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In December 2001, Enron filed for what was at the time the largest corporate bankruptcy in U.S. history.[1] In little over a year, amid increasing investor scrutiny, accusations of fraud, and a series of disclosures of financial irregularities, the company's stock price had plunged from ninety dollars per share in August 2000 to less than one dollar per share in November 2001.[2] Seven months after Enron's record-breaking bankruptcy filing, WorldCom (now MCI Inc.) shattered Enron's record with its own massive bankruptcy filing.[3] As was true with Enron, WorldCom's collapse owed much of its impetus to accounting irregularities and allegations of fraud.[4] In 2002, Congress passed the Sarbanes-Oxley Act (SOX)[5] in response to such scandals.[6] Upon signing SOX into law, President George W. Bush called the legislation "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[7]

Title VIII of SOX, known as the Corporate and Criminal Fraud Accountability Act of 2002[8] ("the Act" or "Title VIII"), established, inter alia, § 1514A, a "whistleblower"[9] protection provision for certain individuals involved with publicly traded companies.[10] As a whole, SOX aims "[t]o protect investors by improving the accuracy and reliability of corporate disclosures,"[11] while Title VIII "provide[s] for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities . . . and for other purposes."[12] SOX also emphasizes the

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1. John C. Coffee Jr., Gatekeepers: The Professions and Corporate Governance 18 (2006). *See generally* Bethany McLean & Peter Elkind, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron (2003) (providing a definitive literary account of Enron's meteoric rise and subsequent collapse).

2. *See* Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. Times (Nov. 29, 2001), http://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html.

3. Todd Wallack, *Biggest U.S. Bankruptcy Ever: WorldCom Filing, Expected by Wall Street, Could Further Shake Confidence of Small Investors*, SFGate (July 22, 2002, 4:00 AM), http://www.sfgate.com/news/article/Biggest-U-S-bankruptcy-ever-WorldCom-filing-2792832.php.

4. *See id.*

5. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S.C.).

6. *See* S. Rep. No. 107-205, at 1–2 (2002); Greg Farrell & USA Today, *WorldCom's Whistle-Blower Tells Her Story*, ABC News (Feb. 15, 2008), http://abcnews.go.com/Business/story?id=4295223.

7. Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 Pub. Papers 1319, 1319 (July 30, 2002).

8. *See* S. Rep. No. 107-146 (2002).

9. Broadly defined, a whistleblower is "[o]ne who reveals wrongdoing within an organization to the public or to those in positions of authority." The American Heritage Dictionary of the English Language 2035 (3d ed. 1992). To "blow the whistle" is "[t]o expose a wrongdoing in the hope of bringing it to a halt." *Id.* For an interesting discussion about the origins of the term in an organizational context, see generally Wim Vandekerckhove, Whistleblowing and Organizational Social Responsibility: A Global Assessment (2006).

10. 18 U.S.C. § 1514A (2012).

11. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S.C.).

12. S. Rep. No. 107-146, at 2.

importance of shareholders as seen in the Senate report on the Public Company Accounting Reform and Investor Protection Act of 2002.[13] Section 1514A of SOX provides, in relevant part, that any publicly traded company, or any contractor of such a company, may not discriminate against an employee who, acting lawfully and under reasonable belief, exposes or facilitates the exposure of information that the company's conduct is violating: (1) certain sections of SOX;[14] (2) any rules promulgated by the Securities and Exchange Commission (SEC); or (3) any federal laws prohibiting fraud against shareholders.[15]

In 2014, the Supreme Court extended § 1514A's whistleblower protection in *Lawson v. FMR LLC*.[16] In *Lawson*, the Court granted certiorari to resolve an interpretive conflict between the First Circuit and the Department of Labor's Administrative Review Board (ARB) regarding whether § 1514A's whistleblower protection extended to the employees of privately held contractors who perform work for publicly traded companies.[17] The First Circuit held that § 1514A's whistleblower protection did *not* apply to employees of privately held contractors;[18] whereas in a later decision[19] the ARB held, "§ 1514A affords whistleblower protection to employees of privately held contractors that render services to public companies."[20] The petitioners in *Lawson* were employees of private contractors who provided management and advisory services to several mutual funds.[21] After one employee raised concerns regarding certain cost accounting methodologies, and another about inaccuracies in a draft SEC registration statement, both suffered retaliation by the

13. S. Rep. No. 107-205, at 2, 15, 19 (2002) (explaining that auditors' primary duties are to shareholders, acting on behalf of the shareholders, and acting in the best interest of shareholders).

14. The sections specified are §§ 1341, 1343, 1344, and 1348. 18 U.S.C. § 1514A(a)(1).

15. *Id.* Under the statute, discrimination is in the "terms and conditions of employment" such as failing to promote, demoting, firing, suspending, threatening, harassing, or other actions. *Id.* § 1514A(a).

16. 134 S. Ct. 1158, 1165–66, 1176 (2014).

17. *Id.* at 1164–65.

18. Lawson v. FMR LLC, 670 F.3d 61, 83 (1st Cir. 2012), *rev'd*, 134 S. Ct. 1158.

19. *See* Spinner v. David Landau & Assocs., ARB Nos. 10-111, 10-115, 2012 WL 1999677, at *12 (U.S. Dep't of Labor May 31, 2012).

20. *See Lawson*, 134 S. Ct. at 1165 (citing *Spinner*, 2012 WL 1999677).

21. *Id.* at 1164. A mutual fund is a company that pools money from numerous investors and uses those funds to invest in securities (most commonly stocks and corporate or government-issued bonds). *Mutual Funds and Exchange-Traded Funds (ETFs)—A Guide for Investors*, SEC, https://www.sec.gov/investor/pubs/inwsmf.htm (last modified Jan. 26, 2017). Collectively, these investments constitute the fund's portfolio, which is managed by an investment advisor. *Id.* Investors purchase and sell shares directly from the mutual fund itself. *Id.* Mutual funds are required to sell their shares at the net asset value, which is calculated by taking the mutual fund's assets minus its liabilities. *Id.* However, the mutual fund must price its shares each day, and most do so after the U.S. stock market closes for the day. *Id.* Therefore, when purchasing shares, an investor will not know the price until the next day. *Id.* The purchased shares constitute a proportionate ownership of the fund's holdings and any resulting income from them. *Id.*

contractor.[22] Both employees subsequently brought complaints alleging retaliation in violation of § 1514A.[23] Reversing a divided First Circuit,[24] the Supreme Court extended § 1514A's protection to employees of private contractors serving publicly traded companies who blew the whistle on fraud perpetrated by those companies.[25]

Slightly more than three months after the Supreme Court decided *Lawson*, the U.S. District Court for the Eastern District of Pennsylvania was faced with the decision of whether to further extend § 1514A's whistleblower protection, and declined to do so. In *Gibney v. Evolution Marketing Research, LLC*, the court held that § 1514A did not extend protection to the plaintiff Leo Gibney, an employee who blew the whistle on alleged fraud perpetrated by his employer against the company for which his employer was a contractor—and thus, indirectly, that company's shareholders.[26] Gibney's employer, Evolution Marketing Research ("Evolution") subsequently terminated him, so he brought a claim alleging wrongful termination in violation of § 1514A, naming Evolution as the defendant.[27]

The Eastern District of Pennsylvania held that Gibney fell outside the scope of § 1514A.[28] Gibney based his claim on the Supreme Court's decision in *Lawson*, and argued that as an employee of a contractor who blew the whistle on activity that would, albeit indirectly, defraud the shareholders of a public company, he fell within the expanded purview of § 1514A.[29] The defendant, Evolution, argued for a narrower reading: that the Supreme Court in *Lawson* did not support extending SOX protection to employees of a private contractor for a public company who report fraud that was not committed by the public company and had no connection to the company's shareholders.[30] Evolution argued that § 1514A was unavailable to Gibney because Evolution's client, the publicly traded pharmaceutical giant Merck & Co. ("Merck"), did not commit the alleged fraud.[31]

This case comment contends that the *Gibney* court erred in declining to extend § 1514A's whistleblower protection. First, the court unduly focused on the discussion by the Supreme Court in *Lawson* regarding the particularities of the mutual fund industry. Second, the court failed to give proper weight to the statutory text of § 1514A.

22. *Lawson*, 134 S. Ct. at 1164.

23. *Id.*

24. Lawson v. FMR LLC, 670 F.3d 61 (1st Cir. 2012) (holding that § 1514A barred retaliation by a contractor against a public company's employees, but not against its own, *id.* at 68, and basing its decision in part on the title of section 806 of SOX: "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud"; and on the caption under § 1514A(a): "Whistleblower protection for employees of publicly traded companies," *id.* at 69), *rev'd*, 134 S. Ct. 1158.

25. *Lawson*, 134 S. Ct. at 1161.

26. 25 F. Supp. 3d 741, 747–48 (E.D. Pa. 2014).

27. *Id.* at 742.

28. *Id.* at 747–48.

29. *Id.* at 742, 744.

30. *Id.* at 746.

31. *Id.* at 746–47.

Third, the court failed to give due weight to Congress's broader legislative purpose in enacting § 1514A and SOX in its entirety. The court's decision is likely to engender significant negative repercussions. Contractor employees who uncover wrongdoing by their employers against publicly traded companies will be discouraged from exposing the wrongdoing, to the ultimate detriment of not only individual company shareholders, but also the broader public confidence in the securities market as a whole. At the same time, this ruling is likely to embolden unscrupulous contractors, potentially leading to both greater instances and greater magnitudes of fraud. In turn, companies wishing to protect themselves against such fraud may have to expend greater resources to do so, as this court's decision will deter contractor employees from exposing fraud to the company for fear of retaliation from their bosses.

Leo Gibney was employed by Evolution from October 2009 until his termination on November 7, 2011.[32] During that time, Evolution contracted with Merck to provide consulting services.[33] While serving as Evolution's agent on a Merck project known as Cogent, Gibney allegedly discovered that Evolution was fraudulently billing Merck for certain services, in violation of the contract between the two entities.[34] Gibney reported his objections to this billing practice to Evolution's chief operating officer and general counsel.[35] Two days later, he was terminated.[36]

On January 23, 2012, Gibney filed an administrative complaint with the Occupational Safety and Health Administration (OSHA).[37] On April 1, 2014, after OSHA failed to take action within 180 days, Gibney filed a pro se complaint in the Eastern District of Pennsylvania.[38] On June 10, 2014, the court granted Evolution's

32. *Id.* at 742.

33. *Id.*

34. *Id.* The alleged fraud was essentially a form of double billing, whereby Evolution subcontracted out various services and recouped the cost of doing so by billing Merck for those services as out-of-pocket fees; when according to the contract between Evolution and Merck, the cost of providing those services was to be included within the separate category of professional fees. *Id.* Rather than paying the subcontractors out of the professional fees it received from Merck, Evolution retained the entirety of those fees and separately recouped its subcontracting costs by mislabeling the subcontracted work. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 743. In 1970, Congress enacted the Occupational Safety and Health Act, which broadened OSHA's whistleblower authority and gave OSHA the ability to protect employees from employer retaliation. *The Whistleblower Protection Programs*, U.S. Dep't Lab., https://www.whistleblowers.gov/index.html (last visited Apr. 6, 2017). According to OSHA's guidelines, an employee of a "SOX covered" employer may file a SOX complaint with OSHA. OSHA, U.S. Dep't of Labor, OSHA Fact Sheet: Filing Whistleblower Complaints Under the Sarbanes-Oxley Act (2011), https://www.osha.gov/Publications/osha-factsheet-sox-act.pdf. A company is considered "covered by section 806 of [SOX] if it has a class of securities registered under Section 12 of the Securities Exchange Act or is required to file reports under Section 15(d) of that Act. Its subsidiaries, contractors, subcontractors, or agents may also be covered." *Id.* An employee can file a complaint in writing or by calling or visiting an OSHA office. *Id.* If OSHA does not issue a finding and order within 180 days of the employee filing, the employee may file in federal court. *Id.*

38. *Gibney*, 25 F. Supp. 3d at 743; *see* 18 U.S.C. § 1514A(b)(1)(A)–(B) (2012) (directing a person alleging discrimination under the section to first file a complaint with the Secretary of Labor, and then to file for

motion to dismiss.[39] The court rejected Gibney's argument that he should be covered under § 1514A, stating that to do so required a definition of SOX protection that was "impermissibly broad."[40] The court also stated thus, unlike the plaintiff's case in *Lawson*, Gibney's case did not involve the intricacies associated with the mutual fund industry, so extending § 1514A's protection was not justified.[41] Moreover, even though the court acknowledged that the issue of whether Gibney's claims fell outside the scope of SOX was a "close question,"[42] it ultimately agreed with Evolution's argument that Gibney's complaint was outside the scope of SOX because it did not allege that Evolution assisted or otherwise was involved with fraud committed by Merck.[43]

In agreeing with Evolution's argument, the court referenced *Safarian v. American DG Energy Inc.*[44] In *Safarian*, the plaintiff performed engineering services for the defendant, a publicly traded company; however, Multiservice, a company the plaintiff owned, paid the plaintiff.[45] In this case, the court found that the plaintiff, an engineer, was not involved in accounting or taxation practices, and did not report an issue with corporate disclosures.[46] Thus, the plaintiff's disclosures did not fit into SOX's purpose of protecting investors by improving disclosures and monitoring auditors, accountants, and lawyers.[47] The *Gibney* court also quoted the court in *Harvey v. Safeway*, which stated, "[SOX] was not intended to capture every complaint an employee might have as a potential violation of the Act. Rather, the goal of the legislation was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."[48]

This case comment argues that the *Gibney* court made three primary errors in failing to extend § 1514A's protection to contractor employees who allege indirect shareholder fraud perpetrated by their contractor against a publicly traded company. First, the court unduly emphasized that *Lawson* dealt with alleged fraud in the context of the mutual fund industry. In doing so, the court failed to adequately consider factual similarities, which if given due consideration would have compelled ruling for the plaintiff. Second, the court failed to give proper weight to the statutory text of § 1514A, failing to take proper cognizance of the deliberately broad statutory

de novo review in the appropriate district court if the Secretary does not issue a decision within 180 days).

39. *Gibney*, 25 F. Supp. 3d at 749.

40. *Id.* at 747.

41. *Id.*

42. *Id.*

43. *Id.* at 747–48.

44. *Id.* at 748; *see* Safarian v. Am. DG Energy Inc., No. 10-6082, 2014 WL 1744989 (D.N.J. Apr. 29, 2014), *aff'd in part, vacated in part*, 622 Fed. App'x 149 (3d Cir. 2015).

45. *Safarian*, 2014 WL 1744989, at *1.

46. *Id.* at *4–5.

47. *Id.*

48. *Gibney*, 25 F. Supp. 3d at 748 (quoting Harvey v. Safeway, 2005 WL 4889073, at *3 (U.S. Dep't of Labor Feb. 11, 2005)).

language. Third, the court failed to give due weight to the broad legislative and remedial purposes behind § 1514A and SOX. The court focused on the legislative history that discusses the specific desire to avoid Enron-like scandals in the future, but failed to consider the broader purposes behind SOX, and behind securities regulation reform in general.

First, the *Gibney* court overemphasized a distinguishing factor in *Lawson*: that the case involved a mutual fund with no employees of its own.[49] The Supreme Court noted in *Lawson* that because of the unique structure of mutual funds, its decision to extend whistleblower protection to the petitioners would "avoid[] insulating the entire mutual fund industry from § 1514A."[50] As the Court explained, this fact bolstered its broader reading of the term "employee" to include more than merely employees of public companies themselves because "mutual funds unquestionably are governed by § 1514A" and "[v]irtually all mutual funds . . . have no employees of their own."[51] The Court further pointed out that "Congress presumably had [mutual funds] in mind" in constructing the provision.[52]

In adopting this broader interpretation of "employee," however, the Court in *Lawson* was not focused solely or even primarily on the particular nature of the mutual fund industry. Rather, it focused extensively on "parallel statutory texts and whistleblower protective aims."[53] In dismissing the narrower interpretation the dissent would have taken, the Court noted that the narrower reading would result in "a huge hole" because the "[c]ontractors' employees . . . would be vulnerable to retaliation by their employers for blowing the whistle on a scheme to defraud the public company's investors, *even a scheme engineered entirely by the contractor*."[54] The Court then invited the dissent to "pause to consider whether a Congress, prompted by the Enron debacle, would exclude from whistleblower protection countless professionals equipped to bring fraud on investors to a halt."[55] If the *Gibney* court had asked itself the same question, it might well have reached a different conclusion.

49. *See* Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) ("The mutual funds themselves are public companies that have no employees. Hence, if the whistle is to be blown on fraud detrimental to mutual fund investors, the whistleblowing employee must be on another company's payroll . . . . Contractors . . . are not ordinarily positioned to control someone else's workers.").

50. *Id.* at 1171.

51. *Id.*

52. *Id.*

53. *Id.* at 1162. The primary parallel statutory text in question was 49 U.S.C. § 42121 (2012), from which the Court inferred that Congress borrowed SOX's whistleblower protection against retaliation. *Lawson*, 134 S. Ct. at 1162. The "whistleblower protective aims" were against retaliatory actions taken by the employer if the employee were to engage in whistleblowing activity, thus protecting the shareholders. *Id.* at 1161–62.

54. *Lawson*, 134 S. Ct. at 1168 (emphasis added).

55. *Id.*

The *Gibney* court, however, considered it "clear that the *Lawson* decision was partially motivated by the . . . unusual structure of the mutual fund industry."[56] The court acknowledged "some factual similarities" between the cases, but distinguished the case from *Lawson* by arguing that *Gibney* was "fundamentally different in that it d[id] not implicate the peculiar structure of the mutual fund industry."[57] The court thus used an interesting—but ultimately inconsequential—factual difference to bolster its finding that § 1514A was not intended to reach the conduct at issue in *Gibney*.

In distinguishing the two cases, the court gave short shrift to important factual similarities. Given the broader anti-fraud purposes of SOX as a whole, the court should have weighed the similarities more heavily than the mutual fund industry distinction. In *Lawson*, some of the alleged fraudulent activity consisted of overstating expenses incurred by the contractor in managing the mutual funds.[58] Such alleged fraud, the Court noted, "directly implicates the funds' shareholders: 'By inflating its expenses . . . [the contractor] could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds.'"[59] In *Gibney*, the alleged fraud similarly involved overbilling by the contractor against the public company. As the *Gibney* court itself noted, "[t]he same logic" applied to both activities: The inflated costs associated with Evolution's double-billing "would ultimately be paid by Merck's shareholders, as in Lawson's case."[60] The *Gibney* court erred in emphasizing that the alleged fraud in its case took place in a "fundamentally different" industry over the fact that the alleged fraud itself was, in both cases, fundamentally similar.[61]

Second, the *Gibney* court failed to give proper weight to the statutory text of § 1514A. Specifically, the court failed to take proper cognizance of § 1514A(a)(1)'s broad language outlawing retaliatory discrimination against whistleblowers who provide information "*relating to* fraud against shareholders."[62] In its discussion of the breadth of SOX's whistleblower protection, the court heavily stressed that Gibney alleged that the defendant contractor committed fraud *against* its client.[63] The court asserted, "[n]othing in the text of § 1514 . . . suggests that SOX was intended to encompass *every* situation in which any party takes an action that has some attenuated,

56. Gibney v. Evolution Mktg. Research, LLC, 25 F. Supp. 3d 741, 747 (E.D. Pa. 2014).

57. *Id.*

58. *Lawson*, 134 S. Ct. at 1164.

59. *Id.* at 1173 (quoting Brief for Petitioners at 3, Lawson v. FMR LLC, 134 S. Ct. 1158 (2014) (No. 12-3)).

60. *Gibney*, 25 F. Supp. 3d at 747.

61. *See id.*

62. 18 U.S.C. § 1514A(a)(1) (2012) (emphasis added).

63. *Gibney*, 25 F. Supp. 3d at 747–48 ("Here, however, Plaintiff has not alleged that he blew the whistle on fraud committed *by* Merck . . . . Rather, Plaintiff is alleging that Evolution committed fraud *against* Merck.").

negative effect on the revenue of a publicly-traded company . . . ."[64] To do so, the court warned, would risk making SOX an overbroad "general anti-retaliation statute."[65]

This distinction between fraud committed by a public company—either itself or through its contractor—versus fraud committed against a public company, and thus, indirectly, its shareholders, is not found within the relevant text of § 1514A. Furthermore, the *Gibney* court explicitly rejected Evolution's claim that Gibney's allegations did not relate to fraud against shareholders.[66] The court thus acknowledged that Evolution's alleged misconduct *did* relate to shareholders. According to the "plain meaning"[67] of the text, the plaintiff would therefore be entitled to § 1514A's protection against whistleblower retaliation. The court provided no compelling reason to support its finding that retaliation for Gibney's allegations was unavailable under § 1514A, despite it having conceded that those allegations related to fraud. Instead, the court merely concluded, "Plaintiff advocates for an impermissibly broad definition of SOX protection."[68] It based that conclusion on the argument that such a definition "was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*."[69]

The *Gibney* court placed significant weight on the *Lawson* Court's discussion of one of the immediate precursors to SOX's passage; namely, the Enron accounting scandal. The Supreme Court discussed Enron at length; it noted in the first line of its opinion that Congress enacted SOX "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation."[70] Even more pointedly, it noted that "[i]t is common ground that Congress installed whistleblower protection in [SOX] as one means to ward off another Enron debacle."[71] The *Gibney* court apparently presumed that the *Lawson*

64. *Id.* at 748.

65. *Id.* The court felt that applying § 1514A would create a general anti-retaliation statute because Evolution was defrauding Merck, and Merck was not harming its own shareholders. *Id.* at 747–48; *see also* Safarian v. Am. DG Energy Inc., No. 10-6082, 2014 WL 1744989, at *4 (D.N.J. Apr. 29, 2014) ("Though overbilling might eventually lead to incorrect accounting records and tax submissions, these kinds of disclosures were not contemplated by the statute, have not been protected by other courts, and should fall outside the scope of the Sarbanes-Oxley Act."), *aff'd in part, vacated in part*, 622 Fed. App'x 149 (3d Cir. 2015). *But cf.* Wiest v. Lynch, 710 F.3d 121, 135 (3rd Cir. 2013) (finding that a misstatement of accounting records and a fraudulent tax deduction were sufficient to support a plausible inference of a violation of SOX).

66. *Gibney*, 25 F. Supp. 3d at 747.

67. This term is a well-established principle of statutory construction that is used to decipher the meaning of statutory text by defining words in accordance with their ordinary meaning. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 108 (1990) ("'In determining the scope of a statute, [judges] look first to its language,' giving the 'words used' their 'ordinary meaning.'" (citations omitted) (first quoting United States v. Turkette, 452 U.S. 576, 580 (1981); then quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

68. *Gibney*, 25 F. Supp. 3d at 747.

69. *Id.*

70. Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014).

71. *Id.* at 1169.

Court's analysis of the interplay between the Enron fiasco and SOX's passage indicated *Lawson*'s intention to limit the extent of the statute's whistleblower protection to closely analogous situations.

In focusing on *Lawson*'s Enron-specific language, however, the *Gibney* court failed to adequately consider the *Lawson* Court's broader language regarding SOX's overall anti-fraud purposes. Nodding to a Senate report that identified outside professionals as "gatekeepers who detect and deter fraud,"[72] the Supreme Court noted that "[f]rom this legislative history, one can safely conclude that Congress enacted § 1514A to encourage whistleblowing by contractor employees who suspect fraud *involving* the public companies with whom they work."[73] Involve is defined as "to relate closely."[74] Therefore, the use of "involving" in § 1514A should have been construed to broaden, not limit, its scope and include any suspected fraud that relates to the public companies. Thus, in *Gibney*, although Evolution perpetrated the fraud against Merck, the fraud *involved* Merck, and would indirectly affect its shareholders, causing Evolutions' actions to fit within the intended meaning of § 1514A.[75]

Moreover, broad language in the context of laws designed to regulate the securities markets is commonplace. Section 10(b) of the Securities Exchange Act of 1934, for example, proscribes the "use or employ[ment], in connection with the purchase or sale of any [registered or unregistered] security . . . [of] any manipulative or deceptive device or contrivance."[76] And the Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'"[77] In another securities-related case of statutory first impression, the Supreme Court similarly noted that it would be "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[78] Thus, § 1514A's plain meaning, bolstered further by the broadly remedial nature of the underlying statute itself, and the Supreme Court's guidance on the interpretation of remedial legislation in general and in the context of securities regulation in particular, indicate that the *Gibney* court erred, not only in its emphasis on trivial factual differences over significant factual similarities, but also in statutory interpretation.

Third, the *Gibney* court, in addition to misreading the signals from *Lawson* regarding the breadth of SOX's whistleblower protection, misconstrued Congress's broader legislative intent. According to the *Gibney* court, "in enacting SOX Congress was *specifically* concerned with preventing shareholder fraud either by the public

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72. *Id.* at 1170 (quoting S. Rep. No. 107-146, at 20 (2002)).

73. *Id.* (emphasis added).

74. *Involve*, Merriam-Webster, https://www.m-w.com/dictionary/involve (last visited Apr. 6, 2017).

75. Gibney v. Evolution Mktg. Research, LLC, 25 F. Supp. 3d 741, 747 (E.D. Pa. 2014).

76. Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j (2012)).

77. Herman & MacLean v. Huddleston, 459 U.S. 375, 386–87 (1983) (alteration in original) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963)).

78. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

company itself or *through* its contractors."[79] The legislative history surrounding SOX's passage may indicate that Congress was specifically concerned with preventing a repeat performance of such fraud, but it also indicates that Congress was not solely concerned with that specific scenario. The *Gibney* court acknowledged that "Congress' central concern in enacting SOX" was "protecting shareholders."[80] SOX's broadly remedial nature is evident from the congressional record surrounding its passage. A Senate report specifically discussing Title VIII of SOX emphasized the importance of "[a]ccountability and transparency" in "restor[ing] confidence in the integrity of the public markets."[81] The report stressed that Enron was "only a case study" that indicated the need to reform the securities laws to prevent "[f]uture debacles."[82] According to the report, examples such as Enron "further expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. . . . The consequences . . . for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied."[83]

While the Senate report discusses the Act's whistleblower protection provisions in the context of public company employees, the *Gibney* court should have broadened its analysis of congressional intent to consider the purposeful inclusion of those provisions in the overall Act. In other words, the court should have considered not only Congress's words specifically regarding the whistleblower protection, but also the intended scope of that protection in the context of the Act's overall purpose.[84]

The *Gibney* court erred in declining to extend protection to contractor employees who blow the whistle on fraudulent activity that ultimately defrauds investors in publicly traded companies. The court mistakenly distinguished *Gibney* from *Lawson*; it focused on the particular nature of the mutual fund industry at issue in the latter case but failed to sufficiently consider the more important factual similarities between the actual fraudulent activities in both cases. Additionally, the court gave insufficient weight to the statutory text of § 1514A. The court read a requirement into the statute that protection would apply only with respect to allegations of fraud committed by the company—either directly or through its contractors—when the statutory language explicitly extends protection to allegations *relating to* fraud. The court failed to read the statutory language in the proper context. Concerned with the

79. *Gibney*, 25 F. Supp. 3d at 747; *id.* at 748 ("[T]he specific shareholder fraud contemplated by SOX is that in which a public company—either acting on its own or acting through its contractors—makes material misrepresentations about its financial picture in order to deceive its shareholders.").

80. *Id.* at 747.

81. S. Rep. No. 107-146, at 11 (2002).

82. *Id.*

83. *Id.* at 5; *see also* H.R. Doc. No. 107-414, at 16 (2002) (aiming to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws").

84. This is consistent with the statutory canon of construction *in pari materia*, which states that statutes "may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *In pari materia*, Black's Law Dictionary (10th ed. 2014).

potential for over breadth, the *Gibney* court failed to recognize the broadly remedial purposes behind § 1514A and SOX, and the guidance proffered by the Supreme Court in interpreting remedial legislation in general and in the securities regulation and anti-fraud contexts. Finally, the court misread the broader legislative intent behind SOX's whistleblower protection provisions. In doing so, the court neglected to further Congress's intent to strengthen protection for whistleblowers in a broad range of public-company related activities that could potentially defraud investors.

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