

STATEMENT OF JURISDICTION

The United States District Court for the District of Maryland (“District Court”) had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331, as the claims arose under the laws of the United States, specifically the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX”).

This Court has jurisdiction to hear this appeal from the District Court’s decision and order filed on July 2, 2008, granting the Appellees’ motion to dismiss, remanding to the Department of Labor’s Administrative Review Board under a writ of mandamus, and administratively closing the case. On July 15, 2008, Appellant David Stone filed a motion with the District Court to certify the case for interlocutory appeal. On August 12, 2008, that motion was denied. On August 28, 2008, a notice of appeal was timely filed with the Clerk of the District Court.

This Court also has jurisdiction pursuant to 28 U.S.C. § 1291 to hear this appeal from the District Court’s final decision and order filed October 17, 2008. On October 20, 2008, a second notice of appeal was timely filed with the Clerk of the District Court. This appeal is from a final judgment that disposes of all parties’ claims.

STATEMENT OF THE ISSUES

I. Whether by their plain terms Section 1514A(b)(1)(B) of SOX and 29 C.F.R. § 1980.114(a) grant a complainant *de novo* review in federal court if a final decision has not issued from the Secretary of Labor within 180 days from the filing of the complaint.

II. Whether the District Court erred in dismissing Stone's complaint and in delegating its *de novo* review to the Department of Labor under a writ of mandamus.

III. Whether collateral estoppel precludes Stone from his statutory right to a *de novo* review in the District Court when his case before the Administrative Law Judge involved no hearing, no witnesses, and no opportunity to obtain discovery or documents from his former employer in order to prove his case.

STATEMENT OF THE CASE

Plaintiff and Appellant David Stone (“Stone”) brought this action against his former employers, Instrumentation Laboratory SpA (“IL SpA”), Instrumentation Laboratory Company (“IL”), and against his former supervisors Brian Durkin (“Durkin”), Ann DeFronzo (“DeFronzo”) and Ramon Bennett (“Bennett”) (collectively, “Appellees”) for whistleblower discrimination under SOX. Stone alleged discrimination and retaliation because he persisted in voicing and seeking resolution to concerns pertaining to Appellees’ failure to maintain adequate accounting controls and failure to comply with statutory and regulatory requirements mandated by SOX and other federal securities laws. Stone also brought other claims which were either voluntarily withdrawn or dismissed and which are not a part of this appeal.

On June 19, 2006, Stone filed a SOX retaliation complaint with the Occupational Safety and Health Administration (“OSHA”). *See* Joint Appendix (“J.A.”) at 14. OSHA investigated and on January 3, 2007, the Regional Administrator of OSHA, acting on behalf of the Secretary of Labor (“Secretary”), issued preliminary findings dismissing Stone’s complaint. *See id.* at 95-97. Stone objected to the findings and requested a hearing before a Department of Labor (“DOL”) Administrative Law Judge (“ALJ”) on January 31, 2007, within thirty

(30) days of OSHA's findings, thus precluding the Secretary's preliminary decision from becoming final. *See id.* at 123.

The Appellees filed a motion for summary decision with the ALJ on March 1, 2007. *See id.* at 185. Without allowing the parties to engage in any discovery, on September 6, 2007, the ALJ granted the Appellees' motion and dismissed the complaint. *See id.* at 69-94, 123. Stone appealed the ALJ's decision to the DOL's Administrative Review Board ("ARB") on September 19, 2007. *See id.* at 123. On November 8, 2007, Stone notified the ARB of his intention to seek *de novo* review in federal district court pursuant to 18 U.S.C. § 1514A(b)(1)(B) and 29 C.F.R. § 1980.114(a). He was entitled to pursue this course because the Secretary had not issued a final decision within 180 days after Stone's initial DOL complaint. *See id.* at 124. Stone filed suit in the District Court on November 26, 2007, and the ARB dismissed Stone's appeal on November 29, 2007, because Stone's *de novo* action divested the ARB of jurisdiction. *See id.* at 10-39, 106-08.

In the District Court, the Appellees moved to dismiss Stone's claims pursuant to Fed. R. Civ. P. 12(b)(6). *See id.* at 41. On July 2, 2008, after briefing, the District Court granted Appellees' motion to dismiss Stone's claims, administratively closed the case, and remanded it to the ARB under a writ of mandamus to issue a final decision within ninety (90) days. *See id.* at 161-71. Stone made an immediate motion for certification to the District Court for

interlocutory appeal. *See id.* at 185-86. The ARB issued a briefing schedule, but Stone notified the ARB of his intention not to file an opening brief before that tribunal. *See id.* at 49-50. The ARB dismissed Stone's SOX claim on July 31, 2008. *See id.* at 172-80. On August 12, 2008, the District Court denied Stone's motion for certification of interlocutory appeal. On August 28, 2008, Stone filed a notice of appeal with the District Court, appealing the dismissal of his case. *See id.* at 181-82. Then, on September 19, 2008, Stone moved the District Court for entry of a final decision on his SOX claim. On October 17, 2008, the District Court granted Stone's motion and issued a final decision. *See id.* at 183-89. Stone filed a second notice of appeal on October 20, 2008, appealing the District Court's final decision. *See id.* at 190-96. On October 31, 2008, this Court consolidated the two appeals.

A third appeal, 08-1998, was dismissed voluntarily by all the parties since it was taken prior to the District Court's final decision on October 17, 2008, and it was only concerned with the ARB's decision to dismiss Stone's case for lack of prosecution before the ARB.

STATEMENT OF FACTS

Substantive Facts

Appellant David Stone was hired by IL as a Sales Representative in 1999. *See id.* at 17. IL is a company that develops, manufactures and distributes critical care and hemostasis in vitro diagnostics instruments and related reagents and services for use primarily in hospital laboratories. *See id.* at 12. Stone worked hard and quickly became one of IL's top performers. *See id.* In November 2001, IL promoted Stone to Sales Manager. *See id.* at 18. As Sales Manager, Stone continued to excel, bringing in new business and developing new and effective marketing tools. *See id.* Accordingly, in February 2005, IL again promoted him. *See id.* at 19. Stone became Director of National Accounts and started working with Group Purchasing Organizations ("GPOs").¹ *See id.* IL's contracts with GPOs require that IL: 1) maintain an accurate GPO membership database; 2) make available contractually negotiated prices, terms and conditions to GPO members; 3) discontinue access of contractually negotiated prices, terms and conditions to non-GPO members; 4) report GPO members having "dual roster" or "dual affiliations" with other competing GPO organizations; and 5) accurately account for administrative fees owed to GPOs as a result of doing business with GPO

¹ GPOs are strategic affiliations of member hospitals who concentrate buying power to get lower prices. IL sells its products to members of GPOs; if a hospital purchases IL products through a GPO, IL calculates and pays administrative fees to the GPO.

members. *See id.* at 20-21. In addition, IL's contracts with GPOs require that IL pay administrative fees equal to three percent (3%) of sales revenue generated from purchases by GPO members. *See id.*

As the Director of National Accounts, Stone learned that since 2001, Durkin, the Director of Sales and National Accounts, had neglected to track and pay administrative fees to GPOs resulting in misrepresentations of IL's financial condition to shareholders and revealing weaknesses in IL's internal controls. *See id.* at 22. Stone began to investigate the extent of IL's internal control weaknesses and began working on corrective measures designed to resolve inaccuracies in the customer and sales databases concerning GPO and hospital membership affiliations. *See id.* Stone was concerned that IL's failure to track accurately administrative fees owed to GPOs would impair IL's ability to report accurately revenues and liabilities, and that if the GPOs with whom IL had contracts became aware that IL was not paying the required administrative fees, they would cancel their contracts with IL, thereby preventing IL from selling to most of its customers. *See id.* at 23.

When Stone learned of these problems in September 2005, he began voicing his concerns to Durkin, Paul Stickel ("Stickel"), Administrator of Sales and National Accounts, and DeFronzo about the deficient internal accounting controls

and IL's failure to comply with SOX and other federal securities laws. *See id.* at 23. As Stone became more assertive in trying to induce management to take necessary corrective action, he suffered retaliation, including a pretextual and negative performance review in November 2005. *See id.* Undeterred by the retaliatory performance evaluation he received in November 2005, Stone continued to raise concerns about deficient internal controls and IL's substantial liability for unpaid administrative fees. *See id.* at 25. Stone continued voicing his concerns to Durkin, Stickel and DeFronzo until his termination in March of 2006. *See id.* at 23. Finally, on March 22, 2006, Durkin fired Stone. *See id.* at 27.

Procedural Facts

On June 19, 2006, pursuant to SOX, Stone filed a timely SOX retaliation complaint against Appellees with the Regional Administrator of the DOL's OSHA. *See id.* at 14. OSHA issued its preliminary findings on January 3, 2007. *See id.* at 14, 95-97. Pursuant to 29 C.F.R. § 1980.106(a), on January 31, 2007, less than thirty (30) days after OSHA issued its preliminary findings, Stone objected to OSHA's findings and requested a hearing before an ALJ. *See id.* at 15, 45. Because Stone requested a hearing before an ALJ less than thirty (30) days after OSHA's findings, those findings did not become final. *See* 29 C.F.R. § 1980.106(b)(2).

On March 1, 2007, the Appellees filed a motion for summary decision with the ALJ, arguing that Stone had not engaged in protected activity under SOX. *See id.* at 45. A motion for “summary decision” is the administrative equivalent of a motion for summary judgment under Fed. R. Civ. P. 56 in a district court proceeding. When the Appellees filed their motion, Stone moved to delay consideration of the motion until he could take discovery, including on the issue of protected activity. *See J.A.* at 46 (moving for leave to take discovery in order to oppose summary decision pursuant to Fed. R. Civ. P. 56(f)). The ALJ denied the Rule 56(f) motion. Thus, Stone could submit only an affidavit in opposition to the Appellees’ motion for summary decision. The ALJ did not credit the facts that Stone provided in his affidavit, concluded that Stone had not engaged in protected activity, and granted the Appellees’ motion for summary decision on September 6, 2007. *See id.* at 47, 69-94.

Pursuant to 29 C.F.R. § 1980.110(a), on September 19, 2007, Stone petitioned the ARB for review of the ALJ’s order. *See id.* at 123. Because Stone petitioned the ARB for review within the time allowed by regulation to do so, the ALJ’s order did not become final. *See id.* On October 1, 2007, the ARB established a briefing schedule under which Stone’s initial brief was due on or before October 31, 2007. *See id.* at 98-100, 123. On October 24, 2007, Stone, with Appellees’ consent, moved the ARB to modify the briefing schedule. *See id.*

at 123. Under the modified schedule, approved by the ARB on October 31, 2007, Stone's initial brief to the ARB was due on December 17, 2007. *See id.* at 101-03, 123. In the consent motion to modify the briefing schedule, Stone noted that the extension was required because of trials and other pressing business, and because Stone was "evaluating other options available to him to pursue his claims against [Appellees]." *See id.* at 124.

On November 8, 2007, Stone, pursuant to 29 C.F.R. § 1980.114 and 18 U.S.C. § 1514A(b)(1)(B), filed a notice with the ARB of his intention to bring an action for *de novo* review of his complaint in the appropriate district court of the United States. *See id.* Stone, pursuant to 29 C.F.R. § 1980.114(b), filed his notice with the ARB at least fifteen (15) days in advance of filing his complaint in federal court. *See id.* After receiving Stone's notice, the ARB, on November 15, 2007, ordered the parties to show cause no later than November 26, 2007, why the ARB should not dismiss Stone's appeal pursuant to 29 C.F.R. § 1980.114, which provides for *de novo* review in the appropriate district court. *See id.* at 104-05, 124. Appellees did not respond to the ARB's order to show cause. *See id.* at 124. On November 26, 2007, Stone filed the instant action in the District Court. *See id.* at 10-40, 124. On November 29, 2007, the ARB dismissed Stone's appeal based upon Stone's filing in the District Court, which divested the ARB of jurisdiction. *See id.* at 106-08, 124. Because the ARB did not issue a final decision prior to

dismissing Stone's appeal, no final decision was ever issued by the Secretary regarding the SOX complaint filed by Stone on June 19, 2006. *See id.* at 124.

On March 27, 2008, the Appellees moved to dismiss the action in the District Court under Fed. R. Civ P. 12(b)(6). *See id.* at 41. The Appellees argued that Stone was collaterally stopped from challenging the ALJ's ruling that he had engaged in protected activity under SOX. *See id.* On July 1, 2008, the District Court granted the motion, finding that Stone had already had a full and fair opportunity to litigate his claims before the ALJ, and ordered the ARB to reinstate Stone's administrative case within 14 days and to rule on the merits of the appeal within 90 days. *See id.* at 161-71. On July 15, 2008, Stone made a motion for the District Court to certify an interlocutory appeal of its dismissal of his SOX claim. *See id.* at 6. Stone then filed an emergency motion for certificate of appealability on July 17, 2008. *See id.* The ARB dismissed Stone's SOX claim on July 31, 2008 for lack of prosecution after Stone indicated that he would not be filing an opening brief with the ARB. *See id.* at 172-80. The District Court denied both of Stone's pending motions on August 12, 2008. *See id.* at 6. On August 28, 2008, Stone appealed the dismissal of his SOX claim and the denial of appealability. *See id.* at 181-82. Worried that his appeal might be defective for lack of finality under 28 U.S.C. § 1291, on September 19, 2008, Stone moved the District Court for entry of a final decision on his SOX claim, and for a resolution of his state law

claim for failure to pay wages. *See id.* at 7. The District Court granted Stone's motion and entered final judgment on Stone's SOX claim on October 17, 2008, and it declined to exercise supplemental jurisdiction on Stone's state wage law claim. *See id.* at 183-89. Stone appealed the District Court's final judgment on October 20, 2008. *See id.* at 190-91.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6). See *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285, 288 (4th Cir. 2008) (citing *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991)); *Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 217 (4th Cir. 1994). Further, this appeal requests that this Court make a ruling concerning the proper interpretation of a statute, a legal determination which is subject to *de novo* review. See *In re Coleman*, 426 F.3d 719, 724-25 (4th Cir. 2005); *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002).

In reviewing a Rule 12(b)(6) dismissal, this Court construes factual allegations in favor of the nonmoving party and treats them as true. See *Mayes v. Rapoport*, 198 F.3d 457, 460 (4th Cir. 1999); *Estate Constr.*, 14 F.3d at 218. This Court will “affirm a dismissal for failure to state a claim only if it appears that ‘the plaintiffs would not be entitled to relief under any facts which could be proved in support of their claim.’” *Mayes*, 198 F.3d at 460 (quoting *Schatz*, 943 F.2d at 489).

SUMMARY OF THE ARGUMENT

The plain meaning of § 1514A(b)(1)(B) could not be clearer: a complainant who has not received a final decision from the Secretary within 180 days of filing a SOX complaint has the right to file in an appropriate district court for “*de novo*” review. It is up to this Court to interpret whether § 1514A(b)(1)(B) is mere surplusage that a district court can ignore, or whether Congress expressly conferred upon SOX plaintiffs an unequivocal right to a *de novo* action in federal court where DOL has not issued a final decision within 180 days of the filing of the complaint. The District Court below abdicated its obligation to conduct a *de novo* review, delegated its responsibilities to the administrative agency, and disregarded the plain meaning of the statute. SOX does not say the district courts have these powers – it does say that the district court has jurisdiction to conduct a *de novo* review. In this case we know that the District Court below could not have conducted any kind of review – it had no evidence before it. Stone never had an opportunity to conduct any discovery or to present any evidence at a hearing.

It was error for the District Court to rely on a flawed, untested, and unpublished opinion from the Eastern District of Louisiana, *Allen v. Stewart Enterprises, Inc.*, Case No. 05-4033 (E.D. La. Apr. 6, 2006), for the proposition that courts need not follow the plain meaning of SOX when the aim is the conservation of judicial resources. The *Allen* decision, in turn, was based on

comments that were made during the DOL's rulemaking on SOX suggesting that courts can rely upon doctrines like collateral estoppel so as to avoid having to re-litigate a case. Such comments, however, are not regulations and do not trump a statute. Moreover, DOL has consistently taken the position that its rules issued pursuant to SOX are not intended to be substantive interpretations of SOX, and therefore, the District Court should not have accorded the comments any weight and certainly not so much to override the plain meaning of the statute.

Also, there are at least two statutory and regulatory schemes to which this Court can look to show why *Allen* should not be followed: the Equal Employment Opportunity Act of 1972, and the Immigration Act of 1990. Both these federal statutes give applicants the ability to file in district court for a *de novo* review, and in some cases even after there has been a final adjudication by the administrative agency. Prior decisions of this Court have upheld the same meaning of “*de novo* review” that is being advanced by Stone here.

Collateral estoppel should not work to bar Stone from proving his case because he has not had a full and fair opportunity to litigate his case. He has been denied the opportunity for discovery. This case is highly distinguishable from *Allen* and is much closer to the facts of *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322 (S.D. Fla. 2004). In *Allen* the ALJ had a voluminous record involving 6 days of testimony and post-hearing briefing where the plaintiff was

able to put on his case. In *Hanna*, by contrast, the complainant did not have a decision from the DOL after 180 days and then brought his action for *de novo* review in the Southern District of Florida with no administrative record of which to speak. Similar to *Hanna*, Stone was dismissed at the pleading stage.

ARGUMENT

I. SECTION 1514A OF SOX MANDATES THAT THE DISTRICT COURT REVIEW *DE NOVO* STONE'S SOX COMPLAINT.

A. The Plain Language of § 1514A Mandates *De Novo* Review.

Statutory analysis begins with the plain language of the statute, “the language used by Congress.” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). To best give effect to the intent of Congress, those words must be given their “ordinary meaning.” *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542 (1940)). “By reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole,” a court can determine whether a statute is plain and unambiguous. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If the language is plain and “the statutory scheme is coherent and consistent,” a court need not inquire further. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989); *see also Chevron U.S.A. Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). Thus, where congressional intent is clear from the plain language of the statute, “the sole function of the courts is to enforce [the statute]

according to its terms.” *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

In this Court, statutory interpretation begins and ends with an examination of “the literal and plain language of the statute” where the language is unambiguous. *See Markovski v. Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007). In discerning congressional intent, courts “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *See United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004) (noting this “first ‘cardinal canon’ of construction” is “also the last” when statutory language is unambiguous); *see also Scrimgeour v. IRS*, 149 F.3d 318, 327 (4th Cir. 1998) (judicial inquiry ends if “statutory language is unambiguous and the statutory scheme is coherent and consistent”); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996) (holding that “[a]bsent explicit legislative intent to the contrary, the statute should be construed according to its plain and ordinary meaning.”).

Section 1514A makes it clear that a complainant who has filed a SOX claim with OSHA “must allow the agency at least 180 days to investigate and issue a decision on the merits. At that point, if no decision is issued, the claimant may file a civil action for *de novo* review in the district court.” *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 710 (E.D. Va. 2007); *see also* 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a). The *JDS* court then emphasized, “[t]his

much is uncontroversial...” *JDS*, 473 F. Supp. 2d at 710; *see also Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 (N.D. Ga. 2004) (“When a plaintiff files suit in federal court under Sarbanes-Oxley, the court conducts a *de novo* review of the plaintiff’s claim.”).

It is generally accepted that “as a matter of law, that the plain language of 18 U.S.C. § 1514A(b)(1)(B) allows [a complainant] to bring his whistle-blower complaint in [District] court [when] the DOL [does] not issue[] a final decision within 180 days of the filing of the complaint.” *Hanna v. WCI Cmtys., Inc.*, 348 F. Supp. 2d 1322, 1328 (S.D. Fla. 2004) (internal quotations omitted). The legislative history of SOX is consistent with the plain meaning and this Court should not allow an argument that the legislative history of SOX dictates a different result here. At least one court has determined that the legislative history of SOX “is silent regarding the proper interpretation of 18 U.S.C. § 1514A(b)(1)(B),” which further supports a construction based on plain meaning. *See Hanna*, 348 F. Supp. 2d at 1329.

The plain text of SOX, in relevant part, and its implementing regulations, provide that a complainant may “bring[] an action at law or equity for *de novo* review in the appropriate district court of the United States” if the Secretary of Labor “has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the

claimant”² See 18 U.S.C. § 1514A(b)(1)(B); see also 29 C.F.R. § 1980.114(a) (“If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.”).

SOX’s implementing regulations create a “three step process for obtaining a final decision from the [Secretary of Labor].” See *Hanna*, 348 F. Supp. 2d at 1328. A complainant may file timely objections to the findings and preliminary order entered by OSHA and request a hearing before an ALJ. See 29 C.F.R. § 1980.106. The regulations also permit a complainant subsequently to obtain a review of a decision of an ALJ before the ARB. See 29 C.F.R. § 1980.110. The Secretary has “issued a final decision” pursuant to 18 U.S.C. § 1514A(b)(1)(B) ***only*** when the ARB issues a final decision, or the complainant fails to appeal either OSHA’s order or the ALJ’s decision. See *Hanna*, 348 F. Supp. 2d at 1326-

² Appellees do not contend that Stone acted in bad faith to delay a final decision by the ARB. See J.A. at 50 (noting that Defendants “had no evidence of Plaintiff’s bad faith” when the ARB issued an Order to Show Cause on November 15, 2007, stating Stone was entitled to “bring an action at law or equity for *de novo* review in the appropriate United States district court” unless Defendants showed Stone’s bad faith).

27. The plain language of 18 U.S.C. § 1514A(b)(1)(B) thus allows a complainant to bring an action for *de novo* review in district court where OSHA has entered preliminary findings and the ALJ has issued a decision, but the ARB has not issued a final decision. *See, e.g., Hanna*, 348 F. Supp. 2d at 1328 (holding, “as a matter of law, that the plain language of 18 U.S.C. § 1514A(b)(1)(B) allows [plaintiff] to bring his whistle-blower complaint in this court because the DOL had not issued a final decision within 180 days of the filing of the complaint.”).

Stone filed this lawsuit in strict compliance with the “three step” procedural requirements of 18 U.S.C. § 1514A(b)(1)(B), as the recitation in the Statement of Facts above demonstrates.³ Stone complied with the statute when he sought ALJ review of OSHA’s preliminary findings. After the ALJ dismissed his complaint

³ Appellees have half-heartedly claimed that Stone “waived” his statutory right to file his SOX claim in federal court because, in March 2007, his undersigned counsel indicated that he “would proceed before the ALJ and would not be removing the case to federal court.” *See* J.A. at 46, 52-53. Appellees, citing one case, attempt to transform this routine expression of anticipated litigation strategy into an “inconsistency” that equitably estops Stone from exercising his statutory rights. *See id.* Equitable, or judicial, estoppel in the single case cited by Appellees, *Korangy v. FDA*, 498 F.3d 272 (4th Cir. 2007), resulted from a plaintiff’s attempt to repudiate, on appeal, a critical factual admission he had made in the trial court. *See id.* at 275-76. Stone, by sharp contrast, merely modified his litigation strategy as his case progressed. Appellees have no basis for equating such proper strategic decision-making with shifting admissions regarding the material facts of a case. Stone has done nothing to “waive” his right to remove a non-final decision to federal court.

Moreover, the right to seek *de novo* review under § 1514A(b)(1)(B) is non-waivable. In other words, an ALJ is not authorized to compel a SOX complainant to forgo the option of removing the case to federal court.

without permitting discovery or holding a hearing, Stone complied with the statute when he petitioned for ARB review. Then, before the ARB received any briefs from the parties, Stone properly notified the ARB of his intention to file suit in federal court, and he then filed his complaint in the District Court. *See* J.A. at 176. Stone complied with the statute when, there having been no final decision by the ARB or the Secretary, he subsequently exercised his express right to bring this action for *de novo* review in the District Court. The Appellees ask this Court to rewrite SOX and penalize Stone for following its clear procedural mandates.⁴ By granting the Appellees’ motion to dismiss Stone’s claims, the District Court erroneously ratified the Appellees’ mistaken interpretation of SOX and ignored the plain language of the statute.

In the District Court, Appellees argued that Stone chose to pursue an administrative remedy because he appealed the ALJ’s decision to the ARB prior to filing his complaint with the District Court. *See* J.A. at 52-53. This argument is not persuasive because, as the *Hanna* court recognized, under SOX:

[A] plaintiff may only seek a judicial remedy for his whistleblower complaint once the Secretary has not issued a final decision within 180 days of the filing of the [administrative] complaint. Requiring a Sarbanes-Oxley Act plaintiff to exhaust his administrative remedies under the

⁴ Because Stone strictly followed the procedures allowed under SOX, it is ironic that Appellees accused him of “attempt[ing] to manipulate the procedures allowed under the SOX regulations.” *See* J.A. at 53.

circumstances in this case would render 18 U.S.C. § 1514A(b)(1)(B) completely meaningless.

Hanna, 348 F. Supp. 2d at 1330 (internal citations omitted). This would violate the *Hanna* court’s clear mandate that “[a] statute should be interpreted so that no words shall be discarded as meaningless, redundant, or mere surplusage.” *Id.* (citing *Shotz v. City of Plantation*, 344 F.3d 1161, 1173 (11th Cir. 2003) (citing *United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999) (internal citations omitted))).

This Court should find, as did the *Hanna* court, that:

Congress presumably passed this statute to prevent the Department of Labor from unnecessarily delaying relief for Sarbanes-Oxley Act plaintiffs. Ultimately, it is up to Congress to intervene if it believes that the 180-day provision of 18 U.S.C. § 1514A(b)(1)(B) is too unrealistic a timetable for the Department of Labor to meet in resolving claims under the Sarbanes-Oxley Act.

Id. at 1329. And, as did the *Hanna* court, this Court should refuse to penalize Stone for complying with the plain language of the statute. *See id.*

B. The District Court Did Not Review Stone’s Claim *De Novo*, Thus Violating the Plain Language of § 1514A.

Because the Secretary did not issue a final decision within 180 days of Stone’s filing of his SOX complaint against Appellees, Stone properly brought his action in District Court for *de novo* review, pursuant to § 1514A(b)(1)(B). The

District Court, by insisting that the ALJ's decision somehow constitutes a "final" decision that precludes this action through the doctrine of collateral estoppel on its way to dismissing Stone's claims, ignored the plain, literal, and unambiguous language of the relevant SOX provisions and effectively re-wrote the statute.⁵

It is well established that *de novo* review means "that the whole process before the district court would start from scratch, as if the proceedings [below] had never occurred." *Hanna*, 348 F. Supp. 2d at 1329 (citing *United States v. Koenig*, 912 F.2d 1190, 1192 (9th Cir. 1990)); *see also United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992) ("By definition, *de novo* review entails consideration of an issue as if it had not been decided previously."); *Cross v. United States*, 512 F.2d 1212, 1216 (4th Cir. 1975) ("*De novo*" means "the court should make an independent determination of the issues."); *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) ("De novo review means we make an independent determination of the issues."); *R.R. Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir. 1984) ("De novo review means a totally new fact-finding effort."). The *Hanna* court continued to explain that:

[G]iven the common understanding of the phrase "de novo review," the plain language of the Sarbanes-Oxley Act supports th[e] court's holding that district courts are able to consider the merits of a plaintiff's whistle-blower

⁵ Appellees concede that "SOX technically permits" Stone to *de novo* review in federal court. *See* J.A. at 51.

complaint as if it had not been decided previously so long as the Secretary has not issued a final decision within 180 days of the filing of the [administrative] complaint.

Hanna, 348 F. Supp. 2d at 1329 (internal citations omitted).

In the case at bar, the Secretary did not issue a final decision within 180 days of the filing of Stone's administrative complaint. *See* J.A. at 168. The record from the District Court below makes it clear that instead of reviewing the case *de novo*, the District Court simply abdicated and delegated back to the Secretary (the ARB) for further administrative proceedings on an accelerated timeline. The District Court's July 2, 2008 opinion makes no new or independent factual findings, but only reviews and affirms the findings of the ALJ. *See* J.A. at 163-69. Instead of exercising its statutory authority and conducting a *de novo* review, the District Court ducked its responsibility and remanded the case to the ARB for a final decision. The District Court's failure to review Stone's claims *de novo* violates the statutory grant of jurisdiction that gave the District Court authority to rule on the case in the first place. The District Court should have reviewed Stone's claims anew, made new factual determinations and then applied the law to those facts. The District Court's failure to do this violates the plain language of SOX.

II. **THE DISTRICT COURT ERRED BY DELEGATING ITS *DE NOVO* REVIEW TO THE SECRETARY OF LABOR.**

Rather than follow the well-reasoned decision in *Hanna* and the express terms of SOX, the District Court followed a fatally flawed and unpublished decision from the United States District Court for the Eastern District of Louisiana called *Allen v. Stewart Enterprises, Inc.*, Case No. 05-4033 (E.D. La. Apr. 6, 2006). *See* J.A. at 109-16, 166-67. *Allen* is not entitled to any deference by this Court, it has not been followed by any court (other than the District Court in this case), it ignores the plain meaning of § 1514A, it is based upon DOL's comments to its regulations that conflict with the statutory language of SOX, and as discussed in Part III *infra.*, it is easily distinguished from the case at bar. In addition, this Court should look to its own decisions construing other statutory and regulatory schemes like SOX which provide for *de novo* review in district court to help make a determination in this case.

A. **Allen Is Fatally Flawed.**

The decision in *Allen* is unpublished, it is not cited by any court other than the District Court below in this case, and it is poorly reasoned. It disregards the plain meaning of SOX on the basis that courts have certain inherent authority to enforce doctrines like collateral estoppel and *res judicata* so as to preserve judicial resources. The decision is fatally flawed because it ignores express language in

SOX authorizing a complainant to come to district court for a “*de novo* review” where the Secretary has not issued a final decision in 180 days. *See* 18 U.S.C. § 1514A(b)(1)(B). The *Allen* court says, “Clearly, to interpret the plain language of 18 U.S.C. § 1514A(b)(1)(B) to mandate a *res novo* [new case] adjudication after such extensive litigation, that is simply to re-litigate the case in its entirety, would lead to an absurd result.” J.A. at 115. The *Allen* court does not say why avoiding “needless duplication of effort” is a higher interest than following the clear language that Congress has used. Nor does *Allen* account for Congressional intent to provide for a jury trial in SOX actions which would require a complainant to remove the case to federal court. *See* Legislative History of Title VIII of HR 2673, the Sarbanes-Oxley Act of 2002, Section 806, 148 Cong. Rec. S7418, S7420 (July 26, 2002) (Remarks of Sen. Leahy) (“Only if there is not final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she may bring a *de novo* case in federal court with a jury trial available.”) (internal citations omitted); *see also* http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/STATUTES/SARBANES_OXLEY_ACT_LEGISLATIVE_HISTORY.HTM (last visited Dec. 8, 2008).

B. Regulations Do Not Trump the Plain Language of a Statute, and DOL Exceeded Its Authority to the Extent Its Comments to a Procedural Regulation Attempt to Interpret SOX.

The *Allen* decision relied heavily on the comments promulgated by OSHA concerning 29 C.F.R. § 1980.114 saying that after a full and fair opportunity to litigate a claim in an administrative setting, courts may apply principles of collateral estoppel following extensive litigation before the administrative agency, and may treat filing in district court pursuant to § 1514A(b)(1)(B) as a petition for mandamus to order the DOL to issue its decision under appropriate timeframes. *See Allen* at 5-6 (citing 69 Fed. Reg. 52104-01, 2004 WL 1876043 at 18-19); *see J.A.* at 113-14. There are several problems here.

First, a regulation does not trump the plain terms of a statute, particularly when, in this instance, the DOL has stated that the “rules are procedural in nature and are not intended to provide interpretations of [SOX].” Procedures for the Handling of Discrimination Complaints Under Section 806, 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

Second, this is a comment to a regulation, not the regulation itself which clearly and unambiguously tracks the language of the statute. *Compare* 18 U.S.C. § 1514A(b)(1)(B) *with* 29 C.F.R. § 1980.114(a).

Third, although regulations promulgated by the enforcing agency are typically treated with a degree of deference, to the extent that OSHA’s regulatory

guidance is inconsistent with the plain language of the Act, the statute governs. *See Chevron*, 467 U.S. at 843 n.9 (holding that administrative constructions contrary to clear congressional intent must be rejected). OSHA may not rewrite SOX to declare that courts can decide not to allow *de novo* review of a SOX case, and instead may remand the case back to DOL.

Unlike the Fair Labor Standards Act or Title VII of the Civil Rights Act of 1964, which authorize the DOL and the EEOC respectively to promulgate substantive interpretive regulations and guidance, SOX does not grant similar authority to the DOL or OSHA. *See* 29 U.S.C. § 213(a) (authorizing Secretary to define and delimit terms under FLSA); 42 U.S.C. § 2000e-16 (granting EEOC power to issue rules and regulations under Title VII to prevent discrimination against federal employees). SOX provides that actions alleging whistleblower discrimination “shall be governed under the rules and procedures set forth in section 42121(b) of Title 49, United States Code (the Aviation Investment and Reform Act for the 21st Century or ‘AIR-21’).” AIR-21 specifies the complaint procedure and burdens of proof for whistleblowing actions, but does not grant OSHA the authority to develop substantive interpretive guidance.

Indeed, OSHA has implicitly acknowledged that it is not permitted to interpret SOX and has repeatedly referred to its regulations as “procedural rather than substantive.” Procedures for the Handling of Discrimination Complaints

Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31,860, 31,863-64. In issuing its final rule, OSHA again acknowledged that the purpose of the regulations was “not to interpret the statute.” Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Final Rule, 69 Fed. Reg. 52,104, 52,106 (Aug. 24, 2004).

To the extent DOL’s comments were aimed at substantive interpretation of SOX, such an interpretation would exceed DOL’s authority and would impermissibly intrude on the function of Congress to enact federal laws.

C. **Other Statutory and Regulatory Schemes Give Guidance.**

There are at least two other statutory and regulatory schemes that are analogous to the scheme set forth in § 1514A of SOX in that they offer plaintiffs an opportunity to seek *de novo* review in federal court after litigating before an administrative agency: the Equal Employment Opportunity Act of 1972, and the Immigration Act of 1990. This Court’s decisions interpreting those schemes are instructive on how this Court ought to interpret § 1514A of SOX.

1. The Equal Employment Opportunity Act.

Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972 (“EEOA”). *See* 42 U.S.C. § 2000e-16. The EEOA established complementary administrative and judicial enforcement mechanisms to extend the protections of Title VII to federal employees. *See Pueschel v. United States*, 369 F.3d 345, 352-53 (4th Cir. 2004). The EEOA thus allows a federal employee to commence a civil action in federal court after a final agency decision regarding the employee’s discrimination claim. *See id.* (emphasis added). The federal employee is entitled to *de novo* review of the final agency decision. *See Laber v. Harvey*, 438 F.3d 404, 420 (4th Cir. 2006) (citing *Chandler v. Roudebush*, 425 U.S. 840, 844 (1976)). The Fourth Circuit has noted that the definition of “trial *de novo*” “makes clear” that such a trial “proceeds as if no earlier proceedings had been completed at all.” *See Laber*, 438 F.3d at 421. The Fourth Circuit, relying on the plain language of the EEOA, has not found any collateral estoppel impediments to the *de novo* review of a federal employee’s discrimination complaint even after a federal agency and the Office of Federal Operations (OFO) of the Equal Employment Opportunity Commission (EEOC) have rendered a final decision on the complaint. *See, e.g., Laber*, 438 F.3d at 415-20.

As aforementioned, the plain language of SOX creates “complementary administrative and judicial enforcement mechanisms” analogous to those

established by the EEOA. Based on the plain language of SOX, preclusion principles should not impede a SOX complainant's statutory right to *de novo* review. Preclusion considerations should, in fact, carry even less weight in the SOX context than in the EEOA context. Under SOX, the right to *de novo* review applies only when, as in Stone's complaint, there has been no final administrative decision. But in either context, the benefits of collateral estoppel should not be permitted to overcome the plain meaning of the statutory entitlement.

2. The Immigration Act of 1990.

As part of Congress' efforts to streamline the naturalization process, the Immigration Act of 1990 was enacted. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT"). In order to preserve the right to judicial review of naturalization applications by the district courts, naturalization applicants may petition under IMMACT for *de novo* review after the applicant exhausts administrative remedies. *See* 8 U.S.C. § 1421(c); *see also* *Etape v. Chertoff*, 497 F.3d 379, 386 (4th Cir. 2007) (holding that 8 U.S.C. § 1447(b), like § 1421(c), retains applicants' judicial rights and ability to choose forum).

The import of directing this Court to these statutes is to show that SOX is not alone in adopting a procedural scheme whereby a plaintiff can seek *de novo*

review in federal court after litigating his or her claim before an administrative agency.

III. STONE WAS DEPRIVED OF AN OPPORTUNITY TO LITIGATE HIS CLAIMS BEFORE THE ADMINISTRATIVE LAW JUDGE AND SO COLLATERAL ESTOPPEL SHOULD NOT PRECLUDE HIS STATUTORY RIGHT TO *DE NOVO* REVIEW IN THE DISTRICT COURT.

The District Court's decision to follow *Allen* was error for all the foregoing reasons set forth in Part II *supra*, but especially in this case because it is so very different on its facts. In *Allen*, the federal trial court was reluctant to hold a hearing that had already been held for six (6) days before the ALJ with witnesses, cross-examination, documentary evidence, argument of counsel, post-hearing briefs, and the like. The facts of *Allen* suggest that a district court could rely on collateral estoppel when the litigants have had a full and fair opportunity to present their cases, their witnesses, their proof, and their arguments.

The facts could not be more different here in Stone's case: there was no discovery before the ALJ, no hearing for any length of time, no witnesses, no documents, no cross-examination, nothing but briefing. *See* J.A. at 164, 168-69. Indeed, Stone made application to the ALJ for discovery needed to oppose the motion for summary decision (under the equivalent to Fed. R. Civ. P. 56(f)) and was rejected. *See id.* at 46.

The doctrine of collateral estoppel is based on the principle that it is a waste of judicial resources to have the same parties litigating the same issue twice. The District Court lays out the elements for collateral estoppel and then fails to apply them to the facts. *See id.* at 166. The fifth element is “a full and fair opportunity to litigate the issue in the previous forum.” *Id.* (citing *Va. Hosp. Ass’n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987)). While Stone was given the opportunity to file a brief, and he attached two affidavits which contained exhibits, there was no opportunity to obtain discovery so that Stone could prove he had engaged in protected conduct. *See J.A.* at 69-72, 82-83, 123. Again, in Stone’s case before the ALJ, there was no hearing, no witnesses, no cross-examination, no oral argument, no post-hearing briefs, no discovery, no expert witnesses, and no exchange of documents. *See id.* at 69-72, 82-83, 123. A motion for summary decision before an ALJ is not a full and fair opportunity to litigate such that the fifth prong of the collateral estoppel test is satisfied. A full and fair opportunity to litigate involves the opportunity to confront witnesses that are outside the reach of pre-filing investigations, the opportunity to search electronic databases for relevant documents and email communications, and the opportunity to present facts and evidence at a hearing. Stone was deprived of all these things. Collateral estoppel is simply unfair to apply in this context.

