Nos. 16-1209 & 16-1249

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY C. DIETZ,
Plaintiff-Appellee/Cross-Appellant,

– v. –

CYPRESS SEMICONDUCTOR CORPORATION,
Defendant-Appellant/Cross-Appellee.

On Appeal and Cross-Appeal from the U.S. District Court for the District of Colorado, No. 1:16-cv-000832-LTB, Judge Lewis T. Babcock

---

FIRST BRIEF ON CROSS-APPEAL BY APPELLANT CYPRESS SEMICONDUCTOR CORPORATION

MARCIA E. GOODMAN
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

DONALD M. FALK
LEE H. RUBIN
Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

Counsel for Appellant Cypress Semiconductor Corporation

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Cypress Semiconductor Corporation states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i
Table of Authorities iii
Prior and Related Appeals iv
Jurisdictional Statement 1
Statement of the Issues Presented 1
Statement of the Case 1
A. Dietz becomes a Program Manager at Cypress 3
B. Dietz questions the legality of Cypress's Design Bonus Plan 5
C. Dietz forecasts that a three-week delay on his project would occur months in the future 8
D. Nulty criticizes Dietz's management of his project 10
E. Dietz announces his resignation 11
F. Dietz makes his resignation effective immediately 13
G. The Regional Administrator dismisses Dietz's complaint 15
H. The administrative law judge finds for Dietz 16
I. The Administrative Review Board affirms in a divided opinion 17
J. The district court enters judgment for Dietz 20
Summary of Argument 20
Argument 21
I. The District Court Erred in Enforcing the Erroneous Orders of the Administrative Review Board 21
II. This Court Should Decide This Appeal Together with Cypress's Petitions for Review 24
Conclusion 27
Statement on Oral Argument 27
District Court Order (Dkt. 26) ..... Attachment
District Court Final Judgment (Dkt. 27) ..... Attachment

TABLE OF AUTHORITIES

Page(s)

Cases

Barnes v. United States,
776 F.3d 1134 (10th Cir. 2015) 3

Colony Ins. Co. v. Burke,
698 F.3d 1222 (10th Cir. 2012) 21

Jennings v. Stephens,
135 S. Ct. 793 (2015).....21

Lockheed Martin Corp. v. Admin. Review Bd.,
717 F.3d 1121 (10th Cir. 2013) 23

Lucht's Concrete Plumbing, Inc. v. Homer,
255 P.3d 1058 (Colo. 2011) (en banc).....7

Rollins v. Am. Airlines, Inc.,
279 F. App'x 730 (10th Cir. 2008).....22

Singh v. Southland Stone, U.S.A., Inc.,
186 Cal. App. 4th 338 (2010) 7

Westar Energy, Inc. v. Lake,
552 F.3d 1215 (10th Cir. 2009) 26

Statutes

18 U.S.C. § 1514A .....*passim*

18 U.S.C. § 1514A(a)(1).....15

18 U.S.C. § 1514A(b)(2)(A).....1

28 U.S.C. § 1291.....1

49 U.S.C. § 42121(b)(6)(A).....1

PRIOR AND RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(B), Cypress Semiconductor Corporation states that the following are prior or related cases:

- *Cypress Semiconductor Corp. v. Administrative Review Board, U.S. Department of Labor*, Nos. 16-9523, 16-9529, & 16-9534 (10th Cir.).

- *In re: Timothy C. Dietz*, No. 16-1205 (10th Cir.).

JURISDICTIONAL STATEMENT

These appeals arise out of plaintiff Timothy Dietz's civil action to enforce orders of the Administrative Review Board of the U.S. Department of Labor against defendant Cypress Semiconductor Corporation. The district court had subject-matter jurisdiction under 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. § 42121(b)(6)(A). On May 18, 2016, the district court entered final judgment for Dietz that disposed of all parties' claims. A175-76.[1] Cypress timely filed a notice of appeal on May 20, 2016. A177. This Court has jurisdiction over Cypress's appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court should reverse the district court's judgment that enforces orders of the Administrative Review Board ("ARB") because those orders, which are currently under review by this Court in Nos. 16-9523, 16-9529, and 16-9534, are erroneous.

2. Whether this Court should decide this appeal together with Cypress's petitions for review of the ARB orders that the district court's judgment enforces.

STATEMENT OF THE CASE

Timothy Dietz worked for Cypress Semiconductor Corporation from November 2012 until he resigned in June 2013. A94, A97. After he quit, he filed an administrative complaint in the Department of Labor alleging that Cypress had

[1] "A_" refers to the Appendix of Appellant Cypress Semiconductor Corporation.

constructively discharged him in retaliation for protected whistleblower conduct, in violation of 18 U.S.C. § 1514A, part of the Sarbanes-Oxley Act. A10.

The Regional Administrator for the Occupational Safety and Health Administration investigated Dietz's complaint and dismissed it for lack of merit, finding no protected activity and no constructive discharge. *Id.* Dietz appealed, and after a trial, an administrative law judge ("ALJ") ruled in his favor. Although Dietz had an annual salary of $148,500 and worked at Cypress for only seven months before resigning, the ALJ awarded Dietz $654,906 in front pay, $220,105.85 in back pay, interest, attorneys' fees, costs, and other monetary relief. A18, A91. Over a dissent, a panel of the ARB affirmed in a ruling that the majority frankly characterized as "odd" and "unusual." A23-24.

Cypress has petitioned this Court for review of the ARB's divided order, in addition to two other ARB orders that awarded Dietz an additional $252,416.37 and $35,620.75 in attorneys' fees and costs. Those petitions are docketed as Nos. 16-9523, 16-9529, and 16-9534 and have been consolidated.

Meanwhile, Dietz filed a civil action in the district court to enforce the ARB's orders. Finding its role "ministerial," the district court entered judgment in Dietz's favor (A172, A175-76), but stayed enforcement after Cypress posted a $1.25 million

supersedeas bond (A179-87). Cypress now appeals from the district court's judgment.[2]

A. Dietz becomes a Program Manager at Cypress.

Dietz worked as a software engineer at Intel Corporation from 2000 to 2004. AR 553.[3] In 2006, Dietz graduated from law school, passed the Maine bar exam, and began practicing as an attorney in Maine. AR 553-55. In 2008, Dietz rejoined Intel as a software engineer in California. AR 555. Although he was not an attorney for Intel, he passed the California bar exam in 2009. AR 555, 558. He also passed the New Hampshire bar exam in 2011. AR 555.

In May 2012, Dietz moved to Colorado Springs to work for Ramtron International Corporation, a semiconductor company. AR 563, 567. Dietz was a new products program manager at Ramtron. AR 568. He also claimed to be Ramtron's intellectual property attorney, although at trial Ramtron's former CEO denied that Dietz was an attorney for Ramtron. AR 1174-75.

---

[2] In No. 16-1205, Dietz petitioned for a writ of mandamus, seeking to set aside the district court's order staying execution of the judgment. This Court denied the petition in a written opinion. *See* Order, No. 16-1205 (10th Cir. June 13, 2016). On the day that opinion issued, Dietz cross-appealed from the same stay order. A188. That appeal, No. 16-1249, has been consolidated with this one and will be addressed in the parties' subsequent briefs.

[3] Many of the underlying facts in this case are not part of the district court record, but rather are part of the administrative record that the Department of Labor filed in Nos. 16-9523, 16-9529, and 16-9534 on July 18, 2016. "AR" refers to that administrative record, which the Court should judicially notice. *See, e.g.*, *Barnes v. United States*, 776 F.3d 1134, 1137 n.1 (10th Cir. 2015).

In September 2012, Cypress agreed to acquire Ramtron in a deal that closed in November 2012. AR 569-70. Dietz applied for employment at Cypress. AR 950. Tom Surrette, Cypress's Executive Vice President of Human Resources ("HR"), physically handed Dietz an offer for employment as a Program Manager at Cypress, and Dietz accepted on the spot. AR 581-82. Surrette physically handed other Ramtron employees offer letters to become employed at Cypress as well. AR 1226.

At Cypress, Dietz originally reported to Brian Todoroff, who reported to James Nulty. AR 606. Nulty was the Senior Vice President of the Quality Department and was based in Cypress's headquarters in San Jose, California. AR 660, 944. Later Dietz reported directly to Nulty. AR 606.

Program Managers at Cypress are responsible for maintaining schedules for the new projects that they manage. AR 949, 960. One of their primary functions is to issue warnings when potential scheduling slips occur and to resolve those issues promptly. AR 977. They are required to "escalate" potential slips to their bosses "immediately" once they become aware of them. AR 994. In addition, at least weekly, they must update their projects' status on Cypress's computer system. AR 1017-19. Program Managers also must know the status of their projects at all times and be prepared to discuss them with management. AR 1013. Nulty taught a class on these responsibilities to all new Program Managers, including Dietz. AR 957-58, 1022.

Although Dietz at first received generally favorable reviews from Nulty, there were criticisms. For example, in February 2013, Nulty wrote in Dietz's 90-day review that Dietz "should escalate . . . when he asks for something and doesn't receive it in time to get his job done." AR 661.

B. Dietz questions the legality of Cypress's Design Bonus Plan.

Cypress loses more than $1 million for each week its projects are delayed. AR 966. To reduce delays, Cypress created a "Design Bonus Plan" ("Bonus Plan"). The Bonus Plan applied only to a subset of engineers—about 20% of Cypress's workforce. AR 512, 1203-04, 1257. It did not apply to Dietz. AR 620-21.

The base salary of an employee who participated in the Bonus Plan was set at a level that was 10% below the pre-Bonus Plan salary. AR 1206, 1254. A dollar value equal to the reduction was allocated to the Bonus Plan, with bonuses paid quarterly based on the progress rate of the employee's project. AR 1207. Bonus payouts ranged from as low as 20% of the bonus allocation if the project was far behind schedule (an effective 8% salary reduction from the pre-Bonus-Plan salary), to 200% of the allocation if the project was on schedule (an effective 10% bonus above pre-Bonus-Plan salary), up to 500% of the allocation if the project was far ahead of schedule (an effective 40% bonus over and above pre-Bonus-Plan salary). AR 1254. On average, employees participating in the Bonus Plan received an effective 27% bonus above pre-Bonus-Plan salary. AR 1223.

Cypress made sure that employees knew about the Bonus Plan before it applied to them. The Bonus Plan was thoroughly discussed on Cypress's intranet. AR 624, 629; *see* AR 3041-98. In addition, before any project subject to the Bonus Plan launched, each team member on the project was required to acknowledge reading and agreeing to the project's Design Governing Spec, which referenced the Bonus Plan. AR 624, 840. And to ensure that engineers were eased in to the Bonus Plan, there were no salary reductions but only bonuses, compared to Pre-Bonus-Plan salary, during each employee's first quarter in the plan. AR 523-24.

Because he was a Program Manager, Dietz was not subject to the Bonus Plan. AR 620-21. In fact, no former Ramtron engineers were subject to the Bonus Plan until long after they were employed. For nearly a year after commencing employment with Cypress, the former Ramtron employees who later became subject to the Bonus Plan received precisely the salary stated on their employment offer letters and had no portion of their salary reduced due to participation in the Bonus Plan. AR 643.

In December 2012, well before the Bonus Plan took effect for the former Ramtron employees, Cypress met with them to discuss the Bonus Plan. AR 1224. Dietz attended a second meeting about the Plan on April 11, 2013. AR 630-33.

The next day, Dietz wrote an email to Nulty expressing "concerns" about the Bonus Plan "from both a legal and an ethical standpoint." AR 1695. Dietz suggested

that the salary reduction might violate California and Colorado wage laws, and he quoted wage statutes from both states. AR 1696-97.[4]

Nulty wrote back that he would have to review Dietz's email with others before responding. AR 648, 1695. Nulty forwarded Dietz's email to Cypress's general counsel, Victoria Valenzuela, and to Surrette. AR 1024. Neither Surrette nor Valenzuela thought that Dietz had alleged fraud, which would have required them to raise the issue with the Audit Committee of Cypress's Board of Directors; instead, they understood that Dietz was simply questioning compliance with state wage laws. AR 1194, 1197, 1280, 1285. Valenzuela was "happy" to answer Dietz's questions and told Nulty that she would reach out to Dietz. AR 1284-85. Surrette thought that Dietz's email was a "non-event" and let Valenzuela respond to Dietz. AR 1228.

On April 22, Valenzuela spoke with Dietz for 20 minutes. AR 649, 652. According to Dietz, the meeting started with "friendly conversation." AR 650. Dietz then told Valenzuela he thought that the Bonus Plan was a condition of employment,

[4] The lawfulness of the Bonus Plan is not at issue in this appeal, and of course, the terms of at-will employment—including salary—can be changed prospectively at any time without risking a claim of fraud. *See Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 356-57 (2010) (upholding reduction in salary); *Lucht's Concrete Plumbing, Inc. v. Homer*, 255 P.3d 1058, 1061-63 (Colo. 2011) (en banc) (enforcing non-compete agreement signed after the start of employment, and holding that there is "no distinction between the adequacy of consideration made at the initial hiring and consideration made during the relationship"). Cypress's at-will employees, including its employees who were formerly at Ramtron, knew about the Bonus Plan before it applied to them and could choose to leave Cypress before the Bonus Plan covered them. They chose instead to remain at Cypress and thus become subject to the Bonus Plan.

and complained that the plan should have been mentioned to Ramtron employees in their offer letters. AR 1307. Valenzuela responded that Cypress's employees are "at-will," that Cypress's "intent is to explain [the Plan] and make sure they understand it," that Cypress's employees "acknowledge that they've read it and they understand" the Plan before it applies to them, and that Cypress is "always available for questions." AR 1307-08. She further told Dietz that, before it instituted the Bonus Plan, Cypress received an opinion from outside counsel that the Bonus Plan was lawful. AR 890, 1274. Valenzuela suggested, and Dietz agreed, that additional training on the Bonus Plan might be helpful. AR 652. At trial, Dietz described the conversation as "cordial," "productive," and "not antagonistic." AR 649, 652, 888. Valenzuela likewise described it as "very cordial." AR 1324.

After their call, Dietz followed up with an email to Valenzuela, writing, "Thanks for taking the time to talk with me today!" AR 1759.

C. Dietz forecasts that a three-week delay on his project would occur months in the future.

Dietz's project launched at the end of March 2013. AR 525. On April 19, Dietz circulated minutes from a meeting on his project. AR 1027. Nulty wrote Dietz that Dietz had listed "lots of problems" with "no plans or follow up actions given to address them." AR 854. Nulty asked whether "the project will slip" and suggested that Dietz schedule another meeting on the project and escalate issues to Dietz's managers. AR 855-56. Dietz wrote back that "it would be premature to escalate." AR 856.

Nulty responded that it was Dietz's "call," but that Dietz should know "the following questions I evaluate schedule slips with," including when the Program Manager became aware of the event that caused the slip, and how quickly the Program Manager responded. AR 857, 1030. Nulty explained that the Program Manager's response "usually determines how I judge individual performance" because it is "where 99% of the screw-ups occur." AR 858. Dietz testified at trial that Nulty's email was neither "threatening" nor "retaliatory." AR 858.

On May 28, Dietz was sworn in as a member of the Colorado bar at a ceremony in Denver. AR 798-99. That same day, Todoroff told Nulty that Dietz had forecasted a three-week schedule slip in an important milestone that would occur 14 weeks from then. AR 1036-38. Nulty was concerned, and wondered why Dietz could not "figure out a way to recover that slip." AR 1038, 1041. Nulty asked Todoroff to schedule a teleconference for the following day. AR 1040.

Shortly after their teleconference, Nulty wrote an email to Dietz criticizing him for allowing the project status report to "go stale," delaying "escalating" his knowledge that engineers had been pulled off of his project, and failing to "explain in sufficient detail" why the project had a three-week delay scheduled to occur 14 weeks later. AR 1712. Nulty wrote that he would document these issues in a formal memo and wanted Dietz to "know this before tomorrow's [prescheduled] meeting" with Cypress's CEO "so you aren't surprised if you hear this stated." AR 880-81. Dietz

admitted at trial that it would have been "legitimate" for the CEO to question Dietz on why Dietz had "extend[ed] the schedule three weeks, 14 weeks out in the future" and that Nulty's email alerted Dietz to this fact. AR 881.

Within minutes of receiving Nulty's email, Dietz wrote back that he "will be preparing a responsive memo." AR 1713. An hour later, Dietz sent another email saying that he and the manager of the test engineers on the project had "met and moved some tasks around," which eliminated the scheduled delay. AR 1715. Nulty was still concerned that Dietz could have found a solution sooner, rather than forecasting the schedule slip. AR 1047, 1053, 1063.

D. Nulty criticizes Dietz's management of his project.

Nulty drafted a memo with his concerns and consulted with Cypress's human resource department. Kim Kubiak, a member of the HR team, suggested that Nulty ask Dietz to respond with a memo on what he did wrong and what he could have done more effectively, and that Nulty let Dietz know that Nulty's memo and Dietz's response would be kept in Dietz's personnel file. AR 1153-54. Another HR employee, Erica Gustafson, recommended that Nulty add commonly used language that "[a]ny future infractions will result in further disciplinary action, up to and including termination." AR 1156. Gustafson also recommended that Nulty give Dietz 90 days to correct his performance. AR 1051. Nulty declined to issue a 90-day warning, thinking

it would be "escalating" the situation "more than this was," and he simply wanted to document Dietz's performance issues and have Dietz correct them. *Id.*

On June 4, Nulty sent his memo to Dietz only. AR 712. Dietz asked Nulty to remove others (Todoroff and Rainer Hoehler, who managed the Colorado Springs office (AR 430-31)) from the distribution list, and Nulty agreed. AR 1065-66.

E. Dietz announces his resignation.

Nulty's memo warned only that "[a]ny *future* infractions will result in further disciplinary action, up to and including termination." AR 1401 (emphasis added). And the record is undisputed that nobody at Cypress ever discussed terminating Dietz (AR 1236)—a fact that Dietz conceded at trial. AR 921-22.

Dietz did not wait to see what would happen in the future, however. Instead, the very next day, June 5, Dietz sent a letter to Surrette, Cypress's head of HR, that Dietz also distributed to Nulty and others. AR 745. The June 5 letter began by disputing Nulty's criticisms, alleging they were "unlawful retaliation" for Dietz's complaint about Cypress's Bonus Plan. AR 1412. Dietz claimed that he did nothing wrong and would not admit error or consider a better approach to the scheduling problem. He then wrote:

> Therefore, my response is that I am terminating my employment at Cypress.
>
> I will agree to stay onboard [from June 5] through July 1 as a professional courtesy . . . and to keep [my] project stable while executing

> an orderly turnover, unless Cypress chooses to terminate my employment sooner.

AR 1413 (underlining in original). Dietz also demanded "accelerated vesting of [Ramtron] stock," claiming "I have standing to assert my now vested rights, as of my last day of employment at Cypress, as a third party beneficiary under the [Ramtron-Cypress] agreement, and hereby do so." AR 1414. Dietz signed his letter:

> Timothy C. Dietz, Esq.
> Admitted in California, Colorado, Maine and New Hampshire

Id.

Nulty was "stunned" by Dietz's resignation. AR 1067. He quickly met with Valenzuela, who was "totally shocked" by the letter. AR 1336, 1339, 1347. Nulty also forwarded Dietz's letter to Surrette, who too was "surprised" by Dietz's response. AR 1238. Surrette worked late into the night to gather information on the disagreement between Nulty and Dietz. AR 1238-40. Surrette also sought legal advice regarding Dietz's retaliation accusations. *Id.*

The next day, June 6, Surrette determined that "there was merit" to Nulty's criticisms based on "data that was objectively available on our systems." AR 1240. He also determined that there was no retaliation against Dietz for his complaint about the Bonus Plan. AR 1251.

Surrette nevertheless asked Nulty to meet with Dietz, Hoehler, and Diane Ratliff, an HR employee in Colorado. AR 1240-41. Nulty sent an invitation for a

meeting at noon on the following day, June 7. AR 747-48, 1068. The meeting request did not list an agenda. AR 748-49.

Surrette testified that Cypress generally follows a "turnaround process" when a valued employee resigns, which involves quickly reacting to persuade the employee to rescind his resignation at Cypress. AR 1249. Surrette testified that, in arranging a meeting to take place within 48 hours of Dietz's notice, Cypress followed the spirit of the process with respect to Dietz's resignation, given "the significant fact-finding and multiple parties involved." AR 1250. And because Dietz had written that he would not leave Cypress until July 1, Surrette thought that Cypress had time to discuss the issue with Dietz. *Id.*

When Dietz received Nulty's meeting request, he went to see Ratliff. AR 750. Dietz also tried to call Nulty but could not reach him by phone. *Id.* Dietz later testified that, based on the absence of an agenda and Nulty's lack of communication with him, he concluded that Cypress was not following the turnaround process. AR 752. He nevertheless admitted at trial that nobody in the Colorado office was "isolating" him from June 5 through June 7. AR 931-32.

F. Dietz makes his resignation effective immediately.

The next morning, June 7, Dietz sent an email to the Colorado office with the subject, "Last day at Cypress." AR 1743. He wrote that he had planned to give Cypress until July 1 "to allow for an ordered transition" of his project, but based on

"the work environment over the past two days," Dietz "conclud[ed] that holding out until July 1 is unworkable" and he was making his "termination immediate." *Id.* He further wrote that (having been admitted to the Colorado bar the previous week) he planned to "open a small law office in Colorado Springs." *Id.*

Dietz then told Ratliff that he would not attend their noon meeting. AR 436. She immediately called Nulty to tell him that Dietz had just quit effective immediately. She also sent an email that Dietz had walked out of the office, which left Valenzuela and others in San Jose "scratching [their] heads" because "none of it made sense." AR 1353. At that point, Nulty decided to accept Dietz's resignation. AR 436, 438, 1251. Nulty, Ratliff, and Hoehler attended the noon meeting. AR 1070. Dietz did not. *Id.*

Dietz states he spent the rest of June working to open a law practice—one of his "dreams" since he "went to law school." AR 922, 926. The office opened on July 1, 2013. AR 762. That same day, Valenzuela sent Dietz a letter explaining that Cypress was accelerating his Ramtron stock. AR 1852-53. She wrote that Dietz's prior "legal arguments were unnecessary" as Dietz was "entitled to the stock acceleration because it is a negotiated term" of the Ramtron-Cypress agreement. AR 1852.

Dietz testified that he is "fairly secure with [his] retirement income" from his prior military service. AR 923.

G. The Regional Administrator dismisses Dietz's complaint.

In August 2013, Dietz filed a complaint in the Department of Labor. The complaint alleged that Cypress constructively discharged Dietz in retaliation for his complaint regarding the Bonus Plan, which, Dietz wrote, violated California and Colorado wage laws. AR 2538. Dietz claimed that Cypress had thereby violated 18 U.S.C. § 1514A. As relevant here, Section 1514A prohibits retaliation against an employee who notifies his employer of "conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1).

The Regional Administrator for the Occupational Safety and Health Administration investigated Dietz's complaint and concluded that there was "no reasonable cause to believe that [Cypress] violated [Section 1514A]." AR 2. There was "insufficient evidence" that Dietz "was subjected to an adverse employment action because he provided his resignation after a meeting was scheduled with the upper management team." AR 3. The Regional Administrator further found that "the resignation does not meet the threshold of constructive discharge as there is insufficient evidence to show that [Cypress] deliberately created working conditions

that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign." *Id.*

The Regional Administrator also found that Dietz did not engage in "protected activity" under Section 1514A. AR 3. Dietz lacked "an objectively reasonable belief that [Cypress] engaged in wrongdoing that would violate wire fraud, bank fraud, securities fraud, an SEC rule or violation of any provision o[f] Federal law relating to fraud against shareholders." *Id.*

The Regional Administrator accordingly dismissed Dietz's complaint. AR 3.

H. The administrative law judge finds for Dietz.

Dietz objected, and a trial was held before an ALJ, who ruled for Dietz. The ALJ found that Dietz was constructively discharged. A81. The ALJ wrote that Nulty's June 4, 2013 memo was "career ending," and Dietz was "entirely reasonable" in viewing the memo as "the first step in laying the foundation for his termination." A81-82. The ALJ also found that Dietz's June 5 resignation letter was sent in "rel[iance] on what he reasonably perceived to be" Cypress's turnaround process, which required Cypress to immediately persuade Dietz not to resign. A82. And the ALJ found that "under the circumstances," it was "objectively reasonable" for Dietz to "conclude that he faced imminent discharge" at the June 7 meeting and that "a reasonable person in Mr. Dietz's situation would conclude that quitting was his only option." A82-83.

The ALJ also found that Dietz engaged in protected activity under Section 1514A. The ALJ wrote that Section 1514A "brings within its ambit fraud that is reasonably believed to involve the use of interstate mails, wires, or banks," and that "Dietz clearly believed that [Cypress] was carrying out a fraudulent scheme by violating state laws on payment of wages to its employees, a scheme that necessarily implicated interstate mail, wires, and banks." A73.

The ALJ awarded Dietz $220,105.85 in back pay, $31,199.08 in back benefits, immediate vesting of 3,512 shares of Cypress stock and 2,041 shares of Cypress stock options, interest, costs, and attorneys' fees. A91. In addition, "to make [Dietz] whole," the ALJ awarded an additional $654,906.00 in front pay based on Dietz's "plan that he would work for about five years for [Cypress], and then re-evaluate." A89-90.[5] In a subsequent order, the ALJ calculated Dietz's attorneys' fees and costs at $252,416.37. A160.

I. The Administrative Review Board affirms in a divided opinion.

Cypress appealed to the ARB. Writing that its opinion "should not be viewed as agreeing with, or adopting, anything" in the ALJ's decision, and conceding that the ALJ made "mistakes," the ARB nevertheless affirmed in a 2-1 order. A94, A98.

[5] The ALJ gave Cypress the option to "reinstate" Dietz to his "previous position" but no longer "report to Mr. Nulty," which would require Cypress to restructure its workforce. A90. Cypress declined reinstatement.

The panel divided over whether Dietz was constructively discharged. The majority acknowledged that the ALJ had "conflate[d]" what it described as the alternative methods for establishing constructive discharge, but nonetheless affirmed the ALJ's finding of constructive discharge. A104. Viewing the issue as "a close case," the majority ruled that Dietz was constructively discharged on June 7, 2013—two days *after* his June 5 resignation letter. A105-06, A113.

The majority admitted that its ruling was "unusual" and "odd" given that Dietz's June 5 letter "flat out states, 'I am terminating my employment at Cypress.'" A106-07. And it found "odd, almost disingenuous" Dietz's testimony that he did "not actually" resign on June 5. A107. But it was "willing to accept this seeming contradiction because looking at Dietz's June 5th letter in its full context, we are convinced that the ALJ must have believed (though she did not say in precisely these terms) that Dietz was effectively hedging his bets" by sending the June 5 letter with the "hope" that Cypress would "do something to retain [him]." A107-08. The majority further ruled that Cypress essentially communicated to Dietz that it "was *definitely*" going to fire him on June 7 because Nulty sent Dietz an "agenda-less meeting that no one would tell Dietz anything about." A108. It concluded: "Although Cypress did not say the magic words, 'Unless you resign, you'll be fired' out loud, a reasonable person in Dietz's position would have understood Cypress's actions to send just that message." A109.

The majority also found that Dietz engaged in protected activity under Section 1514A. The majority began by conceding that the ALJ "misunderstood what Dietz had to show" under Section 1514A and committed "clear error" in finding that Dietz alleged bank fraud. A99, A101. It further held that Dietz's allegation that Cypress's Bonus Plan violated "state wage laws is, by itself, insufficient to constitute protected conduct" under Section 1514A. A102. And it suggested that Dietz's April 12 letter to Nulty was *not* itself protected activity because it did not allege any misrepresentation. A101.

Nevertheless, the ARB ruled that Dietz in effect alleged fraud during his April 22 conversation with Valenzuela by arguing that Cypress's November 2012 employment offer letters to Ramtron employees should have mentioned the Bonus Plan. A102-03. And the ARB found that Cypress's alleged fraud involved the use of the mails or wires because, "even without such explicit evidence in the record, we can infer" such evidence because "Dietz had to have believed that Cypress used either the mails" or the wires "to send the former Ramtron employees their offer letters." A100.

Judge Corchado dissented in part. He did "not agree that the record contains substantial evidence supporting the ALJ's finding that Cypress constructively discharged Dietz and, therefore, would reverse." A114. Judge Corchado explained that "no record evidence indicat[es] any additional personnel action forthcoming" after Nulty sent his June 4 memo. A115. Judge Corchado also found it "[il]logical to infer,

from the record as a whole, that Cypress was going to 'fire' Dietz when Dietz had already expressly resigned." *Id.* And he found "no substantial evidence supporting an inference that Cypress believed Dietz was bluffing" in his June 5 letter announcing his resignation, and "no substantial evidence that logically supports a *reasonable* inference that [Dietz] was going to be fired on June 7, 2013." *Id.*

In a subsequent order, the ARB affirmed the ALJ's award of $252,416.37 in attorneys' fees and costs. A160. And in a third order, the ARB awarded Dietz $35,620.75 in fees and costs for proceedings before the ARB. AR 2534.

In Nos. 16-9523, 16-9529, and 16-9534, Cypress has petitioned this Court for review of all three ARB decisions. Briefing is underway in those cases.

J. The district court enters judgment for Dietz.

After the ARB issued its first decision, Dietz filed a civil action in the district court to enforce the ARB's orders. *See* A6. The district court found its role to be "'ministerial,'" granted in relevant part Dietz's motion to enforce the ARB's orders, and entered a judgment in Dietz's favor. A172-76.

SUMMARY OF ARGUMENT

The district court's judgment should be reversed because it enforces erroneous orders of the ARB, which this Court is reviewing in Nos. 16-9523, 16-9529, and 16-9534. Because the correctness of the district court's judgment is dependent on this Court's resolution of Cypress's petitions for review in Nos. 16-9523, 16-9529, and 16-

9534, this Court should decide this appeal together with Cypress's petitions for review. Deciding these matters together furthers judicial economy and prevents irreparable harm to the parties. The Court accordingly should decide this appeal together with Cypress's petitions for review and should grant Cypress's petitions and reverse the district court's judgment.

ARGUMENT

I. The District Court Erred In Enforcing The Erroneous Orders Of The Administrative Review Board.

The district court's judgment should be reversed. The district court in effect granted Dietz judgment on the pleadings (*see* A129-32 (Dietz's motion to enforce the ARB's orders), A172-74 (order granting Dietz's motion in relevant part and ordering judgment in Dietz's favor))—relief that Cypress opposed (A134-40, A146-47, A165-70). This Court should review the district court's judgment *de novo*. *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012).

The problem with the district court's judgment lies not in the district court's *reasoning*, but in the *judgment* itself. *See Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) ("federal appellate courts[] do[] not review lower courts' opinions, but their *judgments*"). The judgment below enforced ARB orders that are themselves erroneous.

This appeal should be controlled by the outcome in Nos. 16-9523, 16-9529, and 16-9534. If, as Cypress contends in those cases, the ARB erred in ruling that Cypress

violated Section 1514A, then Dietz should not receive payment under that statute. *See, e.g.*, *Rollins v. Am. Airlines, Inc.*, 279 F. App'x 730, 732 (10th Cir. 2008) ("damages" based on administrative orders that are later vacated would be "an unjustified windfall"). And if this Court were to uphold the ARB's orders, then affirmance of the district court's judgment would follow. The correctness of the district court's judgment turns on the correctness of the ARB's orders.

Cypress will show in Nos. 16-9523, 16-9529, and 16-9534 that the ARB erred in concluding that Dietz was constructively discharged on June 7, 2013. Dietz had already expressly "terminat[ed] [his] employment at Cypress" by that point. AR 1737. And the ARB dissent correctly explained that there is "no substantial evidence that logically supports a *reasonable* inference that [Dietz] was going to be fired on June 7, 2013." A115 (emphasis in original). Indeed, the ARB majority's opinion expressed significant concerns with the ALJ's analysis and Dietz's apparent dishonesty, and conceded that the affirmance rested on a "seeming contradiction." A105-07. The record, the dissent, and the majority's verbal gymnastics all suggest that there is a high likelihood that this Court will reverse the ARB's finding of constructive discharge.

Cypress also will show that the ARB erred in concluding that Dietz engaged in protected conduct under Section 1514A. While Dietz did question whether Cypress's Bonus Plan complied with California and Colorado wage laws, the ARB correctly

ruled that those allegations are "insufficient to constitute protected activity" under Section 1514A. A101.

The ARB erred, however, in concluding that Dietz's complaints about Cypress's offer letters to Ramtron employees sounded in federal wire fraud or mail fraud. Dietz's allegation did not sound in *fraud* at all. The record is clear that Cypress paid former Ramtron employees at the salary stated on their offer letters from November 2012 until at least August 2013—months *after* Dietz had raised his complaints and resigned. AR 526, 643. Cypress also made countless efforts to educate former Ramtron employees about the Bonus Plan well before it took effect for those employees. And even then, Ramtron personnel could choose to leave Cypress before the Bonus Plan applied to them in August 2013 and receive the very same benefits under the Cypress-Ramtron acquisition agreement that they could have received in November 2012. AR 1219-23. Cypress did not come close to defrauding Ramtron employees.

Nor did Dietz's allegation sound in *wire* or *mail* fraud. This Court will review the ARB's ruling for "substantial evidence." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1129 (10th Cir. 2013). And the only evidence in the record is that Surrette *physically handed* employment offers to Ramtron employees, including to Dietz. AR 581-82, 1266. Indeed, the ARB conceded that there is no "explicit evidence in the record" to support its finding that Cypress sent its employment offers to

Ramtron employees through the mail or wires. A100. The only explicit evidence of the manner in which employment offers were conveyed shows that neither the mail nor wires were used, and that Dietz had no reasonable basis to believe that they had been utilized for this purpose. Reversal of the ARB's order is required under the "substantial evidence" standard.

In short, Cypress will show in Nos. 16-9523, 16-9529, and 16-9534 that the ARB erred. And because the ARB's orders are erroneous, the district court erred in enforcing them. The district court's judgment should be reversed.

II. This Court Should Decide This Appeal Together With Cypress's Petitions For Review.

Because the correctness of the district court's judgment turns on the correctness of the ARB's orders, this Court should decide this appeal together with Cypress's petitions for review in Nos. 16-9523, 16-9529, and 16-9534. Cypress previously filed a motion to consolidate this appeal with its petitions. But the motions panel ruled that "[t]here will be no decision at this time regarding whether all of these matters will be submitted together for consideration." Order at 2, No. 16-1209 (10th Cir. June 13, 2016). The merits panel should revisit that issue and decide these matters together.

Deciding these matters together furthers judicial economy. Briefing is likely to be completed around the same time for the appeals and the petitions. Indeed, as of this filing, briefing on the petitions and the appeals is scheduled to be completed the same week.

In addition, the result of this appeal will follow from this Court's decision on Cypress's petitions. If this Court grants Cypress's petitions, it will reverse the district court's judgment in this appeal; and if this Court denies Cypress's petitions, it will affirm the district court's judgment.

Neither party will be harmed by deciding this appeal together with the petitions. Both Dietz and Cypress are protected by the $1.25 million supersedeas bond that Cypress has posted in the district court. *See* A179-87. That bond ensures that Dietz receives payment if this Court affirms the ARB's orders. And it prevents Dietz from dissipating the substantial monetary payment while this Court reviews the ARB's orders. Dietz has yet to articulate how he is harmed by being treated like any other litigant who has received a money judgment that is on appeal.

On the other hand, deciding this appeal before this Court decides Cypress's petitions threatens significant harm and inefficiencies. To begin with, this Court would be required to decide two cases rather than one. And this case will require this Court to decide an apparent issue of first impression: whether a court of appeals should affirm a judgment that enforces an ARB order that may well be wrong and is currently under review by the same court of appeals, but has not yet been overturned. That question would be moot if this Court decides the matters together.

Additional litigation is also certain if this Court decides this appeal before it decides Cypress's petitions for review. Cypress believes that its petitions for review

will be granted, and Cypress reasonably fears that Dietz and his attorneys will dissipate the $1,158,627.30 payment required under the district court's judgment. Dietz previously told this Court that Cypress may file a Rule 18 motion to stay the ARB's orders. *See* Dietz Response at 3 n.2, No. 16-1209 (10th Cir. May 8, 2016) ("Cypress can, of course, seek a stay from this Court as contemplated by Fed. R. App. P. 18."). If entered before the petitions for review are decided, an affirmance in this appeal might force Cypress to file such a motion, leading to a wasteful duplication of this Court's resources, as the issues raised in the motion may overlap with the merits of Cypress's petitions for review.

Requiring Cypress to pay Dietz before this Court decides Cypress's petitions also threatens Cypress with irreparable harm. If Cypress pays Dietz and this Court later *grants* Cypress's petitions, Cypress has the right to recover its payment, which might require an additional, unnecessary lawsuit for unjust enrichment against Dietz and his attorneys. *See Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1231 (10th Cir. 2009) (Hartz, J., concurring). And if Dietz or his attorneys were to dissipate the payment so that they could not afford to repay Cypress, they might be forced into bankruptcy, and Cypress might not be made whole. In contrast, if Cypress is required to pay Dietz upon affirmance of the judgment in this case and this Court later *denies* Cypress's petitions, then Dietz will have received payment at a slightly earlier date—a small benefit given the risks, and one offset by the interest he would receive if the

payment is made later. Given the risk of irreparable harm to Cypress, the Court should simply decide this appeal together with Cypress's petitions for review.

CONCLUSION

This Court should decide this appeal together with Nos. 16-9523, 16-9529, and 16-9534, should grant Cypress's petitions for review in those cases, and should reverse the judgment of the district court in this case.

STATEMENT ON ORAL ARGUMENT

Cypress believes that oral argument will assist the panel. In particular, there is considerable overlap between this appeal, Dietz's cross-appeal in No. 16-1249, and Cypress's petitions for review in Nos. 16-9523, 16-9529, and 16-9534. The district court's judgment is the result of years of litigation in the Department of Labor, and the administrative record is lengthy and complex. The panel may have questions regarding all of these issues, which can be effectively discussed at oral argument, which should be consolidated with the argument on the petitions for review.

Dated: July 26, 2016

Respectfully submitted,

/s/ Donald M. Falk

DONALD M. FALK
LEE H. RUBIN
Mayer Brown LLP
Two Palo Alto Square,
Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

MARCIA E. GOODMAN
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

Counsel for Appellant Cypress Semiconductor Corporation

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief that (1) all required privacy redactions have been made per 10th Cir. R. 25.2; (2) if required to file additional hard copies, that the ECF submission is an exact copy of the documents; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Virus definition version 1.225.2477.0, last updated on July 26, 2016, and according to the program are free of viruses.

/s/ Donald M. Falk

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,418 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and set in Times New Roman in a typeface size of 14 points.

/s/ Donald M. Falk

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system on July 26, 2016. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Donald M. Falk

ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Action No. 16-cv-00832-LTB

TIMOTHY C. DIETZ, an individual,

Plaintiff,

v.

CYPRESS SEMICONDUCTOR CORPORATION, a California corporation,

Defendant.

ORDER

This is an action to enforce a final order of the U.S. Department of Labor ("Department") awarding Plaintiff Timothy Dietz damages against his former employer, Defendant Cypress Semiconductor Corporation, for retaliating against him in violation of Section 806 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A. Based upon my review of the file and record in this case, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion Pursuant to 49 U.S.C. § 42121(b)(6)(A) for Forthwith Enforcement of U.S. Department of Labor's Final Decision and Order and Request for Expedited Briefing Schedule [Doc. # 9] is **GRANTED IN PART AND DENIED IN PART**. As Plaintiff argues, this Court has jurisdiction to "enforce" the final order of the Department in this case. *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference 49 U.S.C. § 42121(b)(6)(A)). In addition, the Tenth Circuit has noted that the district court's duty to enforce the Department's orders "is a ministerial one." *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1514 (10th Cir. 1985). Therefore, as provided in the Department's

March 30, 2016 Final Decision and Order [Doc. # 1-4] and its May 12, 2016 Order Affirming the Administrative Law Judge's Supplemental Decision and Order Awarding Attorneys' Fees [Doc. # 20-1], Plaintiff is awarded the following:

a. Back pay in the amount of $220,105.85 plus interest on said sum at the rate established by 26 U.S.C. § 6621;

b. Lost health, life, and vision insurance benefits in the amount of $31,199.08 plus interest on said sum at the rate established by 26 U.S.C. § 6621;

c. Front pay in the amount of $654,906.00;

d. Immediate vesting of 3,512 shares of stock in Cypress Semiconductor Corporation; and

e. Attorney's fees and costs in the amount of $252,416.37.

I note that Plaintiff has not moved for enforcement of other relief apparently awarded by the Department, including certain stock options and a neutral employment reference. I also note that the Department provided for reinstatement of Plaintiff to his position with Defendant as an alternative to front pay, but neither party has indicated that this is a viable option.

2. Under Federal Rule of Civil Procedure 58(b), the clerk must "promptly" enter judgment in Plaintiff's favor. Under Federal Rule of Civil Procedure 62(a), however, "no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry." Further, under Federal Rule of Civil Procedure 62(d), an appellant may obtain a "stay by supersedeas bond" of "proceedings to enforce a judgment." The bond "may be given upon or after filing the notice of appeal," and the

stay "takes effect when the court approves the bond." *Id.* Defendant has informed the Court that it desires to obtain a stay of the Court's judgment while it appeals this case and a related appeal of the merits of the Department's order to the Tenth Circuit. I find and conclude that a supersedeas bond in the amount of $1,250,000.00 is sufficient to "secure[ ] the judgment against insolvency of the judgment debtor." *See Strong v. Laubach*, 443 F.3d 1297, 1299 (10th Cir. 2006). Therefore, Defendant's Motion to Stay Proceedings [Doc. # 15] is **GRANTED IN PART**, to the extent that a stay of proceedings to enforce the judgment pursuant to Rule 62(d) will automatically enter upon Defendant's filing of a notice of appeal and posting of a supersedeas bond with this Court in the amount of $1,250,000.00; the motion is otherwise **DENIED**. Should Defendant not do so within the 14-day automatic stay period set forth in Rule 62(a), no further stay will enter and Plaintiff will be free to execute on the judgment.

DATED: May 18, 2016, at Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 16-cv-00832-LTB

TIMOTHY C. DIETZ, an individual,

Plaintiff,

v.

CYPRESS SEMICONDUCTOR CORPORATION, a California corporation,

Defendant.

FINAL JUDGMENT

PURSUANT to and in accordance with Fed. R. Civ. P. 58(b) and the Order entered by the Honorable Lewis T. Babcock on May 18, 2016, and incorporated herein by reference as if fully set forth, it is

ORDERED that Plaintiff's Motion Pursuant to 49 U.S.C. § 42121(b)(6)(A) for Forthwith Enforcement of U.S. Department of Labor's Final Decision and Order and Request for Expedited Briefing Schedule is GRANTED IN PART AND DENIED IN PART. It is

FURTHER ORDERED that Plaintiff is awarded the following:

a. Back pay in the amount of $220,105.85 plus interest on said sum at the rate established by 26 U.S.C. § 6621;

b. Lost health, life, and vision insurance benefits in the amount of $31,199.08 plus interest on said sum at the rate established by 26 U.S.C. § 6621;

c. Front pay in the amount of $654,906.00;

d. Immediate vesting of 3,512 shares of stock in Cypress Semiconductor

Corporation; and

e. Attorney's fees and costs in the amount of $252,416.37. It is

FURTHER ORDERED that final judgment is hereby entered in favor of Plaintiff Timothy C. Dietz and against Defendant Cypress Semiconductor Corporation. It is

FURTHER ORDERED that Defendant's Motion to Stay Proceedings is GRANTED IN PART, to the extent that a stay of proceedings to enforce the judgment pursuant to Fed. R. Civ. P. 62(d) will automatically enter upon Defendant's filing of a notice of appeal and posting of a supersedeas bond with this Court in the amount of $1,250,000.00; the motion is otherwise DENIED.

DATED at Denver, Colorado this 18th day of May, 2016.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

By: s/Emily Buchanan
Emily Buchanan, Deputy Clerk