) (parties to foreign dispute may "not complain if our courts refuse to meddle in their affairs and remitted them to the place that established and would enforce their rights.").

citizens of Massachusetts to spend their valuable time providing jury service for a dispute that has absolutely nothing to do with Massachusetts and everything to do with Argentina. Moreover, Argentina plainly has a strong public policy in favor of the retention of lawsuits adjudicating employment disputes. *See supra* Part IV(B)(3). The significance of the Argentine public interest in adjudicating this case cannot be ignored.

CONCLUSION

For all the foregoing reasons, BSC asks this Court to AFFIRM the District Court's grant of both of its motions to dismiss all counts of Plaintiff's Complaints.

Respectfully submitted,

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Dated: January 28, 2005

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, James W. Nagle, hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) and that this brief contains 13,949 words, excluding the Corporate Disclosure Statement, the Table of Contents and the Table of Authorities.

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CERTIFICATE OF SERVICE

I, James W. Nagle, hereby certify that on January 28, 2005, a true copy of the foregoing Brief of Appellee was served by First-Class Mail, Postage-Prepaid upon:

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