No. 23-6841

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BENTZION S. TURIN
Petitioner-Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent-Appellee,

and

MAIDEN HOLDINGS, LTD., MAIDEN INSURANCE COMPANY LIMITED, MAIDEN HOLDINGS HORTH AMERICA, LTD., ART RASCHBAUM, REPRESENTATIVE OF THE ESTATE OF MICHAEL KARFUNKEL, BARRY ZYSKIND, AMTRUST FINANCIAL SERVICES, INC., AII INSURANCE MANAGEMENT LTD
Intervenors.

On Petition for Review of a Decision of the
United States Department of Labor's Administrative Review Board

BRIEF FOR THE RESPONDENT UNITED STATES DEPARTMENT OF LABOR

SEEMA NANDA
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

PRIOM AHMED
Attorney
U.S. Department of Labor
200 Constitution Ave, NW, N-2716
Washington, D.C. 20210
Telephone: (202) 693-5586
E-mail: Ahmed.Priom@dol.gov

STATEMENT REGARDING ORAL ARGUMENT

Although the Respondent U.S. Department of Labor will gladly participate in any oral argument scheduled by this Court, we do not believe that oral argument is necessary in this case because the issues may be resolved based on the briefs submitted by the parties.

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STATEMENT OF JURISDICTION

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. Part 1980. The Acting Secretary of Labor ("Secretary") had subject matter jurisdiction based on a complaint filed on April 2, 2009 with the Occupational Safety and Health Administration ("OSHA") by Bentzion S. Turin ("Turin") against his former employer, Maiden Holdings, LTD, Maiden Insurance Company Limited, Maiden Holdings North America, LTD, the Estate of Michael Karfunkel, Barry Zyskind, (taken together, "Respondents" or "Maiden"), AmTrust financial Services, Inc. ("AmTrust"), and All Insurance Management LTD ("AIIM"), under 18 U.S.C. § 1514A. Joint Appendix ("A") 25.[1]

On June 29, 2023, the Administrative Review Board (the "Board" or the "ARB") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") denial of Turin's complaint. On September 15, 2021, Turin filed a timely Petition for Review with this court, which has jurisdiction to review the Secretary's final order because at the time of the alleged violation, Turin resided in New York. *See* A25, 122, 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)

[1] The Secretary cites to the Joint Appendix (ACMS Nos. 52-73), filed on February 14, 2024, and the Corrected Appendix (ACMS No. 92), filed on March 27, 2024, as "A_." The Special Appendix (ACMS No. 74), filed on February 14, 2024, is cited to as "SPA_."

(review of final order of the Secretary may be obtained in the court of appeals of the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the violation); *see also* 29 C.F.R. § 1980.112(a).[2]

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ALJ's decision, affirmed by the Board, that Turin did not demonstrate he engaged in SOX-protected activity.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

SOX prohibits an employer from retaliating against an employee for providing information to a person with supervisory authority over the employee or another person specified in the statute about conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud); any rule or regulation of the Securities and Exchange Commission ("SEC"); or any provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A. An employee who believes that he has been subjected to retaliation for lawful whistleblowing under SOX may file a complaint with the Secretary. *See* 18 U.S.C. § 1514A(b)(1)(A).

[2] Proceedings under the SOX employee protection provision are governed by the rules, procedures, and burdens of proof of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(A) and (C).

To succeed in a claim under the whistleblower protection provision of SOX, an employee must show by a preponderance of the evidence that (1) the employee engaged in protected activity; (2) the employee suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.109(a); *See Gale v. U.S. Dep't of Lab.*, 384 F. App'x 926, 929 (11th Cir. 2010) (citing *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)). If a complainant meets this initial burden, the burden then shifts to the employer to show by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1980.109(b).

An employee who believes that they have been subjected to retaliation for lawful whistleblowing under SOX may file a complaint with the Secretary.[3] *See* 18 U.S.C. 1514A(b)(1)(A). Following an investigation of the complaint, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. *See* 18 U.S.C. §

[3] The Secretary has delegated responsibility for receiving and investigating SOX whistleblower complaints to the Assistant Secretary for Occupational Safety and Health. *See* Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, Sec'y's Order No. 08-2020 (May 15, 2020), 85 Fed. Reg. 58393, 2020 WL 5578580 (Sept. 18, 2020); *see also* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A).

1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.105. Either the complainant or the employer may file objections to this determination and request a *de novo* hearing before a Department of Labor ALJ. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.106. The ALJ has wide discretion to manage the hearing process, including the authority to limit discovery or to decide the matter without a hearing based on a motion to dismiss or motion for summary decision, as appropriate. *See generally* 29 C.F.R. Part 18. The ALJ's decision is subject to discretionary review by the ARB. *See* 29 C.F.R. § 1980.110. The ARB's decision is then subject to the Secretary's discretionary review. *See* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, Sec'y's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13186, 2020 WL 1065013 (Mar. 6, 2020). If the Secretary does not exercise discretionary review within 28 days, the ARB's decision becomes the final order of the Secretary. *Id.* This final order is reviewable in the court of appeals for the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the alleged violation. *See id.*; 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a).

B. STATEMENT OF FACTS[4]

In June 2007, Maiden Holdings, Ltd. ("Maiden")[5], a reinsurance company founded by Barry Zyskind, Michael Karfunkel, and George Karfunkel, hired Turin as its Chief Operating Officer, General Counsel, and Assistant Secretary. Special Appendix ("SPA") 54.

In the summer of 2008, Maiden was considering acquiring GMAC RE, a reinsurance company. A29, 233, 251. In October 2008, Maiden was negotiating its credit rating with A.M. Best, a company that acts in a regulatory role for the insurance industry. *Id*. at 234-37, 361-62, 3929, 4042. A.M. Best had granted Maiden an A- rating. *Id*. at 234. To maintain it's A- rating, A.M. Best required Maiden to raise $260 million in additional capital when it acquired GMAC RE. *Id*. at 237. To achieve the GMAC RE purchase, George and Michael Karfunkel, who were also Zyskind's in laws, offered to backstop the capital raise, or, in other words, to provide the full $260 million if Maiden was unable to raise the capital. *Id*. at 39, 240, 246, 1258, 3929. Because the Karfunkels would be participating in the transaction, and they were both major investors in Maiden as well as its largest client, AmTrust, the GMAC RE transaction was considered a "related-party

[4] This statement of facts is based on the facts as set forth in the ALJ's D&O.
[5] Maiden Insurance and Maiden Holdings North America Ltd. are wholly-owned subsidiaries of Maiden. SPA3.

transaction." *Id*. at 263. Zyskind was also the President, CEO, and a director of AmTrust, making him a "related party." SPA55. A "related party transaction" requires a company to maintain appropriate governance to ensure there is fairness in the transaction. A263 Maiden had an Audit Committee, comprised of independent directors of the board, which was responsible for reviewing and approving related party transactions. *Id*. at 289, 1652.

Two of the options Maiden considered for the capital raise were creating a trust preferred security or providing a rights offering. SPA61. A trust preferred security is a security that has properties of both equity and debt; it allows a company to defer the interest rate without adverse consequences. *Id*. at 243, 394. A rights offering involves creating additional shares of a company's stock, and would allow the shareholders of Maiden to buy subsequent shares at a discount. *Id*. at 42, 242.

Turin prepared an agenda for an October 23 Board meeting, in which "Discussion of Related Party Aspects of GMAC Re Transaction" was listed as an agenda item. SPA82, A1697. Turin wrote, on a copy of the agenda, "rights offering and backstop" next to the names Neff and Nigro. *Id*. On November 3, Maiden issued a press release to announce the GMAC RE acquisition, through a proposed rights offering. A342, 3930-32. Turin worked with Zyskind to prepare talking points for the press conference. *Id*. at 3933.

On November 7, two members of Maiden's Audit Committee, Steven H. Nigro and Ray Neff, discussed alternative sources of capital. A289, 2608–09. Nigro emailed Zyskind and Turin about other financing vehicles they could explore, including a letter of credit. *Id*. at 2608–09.

At a November 12 third quarter earnings call, Zyskind told Maiden's shareholders about Maiden's intention to do a rights offering. A1539, 1708. Turin read a safe harbor statement to the audience during the call, which allowed Maiden to change its mind after the call. *Id*. at 1064, 1708.

Zyskind and Turin received negative feedback from Maiden's investors related to the rights offering. A1260. Maiden's share price fell with the news of the GMAC RE purchase and the proposed rights offering, leading Maiden's leaders to search for alternative capital sources. *Id.* at 283-84, 732–34. Maiden considered capital sources including a letter of credit through the Connery Family Trust. *Id*. at 1032. On November 12, the Connery Family Trust sent a draft Letter of Credit proposal to Maiden. *Id*. at 3935.

Zyskind met with several different investment banks and listened to their proposals for other options to raise capital. A1253. An investor and hedge fund, Elliott Capital ("Elliott"), reached out to them. *Id*. Elliott believed that a rights offering was a bad idea for shareholders, because it would be "dilutive to the shareholders" and "take many, many years for the company to remount a normal . .

. stock price." *Id*. at 1262. Elliott expressed that a trust-preferred was a good idea because Maiden would "give up much less equity" than with a rights offering. *Id*. at 1263. Turin worked with Zyskind on financing the GMAC RE acquisition through a trust preferred option with Elliott. *Id*. at 42, 3888-98. Turin also worked with a corporate lawyer, Matthew Ricciardi from Dewey & LeBoeuf, on structures for rights offerings. *Id*. at 4291.

On November 22, Turin emailed Nigro for more details on the financing options and met Nigro for lunch on November 25. A1048-52, 3410, 3883. Nigro stated that the two discussed compensation matters, and that Turin raised the issue of alternative financing at the end of the meeting. *Id*. at 1048-52. Turin discussed other executives in the insurance industry for firms the same size as Maiden after the GMAC RE purchase and Nigro told Turin that those executives were not his peers and had the experiencing of running a re-insurance operation. *Id*. at 1050. Nigro explained to Turin that he had a role in Maiden and shouldn't feel threatened. *Id*. at 1051.

On November 14, 2008, Turin emailed himself notes captioned "Art," listing "Confidentiality, Backstop, Business Mix," and the statement "How do I know I'm protected?" A3993.

Between November to December 2008, Turin purchased Maiden stock—after Maiden announced the rights offering, while he was dealing with Elliott and

working on a trust preferred option. A1556-57. He purchased over 30,000 shares in Maiden stock around this time. *Id*. at 1559. He purchased 5,000 shares of Maiden stock on the day that he met Nigro for lunch. *Id*. at 1555.

On November 26, Elliott emailed a proposed term sheet to Zyskind and Turin. A3905. On December 3, Nigro emailed Turin informing him what they would need to do to move forward with the letter of credit. *Id*. at 3886.

On December 2, Art Raschbaum, who was appointed the President and CEO of Maiden in November 2008 and had worked for GMAC RE, asked Turin to provide analysis on the propriety of the Elliott trust preferred option and clarification regarding the corporate governance process for approving it. A616-18, 3881; SPA6, 54. Raschbaum also asked Turin to obtain market data on the trust preferred option because he wanted to confirm there were no other options than the 14% interest rate. A618. Turin did not provide Raschbaum this information. *Id*., 3881. On December 5, Turin stated he would call outside counsel and respond to Raschbaum the following week. *Id*. at 3869. The "only further commentary" Turin provided about outside counsel's opinion was that it would be desirable to offer the trust preferred option to each shareholder. *Id*. at 621. Turin did not share his own views with Raschbaum. *Id*.

On December 10, Turin emailed Michael Groll, who worked at Dewey & LeBoeuff, LLP, to ask if Groll could ask someone about the NASDAQ 20% rule

"to opine upon whether this structure around the 20% (in the warrant provision) would work. I am hoping we don't do this deal so don't look at the whole term sheet I just want to know whether one can circumvent the 20% rule with the mechanism described in Term Sheet." A3879.

Elliott withdrew from the transaction in early December. A258. Maiden settled on a capital raise with a private trust preferred security and engaged a banker, Friedman Billings Ramsey ("FBR") to assist them in the process. *Id*. at 283-86. Lawrence Metz, who replaced Turin as general counsel, testified that there was no requirement for them to do a public transaction, and they had not considered doing one due to the financial market. *Id*. at 281, 284.

FBR and Elliott both set the interest rate at 14% for the trust preferred. A243, 431, 3994. FBR also provided a fairness report, which consisted of case studies of recently completed trust preferred transactions, in which the interest rates ranged from 11% to 14.7%. *Id*. at 2502, 4066. Maiden considered several other term sheets, each of which contained a 14% interest rate. SPA118; A4012, 4715, 4781.

On December 14, 2008, Raschbaum and Zyskind decided to fire Turin because of his "increasingly manipulative and deceptive behavior." A269. Turin had made negative comments to Zyskind about one of his employees. *Id*. Turin also shared information that Raschbaum had asked him to keep confidential with

Zyskind. *Id*. at 271-72. Zyskind wanted to find a future for Turin outside of the company but also felt that the company was becoming a more complex business with the GMAC acquisition and needed more experienced management than Turin. *Id*. at 278-79.

On December 15, 2008, Raschbaum, Zyskind, and Turin were planning to meet with an attorney to discuss the rights offering. A279. Zyskind terminated Turin prior to the meeting. *Id*. Turin asked Raschbaum to join him for a coffee, where he told Raschbaum he had been terminated. *Id*. at 282. Turin thought that Zyskind would change his mind, and Raschbaum informed him that they would not change their minds and he could not renegotiate his job back but Zyskind would work with him to help him for the future. *Id*. at 670-71. Raschbaum did not recall Turin stating anything to him about the Elliott trust preferred, the Karfunkels' involvement in financing the deal, or about fraud. *Id*. at 674-75.

On December 15, 2008, Zyskind and Raschbaum offered the general counsel position to Metz. A1074. Zyskind asked Metz and Turin to travel to Bermuda the next day to discuss the legal matters Turin had worked on. *Id*. at 1152. Turin did not raise his concerns about fraud with Metz. A1152-63.

Between the end of December 2008 to January 2009, Turin continued to email Maiden's officers, requesting meetings to discuss future steps, proposing alternative situations in which he could continue to work at Maiden or work as a

consultant, and attaching his resume so that they could keep him in mind for other opportunities. A3406, 3937, 3957, 5004-10, 5014-15, 5018. His emails to Maiden also became more adversarial and he advised them to retain independent counsel to resolve his employment status. *Id*. On December 31, Raschbaum emailed Turin, reiterating that he had been fired and asking him to return company property. *Id*. at 3937. Turin responded stating that he was a "Sarbanes Oxley Whistleblower," and that the attempted termination of one would trigger duties for the Board of Directors. *Id*. at 3938. Raschbaum testified that was the first time he had heard Turin refer to himself as a Sarbanes-Oxley whistleblower. *Id*. at 788. Turin continued to email Raschbaum with threats about the consequences of terminating him in January 2009. SPA103. On January 15, Maiden sent Turin a letter stating that he had no employment agreement, corporate powers, or duties going forward with Maiden. A796.

Turin's employment agreement with Maiden had been provisional, and he attempted to secure a permanent agreement several times. A1452, 4298-300. In March 2008, Turin filed a permanent employment agreement with the SEC, without Zyskind's knowledge, which had never been approved by Maiden's Compensation Committee. *Id*. at 1451-52. Maiden did not discover this until after Turin was terminated, when Turin referred to the employment agreement in an

email. *Id.* at 5004. When Zyskind followed up, three times, asking for a copy of the "purported employment agreement," Turin did not reply. *Id*. at 5014.

After Turin's termination, Maiden also discovered that Turin had been compensated by a subsidiary of AmTrust in Bermuda, which had never been disclosed to the Audit Committee despite the conflict of interest and Turin's position as a related party. A313-15.

On January 9, 2009, Maiden's Audit Committee commissioned an independent fairness opinion from FBR, and issued an opinion finding that the terms of the trust preferred deal were fair. A291-92, 507-08, 748-49, 751, 754.

C. COURSE OF PROCEEDINGS

On April 2, 2009, Turin filed a SOX complaint with OSHA alleging that his employment was terminated in retaliation for engaging in protected activity. *See* 18 U.S.C. § 1514A(b)(1)(A); A25-38. He argued that he had reported his concerns that Zyskind perpetuated fraud by working on the financing for Maiden's acquisition of GMAC RE without a separate representative from Maiden and failed to follow the "appropriate process in connection with a planned related party transaction." A29. On December 31, 2009, OSHA denied the complaint as untimely. SPA51. Turin appealed OSHA's determination and requested a hearing. *Id*. On June 25, 2010, the Respondents moved to dismiss the complaint as untimely filed, or, in the alternative, to dismiss AmTrust Financial Services, Inc. as a party.

Id. On June 30, 2010, the ALJ dismissed the complaint as untimely. SPA52. On March 29, 2013, the ARB reversed the dismissal based on a tolling agreement between the parties and remanded the case for further proceedings. *Id*.

1. The ALJ's November 9, 2016 Decision Denying Respondent's Motion for Judgment on Partial Findings

Turin presented his case before the ALJ over eleven days of hearing. SPA52. Respondents moved for judgment on partial findings under Fed. R. Civ. P. 52(c) and to dismiss Respondents AmTrust and AIIM. *Id*. On November 9, 2016, the ALJ issued two decisions and orders. In one, the ALJ dismissed Respondents AmTrust Financial Services and AIIM from the case. *Id.* In a second decision, the ALJ denied the Respondent's motion for judgment on partial findings. *Id*. at 48. The ALJ found that the Turin had succeeded in establishing a prima facie case under SOX, and ordered that the "Respondents must now present their own prima facie case and show either that Complainant is, in fact, unable to make out his prima facie case, or establish by clear and convincing evidence that Respondents' would have taken the same unfavorable personnel action in the absence of the [protected] behavior." *Id*. at 37 (quotations omitted). The ALJ also stated that she would not entertain motions to reconsider or to file an interlocutory appeal, noting the discretionary nature of answering a Rule 52(c) motion. *Id*. at 48.

2. The ALJ's September 2, 2021 Decision Dismissing the Complaint

The ALJ resumed hearings to allow Respondents to present their case, with the first hearing beginning on September 11, 2014 and the last occurring on November 8, 2018. SPA52-53.

On September 2, 2021, in a 133-page Decision and Order, the ALJ concluded that Turin had failed to establish that he had engaged in protected activity and dismissed the complaint. SPA51-184. The ALJ stated that the November 9, 2016 decision was a nullity due to the inclusion of additional witness testimony and documentary evidence. *Id*. at 53 n.8. The ALJ declined to refer to any findings of facts or conclusions of law contained in the November 9, 2016 Order. *Id*.

The ALJ found that Turin was not credible due to "contradictions to his sworn testimony, lapses in memory, and a general tendency to exaggerate." SPA56. As relevant here, the ALJ relied on, among other factors, contradictions in Turin's testimony and the record regarding whether there was an agreement that he would represent Maiden during conflicts of interest and contradictions between his testimony and the record regarding whether he blew the whistle to Nigro about the Eliott trust preferred proposal. *Id*. at 56–62.

The ALJ held that Turin was unable to show that he engaged in SOX-protected activity by raising concerns about conduct that he reasonably believed violated one of the provisions of law enumerated in SOX. SPA164-65. In particular, he failed to show that he subjectively believed corporate fraud was occurring or that such a belief would have been objectively reasonable. SPA165. To support this finding, the ALJ relied on testimony and documentary evidence regarding Turin's communications during the relevant time period and his continued stock purchases in Maiden. The ALJ also noted that Turin did not follow Maiden's formal process to communicate fraud in an anonymous way and referred to himself as a whistleblower only after he was terminated. *Id*. at 166-68.

The ALJ further held that Turin's alleged beliefs would not have been objectively reasonable because a similarly situated corporate lawyer would not have believed that Zyskind was committing fraud or violating securities laws and regulations. SPA168-69. The ALJ reasoned that a similarly situated corporate lawyer would have understood the facts Turin alleged were fraud were business decisions Maiden took to acquire a larger company during a financial crisis. *Id*. The ALJ found Turin's fraud allegations unreasonable for an attorney in Turin's position because 1) the record did not show that Zyskind had concealed important information; 2) Turin drafted the Audit Committee policies for review of related-party transactions and knew that the Audit Committee would provide a check on

any fraud that could have arisen; 3) Maiden actively explored both the rights offering and trust preferred options and acted reasonably in opting for the trust preferred given that it stocks fell after its announcement of the rights offering; 4) the 14% interest rate for the trust preferred was reasonable in the financial climate; and 5) Zyskind had not been deceptive during the third quarter earnings call because Maiden had not firmly decided on any of the potential securities it was considering for the capital raise. *Id*. at 171-72. The ALJ also concluded that Maiden did not have a legal obligation to allow the public to participate in any capital raise. *Id*. at 173. Lastly, the ALJ concluded that assuming, *arguendo*, Turin had a subjective and objectively reasonable belief regarding fraud and securities violations, Maiden would not have known of his belief because he never clearly communicated his concerns before he was fired, and Maiden would have fired Turin despite any alleged protected activity. *Id*. at 180-83. Accordingly, the ALJ dismissed the complaint. *Id*. at 184.

3. The ARB's June 29, 2023 Decision

On September 15, 2021, Turin petitioned for review of the ALJ's decision. A23. On June 29, 2023, the ARB affirmed and held that substantial evidence supported the ALJ's conclusion that Turin did not have a subjective or objectively reasonable belief that the conduct he complained of constituted a violation of one of the categories of law listed in SOX. SPA192. The ARB did not reach any of the

ALJ's other findings of fact or conclusions of law, or the ALJ's order dismissing AmTrust and AIIM as Maiden's fellow respondents. *Id*. at 192-93. Accordingly, the ARB affirmed the ALJ's conclusion that Turin failed to demonstrate that he engaged in protected activity. *Id.*

On July 28, 2023, Turin petitioned this Court for review of the ARB's final decision. Second Circuit Docket No. 23-6841, Doc. 1, Petition for Review, July 28, 2023.

SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's determination, as affirmed by the Board, that Turin did not engage in protected activity.

For an activity to be protected under SOX, an employee must provide information to the federal government, Congress, or a person with supervisory authority over the employee or other person listed in the statute concerning conduct that he "reasonable believes" constitutes a violation of mail, wire, bank, or securities fraud statutes, an SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1). This "reasonable belief" requirement has two components: the employee must show that he both subjectively believed his employer's conduct violated the law and that this belief was objectively reasonable.

First, the Board correctly affirmed the ALJ's conclusion that the record evidence did not support a finding that Turin subjectively believed Zyskind was violating any of the SOX-enumerated laws or regulations.

Turin alleges that Maiden terminated his employment because he raised concerns about (1) Zyskind negotiating the terms of the GMAC RE financing terms when he was a related party to the deal, and (2) Zyskind indicating to shareholders that Maiden would raise capital for the GMAC RE acquisition through a rights offering, while intending to raise the capital through a trust preferred to benefit his in-laws, the Karfunkels. Although Turin couched these issues as violations of the fraud laws, SEC rules or regulations, or Federal laws related to fraud against shareholders when he testified before the ALJ, he presented no clear evidence that he subjectively believed that to be the case at the time he purportedly raised the concerns, and the evidence presented at the hearings did not even establish that the concerns had been raised.

As the fact finder, the ALJ made a credibility determination based on contradictions between Turin's testimony, the record evidence, and the testimony of others. She credited the testimony of Maiden's witnesses over Turin's regarding the events of fall 2008 and appropriately determined that Turin failed to show that he reported conduct that he believed indicated that Zyskind was committing fraud or violating any of the enumerated categories of law in SOX. The ALJ also

appropriately held—based on Turin's opaque communications, his continued stock purchases during the period he alleged he was whistleblowing, and his failure to use Maiden's formal process for reporting his concerns—that Turin did not show that he subjectively believed that Zyskind was violating any of the provisions listed in SOX.

Additionally, substantial evidence supports the ALJ's holding that Turin did not have an objectively reasonable belief that Zyskind had violated one of the laws enumerated in the SOX whistleblower provision. As the ALJ properly found, Turin provided no evidence that Zyskind was deceiving shareholders in his statements about Maiden's intent to consider a rights offering. There is ample evidence in the record that Maiden was under considerable time pressure from A.M. Best to raise the $260 million in capital and yet diligently considered alternative financing options. The record also shows that Maiden's Audit Committee found the terms of Maiden's deal were fair. Moreover, given the uncertain financial market at the time, and the negative market reaction to the proposed rights offering, Maiden needed flexibility in its financing options.

Turin further alleges that the ALJ erred in ruling against him in her September 2, 2021 decision, contrary to her findings in her initial denial of Maiden's Fed. R. Civ. P. Rule 52(c) motion in her November 9, 2016 orders. However, the ALJ's Rule 52(c) denial did not preclude her from ruling against

Turin at the conclusion of the hearings. The ALJ had not heard all of the evidence when she issued the November 2016 orders, and she was permitted to reach her final decision after considering the Respondents' testimony and Turin's rebuttal.

Accordingly, the Board correctly affirmed the ALJ's determination that Turin did not engage in protected activity under SOX.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S RULING, AFFIRMED BY THE BOARD, THAT TURIN DID NOT ENGAGE IN PROTECTED ACTIVITY.

A. STANDARD OF REVIEW

Judicial review under SOX is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A); *see also Fields v. U.S. Dep't of Lab., Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999). Under the APA, the Court reviews the ARB's findings of law *de novo* according due deference to the Board's interpretation of the employee protection provisions set forth in SOX, and upholding the Board's findings unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *see Fields*, 173 F.3d at 813 (citations omitted). "[T]his standard is exceedingly deferential[.]" *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). "The court's role is to ensure that the agency came to a rational conclusion, 'not to conduct its own

investigation and substitute its own judgment for the administrative agency's decision.'" *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008) (quoting *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996)).

The court "conduct[s] [a] *de novo* review of the Secretary of Labor's legal conclusions, but [it] test[s] the Secretary's factual findings for substantial evidence." *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012). In the present case, the ALJ's determination that Turin failed to demonstrate that he engaged in protected activity under SOX should be reviewed for substantial evidence. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1133. Accordingly, "substantial evidence exists even when two inconsistent conclusions can be drawn from the same evidence." *Id.* (citing *Zahnd v. Sec'y of Dep't of Agric.*, 479 F.3d 767, 771 (11th Cir. 2007)). "The substantial evidence standard limits the reviewing court from 'deciding the facts anew, making credibility determinations, or re-weighing the evidence.'" *Id.* (citing *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

B. TURIN FAILED TO SHOW THAT HE ENGAGED IN SOX-PROTECTED ACTIVITY

SOX prohibits publicly traded companies from retaliating against an employee because of any protected whistleblowing activity. *See* 18 U.S.C. §

1514A(a). In order to prevail on his claim of retaliation in this case, Turin was required to demonstrate that he engaged in protected whistleblowing by providing information to a person at Maiden with supervisory authority over him or another person indicated by the statute regarding conduct that he reasonably believed was a violation of federal mail, wire, bank, or securities fraud statutes, an SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1). To satisfy the "reasonable belief" requirement, Turin had to show that he both subjectively believed that the conduct that he complained of violated the law and that such a belief was objectively reasonable. *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *see Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014). "[T]he reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015) (citing *Sylvester v. Parexel Int. LLC,* No. 07-123, 2011 WL 2165854, at *12 (ARB May 25, 2011)).

In this case, substantial evidence supports the ALJ's determination that Turin did not engage in protected activity because (1) Turin failed to establish that he complained of conduct that he subjectively believed violated any of the

provisions of law listed in SOX; and (2) he did not show that such a belief would have been objectively reasonable.

1. The ARB Properly Affirmed the ALJ's Conclusion that Turin Failed to Show That He Subjectively Believed That Maiden Was Violating Any of the Categories of Law Listed in SOX

The ALJ properly held that Turin did not have a subjective belief that Zyskind's conduct violated the provisions listed in SOX. Her conclusion is supported by her credibility determinations; testimony from Nigro, Zyskind and Raschbaum; Turin's communications (or lack of communications) relating to his concerns of fraud; Turin's stock purchases; and Turin's failure to use Maiden's formal process for lodging his complaints.

Turin alleges that he was fired in retaliation because he blew the whistle on Zyskind committing shareholder, securities, and wire fraud, in violation of SOX. SPA93. First, he argues that he believed Zyskind committed these acts of fraud by negotiating the terms of the GMAC RE financing when Zyskind was a related party, without any independent Maiden representation. *Id*. at 170. Second, he argues that Zyskind deceptively represented to shareholders and the press that he would finance the acquisition with the rights offering when he intended to use the trust preferred and benefit his in-laws. *Id*. at 170-75.

i. Credibility

The ALJ made a credibility determination based on Turin's dishonesty in his dealings with Maiden. SPA150, 155-56, 162. The ALJ considered Turin's submission of a false employment agreement to the SEC and his lack of disclosure about his role with AmTrust as a paid director to detract from his testimony overall. *Id*. at 150-51. The ALJ also determined that Turin lied about an alleged agreement between him and Zyskind in which they agreed that Turin would represent Maiden and Zyskind would represent Maiden when there was a conflict between Maiden and the Karfunkels or AmTrust. SPA178, A79. However, Zyskind testified there was no such agreement in place, and that such an assertion was "ridiculous," because Turin did not represent Maiden independently. A1526. Zyskind clarified that during a related party transaction, "the independent board of AmTrust and the independent board of Maiden[] were responsible for negotiating[.]" *Id*. Raschbaum testified that Turin would not have been best suited to represent Maiden in such a conflict because he lacked "extensive background in capital market transactions." *Id*. at 651-52. He also testified that Turin had not communicated with him that Turin would represent Maiden's shareholders in their interactions in November and December 2008. *Id*. at 652. The ALJ also relied on Maiden's August 21, 2007 Board of Directors meeting, in which there was no discussion of such an arrangement, and credited Raschbaum's testimony that Turin

had not brought up any issues relating to conflicts of interest prior to his December 30, 2008 email. *Id*. at 779, 3965. Accordingly, the ALJ's determination that Turin had been deceptive as to the existence of an agreement between him and Zyskind regarding conflicts of interest is supported by the record.

The ALJ properly found that Turin provided incredible testimony regarding the occasions when he alleged that he blew the whistle. For instance, the ALJ properly found, based on Nigro's testimony, and evidence in the record, that Turin did not blow the whistle to Nigro. Turin argued that he blew the whistle to Nigro at their lunch meeting on November 25, 2008, and that Nigro told him that he would bring alternative financing options to Raschbaum. A592, SPA123. The ALJ credited Nigro's testimony explaining that finding alternative sources of capital was part of his fiduciary duty, and credited Nigro's testimony that Turin never raised concerns to him about fraud at the November 25 meeting. SPA123, A1053. The ALJ's decision to credit Nigro's testimony was buttressed by record evidence showing that Nigro and Turin had discussed Maiden entering a letter of credit with Connery Family Trust even prior to the November 25 lunch meeting. A1036-37. In an email where Turin thanked Nigro for exploring alternative investments, Nigro had replied, "presenting alternatives is what we do." *Id*. Moreover, Nigro testified that they mainly discussed Turin's compensation at the lunch and mentioned the trust preferred in passing, and that had Turin told him at lunch that they were

unjustly enriching shareholders or committing securities fraud, "I would have ended the lunch that minute, taken him down by private car, and barged into Barry Zyskind's office and said what we did." A1049, 1053, 1601. Nigro testified that Turin did not express any concerns regarding the process of raising the $260 million dollars. *Id.* at 1601.

Additionally, Turin alleged that he had discussed his concerns around the lack of Maiden's representation at negotiations related to the GMAC purchase at an October 23, 2008 meeting. SPA154. Turin provided his copy of the meeting agenda, in which he had handwritten "rights offering and backstop" next to Neff and Nigro's names, as evidence of his whistleblowing. A1697, SPA154. The ALJ reasonably found that Turin was providing an "expansive, self-serving explanation" for "scant notation," rendering his testimony that he blew the whistle implausible. SPA154. The ALJ also noted that Turin had testified that the meeting did not actually occur until October 28, 2008, and did not occur in Toronto, as the agenda stated—further casting doubt on the credibility of the document Turin proffered as proof of his whistleblowing. *Id*.[6]

[6] The testimony the ALJ cited in support is not in the Joint Appendix submitted to the Court, but is cited to in the Certified List on pages A12, 18, and 19. Turin does not contest the ALJ's description of this testimony in his brief. Should the Court require this testimony, the Secretary will file a copy.

Based on Turin's prior history of deception, contradictory testimony, and implausible explanations, the ALJ, as the fact-finder, decided that Turin's testimony was not credible. The ALJ's decision to credit Maiden's witnesses' testimony, including testimony that contradicted that Turin had a subjective belief that Zyskind was violating any of the provisions listed in SOX, is due substantial deference and should be upheld as long as it is reasonable. *See N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) (holding in an appeal of an National Labor Relations Board decision affirming an ALJ's decision, that the court must "give special deference to the ALJ's credibility determinations, which will not be disturbed unless they are inherently unreasonable or self-contradictory."). Turin makes no persuasive argument for this court to disturb the ALJ's credibility determinations. *See Stone & Webster Constr., Inc*., 684 F.3d at 1133 ("[t]he substantial evidence standard limits the reviewing court from 'deciding the facts anew, making credibility determinations, or re-weighing the evidence.'"); *see also Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Lab.*, 717 F.3d 1121, 1132 (10th Cir. 2013) (finding that the ALJ's finding was heavily based on a credibility determination and the appealing party made "no sufficiently persuasive argument for this court to take the extraordinary step of disturbing that credibility determination"). He does not address the merits of the ALJ's credibility findings in his brief, and instead argues, without any proof, in a

footnote, that the ALJ was biased against him because he had been accused of disparaging a female employee. Appellant's Br. at 69 n.18. This unsubstantiated distraction from the credibility issues in the record provides no basis to depart from the ALJ's thoroughly explained credibility determinations, which are due great deference.

ii. Further record evidence of Turin's lack of a subjective belief

Along with the credibility findings, the ALJ properly considered the record evidence in holding that Turin lacked a subjective belief that Zyskind was committing fraud or violating the enumerated SOX provisions. First, the ALJ found that there was only one piece of documentary evidence relating to whether Turin had subjectively believed that fraud or violations of SEC rules were occurring, and that was his December 10, 2008 email to Groll regarding an Elliott term sheet, where Turin asked Groll "whether one can circumvent the 20% rule[7] with the mechanism described in Term Sheet" and told him that he was "hoping we don't do this deal." A3879, SPA165. The ALJ found that Turin's primary concern appeared to be how to structure a deal quickly, not how to avoid fraud, and noted that Turin did not explain why he hoped the deal would not occur. SPA165-66. Turin's email to Groll—another attorney—lacks any mention of his concerns

[7] The NASDAQ 20 percent rule requires shareholder approval before a company can issue shares that exceed 20% of the outstanding shares. SPA165 n.895.

regarding violations of the law, and thus does not support a conclusion that Turin subjectively believed that Zyskind was violating SOX provisions. The ALJ's reading of this evidence is reasonable.

Turin asserts that he had already explained his concerns to Groll, providing no independent evidence, and citing only his own discredited testimony in support. Appellant's Br. at 90. His only other explanation for his lack of communication is focused on the ALJ's "erroneous" decision to change her credibility determination between her 2016 decision and her 2021 decision—which occurred after the ALJ heard Maiden's witnesses' testimony as well as Turin's rebuttal. *Id*., SPA53 n.8. As addressed further below, the ALJ was permitted to reach her final conclusion, and make an adverse credibility finding, upon hearing further testimony that contradicted and undermined Turin's testimony.

Next, the ALJ's finding that Turin had not communicated his concerns related to potential fraud until after the December 15, 2008 termination is supported by substantial evidence in the record. SPA166. Turin presented no evidence, apart from him own testimony, showing that he articulated his concerns that Zyskind was committing fraud to anyone prior to his termination. Turin argues that he was not required to use the word "fraud" or to identify the precise law that Zyskind's conduct violated, and states that he complained about conduct he believed to be fraudulent. Appellant's Br. at 82. However, he fails to provide any

support in the record for his complaints about problematic conduct (other than to cite his own testimony). His assertion that he referred to his whistleblower activity in his note to himself, "how do I know I'm protected," is also unpersuasive given the vague nature of this note. A3993.

Turin alleges that he raised his concerns to Zyskind, Neff, Tait, Groll, and Ricciardi. Appellant's Br. at 13-23. However, Turin relies on his own discredited testimony as evidence for these assertions. *Id*. The only other person whose testimony he references is Ricciardi's, who testified that Turin's concerns about a related party transaction were reasonable. *Id*. at 18, A231. But, as the ALJ noted, Ricciardi also testified that it was "[v]ery hard to say at this point" whether he had discussed these concerns with Turin, and Ricciardi was not asked about Maiden's Audit Committee's role in clearing related party transactions. SPA176-77. Turin also alleges that the ALJ erred in not crediting his testimony that he blew the whistle to Neff and Tait, since both individuals were under Maiden's control, neither individual testified at the hearing to provide evidence to the contrary, and Maiden could have called them as witnesses to rebut his testimony. Appellant's Br. at 19. The ALJ considered and reasonably rejected this argument because Turin provided no explanation for why he could not call Groll and Tait himself to corroborate his testimony. *See* SPA165-68. The ALJ considered Turin's allegations that he raised his concerns with various individuals, and properly found that the

preponderance of evidence did not demonstrate that Turin did so, or that he subjectively believed fraud or violations of securities laws were occurring.

As discussed above, Zyskind, Raschbaum, and Nigro testified that Turin failed to mention conflicts of interest or concerns about fraud to them. The ALJ also noted that Turin never mentioned his concerns to Metz, who Turin traveled with to Bermuda on December 16, shortly after Zyskind informed him he was fired, and with whom he had a "congenial relationship." SPA167, A1071. Turin's explanation for his lack of communication is that he did not know if he had been fired at this point. Appellant's Br. at 85. Regardless of whether Turin believed he had been terminated or not, it was reasonable for the ALJ to look at the communications Turin had with others to gauge whether he subjectively believed that Zyskind was engaged in fraud or other illegal conduct. The evidence, taken as a whole, shows that Turin failed to establish that he made any communications in which he articulated that he was concerned about conduct that he believed constituted a violation of the relevant laws.

And as the ALJ pointed out, SOX does not require Turin to have used the word "fraud" or to have cited any provision of law in raising his concerns. *See Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 997 (9th Cir. 2009); *Welch*, 536 F.3d at 276 ("An employee need not 'cite a code section he believes was violated' in his communications to his employer . . ."); *Day v. Staples, Inc*., 555 F.3d 42, 55 (1st

Cir. 2009) ("The employee is not required to provide the employer with the citation to the precise code provision in question."). However, to be protected, a complainant's concerns cannot be completely untethered from one or more of the six categories of law listed in SOX. *Nielsen*, 762 F.3d at 221 n.6 (2d Cir. 2014) ("the statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions."). While Turin was not required to communicate the reasonableness of his belief to management, *see Sylvester*, 2011 WL 2165854, at *12 (citing *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006)), his communications to management do provide evidence regarding his belief, *id.* (citing *Collins v. Beazer Homes USA, Inc*., 334 F.Supp. 2d 1365, 1377-78 (N.D. Ga. 2004)). Thus, the fact that Zyskind and Raschbaum credibly testified that they did not perceive Turin to have raised any concerns regarding violations of the law supports the ALJ's determination that Turin did not believe Zyskind's conduct violated the provisions of law listed in SOX.

The ALJ also found that Turin continued to make Maiden stock purchases throughout the period when he alleged fraud was occurring, and concluded this "belie[d] [Turin's] allegations that he subjectively believed serious, market-changing, corporate misconduct like fraud was occurring or was about to occur." SPA166. The ALJ explained that this was not dispositive, but that Turin's stock

purchases demonstrated his subjective belief that no fraud was occurring or about to occur. *Id*. When considering this evidence with the discrepancies in Turin's testimony with the testimony of others and record evidence, and Turin's lack of any communication indicating that he believed Zyskind was engaging in illegal conduct, the ALJ's determination that Turin did not have a subjective belief that Maiden was violating SOX whistleblower laws is reasonable.

In response, Turin argues that a whistleblower can believe that he is reporting unlawful conduct while also believing that his employer is growing a successful business and will be attentive to the concerns raised. Appellant's Br. at 92-93. While this argument might be true in theory, in context, it seems dubious given the sheer number of shares Turin purchased during this time—over 30,000 between November and December. A1559. One of his purchases (for 5,000 shares) was on the exact date he alleged to blow the whistle on Nigro at lunch. *Id*. at 1555. It is difficult to believe that Turin had concerns about Zyskind conducting shareholder fraud, wire fraud, and securities fraud, but felt comfortable continuing to purchase tens of thousands of shares in Maiden. When confronted with this during the hearings, Turin testified that he thought "the very bad things were going to be resolved." *Id*. at 1608. He fails to elaborate on this unconvincing explanation further in his brief. Accordingly, the ALJ's conclusion that Turin's share purchases undermined his assertion of subjective belief is reasonable. *See Stone & Webster*

Const., Inc., 684 F. 3d at 1133 ("[S]ubstantial evidence exists even when two inconsistent conclusions can be drawn from the same evidence).

Lastly, the ALJ noted that Turin did not use the formal process Maiden had in place to communicate his concerns anonymously and never referred to himself as a whistleblower until after he was fired. SPA166-67. While SOX does not require a whistleblower refer to themselves as such or to provide information through any particular means, such as a corporate reporting mechanism if one is available, Turin had drafted the governance for the independent Audit Committee, and thus was familiar with the existing processes to report any violations of the law. A518. Together with the opaque nature of Turin's communications with others and the fact that he never mentioned fraud, Turin's reference to himself as a whistleblower only after his firing and his decision not to use the available reporting process are additional facts that bolster the conclusion that Turin did not believe there was fraud or another violation of law.

In sum, the totality of the evidence supports the ALJ's conclusion that Turin did not establish that he had a subjective belief[8] that Zyskind's conduct violated

[8] While the ALJ uses the phrase "subjectively and objectively reasonable" in her decision, she used the correct legal standard in evaluating whether Turin subjectively believed there was conduct indicative of a violation of one of the categories of law listed in SOX and whether that belief would have been objectively reasonable. SPA165-182.

any of the provisions listed in SOX, and the ARB was correct to affirm the ALJ's conclusion.

2. The ARB Properly Affirmed the ALJ's Conclusion That Turin Did Not Have an Objectively Reasonable Belief That Maiden was Violating any Relevant Provision of Law

Substantial evidence supports the agency's holding that even if Turin subjectively believed that Zyskind was engaged in conduct that was fraudulent or violated SEC rules, such a belief would not have been objectively reasonable. The ALJ properly held that a reasonable person with the same training and experience as Turin, a corporate lawyer with awareness of the 2008 financial collapse and Maiden's share price, would not have believed that Zyskind was engaging in fraud or violations of SOX provisions. *See* SPA157-58, *Nielsen,* 762 F.3d at 221 (2d Cir. 2014) ("The objective prong of the reasonable belief test focuses on the 'basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.'" (internal citation omitted)).

Turin alleged that he reasonably believed Zyskind committed wire fraud by excluding Maiden's representatives from the discussion of trust preferred terms and pushing a related-party transaction that would benefit the Karfunkels. SPA171. The ALJ properly determined that the evidence did not support his allegations. *Id*. First, Maiden had an Audit Committee that was responsible for reviewing related party transactions, such as the Karfunkel backstop, and could reject transactions

that violated the laws. A213, 290, 1136. The Audit Committee commissioned an independent fairness opinion from FBR to determine whether the trust preferred transaction was fair and issued an opinion on January 9, 2009, finding that the terms of the deal were fair. *Id*. at 291-92, 507-08, 748-49, 751, 754. While Turin argues that submission of the trust preferred proposal to the Audit Committee and the fairness report occurred after he was discharged, and thus have no bearing on his concerns, Appellant's Br. at 81, Turin knew prior to his termination that the Audit Committee would fulfill a gatekeeping function because he drafted Maiden's policy to have the Audit Committee clear related-party transactions. A290, 1088-89. He does not explain why he was so concerned about the related-party transaction when he knew that the Audit Committee would have considered the ethical ramifications and investigated the governance process for fairness.

Second, the ALJ reasonably found that Turin had no basis to believe that Zyskind was perpetuating wire fraud or securities fraud by disseminating statements about Maiden's intent to consider a rights offering. SPA171-72. As the ALJ found, Turin did not provide evidence that Zyskind's statements during Maiden's third quarter earnings call were deceptive or that Zyskind had firmly decided to pursue a trust preferred instead of the rights offering at that time. The record shows that Maiden was considering alternative financing solutions, such as the Connery Family Trust Letter of Credit. A1032, 2609. After the proposed rights

offering was announced, Maiden's shares dropped, leading it to consider other options. *Id*. at 283-84, 732-34. The ALJ appropriately found that a reasonable corporate attorney would have recognized, based on the uncertain, fluctuating financial market at the time, Maiden would have "needed flexibility in finalizing its financial options" because it had to raise a substantial amount of money during the financial crisis of 2008 and had received a negative market reaction to the proposed rights offering. SPA172-73, A283-84, 1237. Further, the record shows that Zyskind, as the non-executive chairperson of Maiden, with a mergers and acquisitions background, had the right to negotiate deals on Maiden's behalf. A338-40. And, as discussed above, any related-party transaction with Zyskind and the Karfunkels would have been reviewed by the Audit Committee for fairness.

In response to Turin's argument that Zyskind unfairly negotiated a 14% interest rate for the trust preferred term sheet to benefit the Karfunkels, the ALJ properly concluded that the record evidence does not support such an allegation. The FBR fairness report provides case studies of completed trust preferred transactions that occurred around the same time Maiden was trying to purchase GMAC RE. SPA170, A2402, 4066. The interest rates for these transactions ranged from 11% to 14.7%. A4066. Further, Raschbaum testified that they "spent time with the banker trying to understand what a reasonable rate would be, what was available in the marketplace, with a focus on how do we make this available to at

least shareholders that are holding the majority of the shares." *Id*. at 506. He testified that while they "all" felt the interest rate was high, "you needed to consider the marketplace that were in at the time. There were very limited options for funding outside of the founders and a limited number of shareholders." *Id*. at 258. Turin has not rebutted this evidence, other than to assert there was a transaction as low as 11%, ignoring the fact that there was also a transaction as high as 14.7%, higher than the interest rate that Maiden's transaction had. Appellant's Br. at 68 n.26. There is no evidence in the record to show that the 14% interest rate was unfairly negotiated, or that it was dictated by anything other than the market.[9]

Turin argues that Maiden rushed through a capital raise when it did not need to, and used the urgency as an excuse to force Maiden to accept financing terms

[9] Turin also argued that the term sheets were all essentially identical, which proved to Turin that the Karfunkels had negotiated the 14% interest rate. SPA120, Appellant's Br. at 77-78. Turin's argument is speculative, and he does not provide support for the leap in his conclusion that the Karfunkels necessarily negotiated the interest rate. Moreover, the ALJ explained how the term sheets differed significantly—detailing how the Elliott term sheet changed over time by deleting a term requiring Maiden to pay any interest Elliott would not earn over time if Maiden paid the loan early, and describing how one term sheet allowed Maiden to "call" the security ten years after issuance, and one allowed Turin to "call" the term sheet at any time. SPA120. In response, Turin repeats his argument that the term sheets are essentially the same proposals given the timing and similarity of the proposals—without explaining what makes them "identical" besides the 14% interest rate, or what makes the differences the ALJ pointed out "minor." Appellant's Br. at 77.

negotiated by Zyskind and the Karfunkels. Appellant's Br. at 74-75. However, the ALJ properly found that Maiden had an implied deadline from A.M. Best based on testimonial and record evidence. The ALJ appropriately credited, among others, (1) Raschbaum's testimony that A.M. Best did not have an open-ended timeframe for the capital raise and that Maiden could not have taken more time because of the market conditions; (2) Zyskind's testimony that Maiden had made a "soft commitment" to A.M. Best to secure the financing by the end of 2008 and that they could not have taken more time given the market conditions and Maiden's share price falling; and (3) Nigro's testimony that Maiden's "best course of action" was to complete the capital raise quickly because A.M Best was reactive to the market conditions. SPA114-15. The ALJ also relied on A.M. Best's warning that it would closely watch Maiden's activities as it integrated GMAC RE. *Id*. at 114, A4042. The record supports the ALJ's conclusion that time was of the essence for Maiden's capital raise, and undermines Turin's speculative assertion that Zyskind created urgency so that he could promote the trust-preferred.

Lastly, the ALJ properly found that the evidence does not support Turin's allegation that Zyskind engaged in shareholder fraud by secretly pursuing a financing mechanism that would benefit his family members, the Karfunkels. SPA174. As discussed above, the evidence shows that Maiden had been considering alternative financing mechanisms, and once Maiden's stocks fell after

they announced the rights offering, Maiden reconsidered its approach. The ALJ pointed out that Turin himself had also been involved in determining whether a trust preferred or a rights offering was better and in assessing the Connery Family Trust letter of credit. *Id*. at 175, A3869-71, 3885, 3893, 3898, 3904. He was also tasked with providing Raschbaum analysis on the corporate governance process required for a trust preferred—and still, Turin never indicated to Raschbaum his alleged concerns with the related party transaction or that the Karfunkels were negotiating the interest rate. A618-21, 3869. The ALJ's conclusion that Maiden had considered alternative capital sources before deciding on the trust preferred—and that there was no evidence of Zyskind's secret intent to deceive shareholders—is supported by the record.

Accordingly, substantial evidence supports the ALJ's holding, and the ARB's affirmance of that holding, that Turin did not establish that he had an objectively reasonable belief that Zyskind was committing fraud or violating one of the laws enumerated in SOX.

3. The ALJ's September 2021 Decision is Consistent with Rule 52(c)

Finally, Turin challenges the ALJ's decision to treat her November 9, 2016 orders as a nullity in her September 2, 2021 decision. Appellant's Br. at 68. On November 9, 2016, the ALJ denied Maiden's Fed. R. Civ. P 52(c) motion for judgment on partial findings, which occurred at the end of Turin's presentation of

his case, in which he mainly testified, with one witness who provided "limited testimony." A13, SPA162. After the November 9, 2016 orders, Maiden presented its case, with nine separate witnesses, and Turin presented his rebuttal. SPA162. The ALJ noted that Maiden "advanced a clear narrative of the case" and "highlighted the presence and activity of the Audit Committee, safe harbor statements, and Maiden's attempts at securing alternative financing to determine that [Turin's] allegations of fraud are not objectively reasonable." *Id*. The ALJ, in her 2021 decision, addressed her 2016 orders by stating: "The inclusion of additional testimony of witnesses and documentary evidence renders the facts contained in the undersigned's November 9, 2016 Orders—limited as they were to the testimony of Complainant and Ricciardi—a nullity. Regardless, the undersigned specifically declines to refer to any finding of fact or conclusion of law contained in the November 9, 2016 Orders." *Id*. at 53 n.8.

The ALJ's decision, upon receiving further testimony and evidence, to find against Turin on September 2, 2021, does not run afoul of Rule 52(c). Rule 52(c) states that, "If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 52(c). As an initial note, Maiden had not been fully heard on November 9, 2016, and Turin

had not presented his rebuttal—thus, under rule 52(c), the ALJ could not enter judgment *against* Maiden. Instead, the ALJ merely denied Maiden's motion *against* Turin and held that Turin had established a *prima facie* case of retaliation for whistleblowing based on the evidence presented to date. SPA37. However, she also noted that Maiden still had to "present their own *prima facie* case and show either that [Turin] is, in fact, unable to make his prima facie case or establish by clear and convincing evidence that Respondents would have taken the same unfavorable personnel action in the absence of the [protected] behavior." *Id*. (internal quotation marks and citation omitted). This language makes clear that in the November 2016 decision, the ALJ had not ruled whether Turin would ultimately prevail on his SOX claim. *See Ashkin v. Time Warner Cable Corp*., 52 F.3d 140, 144 (7th Cir.1995) ("Denial of such a motion does not mean, as [Plaintiff] seems to believe, that the plaintiff has proven all of the elements of [his] claim."). The language in the ALJ's decision shows that her decision was not final: she noted the "discretionary" nature of her decision and informed the parties that she would not "entertain any motions to reconsider or motions to file an interlocutory appeal." SPA48. Her denial of the Rule 52(c) motion did not prevent her from making a later decision on the merits of the case. *See Weissinger v. U. S.*, 423 F.2d 795, 797-98 (5th Cir. 1970) ("The trial judge may conclude . . . that it is inadvisable to sustain the defendant's motion midway in the trial and that the trial

should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. It does not preclude the trial judge from making, at the conclusion of the case, findings and determinations at variance with his prior tentative ruling.").[10] Thus, the ALJ remained free to revise her view if, as happened here, the evidence that Maiden presented convinced her that Turin had not engaged in SOX-protected whistleblowing.

Accordingly, the Board properly affirmed the ALJ's decision holding that Turin failed to establish that he engaged in protected activity within the meaning of SOX and consequently, denied his complaint.

[10] Turin argues that the ALJ can only "amend" her 2016 decision to correct a "manifest error." Appellant's Br. at 68. He cites to *U.S. v. Local 1804-1, Int'l. Longshoremen's Ass'n*, 831 F. Supp. 167, 169 (S.D.N.Y.1993), *aff'd U.S. v. Carson*, 52 F.3d 1173 (2nd Cir. 1995). However, that case is inapposite because it discusses post-judgment motions made under Fed. R. Civ. P. 52(b) asking a court, *after entry of judgment*, to amend its findings, and does not discuss decisions made pursuant to Rule 52(c). Here, the ALJ did not enter a judgment for or against Turin in the 2016 decision, but only declined to enter judgment against him.

CONCLUSION

Substantial evidence supports the ALJ's holding, affirmed by the ARB, that Turin failed to demonstrate he engaged in protected activity. This Court should accordingly affirm the ARB's decision denying Turin's complaint.

Date: May 15, 2024

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Priom Ahmed
PRIOM AHMED
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, D.C. 20210
Telephone: (202) 693-5586
E-mail: Ahmed.Priom@dol.gov

Counsels for Respondent-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that:

1. This brief complies with the type-volume limitation of 2d Cir. Local R. 32.1(a)(4)(A) because it contains 10,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word for Microsoft 365.

s/ Priom Ahmed
PRIOM AHMED

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, D.C. 20210
Telephone: (202) 693-5586
E-mail: Ahmed.Priom@dol.gov

Counsel for Respondent-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2024, the foregoing was electronically filed and served through the Court's CM/ECF system on the following counsel of record:

Edward S. Rudofsky
Five Arrowood Lane
Melville, New York 11747
Counsel for Petitioner-Appellant

Edward T. Ellis
900 Third Avenue, 8th Floor
New York, New York 10022
Counsel for Intervenors

s/ Priom Ahmed
PRIOM AHMED
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, D.C. 20210
Telephone: (202) 693-5586
E-mail: Ahmed.Priom@dol.gov

Counsel for Respondent-Appellee