

U.S. Department of Labor

Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



In the Matter of:

YUNHEE KIM,

ARB CASE NO. 2020-0020

COMPLAINANT,

ALJ CASE NO. 2019-SOX-00012

v.

DATE: JAN 28 2020

SK HYNIX MEMORY SOLUTIONS,  
SK HYNIX, SK TELECOM, TONY YOON  
STEVE SON, and KEY SONG,

RESPONDENTS.

Appearances:

*For the Respondents:*

John P. Zaimes, Esq., and Justin Ilhwan Park, Esq.; *Mayer Brown LLP*,  
Los Angeles, California

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and  
James A. Haynes and Heather C. Leslic, *Administrative Appeals Judges*

### DECISION AND ORDER DENYING PETITION FOR INTERLOCUTORY APPEAL

The Complainant, Yunhee Kim, a former employee of Respondents, collectively SK Hynix, filed a complaint alleging SK Hynix violated the whistleblower provision of the Sarbanes-Oxley Act of 2002 (Section 806 or SOX), 18 U.S.C. § 1514A (2010),<sup>1</sup> as amended, and its implementing regulations at 29 C.F.R.

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<sup>1</sup> SOX provides:

(a) Whistleblower Protection for Employees of Publicly Traded Companies.-- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is

Part 1980 (2019). The complaint was referred to a Department of Labor Administrative Law Judge (ALJ) for hearing. SK Hynix filed a motion to dismiss, which the ALJ denied. SK Hynix filed this petition for interlocutory review of the ALJ's dismissal. As discussed below, SK Hynix has demonstrated no basis for departing from the Board's general practice of refusing to accept interlocutory appeals; we **DENY** Respondent's petition for interlocutory review.

### BACKGROUND

On December 13, 2018, Respondent SK Hynix filed a motion to dismiss for lack of subject matter jurisdiction. The ALJ initially granted SK Hynix's motion to dismiss but allowed Kim to amend her complaint. Kim filed her first amended complaint alleging additional coverage facts. Citing *Sylvester v. Parxel Intl. LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, -042 (ARB May 25, 2011), the ALJ also ordered supplemental briefing as to the applicability of *Twombly / Iqbal*<sup>2</sup> to SOX's pleading requirements.

On May 17, 2019, SK Hynix again moved to dismiss, alleging that Kim's direct employer, SK Hynix Memory Solutions, is not subject to SOX's whistleblower protection provisions because it is not covered under SOX and thus the Department of Labor does not have subject matter jurisdiction.

On November 4, 2019, the ALJ denied SK Hynix's motion. SOX covers publicly traded companies and subsidiaries and affiliates whose financial information is consolidated with public companies.<sup>3</sup> The ALJ defined "affiliate" as

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included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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--

18 U.S.C. § 1514A (footnote omitted).

<sup>2</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>3</sup> SOX provides: "...including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company,..." 18 U.S.C. § 1514A. In the March 18, 2019 Order Granting Motion to Dismiss and Leave to Amend, the ALJ

one who “controls, is controlled by, or is under common control with an issuer of a security.” ALJ Nov. 4 Order at 4. Treating the motion as a threshold merits motion and not one of jurisdiction, the ALJ concluded that the issue of “control” is fact-dependent and that Complainant had met her pleading standard to proceed to discovery or hearing. Citing ARB precedent, the ALJ concluded that the standard set forth in *Twombly / Iqbal* is not applicable to ALJ proceedings. *Id.* at 3.

### DISCUSSION

The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored. There is a strong policy against piecemeal appeals. *Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 17-004, ALJ No. 2010-SOX-018, slip op. at 3 (ARB Apr. 20, 2017). Like the federal appellate courts, the Board applies the finality requirement in the interest of “combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when” the administrative law judge issues a decision on the merits of the case. *Greene v. Env’tl Prot. Agency*, ARB No. 02-050, ALJ No. 2002-SWD-001, slip op. at 4 (ARB Sept. 18, 2002). Nonetheless, the ARB is authorized to grant such orders in its discretion when exceptional circumstances warrant such process. Secretary’s Order No. 01-2019, Secretary’s Order, para. 5 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019) (“Secretary’s Order”) (delegating to the Board “discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute”).

When a party seeks interlocutory review of an ALJ’s order, the ARB has elected to look to the procedures found at 28 U.S.C. § 1292(b)<sup>4</sup> to determine whether

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noted that SK Telecom, a publicly traded company, owns 20.1% of SK Hynix’s shares and SK Hynix’s information is consolidated with SK Telecom’s financial statements.

<sup>4</sup> 28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

to accept an interlocutory appeal for review. *Office of Fed. Contract Compliance Programs v. JPMorgan Chase & Co.*, ARB No. 17-063, ALJ No. 2017-OFC-007 (ARB Oct. 5, 2017); *Nichols Tree Farms*, ARB No. 16-008, ALJ No. 2015-TAE-013 (ARB Jan. 19, 2016).

To satisfy the statutory prerequisites for section § 1292(b) review, the party seeking such review of an order which is not final must establish (1) that the order involves a controlling question of law, (2) there is a substantial ground for difference of opinion in resolving the issues presented by the order, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *JPMorgan Chase*, ARB No. 17-063, slip op. at 6.

In its petition for interlocutory appeal, SK Hynix claims that the ALJ did not correctly apply the definition of “control” applicable to securities laws. Petition for Inter. App. at 3-4. SK Hynix claims Kim’s amended complaint has failed to plead any facts that a publicly traded corporation controlled Kim’s employer, SK Hynix Memory Solutions. SK Hynix also challenges the ALJ’s ruling that *Twombly / Iqbal* pleading standards do not govern SOX’s pleading standards. In support of its petition, SK Hynix argues its appeal of the November 4 Order (1) presents a “controlling question” of law, (2) for which there is substantial difference of opinion, and (3) may materially advance the ultimate termination of the litigation. Petition for Inter. App. at 4.

#### **1. The ALJ did not certify the issue for interlocutory review**

The first step in the interlocutory appeal process is to have the ALJ certify the interlocutory issue for appellate review. *Johnson v. U.S. Bancorp*, ARB No. 11-018, ALJ No. 2010-SOX-037, slip op. at 4 n.15 (ARB Mar. 14, 2011) (“The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.”) (*quoting In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003)); *see also Gunther v. Delttek*, ARB Nos. 12-097, 12-099; ALJ No. 2010-SOX-049 (ARB Sept. 11, 2012). The ALJ denied SK Hynix’s motion to certify the issue for interlocutory appeal. Dec. 12, 2019 Order Denying Request to Certify.

## 2. SK Hynix does not argue the collateral order doctrine

The ARB has held that a party failing to receive a certification may proceed under the “collateral order” exception the Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See *Turin*, ARB No. 17-004, slip op. at 3. Under the collateral order doctrine, an appellate board may entertain interlocutory review if the decision appealed belongs to that “small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”<sup>5</sup> To fall within the “collateral order” exception, the order appealed must “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” *Thompson v. BAA Indianapolis, LLC*, ARB No. 06-061, ALJ No. 2005-AIR-032 (ARB June 30, 2006), quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

We presume SK Hynix does not argue the collateral order exception requirements, because the ALJ’s denial of SK Hynix’s motion to dismiss does not involve a collateral order or any type of final decision. See, e.g., *JPMorgan Chase*, ARB No. 17-063, slip op. at 6 quoting *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1133 (D.C. Cir. 2004) (“Denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is not ordinarily subject to interlocutory appeal. It is neither a final decision nor a proper subject for appeal under the “collateral order” doctrine. Whether conclusive or not, it plainly is not separate from the merits.”). Contrary to the finality required by the collateral order doctrine, the ALJ’s order merely denied SK Hynix’s motion to dismiss in favor of further proceedings.<sup>6</sup> SK Hynix and Kim are free to argue the merits of the ALJ’s decision on appeal from the ALJ’s decision.

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<sup>5</sup> *Heckman v. M3 Transp. LLC*, ARB No. 16-083, ALJ No. 2012-STA-059, slip op. at 2 (ARB Nov. 10, 2016), quoting *Cohen*, 337 U.S. at 546; see also *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009).

<sup>6</sup> We contrast this dismissal from an order denying a motion to dismiss on the ground of sovereign immunity, for example. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1025-26 (D.C. Cir. 1997) (“order denying dismissal for immunity is effectively unreviewable on appeal because ‘sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.’”).

**CONCLUSION**

Having failed to demonstrate “exceptional circumstances” for interlocutory review SK Hynix has failed to establish a basis for departing from the Board’s general rule against accepting interlocutory appeals. Accordingly, SK Hynix’s petition for interlocutory review is **DENIED**.

**SO ORDERED.**

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