UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

GARY A. SHAPLEY and JOSEPH ZIEGLER, Appellants,	)	DOCKET NUMBERS PH-1221-25-1633-W-1 AT-1221-25-1932-W-1
v.	)	
DEPARTMENT OF JUSTICE Agency.	)	
	)	DATE: August 13, 2025

APPELLANTS' RESPONSE TO AGENCY'S MOTION TO DISMISS

Last week's filing from the Department of Justice ("Agency") perpetuates the same retaliation that prompted this case to begin with. The Agency's Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss" or "Motion") improperly suggests Appellant Shapley leaked confidential information to the press—an allegation with no basis in fact whatsoever which, if true, would constitute a criminal violation of taxpayer privacy laws. The Motion then deceptively attempts to reframe the Agency's retaliation against Shapley as an investigation into the leak.

Remarkably, in its zeal to rewrite history, the Agency included in its Motion a provably false statement, contradicting its own exhibits and misleading readers by claiming the press article attributed the source of the leak to federal agents when it did not. By submitting intentionally false statements, Agency counsel—like Appellants—would be subject to stiff penalties for perjuring themselves. The question is whether Agency counsel meant to include a false and misleading claim in its motion, or was merely sloppy and imprecise in a way that happened to bolster its attempt to improperly smear Appellant Shapley.

The remainder of the Agency's Motion cherry-picks portions of the Appellants' Initial Appeal ("IA") while ignoring vast swaths of the complaint that apply to the Agency. In preparing

the document, the Agency was required to provide both a response to the IA and any evidence it views as relevant. But by moving to dismiss Appellants' complaint for lack of jurisdiction, disregarding page after page of factual allegations regarding the Agency, the Agency's Motion is an insult to this administrative judge and to the Board generally.

I. AGENCY'S "FACTUAL BACKGROUND"

In addressing then-U.S. Attorney David Weiss's request for Appellant Shapley's communications, the Motion to Dismiss introduces an October 6, 2022 *Washington Post* article. But right out of the gate the Agency makes a false statement, declaring: "The article cites as its source 'federal agents[.]'" In fact, the first line of the article clearly states that its source is "people familiar with the case." Such sourcing could just as easily refer to Hunter Biden's own defense counsel, who had been briefed two days before the article, as it could prosecutors on the case.

One might excuse Agency counsel's misrepresentation by assuming they failed to read the article in question. However, Tab 4a of the Agency's own Motion is a letter from Weiss wherein he accurately states, "[T]he article sources these allegations to 'people familiar with the case[.]'" Thus, it is difficult to believe the false statement in the Agency's Motion was inadvertent. Only a few more words would have been necessary for Agency counsel to give the context that despite the article's stated sourcing, the Agency believes it has reason to suspect the identity of the leaker. But these sophisticated and experienced Agency counsel[1] did not use those

[1] Agency counsel are both Assistant General Counsels for the Department of Justice's Executive Office for U.S. Attorneys, which provides executive and administrative support for the 93 United States Attorneys located around the country. Agency counsel have a combined total of nearly fifty years of legal practice between them.

additional words, instead putting a clearly false statement in black and white in a document that they had a professional duty to ensure was true and correct.

The Agency's false statement, together with the reference to Appellant Ziegler's OSC complaint noting Ziegler wasn't the *Washington Post*'s source, appears to be a not-so-subtle attempt to justify the Agency's request for Appellant Shapley's emails by implying it was then or is now apparent that Shapley was the source of the leak. Yet not only has Appellant Shapley provided a sworn affidavit and testimony under penalty of perjury to three different government entities that he was not the *Washington Post*'s source,[2] the Agency's subterfuge is not supported by the timeline or by facts in the Agency's own Motion to Dismiss,[3] suggesting Agency counsel have their own axe to grind in this case.[4]

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[2] By June 14, 2023, Appellant Shapley had provided such testimony to TIGTA, the DOJ OIG, and the House Committee on Ways and Means, all of which are subject to 18 U.S.C. § 1001.

The Agency's Tab 4a is the first time Appellants have heard of the alleged conversation between Hunter Biden defense counsel Christopher Clark and a *Washington Post* reporter suggesting the leak came from FBI agents. Notwithstanding the alleged conversation, because Clark disingenuously switched after the Appellants came forward to Congress to accusing the Appellants of being the source of the October 6, 2022 *Washington Post* leaks, on July 3, 2023 Appellant Shapley sent an affidavit to multiple committee of Congress, TIGTA, and the DOJ OIG affirming he was not the *Washington Post*'s source and had never leaked confidential taxpayer information. https://empowr.us/wp-content/uploads/2023/07/2023-07-03-Letter-to-Congress-with-Shapley-affidavit.pdf. He also sent the affidavit and an accompanying letter through counsel to the *Washington Post* requesting that they clear his good name by confirming he was not their source. https://empowr.us/wp-content/uploads/2023/07/2023-07-03-Letter-to-WaPo-with-affidavit-1.pdf.

[3] The timeline establishes ("by if nothing else," as Agency counsel put it, "common sense") how deceitful it is state that "the *Washington Post* article's contents" and "an attorney-of-record for [a] high-profile defendant vociferously claiming that the 'agents' were 'violating the law to prejudice' the defendant" established "the importance and necessity of gathering additional information" in the form of the discovery request. That Weiss referred the matter to the DOJ OIG and TIGTA on October 11, 2022 contradicts the idea that he proceeded to commence his own investigation. Further, Weiss's investigative referral indicates he took seriously the alleged "additional information" Clark claimed to have obtained suggesting the leak came from FBI agents, not the Appellants. Motion to Dismiss, Tab 4a. Yet as outlined in the IA, the Agency *only* requested additional communications on October 24, 2022 from Appellant Shapley, who had made various disclosures to Weiss in the October 7 meeting and whose prior discovery production in April 2022 contained additional protected disclosures about the Agency's handling of the Hunter Biden investigation. IA at 37. The Agency did not request these types of additional communications from the FBI investigative team and the rest of the IRS team until two weeks later—and the FBI declined to provide the communications to the Agency. IA at 38.

[4] It is well established that disclosures reflecting poorly on an agency, such as on its capabilities and performance, can provide retaliatory motive even for agency officials not directly implicated by the disclosures. *Robinson v.*

As discussed below, because the jurisdictional stage is not the proper time for the Board to consider the Agency's factual arguments in order to rule on the Motion to Dismiss, it is also unnecessary for Appellants to fully respond to them at this stage. But Agency counsel should be admonished for the false statement in their pleading and should not be allowed to use it to advance their inaccurate narrative.

II. AGENCY'S ARGUMENT

The Agency's Argument commences by citing the precedent that most undercuts its Motion to Dismiss, *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1368–69 (Fed. Cir. 2020). Although this appears to be almost a Freudian betrayal, the Motion's repetitive arguments about evidence make clear the Agency does not understand the Board's jurisdictional requirements at all.

Having demonstrated exhaustion before the Office of Special Counsel, for Appellants to establish Board jurisdiction over their case, they need only make non-frivolous allegations that the elements of a reprisal case exist. This is a far lower standard than the "preponderance of evidence" standard required to prove the merits of the case. *Compare* 5 C.F.R. § 1201.57(b) *with* 5 C.F.R. § 1201.57(c)(4). The non-frivolous allegation standard is analogous to the well-pleaded complaint rule, which Agency counsel should understand given its centrality to federal civil litigation. Thus, evaluating Appellants' allegations "on their face" does not mean the merits of the entire case must be assessed from the IA, as the Agency's Motion to Dismiss seems to

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Department of Veterans Affairs, 923 F.3d 1004, 1008–09, 1018–19 (Fed. Cir. 2019); *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012); *Smith v. Department of the Army*, 2022 MSPB 4, ¶ 28.

suggest.[5] Rather, as the Federal Circuit outlined in *Hessami*, the question is "whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is *plausible on its face*." *Hessami* at 1369 (emphasis added). After all, discovery isn't available until after an appeal is filed, and in this case as in so many others, some relevant evidence will only be in the custody of the agency. As the Board's regulations explain, "[d]iscovery is designed to enable a party to obtain relevant information needed to prepare the party's case." 5 C.F.R. § 1201.71.

Still, as outlined below, Appellants' 80-plus page IA contains vastly more alleged facts than would be necessary to plead a basic prima facie case of retaliation.

A. APPELLANTS' PROTECTED DISCLOSURES

To restate alleged facts from the IA:

- "[I]n a September 3, 2020 prosecution team phone call, AUSA Wolf and DOJ Tax attorneys discussed removing Hunter Biden's name from electronic search warrants and several document requests. Appellant [Ziegler] disclosed on the call that he believed removing the subject's name was unethical, and he was uncomfortable doing it." IA at 19.
- "[I]n a phone call on Friday, December 11, 2020, AUSA Wolf communicated to Appellant [Ziegler] that the Delaware USAO and DOJ Tax had decided that a request for documents already issued to Hunter Biden's counsel was sufficient. Appellant [Ziegler] pointed out that this would allow the subject to decide which records he wanted to turn over, and disclosed that this was a significant deviation from IRS-CI investigative practice. When AUSA Wolf was not moved, Appellant [Ziegler] proposed not letting Hunter Biden's counsel know investigators had

[5] Other than their section expressing dissatisfaction with Appellants' plea for corrective action, all three of the Agency's Argument headings begin with "Appellants Fail to Provide Evidence . . . ."

learned of the storage unit, and if the storage unit was not accessed within 30 days showing Hunter Biden's good faith effort to comply with the document request, then executing the search warrant on the storage unit. AUSA Wolf responded that she was worried about what this might do to the relationship with opposing counsel. Appellant [Ziegler] then disclosed to AUSA Wolf that it appeared to him prosecutors were inappropriately more worried about litigation against them than in properly executing the investigation. AUSA Wolf responded that if Appellant [Ziegler] had these views, she had concerns about working with Appellant [Ziegler] moving forward and might need to address that with IRS-CI upper management. Appellant [Ziegler] told AUSA Wolf he did not mean to offend her, but provided evidence of why the approach to this case deviated from IRS-CI standard practice. . . . Appellant [Ziegler] reiterated that he did not want to have a bad relationship with the Delaware USAO, but believed it was important that there be an environment where he could disclose issues as he saw them." IA at 24–25.

- In approximately April 2022, "Appellant [Shapley] produced to the Delaware USAO his SCRs [Significant Case Reports] going back to January 2020, which included various protected disclosures…—many of them protected disclosures about the Delaware USAO's own misconduct[.]" IA at 22. For example, with the discovery production, the Agency now had in its possession Appellant Shapley's SCR from May 2021, which alleged preferential treatment of the investigation's subjects as a result of politics infecting decisions and protocols:

> This investigation has been hampered and slowed by claims of potential election meddling. Even after the election, the day of

> action was delayed by more than two weeks. . . . [I]t appears there may be campaign finance criminal violations. AUSA Wolf stated on the last prosecution team meeting that she did not want any of the agents to look into the allegation. She cited a need to focus on the 2014 tax year, that we cannot yet prove the allegation beyond a reasonable doubt and that she does not want to include their Public Integrity unit because they would take authority away from her. We do not agree with her obstruction on this matter. The assigned AUSA does not like dissenting opinions. The USAO and FBI have received congressional inquiries concerning this investigation and it's believed they have ignored their requests.

IA at 16.[6] The IA further alleges: "Sometime after the October 7, 2022 meeting, it strongly appears that the Delaware USAO first read IRS-CI's discovery materials, which included Appellant [Shapley]'s protected disclosures to his chain of command regarding DOJ's handling of the Sportsman case." IA at 37.

- In an August 16, 2022 meeting, Appellants "'raised some issues [they] had during the investigation[.]'" IA at 32.

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[6] The underlying SCR is available at https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T95-Shapley-3_Attachment-14_WMRedacted.pdf. Other SCRs produced to the Agency in April 2022 contained various other protected disclosures from Appellant Shapley about the Agency's handling of the Sportsman case, but as the Agency knows, the IRS tends to view the contents of such documents as protected by 26 U.S.C. § 6103. One of the produced SCRs not in the IA but already released by the House Ways and Means Committee under 26 U.S.C. § 6103(f)(4)(A) dates to December 2020:

> The one person interviewed on the day of action confirmed this storage unit and provided more than enough probable cause to obtain a search warrant to seize the records related to this investigation from the storage unit. Without including the IRS, the Delaware USAO unilaterally decided not to conduct a search warrant on this location instead deciding to inform defense counsel for Sportsman about the storage unit and requesting they hand over the documents in good faith and as a result of the [redacted] already served.
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> * * *
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> This investigation has been hampered and artificially slowed by various claims of potential election meddling. Even after the election, our day of action to go overt was delayed more than two weeks. . . . The assigned AUSA does not allow dissenting opinion without verbal admonishment. The USAO and FBI received congressional inquiries concerning this investigation and have repeatedly ignored their requests, openly mocking the members of congress who made the requests. It appears that someone at DOJ leaked information to the media after our day of action.

https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T91-Shapley-3_Attachment-10_WMRedacted.pdf.

- In an October 7, 2022 meeting, Appellant Shapley "'expressed to [USA] Weiss several concerns with how this case had been handled from the beginning.'" IA at 36. Shapley's disclosed concerns were precisely why the FBI Special Agent in Charge followed up by asking if others believed the case had been politicized.
- At the end of November 2022, Appellant Shapley produced to the Agency both his SCRs since May 2022 and his emails from the entirety of the case, dating back to January 2020. IA at 39.

Although unnecessary at this stage to address the Motion to Dismiss's factual arguments regarding Appellants' disclosures, it is of note that the Motion largely focuses on Appellants' disclosures about delays in the investigation and prosecution, which constituted only a subset of their overall protected disclosures. Even then, as the aforementioned makes clear, Appellants' disclosures about delays were not merely that the machinery of government moved slowly, but rather that they believed delays were intentional and driven by improper political considerations, providing preferential treatment to Hunter Biden because of a desire to limit damage to his father as a presidential candidate and then as president. And the 2020 attorney general's memorandum the Agency cites to justify the timing of charging decisions in September 2022 does no such thing, since Hunter Biden met none of the criteria it described.[7]

[7] Attorney General Barr's February 2020 memorandum merely required various stages of Agency approval for the opening of an investigation into (1) a declared candidate for president or vice president, a presidential campaign, or a senior presidential campaign staff member or advisor, (2) a declared candidate for U.S. Senate or U.S. House of Representatives, or his or her campaign, or (3) illegal contributions, donations, or expenditures by foreign nationals to a presidential or congressional campaign. Motion at 30. Additionally, the memorandum said nothing about charging cases, only opening them; the "broadly construed" language the Agency uses out of context in its Motion in fact states: "The scope of this memorandum should be broadly construed to ensure that Department leadership is made aware of the opening of matters that could potentially be disruptive to our democratic processes if publicly disclosed prior to an election." Motion at 30. The contention that Agency policy did not require delaying charging from September 2022 until after the mid-term election is not just an allegation of Appellants; as the IA states, it was specifically communicated by AUSA Wolf and the DOJ Tax prosecutors. IA at 34.

As summarized in the IA, Appellants reasonably believed their disclosures of preferential treatment and politics infecting decisions and protocols constituted both abuses of authority and gross mismanagement. IA at 66-67. They also reasonably believed their disclosures of failure to mitigate clear conflicts of interest constituted gross mismanagement. IA at 67–68. And as Congress took pains to clarify in the Whistleblower Protection Enhancement Act of 2012, policy decisions that lawfully exercise discretionary authority may still be the subject of protected disclosures where an employee reasonably believes they evidence gross mismanagement or an abuse of authority. 5 U.S.C. § 2302(a)(2)(D); *see also* S. REP. NO. 112-155 at 7–8 (2012).

B. PERSONNEL ACTIONS/CONTRIBUTING FACTOR

The Motion to Dismiss essentially includes most of its contributing factor argument in its section on personnel actions, so Appellants will address both here.

It is well established that a government official with retaliatory animus need not be the official implementing a personnel action for the Whistleblower Protection Act ("WPA") to apply. As the Board has noted, "The Supreme Court has adopted the term 'cat's paw' to describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action." *Dorney v. Dept. of the Army*, 2012 MSPB 28, ¶ 11. This reasoning applies just as well between agencies as it does within agencies.

Thus, "an appellant can demonstrate that a prohibited animus toward a whistleblower was a contributing factor in a personnel action by showing by preponderant evidence that an individual with knowledge of the appellant's protected disclosure influenced the deciding official accused of taking the personnel action." *Aquino v. Dept. of Homeland Sec.*, 2014 MSPB 21, ¶ 23. At the jurisdictional stage, Appellants need only make a non-frivolous allegation that Agency

officials with retaliatory animus influenced IRS officials in taking various personnel actions. They have more than done so in this case.

1. DOJ MARGINALIZATION AND REMOVAL FROM CASE

Although the Motion to Dismiss identifies three personnel actions, Appellants never claimed U.S. Attorney Weiss's request for Appellant Shapley's managerial communications in discovery was a standalone personnel action. Rather, it must be considered collectively along with other steps the Agency took to marginalize Appellants. *See Skarada v. Dept. of Veterans Affairs*, 2022 MSPB 17, ¶ 16. Thus, the IA alleged: "DOJ . . . retaliated against Appellant 1 by demanding more of his internal management communications without legitimate cause. . . . When the USAO read the further protected disclosures the Appellants had made to IRS-CI leadership, USAO demanded the IRS remove the Appellants altogether." IA at 74.

While the Motion to Dismiss misguidedly asserts that "Appellants fail to provide evidence" or "proof" "that the Agency exercised administrative or operational authority over them, or IRS-CI," Motion to Dismiss at 11, the Motion also announces that any case-related decisions U.S. Attorney Weiss made were directly under his prosecutorial responsibilities and authority. While Weiss certainly had the authority to express his unwillingness to work with a particular investigative team or to refuse to prosecute a case unless such a team was removed, the law still prohibited him from doing it on the basis of race or gender, just as it prohibited him from doing it because of Appellants' protected whistleblower disclosures.

Of course, whether an action constitutes a personnel action under the WPA is not based on what authority the action was taken under. As the IA explained: "These changes had practical and significant effects on the overall nature and quality of the Appellants' working conditions, duties, and responsibilities. The Appellants went from spending a large portion of his time

working on the Sportsman case to being isolated, lied to by their leadership, and left in the dark with steps being taken to bring the case to a conclusion without their knowledge or professional judgment being considered. The Appellants also went from having a stellar reputation within IRS-CI to having their reputation sabotaged by DOJ. Taken together, DOJ's marginalization and isolation of the Appellants was a . . . significant change in their duties, responsibilities, and working conditions under 5 U.S.C. § 2302(a)(2)(A)(xii)." IA at 74.[8]

The allegations in the IA are more than sufficient to state a personnel action claim that is plausible on its face.[9] But since the Agency is so eager to get into the merits, we will address some of them here.

At the time Appellants filed with OSC in the spring of 2023—in Appellant Shapley's case, two days after the IRS informed the Appellants they were being removed from the Hunter Biden case at the direction of the Agency—they had only circumstantial evidence that Weiss had been working behind the scenes to retaliate against them since the October 7, 2022 meeting. Congress's investigation has uncovered much more detail. The IA states: "On December 22, 2022, USA Weiss had a telephone call with SAC Waldon and DFO Batdorf. In the call, the three discussed removing the Appellants and the ITFC investigative team from the Hunter Biden investigation." IA at 36. The IA cites one portion of the congressional interview of DFO Batdorf.

[8] Needless to say, *Skarada v. Departmentt of Veterans Affairs,* 2022 M.S.P.B. 17, ¶ 16, does not introduce the idea that if the "significant impact on the overall nature or quality of an employee's working conditions, responsibilities, or duties" is believed by an agency to "ostensibly benefit the[] [employee]" because they have less work to do, the personnel action is no longer covered under the WPA. Every agency that ever reduced an employee's duties as retaliation would rejoice at such a holding.

[9] As noted in the IA, OSC found the IRS's removal of Appellants from the Hunter Biden case constituted a "significant change in duties, responsibilities, or working conditions."

However, other portions of the congressional interview transcript are more explicit as it relates to the Agency's role:[10]

- "[O]nce those documents were received and I believe other discovery was reviewed, David Weiss had some concerns with . . . Gary Shapley and wanted to talk to Darrell and I." Batdorf Transcript at 63.
- "[L]eading up to that phone call . . . there was very little communication from the prosecution team to Gary Shapley and team. . . . They stopped talking to him on October 6th or 7th after this meeting. There was an email that David Weiss had sent to Darrell Waldon, who forwarded me . . . . [I]t basically said that he's no longer going to talk to Gary Shapley . . . . Once discovery was done, we met in December." Batdorf Transcript at 68–69.
- A: "[S]tarting in October, there was no communications with the prosecution team and the investigative agents. In November, the U.S. Attorney said he's no longer communicating with investigative agents. In my 22.5 years of experience and all the different field offices and leadership positions I've been in, that is not a good sign. That is extremely troubling. So, when we talked in December and we talked about removing the investigative team, I mean, again, I've stated all along I have agreed with the evidence in this case and pushed it forward. . . . Focusing on the mission that we have as IRS Criminal Investigation, my job is to get cases to the goal line. If

[10] *Smolinski v. Merit Systems Protection Board* makes clear that an appellant's sources cited to in their IA may be considered at the jurisdictional stage even when agency evidence may not. 23 F.4th 1345, 1350 (Fed. Cir. 2022.) ("The government argues we cannot consider the content of Dr. Smolinski's testimony, but rather must constrain our analysis to the four corners of his OSC complaints. The government cites *Hessami*, but that case merely held that the Board must accept as true a complainant's well-pleaded factual allegations in assessing jurisdiction notwithstanding agency evidence that undermines those allegations. It did not hold that we must turn a blind eye to evidence specifically referenced in and supporting a complainant's allegations, like the April 2018 testimony." (Internal citations omitted.))

removing the investigative team that had no more investigative work to be done would get that case to the goal line and get it prosecuted. . . . I'm willing to remove that investigative team and get that case prosecuted."

Q: "Understood. But you didn't have him removed for misconduct, did you?"

A: "No. . . . That was not my intent. I understood the concerns of David Weiss . . . . My concern was getting the case to the finish line." Batdorf Transcript at 76.

- Q: "[W]hen is the first time you heard Weiss recommend that Shapley needed to be off the case, or he wasn't going to speak to him anymore, that type of issue?

  A: "Darrell [Waldon] shared with me the . . . mid-November email from David Weiss to Darrell Waldon. He forwarded it to me as an FYI.

  Q: "Okay. Was that the first time that you became aware that Weiss was no longer going to be working with Shapley?

  A: "From Weiss' side, yes." Batdorf Transcript at 89–90.

- Q: "[Y]ou're just trying to support the AUSA [sic] who, in a sense, is a client of yours. Is that fair to say? That IRS is providing a resource?"

  A: "We provide resources to assist the United States Attorney's Office in grand jury investigations."

  Q: "Okay. And so to the extent David Weiss, for any reason or no reason, wanted Shapley off the team, that's something that you would consider?"

  A: "Sure. . . . We've asked for AUSAs to be removed from investigations." Batdorf Transcript at 115–16.

Further evidence still has emerged since the filing of the Appellants' Board case, including testimony from Weiss himself acknowledging his desire to have Appellants removed

from the Hunter Biden case only arose after he saw their disclosures about his own office's misconduct and evidence of Appellant Shapley researching "whistleblower protections."[11]

2. DETAIL NON-SELECTION

Once again, the IA outlines a number of facts regarding this personnel action, which occurred after Appellant Shapley's April 2022 protected disclosures were already in the Agency's possession and as additional protected disclosures came to their attention:

- "According to SAC Waldon, sometime in the latter half of October USA Weiss told SAC Waldon that he would no longer be communicating with ASAC Shapley and would be going directly to SAC Waldon. . . . Meanwhile, apparently after USA Weiss's discussion with SAC Waldon about no longer communicating with Appellant 1, in late October the IRS listed the J5 Lead vacancy. However, rather than listing it as an IR-01 position, as it had been under the incumbent, the vacancy was only listed as an IR-04 position." IA at 43.

[11] The House Committee on the Judiciary recently released the transcript of a June 6, 2025 interview with Weiss: https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/david-weiss-transcript-day-1-2_redacted.pdf. Weiss testified:

> I asked for all the materials from Mr. Shapley . . . . Finally got it, and the materials that I saw, some of it concerned me. There were internal memoranda as early as the summer of 2020, for instance, talking about us slow walking and not – claims that have been made to you guys, not pursuing the case . . . . There was also . . . an email about whistleblower protections . . . from either Mr. Shapley's personal account to his business account or vice versa. I can't recall which. That was of concern to me. There was also an email from May of '22 in which Mr. Shapley said he had some concerns. He thought the prosecutors, including me and Stuart Goldberg, were doing the right thing and operating in good faith, but he was prepared to do – he was prepared to do the right thing and to hold us accountable if we failed to do whatever. I don't know what that meant. But . . . I was concerned.

Weiss Transcript at 113–14.

> When I decided I wanted to go forward in the spring of the next year, I decided that, in order to best position us and to preserve the integrity of the case, it was best that we have a new team. And we got a new team.

Weiss Transcript at 115.

- "On November 22, 2022, USA Weiss had a telephone call with IRS-CI Deputy Chief Ficco regarding Appellant 1." IA at 39. Deputy Chief Ficco reported to IRS-CI Chief James Lee, and any J5 Lead selected would staff the two of them.
- "On November 29, 2022 . . . . Appellant [Shapley]'s emails [and] additional protected disclosures to his chain of command since May 2022, including his SCRs . . . . [were] uploaded . . . for the Delaware USAO to review." IA at 39.
- "On December 14, 2022, Appellant 1 had his J5 Lead interview with Deputy Director of Global Operations Carolyn Williams, Director of International Operations Scott Goodlin, and departing J5 Lead Mazzella. . . . The three-person interview panel's selection had to be approved by the Director of Global Operations (Deputy Director Williams' supervisor) and IRS-CI Deputy Ficco." IA at 42.
- "On December 22, 2022, USA Weiss had a telephone call with SAC Waldon and DFO Batdorf. In the call, the three discussed removing the Appellants and the ITFC investigative team from the Hunter Biden investigation." IA at 42.
- "In a senior leadership meeting on January 3, 2023, IRS-CI senior leadership announced [another candidate's] selection as J5 Lead." IA at 43.

Appellant Shapley alleges Weiss's negative communications with the IRS about Shapley, driven by his animus, influenced the IRS's decision: "At the same time as the Delaware USAO and DOJ Tax were contacting IRS-CI and putting increasing pressure on them about Appellant 1, the IRS passed over Appellant 1 for the J5 Lead position, for which he was clearly more qualified than the selectee." IA at 80. Weiss poisoned the IRS well against Shapley. As described above, even if agency officials taking a personnel action have either no knowledge of or no animus because of an appellant's protected disclosures, corrective action may be proper if they

are influenced by someone with such knowledge or animus. *Dorney v. Dept. of the Army*, 2012 MSPB 28, ¶ 11; *Aquino v. Dept. of Homeland Sec.*, 2014 MSPB 21, ¶ 23.

C. PLEA FOR CORRECTIVE ACTION

The Motion to Dismiss inexplicably identifies restoration status quo ante as one of the *many* forms of corrective action contemplated by the WPA, then proceeds to argue as though such restoration is the *only* form of corrective action available. Indeed, although the Motion declares it is "difficult to imagine what 'corrective action' the Agency could provide to Appellants," an answer presents itself a mere four sentences earlier in the Agency's motion: "other forms of monetary damages, costs, and fees[.]" Motion to Dismiss at 19. The statute authorizing cases such as this elaborates: "If the Board orders corrective action under this section, such corrective action may include . . . medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs). Corrective action shall include attorney's fees and costs . . . ." 5 U.S.C. § 1221(g)(1).

III. CONCLUSION

It will soon be three years since the Agency's retaliation against Appellants first commenced. Although it's been well over two years since Appellants were formally removed from the Hunter Biden case and each filed with OSC, OSC was unable to make findings regarding the Agency because the Agency would not provide OSC with necessary records or interviews during the pendency of the criminal case against Hunter Biden.

That criminal case is now over. David Weiss is no longer with the Agency. A new president is in office. But Appellants are still entitled to corrective action for the whistleblower

reprisal against them. The Agency should work constructively to provide a remedy, rather than parroting retaliatory narratives and making new false statements in further reprisal.

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