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Issue Date: 16 November 2007

CASE NO. 2006-SOX-00093

In the Matter of:

ELLEN LEZNIK,
Complainant,

vs.

NEKTAR THERAPEUTICS, INC., et al.
Respondents.

Order Denying In Part And Granting In Part Motion For Summary Decision

I. INTRODUCTION

Ellen Leznik (Complainant or Leznik) filed a complaint of employment discrimination against Respondent Nektar (Nektar) and four individual corporate officers[1] (Named Persons) pursuant to the whistleblower provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West Supp. 2007) (SOX or the Act). Leznik alleges that Nektar and the Named Persons terminated her in retaliation for her participation in protected activities. On May 11, 2005, she filed a complaint with the Occupational Safety and Health Administration (OSHA).[2] After OSHA issued its finding in May 2006,[3] Leznik filed a complaint with the Office of Administrative Law Judges. On August 21, 2007, Nektar and the Named Persons (collectively, "Respondents") filed motions for summary decision. The Respondents contend that no credible evidence supports Leznik's claim that she engaged in protected activity, that the Respondents had no knowledge of any protected activities, and that no protected activity played a role in her termination on February 15, 2005. Furthermore, the Respondents maintain that they can prove,

[1] Unlike most employment discrimination statutes, under the SOX Act individual corporate employees and managers may be held liable for their intentional retaliation against whistleblowers. See 18 U.S.C. § 1514A(a) and the Summary and Discussion of Regulatory Provisions for Section 1980.101, Definitions, 69 Fed. Reg. 52105 (August 24, 2004).
[2] Ellen Leznik's OSHA Complaint, May 11, 2005, attached as Exhibit A-11 to Respondents' Compendium of Evidence in Support of their Motions for Summary Decision (RX A-11).
[3] RX A-16.

by clear and convincing evidence, that Leznik would have been terminated even if her alleged protected activity had not occurred.[4]

I find that Leznik has established a prima facie case of retaliation by raising genuine issues of material fact regarding all elements of her cause of action. The Motion for Summary Decision is denied. Additionally, the Complainant has demonstrated genuine issues of material fact regarding the individual liability of Named Persons Nevan Elam (Elam), who was Nektar's General Counsel, and Paula Kasler (Kasler), who directly supervised her. Leznik has not, however, adduced sufficient evidence to establish a genuine issue of material fact with regard to the individual liability of Named Persons Ajit Gill (Gill), and Elizabeth Frisby (Frisby). As a result, the Individual Respondents' Joint Motion for Summary Decision is denied in part and granted in part.

II. BACKGROUND

Nektar Therapeutics, Inc. is a biopharmaceutical company that develops technologies to deliver medicines to the human body, develops proprietary products, and assists other pharmaceutical companies with improving their own their products.[5] The Complainant, Ellen Leznik, was employed as Staff Corporate Counsel at Nektar and began to work there on April 26, 2004.[6] Her immediate supervisor was Paula Kasler, who served as Vice President of Corporate Legal during Leznik's term of employment.[7] In May 2004 Leznik was assigned to a Nektar venture called Project Phoenix,[8] that was tasked to develop bioequivalent generic versions of popular pharmaceuticals, including the drug Lipitor.[9] Most project activities were conducted in India.[10] While Leznik worked on Project Phoenix, she raised concerns about several issues, including manufacturing problems, a lack of financial transparency in the project, and whether duplicate contracts paid an outside consultant twice for the same work.[11] On July 27, 2004 Leznik was removed from Project Phoenix.[12]

On August 19, 2004 Kasler met with Leznik to discuss Leznik's job performance, focusing on Leznik's interpersonal relationships with co-workers and clients.[13] During that meeting, Leznik called herself as a whistleblower.[14] Kasler inquired what Leznik meant, and Leznik told her that Nektar had done illegal things on Project Phoenix.[15] They briefly discussed

[4] *See generally*, Respondent Nektar Therapeutics' Memorandum of Points and Authorities in Support of its Motion for Summary Decision (Nektar Memo) and Individual Respondents' Joint Memorandum of Points and Authorities in Support of their Motions for Summary Decision (IR Memo).
[5] RX A-5 at EX. 1, pgs. 3-4, (Gill Dep.).
[6] RX A-1 at 8. (Leznik Dep.); CX 74.
[7] RX A-7 at 16. (Kasler Dep.).
[8] CX 7 at 125:20-127:19 (Leznik Dep.)
[9] CX 8 at 107:16-108:21 (Palepu Dep.); CX 58 at 4-5 (Expert Report – Morrison).
[10] CX 7 at 8:25 (Leznik Dep.).
[11] CX 7 at 8:17-43:9; 125:20-127:19; 294:7-295:7; CX 6 at 348:23-349:21 (Leznik Dep.); CX 16 at 356:3-358:22 (Kasler Dep.).
[12] CX 7 at 28:11-23 (Leznik Dep.).
[13] RX A-7 at Ex. 26 (Kasler Dep.).
[14] *Id*.
[15] *Id*.

Leznik's view of the Project Phoenix problems, and Kasler explained why she rejected Leznik's claim to be a whistleblower.[16]

After Leznik's removal from Project Phoenix, she continued to research and raise a variety of problems she perceived with Nektar's contracting processes, internal accounting controls, and a potential violation of Nektar's conflicts of interest code.

On January 17, 2005 Nevan Elam became Nektar's General Counsel.[17] On February 15, 2005 Elam terminated Leznik[18] for poor work performance and difficulties in her interpersonal relationships.[19]

The Complainant identifies ten specific activities which she believes fall within the protective ambit of SOX.[20] Broadly stated, they encompass allegations of: 1) potential patent infringement by Nektar,[21] 2) material weaknesses in Nektar's internal accounting controls and contracting process,[22] 3) problems with contracting, manufacturing, and clinical testing on Project Phoenix,[23] and 4) a violation of Nektar's ethics code.[24] Leznik's activity involved both the disclosure of information to company officials and, in many cases, investigation stemming from the disclosure. Leznik provided information to Nektar officials, including Kasler, Elam, Gill, and Frisby.

III. ANALYSIS

a. THE STANDARD FOR SUMMARY DISPOSITIONS

A presiding administrative law judge grants a summary decision when the pleadings, affidavits, matters officially noticed, or materials obtained by discovery or otherwise frame no genuine issue of material fact. 29 C.F.R. § 18.40(d). The rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, where "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial" but views "all the evidence and factual inferences in the light most favorable to the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

The party moving for summary decision has the initial burden to show that there are no genuine issues of material fact. If the motion is properly supported, the nonmoving party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); *see also Anderson*, 477 U.S. at 248. An issue is "genuine" when there is sufficient evidence for a

[16] RX A-7 at 307:21-308:9 (Kasler Dep.).
[17] RX A-3 at 16:5-8 9 (Elam Dep.); CX 21 at 264:3-17 (Elam Dep.).
[18] RX A-3, 43:17-45:9, 63:3-15 (Elam Dep.); CX 21 at 267:9-18 (Elam Dep.).
[19] RX A-3 at 43:17-45:9, 47:15-56:2, 63:3-15 (Elam Dep.).
[20] Complainant Ellen Leznik's Memorandum of Points and Authorities in Opposition to Respondent Nektar's Motion for Summary Decision, pages 3-4 (Leznik Opp. Memo. - Nektar).
[21] CX 116 (Pfizer Dec.); CX 12 at 765:8-767:12 (Leznik Dep.); CX 42 at 99:11-101:2 (Mulligan Dep.).
[22] CX 7 at 8:17-43:9 (Leznik Dep.).
[23] CX 7 at 8:17-43:9; 125:20-127:19; 294:7-295:7 (Leznik Dep.); CX 6 at 348:23-349:21 (Leznik Dep.); CX 16 at 356:3-358:22 (Kasler Dep.).
[24] CX 6 at 358:3-359:7; CX 7 at 38:11-42:1 (Leznik Dep.); CX 68.

reasonable fact finder to find in the non-moving party's favor. A "material fact" is one which would affect the outcome of the case. *Anderson*, 477 U.S. at 248-49.

b. EVIDENTIARY STANDARDS

I will briefly address the evidentiary standards applicable in this forum, since the Respondents have raised an number of objections to the evidence Leznik proffered to oppose the motion.[25]

Nektar's evidentiary objections are largely unavailing in this forum, where formal rules of evidence do not apply to SOX claims. 29 C.F.R. §1980.107(d). The presiding administrative law judge may exclude only immaterial, irrelevant, or unduly repetitious evidence. *Id.* These broad principles of admissibility assure production of the most probative evidence. Whistleblower discrimination claims commonly turn on inferences drawn from circumstantial evidence, because retaliatory intent is a pivotal issue. The adjudication requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Seater v. S. Cal. Edison Co*., 1995-ERA-13, slip op. at 5 & n.8 (ARB Sept. 27, 1996).

Nektar moved to strike a number of Complainant's statements, on the basis that the documents she offered to support them are unauthenticated, and so under 29 C.F.R. §18.901 they cannot be considered on a summary decision motion. No language in that rule requires that discovery documents or depositions be authenticated on personal knowledge when submitted in opposition to a motion for summary decision. Materials obtained through discovery are typically treated as self-authenticating both in adjudications under Rule 56, Fed. R. Civ. P.,[26] and in adjudications here, where this forum's summary decision rules are modeled on that federal rule. Nektar's evidentiary objections are overruled.

c. THE SARBANES-OXLEY ACT

The whistleblower provision of Sarbanes-Oxley at 18 U.S.C. § 1514A, states in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities

[25] *See* Respondents' Objections and Responses to Complainant's Statement of Material Facts in Dispute, attached with Respondents' Reply Briefs in Support of Motions for Summary Decision.

[26] *See e.g., Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002); *Anand v. BP West Coast Products LLC*, 484 F. Supp. 2d 1086, 1092 (C.D. Cal. 2007).

and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

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

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . .[27]

d. ELEMENTS OF A RETALIATION CLAIM

Congress applied to SOX claims the burdens of proof it had set for whistleblower protection proceedings under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) at 49 U.S.C.A. § 42121(b). See, 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, Leznik must prove that: (1) she engaged in a protected activity; (2) the Respondent(s) knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Reddy v. Medquist*, ARB No. 04-123 at 7, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005). If a complainant proves these four elements, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action had the protected activity not occurred. *Bechtel v. Competitive Tech., Inc.*, ALJ No. 2005-SOX-33 at 26 (ALJ October 5, 2005). The employee then can offer evidence that the employer's stated motivation is mere pretext for underlying retaliatory intent.

This order does not examine exhaustively all issues in dispute. It determines whether the Complainant has established the existence of a genuine issue of material fact for each element of her claim.

i. Protected Activity

The SOX Act protects an employee who provides information about things the employee "reasonably believes constitutes a violation" of laws the Act enumerates, which include both statutes and SEC rules. 18 U.S.C. § 1514A(a)(1); *Collins v. Beazer Homes*, 334 F.Supp.2d 1365, 1376 (N.D. Ga. 2004). The employee need not prove an actual violation to be protected. S. Rep. No 107-146 at 19 (2002);[28] *Passaic Valley Sewerage Comm'r v. U.S. Dep't of Labor,* 992 F.2d 474, 470 (3rd Cir. 1993); *Halloum v. Intel Corp.*, 2003-SOX-7 at 15 (ALJ March 4, 2004), aff'd, ARB No. 04-068 (ARB Jan. 31, 2006). The reported information must have the requisite degree of specificity. *Lerbs v. Buca di Bepo, Inc.*, 2004-SOX-8 at 14 (ALJ June 15, 2004). The employee must have brought to the attention of a supervisor, a federal agency or Member of Congress some specific practice, condition, directive, or event. *Peck v. Safe Air Int.l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). The employee's belief is evaluated

[27] 18 U.S.C. § 1514A (a); *see also* 29 C.F.R. § 1980.102 (a),(b)(1).
[28] See, 2002 WL 32054437 (A&PSAROX).

under both subjective and objective standards, *i.e.*, she must actually believe that the employer's practice, condition, directive, or event violated a law enumerated in the SOX Act, and her belief must be objectively reasonable. *Lerbs*, 2004-SOX-8 at 13 (ALJ June 15, 2004)(relying on *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000)).

The Respondents argue that Leznik did not engage in protected activity for several reasons: a) Leznik was merely doing her job, discovering and disclosing the problems she regarded as fraud, while to be protected under the SOX Act she would have to go outside her role as an in-house attorney; b) Leznik's alleged protected activity did not concern specific allegations of shareholder fraud; and c) Leznik did not reasonably believe that she was reporting shareholder fraud.

Leznik responds that: a) as a matter of law, she is not required to act outside of her regular duties to obtain the Act's protection; b) the Act does not require specific allegations of shareholder fraud; c) she reasonably believed that the activities she disclosed and challenged violated predicate laws enumerated in the Act, and she reasonably believed that certain of the activities could, in fact, constitute shareholder fraud.

1. *Employment as an In-house attorney*

Nektar's assertion that Leznik must act outside her role as an in-house attorney in order to be protected under the Act is untenable as a matter of law. That requirement may apply in other contexts,[29] but it is contrary to the case law and legislative history of SOX. I concur with the ALJ's holding in *Deremer v. Gulf Coast*, 2006-SOX-2 at 59-60 (ALJ June 29, 2007):

> The Act contains no language excluding one's job duties from protected activity. . . It is quite conceivable, as in the case of Sherron Watkins of Enron, that one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results. Therefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to Congressional intent.

Governing Ninth Circuit precedent holds that an employee whose own job duties encompass reporting illegal conduct may obtain whistleblower relief. In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984), the court held that a quality control inspector, who determined whether construction at a nuclear power plant conformed to federal specifications, was protected from adverse employment action taken in retaliation for his persistent internal complaints about safety and quality control practices. The court recognized that quality control inspectors were vital to the regulatory scheme for nuclear power plants and they could not be discharged whenever "they do their jobs too well." *Id*.

Nektar argues that cases protecting nuclear workers under the whistleblower provisions of the Energy Reorganization Act[30] (ERA) are inapplicable to Leznik's situation because the complainants in them had "normal job duties" that "contemplated instances where they had to

[29] Nektar cites to a variety of non-SOX decisions to support its contention, including cases that arose under the Fair Labor Standards Act, Clean Air Act, Clean Water Act, and some state whistleblower protection statutes. See Nektar Memo. at 16-17.
[30] 42 U.S.C. § 5851.

step outside their role of representing their employer, report company violations of law to the proper authorities, and trigger investigations by agency authorities."[31] This argument does nothing for Nektar. The SOX Act and the Secretary's implementing regulations specifically protect reports employees make to their supervisors.[32] Nektar cannot invent exceptions to those federal protections. Section 307 of SOX[33] places a duty on in-house attorneys to report what they perceive as: 1) violations of securities laws, 2) material breaches of fiduciary duties that arise under federal or state laws, or 3) similar material violations of any federal or state laws.[34] These reports are vital to the Act's overall scheme. Congress made clear through Section 307 that at publicly traded corporations, the client of an in-house lawyer is not corporate management, but the entity itself.[35] SEC regulations oblige in-house lawyers to challenge and report illegal conduct all the way to the audit committee of the Board of Directors if necessary.[36] This looks much like the duties of the quality control inspector in *Mackowiak,* whose job included ensuring compliance with federal construction specifications. *Mackowiak*, 735 F.2d at 1160. Leznik has raised a genuine issue about whether she was an attorney covered under Section 307 of the SOX Act,[37] and Nektar has offered no persuasive argument to refute it.

Nektar cites *Grant v. Dominion East Gas*, 2004-SOX-63 (ALJ March 10, 2005) as a SOX-specific case that supports its contention that Leznik must step outside her normal job duties to obtain SOX protection. *Grant* involved reports an engineer technician made about what he thought were accounting errors that he himself did not believe involved any form of wrongdoing. *Id.* at 40 & nn. 38 and 39. The judge regarded them as "basic errors," mistakes of a type that the complainant was hired to correct. That complainant could not tie the errors to any type of fraud or to violations of the laws listed in the SOX Act. *Id*. at 40 & n. 40. The engineer never had an objectively reasonable basis to believe he reported improper activities. If, on the other hand, he had a subjectively and objectively reasonable basis to believe that the utility's bookkeeping was intentionally false, or that management was engaged in a scheme to override or evade internal accounting controls, those reports would be protected. Intentionally false entries in corporate books violates the "books and records" provision of § 13(b)(2)(A) of the Securities Exchange Act and implementing SEC Rule 13b2-1, which says: "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act."[38] Even if, as Nektar suggests, the judge in *Grant* required that the employee step outside his or her job duties to obtain the Act's protection, the *Grant* decision pre-dates *Deremer*, and made no effort to distinguish the Ninth Circuit's holding

[31] Respondent Nektar Therapeutics' Reply Memorandum in Support of Its Motion for Summary Decision, at 6 (Nektar Reply Memo.).
[32] 18 U.S.C. § 1514A(a)(1)(C) and 29 C.F.R. §1980.102(b)(1)(iii).
[33] 15 U.S.C. 7245 and the SEC's implementing regulations at 17 C.F.R. 205.1 *et seq.*, especially 17 C.F.R. § 205.3.
[34] 17 C.F.R. § 205.2(i).
[35] *See* the Statement of Sen. Edwards, Congressional Record, July 10, 2002 at S6551-52, and the Statement of Sen. Enzi, Congressional Record, July 10, 2002 at S6555.
[36] 17 C.F.R. § 205.3(b)(3(i).
[37] Leznik's Memorandum of Points and Authorities in Opposition to Respondent Nektar's Motion for Summary Decision, at 52-56 (Leznik Opp. Memo. – Nektar).
[38] 17 C.F.R. § 240.13b2-1. This rule was applied in the SEC enforcement action in *In re* Matter of Duke Energy Corp., Admin. Proceeding File No. 3-11974 (Order Instituting Cease-and-Desist Proceedings, Making Findings and Imposing Cease-and-Desist Order Pursuant to § 21C of the Securities Exchange Act of 1934) (SEC July 8, 2005), available at http://www.sec.gov/litigation/admin/34-51995.pdf.

in *Mackowiak.* I regard *Mackowiak* and *Deremer* as the better reasoned authorities on the point.[39]

2. *Specific allegations of shareholder fraud*

Article III trial courts have reached contrary conclusions about whether SOX complaints must show that the conduct they disclose implicates some sort of shareholder fraud.[40] SEC rules require public companies to keep accurate books and records and to develop and maintain adequate internal controls. Section 13(b)(2)(B) of the Securities Exchange Act requires public companies to create internal accounting controls that are adequate to give "reasonable assurance" that their financial transactions are recorded accurately, fairly and in "reasonable detail," so they can prepare financial statements that conform to generally accepted accounting principles.[41] The ARB has held that employee disclosures about efforts to circumvent those internal controls are protected activities, because they address violations of SEC rules. *See Klopfenstein v. PCC Flow Technologies Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). In *Klopfenstein*, the ARB said: ". . .we do not believe that activity is protected only when. . . the complainant believes he is reporting 'fraud.' SOX protection applies to the provision of information regarding not just fraud, but also 'violation of … any rule or regulation of the Securities and Exchange Commission.'"[42] The ARB followed *Klopfenstein* with *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), in which it stated that allegations of fraud themselves "must at least be of a type that would be adverse to investors' interests." *Id.* at 15. *Platone* links fraud allegations (*e.g.*, mail or wire fraud) directly with investors' interests, while *Klopfenstein* establishes that allegations of fraud are not the sole means for whistleblowers to secure SOX protections.

The Complainant has produced evidence that establishes a genuine issue of material fact about whether she reasonably believed she disclosed a violation of SEC-mandated internal controls, which would be protected under *Klopfenstein*. For example, Leznik reported what she perceived to be a violation of Nektar's code of ethics; the SEC requires officers and employees to comply with those corporate ethics policies.[43] The violation she raised involved a potential

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[39] Nektar also argues that the United States Supreme Court's recent decision in *Garcetti v. Ceballos*, _ U.S. _, 126 S. Ct. 1951, 1960 (2006) supports its contention that employees must step outside their official duties to be protected. *Garcetti* involved no whistleblower protection statute, it dealt with public employees who claimed their termination was barred by the First Amendment. This is a statutory claim a private employee filed. Congress enacted SOX to remedy employment retaliation against corporate whistleblowers. These statutory protections that the Secretary implemented with her regulations have nothing to do with the reach of First Amendment.

[40] *Compare*, *Reyna v. Conagra Foods, Inc.*, 2007 WL 1704577 at 16 (M.D. Ga. June 11, 2007) (supporting the Complainant's contention that complaints do not necessarily have to relate to shareholder fraud) *with Livingston v. Wyeth*, Case No. 1:03 CV 00919, at 21 (M.D.N.C. July 28, 2006) (supporting the Respondent's contention that complaints must relate to shareholder fraud).

[41] See, 15 U.S.C. § 78m(b)(2)(B) and the SEC rule codified at 17 C.F.R. § 240.13a-15(a).

[42] *Klopfenstein* at 17; *see also Allen v. Stewart Enters., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 at 10 (ARB July 27, 2006) (reporting of violations of internal controls may constitute SOX-protected activity).

[43] *See* § 406 of the SOX Act, codified at 15 U.S.C. § 7264, and the regulations the SEC adopted at 17 C.F.R. § 228.406(b) (4) & (5) and § 229.406(b)(4) & (5), effective March 3, 2003. In response to the § 406 of the SOX Act, the NYSE amended its Section 303A(10) to require each listed company to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and to promptly disclose any waivers of the code for directors or executive officers. Nasdaq adopted NASD Rule 4350(n) and related Interpretive Material, which require each listed company to adopt a code of conduct applicable to all directors, officers and employees, and to make that

conflict of interest problem when Nektar contracted with Dr. Lakshmi Rambhatla, the wife of Nektar executive Sarma Duddu.[44]

Furthermore, Leznik has submitted evidence that she challenged actions that were adverse to the interests of Nektar's investors, as described in *Platone*. She has provided evidence that she raised the issue of potential infringement by Nektar on patents Pfizer held on Lipitor (Lipitor remains one of Pfizer's most profitable drugs), as Nektar tried to develop a generic version of Lipitor without Pfizer's knowledge or permission.[45] This was especially significant because Nektar's ongoing, valuable business relationships with Pfizer could be seriously damaged if Pfizer believed Nektar infringed its Lipitor patent. The reasonableness of her beliefs is discussed in the next section.

3. *Reasonable Belief That an Illegal Activity Took Place*

A complainant's belief that some illegal activity took place must be reasonable subjectively and objectively. The Complainant must prove that she actually believed a violation of a law enumerated in the SOX Act occurred, and that her belief was reasonable for a person of her knowledge and experience. *Deremer*, 2006-SOX-2 at 50.

The Complainant identifies 10 things she did that the SOX Act protects.[46] It is not necessary to analyze all ten. If a genuine issue of material fact exists about the subjective and objective reasonableness of her beliefs about any one of them, Nektar is not entitled to a summary decision.

There is admissible evidence of Leznik's subjective belief that Nektar's conduct violated the Act.[47] Furthermore, Leznik has produced evidence that supports the objective reasonableness of her beliefs. This includes the results of an Ernst & Young audit report issued a few weeks after Leznik's termination, which declared Nektar's internal accounting controls materially deficient and its financial statements unreliable.[48] Additionally, Kasler testified by deposition that she consulted with outside counsel about the issues Leznik perceived to be SOX

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code publicly available. The SEC approved these NYSE and Nasdaq amendments on Nov. 4, 2003. See SEC Release No. 34-48745; File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141.

[44] CX 6 at 358:3-359:7; CX 7 at 38:11-42:1 (Leznik Dep.); CX 68 (Nektar Code of Business Conduct and Ethics).

[45] CX 4 (Mulligan expert report); CX 5 (Mulligan Rebuttal); CX 116 (Pfizer Dec.); CX 12 at 765:8-767:12 (Leznik Dep.); CX 42 at 99:11-101:2 (Mulligan Dep.).

[46] *See* Leznik Opp. Memo. – Nektar at pgs. 3-4.

[47] *See, e.g.* CX 116 (Pfizer Dec.); CX 12 at 765:8-767:12 (Leznik Dep.); CX 42 at 99:11-101:2 (Mulligan Dep.) (establishing Leznik expressed her belief that Nektar endangered its partnership with Pfizer by the way it sought to develop generic Lipitor, that its shareholders were unaware of the danger this posed to Nektar's valuable relationship with Pfizer, and that Pfizer had no notice of the project); RX A-7 at Ex. 26 (Kasler Dep.) (establishing that Leznik identified herself as a whistleblower and believed Nektar did illegal things in Project Phoenix); CX 7 at 8:17-43:9; CX 6 at 429:18-436:22 (Leznik Dep.) (establishing that Leznik expressed her belief that a lack of financial transparency in Project Phoenix was fraudulent under SOX); CX 6 at 358:3-359:7; CX 7 at 38:11-42:1 (Leznik Dep.) (establishing that Leznik expressed her belief that the Rambhatla contract violated Nektar's conflict of interest policy and SOX); CX 7 at 8:17-43:9 (Leznik Dep.) (establishing that Leznik expressed her belief that moving ahead with Project Phoenix before other necessary contracts were in place violated Nektar's duty to maintain adequate internal controls).

[48] CX 20 at 84:12-87:10 (Elam Dep.).

violations so that she could ascertain whether Nektar was obliged to address those issues.[49] The legislative history of SOX states that corporate action taken in response to disclosure of information supports a finding that the employee's belief was a reasonable one.[50] Kasler's consultation constitutes the type of corporate action the legislative history envisioned.

Finally, Leznik has offered expert testimony to show that it was objectively reasonable for her to believe that matters she brought to her supervisors' attention were violations of the statutes and regulations enumerated at 18 U.S.C. § 1514A(a)(1).[51] Nektar relies on *Grant* for the proposition that expert testimony of that type is inadmissible because it is irrelevant.[52] *Grant* does not foreclose the possibility that expert testimony may help a fact finder (an ALJ or perhaps a jury in district court[53]) assess the objective reasonableness of her beliefs, particularly where the expert's testimony may explain circumstances that "generally amount to actual violations of the enumerated statutes or other laws related to fraud against shareholders."[54] The persuasiveness of the Mulligan testimony is not yet in issue. As evidence that bears on whether Leznik's beliefs were objectively reasonable, it frames a genuine issue of material fact.

ii. Respondents' Knowledge of Leznik's Protected Activity

A complainant may hold an employer liable for discrimination without proof that the individual who made the final decision to terminate her knew of her protected activity. The employee need only make a protected disclosure to an individual "with supervisory authority over" her. 18 U.S.C. § 1514A(a)(1)(C). Once an employee's supervisor has actual knowledge of the protected activity, that knowledge is attributed to the ultimate decision-maker. *Deremer*, 2006-SOX-2 at 61-62; *see also Collins*, 334 F. Supp. at 1378 ("To permit an employer to simply bring in a manager to be the 'sole decision maker' for the purpose of terminating a complainant would eviscerate the protection afforded to employees by Sarbanes-Oxley.").

Nektar and all the Named Persons disclaim knowledge of Leznik's protected conduct, but she has provided enough evidence to create a genuine issue of material fact on this point. Leznik told Kasler that Nektar lacked the financial transparency SOX mandated on Project Phoenix, and Kasler referred to SOX when she discussed the matter with Nektar's Vice President of Finance, Viraj Patel and Leznik.[55] Leznik also told Kasler that she believed the various problems in Project Phoenix, in their totality, indicated a scheme to defraud Nektar.[56] Leznik testified that she told Kasler that she believed Section 307 of SOX placed a duty on her (Leznik) to report

[49] CX 11 at 139:17-141:18, 151:21-152:21, 177:9-180:2; 205:8-206:25; CX 16 at 303:8-18 (Kasler Dep.).
[50] Legislative History of Title VIII of HR 2673, the Sarbanes-Oxley Act of 2002, Section 806, 148 Cong. Rec. 104, S7418-S7421 (July 26, 2002). ("Certainly, although not exclusively, any type of corporate or agency action taken based on the information [provided by the employee], or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief.")
[51] *See, e.g.* CX 3 at 70:8-71:16 and CX 4 (Mulligan opines that duplicate contracts on Project Phoenix left Nektar vulnerable to fraud); CX 5 at 3 (Mulligan states that the absence of a contract between Nektar and Rubicon is a type of irregularity that would violate the Securities and Exchange Act of 1934); CX 42 at 99:11-101:2 (Mulligan's assessment of the material risks to Nektar's business if Pfizer sued it for patent infringement).
[52] *See* Nektar Reply Memo. at pg. 12, fn. 12.
[53] Whether a SOX complainant could obtain a jury trial in district court remains unsettled.
[54] *Grant*, 2004-SOX-00063 at 38, & n. 4.
[55] CX 7 at 165:15-166:4 (Leznik Dep.).
[56] CX 7 at 57:10-58:8 (Leznik Dep.).

what she regarded as material violations of SEC rules.[57] Furthermore, Leznik has produced evidence to support her contention that Kasler consulted with outside experts after Kasler met with Leznik on August 19, 2004. The consultations assessed the substantive merit of Leznik's SOX allegations, and how to "manage" Leznik following her disclosures.[58]

It was not necessary for Leznik to communicate precisely which portions of the laws enumerated in 18 U.S.C. § 1514A(a)(1) had been violated for Kasler (or any other Nektar official) to understand that Leznik had engaged in protected activity.[59] All reasonable inferences are resolved in Leznik's favor. The evidence mentioned above creates a genuine issue of fact about whether Kasler knew Leznik had engaged in protected conduct. Kasler's knowledge then may be imputed to Nektar's General Counsel Nevan Elam, the ultimate decision maker.

iii. An Unfavorable Personnel Action

An actionable SOX claim requires that the employer take an unfavorable employment action against the employee. 49 U.S.C. § 42121(b). Employers are barred from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee because of the employee's protected activity. 18 U.S.C. § 1514A(a). The employee's complaint is timely if it is filed within 90 days of that unfavorable action. 18 U.S.C. § 1514A(b)(2)(D).

Both parties agree that Leznik was terminated on February 15, 2005. She filed her complaint with OSHA on May 11, 2005, within the 90 days available to her.[60] The other adverse actions she describes in her complaint[61] occurred outside the 90 day limitation period, and cannot be remedied. It is not necessary to determine on this motion whether those actions serve as proof of the hostile work environment she claims, or merely provide background for her termination claim.

iv. The Causal Nexus Between Termination and Protected Activity

A SOX complainant must show that her protected activity was a contributing factor to an unfavorable employment action. 29 C.F.R. § 1980.109(a). A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enters., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 at 17 (ARB July 27, 2006) (relying on *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating, 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.*

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[57] CX 15 at 522:13-525:25; CX 7 at 8:17-43:9 (Leznik Dep.).
[58] CX 11 at 139:17-141:18, 151:21-152:21, 177:9-180:2; 205:8-206:25; CX 16 at 303:8-18 (Kasler Dep.).
[59] *See Collins*, 334 F. Supp. at 1377.
[60] RX A-11.
[61] The additional adverse actions include Leznik's removal from Project Phoenix on July 27, 2004, (CX 15 at 514:24-516:13) and Leznik's exclusion from an annual communications meeting in December 2004 (CX 7 at 176:20-178:10 and CX 48 at 846:3-848:9). Leznik also alleges hostile treatment by co-workers and supervisors following her disclosures. (CX 15 at 518:4-11; 566:2-18; 567:25-568:10; 567:2-21; 505:3-25), as well as diminishment of her responsibilities and assignments after her removal from Project Phoenix (CX 7 at 176:20-178:10).

Proximity in time can be sufficient to establish that the protected activity contributed to the action. *Collins*, 334 F. Supp. 2d at 1379. When used to infer causation, temporal proximity ordinarily must be close.[62]

Whether the short interval between the protected activities claimed and the termination should lead me to infer that one caused or contributed to the other is a fact question. Leznik was fired two weeks after she raised what she perceived was a violation of Nektar's corporate code of ethics.[63] She has produced evidence that what she thought were violations actually infringed SEC rules. Additionally, Kasler stated in her deposition that she consulted with outside counsel about Leznik's characterization of herself as a whistleblower on January 14, 2005, just a month before Nektar let her go.[64] This temporal proximity may support an inference of causation.

e. LEGITIMATE, NON-DISCRIMINATORY REASON FOR TERMINATION

Once a complainant establishes a prima facie case of retaliation, the burden shifts to the Respondents to demonstrate, by clear and convincing evidence, that the unfavorable personnel action would have occurred even in the absence of protected activity. 18 U.S.C. § 1514A (b)(2)(C); 29 C.F.R. § 1980.109.[65] Clear and convincing evidence is evidence which indicates that "the thing to be proved is highly probable or reasonably certain." *Peck v. Safe Air. Int'l, Inc.*, ARB No. 02-028 at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). The evidentiary burden is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *Grant*, 2004-SOX-00063 at 36.

Nektar contends it terminated Leznik for poor interpersonal relationships with co-workers and clients, including abusive and belittling behavior.[66] Elam testified that he decided to terminate Leznik solely for her performance.[67] To support this contention, Nektar points to Kasler's deposition and declaration that recounts the conflicts Leznik had with others, and to declarations from five other employees.[68]

Nektar correctly states that performance issues, insubordination, and argumentative or combative behavior each can be legitimate, nondiscriminatory reasons to terminate an employee.[69] Nektar has articulated non-discriminatory reasons for the termination.

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[62] But a sophisticated employer may not precipitously fire a skilled or professional employee who cannot easily be replaced, or who is engaged in significant on-going projects, but bide its time before retaliating. *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997). Viewed as a whole, evidence occasionally merits the inference that a remote event sparked job retaliation.

[63] CX 6 at 358:3-359:7; CX 7 at 38:11-42:1 (Leznik Dep.).

[64] CX 11 at 205:8-206:25 (Kasler Dep.).

[65] *See also, Collins*, 334 F. Supp. at 1375 (N.D. Ga. 2004); *Duprey v. Florida Power & Light Co*., ARB-00-070 (ARB Feb. 27, 2003).

[66] Nektar Memo, pgs. 14, 24-25.

[67] RX A-3 at 43:17-45:9, 47:15-56:2, 63:3-15 (Elam Dep.).

[68] RX A-7 at 326:12-330:25 (Kasler Dep.); RX H (Kasler Dec.); RX E (Eldon Dec.); RX B (Clark Dec.); RX F (Filbey Dec.); RX C (Duddu Dec.); RX G (Johnston Dec.).

[69] Nektar Memo. pgs. 23-24; *See, e.g. Taylor v. Wells Fargo*, 2004-SOX-00043 at 11-14 (ALJ Feb. 14, 2005).

f. PRETEXT

If a Respondent articulates a legitimate, non-discriminatory reason for a termination, the complainant may proffer evidence that the rationale is merely a pretext for discrimination. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, and 128, ALJ No. 1997-ERA-53 (ARB April 30, 2001). Evidence of pretext must be more than a complainant's own interpretation of or conjecture about the respondent's motive for the firing. *Johnson v. Stein Mart, Inc.*, No. 3:06-cv-00341 (M.D.Fla. 2007).

Leznik presented enough evidence to create a genuine issue of material fact on pretext. In response to Nektar's evidence of negative performance reviews, Leznik provides a number of reviews which she believes contain positive feedback.[70] The weight to be accorded to these conflicting performance reviews is a matter for trial. Leznik also has produced evidence casting doubt on the assertion that she alienated those she worked with. Nektar claims that Dr. Nagesh Palepu threatened to resign unless Leznik was removed from Project Phoenix, but at his deposition Dr. Palepu testified that he had no problem working with Leznik and does not recall complaining about her.[71]

Evidence of pretext can include "dishonesty about a material fact."[72] Leznik has produced evidence that calls into question the veracity of Elam's explanation for her termination. Elam stated in his deposition that he decided to terminate Leznik, in part, based on a ten minute conversation he had with Nektar employee Tacey Viegas who characterized Leznik's work style and interpersonal interactions as "unconscionable."[73] Leznik has countered with the deposition testimony of Tacey Viegas that he never had that conversation with Elam, and had no problems working with Leznik.[74]

Pretext can also be demonstrated from a pattern of good performance reviews suddenly followed by negative reviews.[75] Kasler praised Leznik in a review prior to the Project Phoenix disclosures.[76] Six weeks later, after the disclosures, Kasler met with Leznik to criticize Leznik's job performance.[77]

Leznik has gone beyond offering her own conclusions about Nektar's actions. Her evidence creates a triable issue about whether the non-discriminatory rationale for her termination is a pretext for whistleblower retaliation.

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[70] CX 82 (Glenbourtt review); CX 83 (Smith review); CX 84 (Malcolmson review); CX 85 (Ferrari review); CX 86 (Little review); CX 87 (Wilson review); CX 88 (Viegas review); CX 89 (Lord review); CX 90 (Harel review).
[71] *Compare* CX 8 at 201:10-202:12 (Palepu Dep.); 184:13-186:6 with RX G (Johnston Dec.).
[72] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).
[73] CX 20 at 58:1-60:24 (Elam Dep.).
[74] CX 44 at 29:16-21 (Viegas Dep.).
[75] *Ellis v. Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980).
[76] CX 73 (Kasler self-appraisal).
[77] CX 26 (Kasler memo on Aug. 19, 2004 meeting).

g. LIABILITY OF THE NAMED PERSONS

The SOX Act imposes individual liability when a decision maker retaliates against an employee because she engaged in protected conduct. The Act is unusual in this respect, as most other employment retaliation laws provide only for employer liability. Decisions from Title VII litigation are not especially helpful here, focusing as they do on whether to impute liability to an employer. Individual liability as a "named person" under the SOX Act and regulations should make supervisors or managers wary about retaliating against employees who raise problems they would rather ignore. The closest analogue is a supervisor's tort liability for interference with an advantageous employment relationship, if the supervisor acted with discriminatory intent in terminating or recommending an employee's termination. *See Carglia v. Hertz*, 363 F.3d 77, 88-89 (1st Cir. 2004). In those situations the supervisor must be motivated by "actual malice," defined as "spiteful, malignant purpose, unrelated to the legitimate corporate interest" to be liable. *Id.* This is not what the SOX Act and regulations require, however. An individual's liability is assessed in same manner that the corporate employer's liability is assessed. Individual liability must be predicated on retaliatory intent that contributed to the decision to take an unfavorable personnel action; it need not be the sole factor that motivated the named individual.

Leznik has produced evidence sufficient to establish a material issue of fact for each element of her prima facie case against Nektar as an entity. A "named person" in a SOX proceeding must actually know (or believe, perhaps erroneously) that the employee engaged in a protected activity, must be materially involved in the decision to take the unfavorable personnel action, and there must be a causal nexus between the protected activity and the unfavorable action the named individual took. Imputing knowledge from a subordinate to an ultimate decision maker is insufficient to impose individual (*i.e.*, "named person") liability. The named person is not liable if he or she demonstrates by clear and convincing evidence that he or she would have done the same thing even if the employee had not engaged in the protected activity. The Complainant then may prove that the reasons the individual offered for the termination are pretexts for intentional discrimination.

The analysis of whether Leznik engaged in protected activity does not change, her firing remains an unfavorable personnel action, the legitimate non-discriminatory rationale for the action does not vary by Respondent, and pretext analysis is the same. The portions of discussion set out above that must be analyzed anew are whether the individual Respondents knew of one of Leznik's protected activities, whether the individual had line authority to fire or seek Leznik's firing, and whether knowledge of her participation in a protected activity motivated the individual, in some part, to terminate Leznik.

i. Individual liability of Elam

Elam recounted in his deposition a conversation in which Kasler told him that Leznik had described herself as a whistleblower.[78] According to the deposition, Kasler told Elam that she repeatedly asked Leznik what Leznik meant by "whistleblower" and received no response. As a

[78] CX 20 at 109:16-110:10; 49:13-50:12 (Elam Dep.); RX A-1, 359:8-361:3; 997:12-999:12 (Leznik Dep.).

result, Elam said he concluded there was no basis for the claim.[79] However, Kasler's own testimony provides evidence that Leznik did, in fact, elaborate upon her whistleblower comment, pointing to perceived illegalities on Project Phoenix. Additionally, Leznik scheduled a meeting with Elam to discuss deficiencies in Nektar's contracting process, and Elam forwarded Leznik's emails about the meeting to Kasler.[80] Kasler and Elam both admit that Elam consulted with Kasler about Leznik's job performance prior to the termination, and discussed how to handle the termination after the decision was made.[81] This evidence shows that Elam and Kasler were in regular communication regarding Leznik and the various activities she alleges were protected. As all reasonable inferences are made in favor of the non-moving party, this evidence creates a genuine issue of material fact regarding Elam's actual knowledge of Leznik's activities.

Elam terminated Leznik in February 2005.[82] Elam says that he did not seek the approval or consent of any other individual in making the decision, and that he doesn't know of any Nektar policy that required more than one person to make a termination decision.[83] There is no dispute about Elam's material involvement in the firing.

ii. Individual liability of Kasler

Leznik has produced evidence sufficient to support her allegation that Kasler had personal knowledge of Leznik's alleged protected activities. Kasler was Leznik's direct supervisor. Leznik reported all of her concerns about Project Phoenix directly to Kasler,[84] even going to far as to tell Kasler that she believed the various problems, taken as a whole, indicated a "scheme to defraud Nektar."[85] Leznik informed Kasler of her concerns about the risk of patent litigation by Pfizer.[86] Leznik discussed with Kasler what she believed were material weaknesses in Nektar's accounting controls,[87] and informed Kasler that she scheduled a meeting with Elam to discuss those weaknesses.[88] When Leznik determined that the Rambhatla contract could be a violation of Nektar's code of ethics policy, she presented that concern to Kasler.[89] Additionally, Leznik claims she discussed her Section 307 duties in with Kasler in relation to Project Phoenix.[90]

Kasler states that she did not make the decision to terminate Leznik.[91] Kasler and Elam agree that Elam consulted with Kasler about Leznik's job performance before the termination and discussed how to handle the termination after Elam made the decision.[92] In the short time

[79] RX A-3, 109:16-111:2 (Elam Dep.).
[80] CX 75 at 263:5-264:2 (Elam Dep.); RX 65 (Leznik's emails to Elam); CX 97 (showing the Elam forwarded the emails to Kasler).
[81] RX A-7, 105:24-107:8 (Kasler Dep.); RX A-3, 63:9-64:8, 137:5-138:22, 141:1-10 (Elam Dep.).
[82] RX A-3, 43:17-45:9, 63:3-15 (Elam Dep.); CX 21 at 267:9-18 (Elam Dep.).
[83] RX A-3, 141:1-10 (Elam Dep.).
[84] CX 7 at 8:17-43:9; CX 15 at 570:17-571:8 (Leznik Dep.).
[85] CX 7 at 57:10-58:8 (Leznik Dep.).
[86] CX 15 at 570:17-571:8; CX 12 at 767:13-769:13 (Leznik Dep.).
[87] CX 11 at 45:8-47:5 (Kasler Dep.).
[88] CX 7 at 8:17-43:9 (Leznik Dep.).
[89] CX 7 at 8:17-43:9 (Leznik Dep.); CX 68 (Nektar Code of Ethics).
[90] CX 15 at 522:13-525:25 (Leznik Dep.).
[91] RX A-7, 105:24-107:8 (Kasler Dep.).
[92] RX A-7, 105:24-107:8 (Kasler Dep.); RX A-3, 63:9-64:8, 137:5-138:22, 141:1-10 (Elam Dep.).

between Elam becoming General Counsel and Leznik's termination, Kasler and Elam consulted frequently about Leznik's performance.[93] Leznik has produced evidence showing that Kasler consulted with Frisby, Elam, and outside counsel about the timing and reasons for Leznik's termination.[94] There is a genuine issue of fact regarding Kasler's material involvement in the decision to terminate Leznik, and whether she had the necessary retaliatory intent.

iii. Individual Liability of Gill

Ajit Gill was President and Chief Executive Officer of Nektar during the full term of Leznik's employment.[95] Leznik argues that Gill had knowledge of her protected conduct because Gill was CEO and president of Nektar when Project Phoenix was approved, and he was intimately involved with the project.[96] Additionally, Leznik spoke to Gill about the problem of projects starting without a contract in place, and Gill told Leznik to come up with a plan and present it to him.[97] Leznik states that because Gill was Kasler's direct supervisor (the General Counsel position being open), it is implausible that he would not have knowledge of Leznik's protected activities.

I find that Leznik's evidence regarding Gill's actual knowledge of her alleged protected activity is too speculative to withstand the motion for summary decision. Leznik surmises that Gill must have known about her Project Phoenix activities because of his own involvement with the project, but this is not a well-supported claim. Though Leznik approached Gill about the contracting issue, that interaction alone is insufficient to show he was alerted to protected activity. The conversation was brief, and Leznik made no mention of fraud, SOX, violation of SEC rules, or her 307 duties in that conversation. Though it is not necessary to reference specific laws in order to invoke SOX protection, Leznik's own characterization of the conversation does not support an inference that she communicated her suspicions about systemic, meaningful deficiencies to Gill at that time. Furthermore, Gill's position as CEO is not, in itself, evidence that could support a finding of personal liability for retaliatory actions by others.[98] Those sort of inferences support corporate liability.

Gill denies making the decision to terminate Leznik.[99] Elam says he made the decision without Gill.[100] Leznik points to Elam's deposition, in which Elam says he told Gill that he intended to fire Leznik and Gill said "okay."[101] This is not evidence that Gill was materially involved in the decision to terminated Leznik (and certainly not proof that Gill instructed Elam to terminate Leznik), only that Elam made Gill aware of the decision. Leznik's proof fails on the issues of knowledge of protected activity, and on causation.

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[93] CX 21 at 264:3-17, 266:32-267:8 (Elam Dep.).
[94] CX 11 at 139:17-140:4 ; CX 16 at 303:8-18 (Kasler Dep.).
[95] RX A-5 at 13:1-5 (Gill Dep.).
[96] CX 48 at 880:14-881:9 (Leznik Dep.); CX 26 (Kasler memo.); CX 11 at 80:20-82:20; CX 16 at 261:20-262:21 (Kasler Dep.).
[97] RX A-1, 896:8-897:3 (Leznik Dep.).
[98] *See, e.g. Gallagher v. Granada Entertainment USA, et al.*, 2004-SOX-00074 at 14-15 (ALJ April 1, 2005).
[99] RX A-5 14:1-3 (Gill Dep.).
[100] RX A-3 14:1-10 (Elam Dep.).
[101] CX 20 137:20-138:7 (Elam Dep.).

iv. Individual Liability of Frisby

Elizabeth Frisby served as Nektar's Vice President of Human Resources while Leznik worked there. Leznik asserts that Frisby had actual knowledge of her protected conduct because Kasler consulted with Frisby about Leznik, including discussion of Leznik's "whistleblower" comment[102] and Kasler consulted Frisby after Leznik challenged the propriety of the Rambhatla contract.[103]

Frisby states that she did not know and was not told why Leznik called herself a whistleblower, and she never received information that Leznik reported concerns about any fraud on Nektar's shareholders.[104] She states the purpose of her consultation with Kasler was to discuss Leznik's performance problems, not Leznik's characterization of herself as a whistleblower.[105]

Frisby denies she made the termination decision.[106] Leznik believes Frisby was involved in her termination because: 1) Elam communicated his desire to have Leznik terminated directly to Frisby;[107] 2) Frisby forwarded Leznik's performance appraisal to Elam on his first day at Nektar;[108] and 3) Frisby and Kasler jointly decided to consult with outside counsel about Leznik's employment, and Frisby participated in those communications.[109]

Though there may be a genuine issue of fact about what Frisby knew, Leznik has not produced sufficient evidence to show that Frisby was substantively involved in the termination decision. The proof shows that the individuals with direct authority to fire Leznik were Elam and Kasler, Frisby merely effectuated their decision. That is not enough to make Frisby liable individually.

ORDER

It is ordered that:

1) Respondent Nektar's Motion for Summary Decision is denied.

2) Respondent Nevan Elam's Motion for Summary Decision is denied.

3) Respondent Paula Kasler's Motion for Summary Decision is denied.

4) Respondent Ajit Gill's Motion for Summary Decision is granted.

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[102] CX 16 at 303:8-18; CX 11 at 151:21-152:21 (Kasler Dep.); RX A-1, 875:4-878:15 (Leznik Dep.); RX A-4, 130:20-131:9 (Frisby Dep.); RX 26.
[103] CX 7 at 8:17-43:9 (Leznik Dep.).
[104] RX A-4, 134:11-135:22; 158:16-25 (Frisby Dep.).
[105] RX A-4, 122:14-124:11, 130:20-131:6 (Frisby Dep.).
[106] RX A-4, 87:25-88:2 (Frisby Dep.).
[107] CX 20 at 138:11-22 (Elam Dep.).
[108] CX 21 at 264:3-17 (Elam Dep.).
[109] CX 16 at 303:8-18; CX 11 at 151:21-152:21 (Kasler Dep.).

5) Respondent Elizabeth Frisby's Motion for Summary Decision is granted.

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William Dorsey
Administrative Law Judge