UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DANIEL BERMAN,

Plaintiff,

-against-

NEO@OGILVY LLC and WPP GROUP USA INC.,

Defendants.

----------X

14-CV-00523 (GHW)(SN)

REPORT & RECOMMENDATION

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE GREGORY H. WOODS:

Plaintiff Daniel Berman alleges that Neo@Ogilvy LLC ("Neo") and WPP Group USA Inc. ("WPP") (collectively, "defendants"), retaliated against him in violation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act") and in breach of express and implied employment contracts. Defendants moved to dismiss all of Berman's claims for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, I recommend that defendants' motion to dismiss be GRANTED but that Berman be granted leave to amend his retaliation claim.

BACKGROUND

I. Factual Background

The following facts, taken from the complaint and supporting documentation, are assumed to be true for the purposes of this motion.

A. Berman's Employment Duties

Berman worked as the Finance Director of Neo@Ogilvy North America from October 12, 2010 through April 30, 2013. Neo and WPP are subsidiaries of WPP PLC, a publicly-traded foreign corporation. Defendants and WPP PLC are "regulated by, and subject to, all or a portion of" Dodd-Frank and the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 *et seq.*, ("Sarbanes-Oxley") and are "regulated by, and subject to" U.S. securities laws. (Compl. ¶¶ 10-12.)

As Finance Director, Berman was responsible for proper financial reporting, compliance with Generally Acceptable Accounting Principles ("GAAP"), and compliance with WPP's accounting policies. Given these responsibilities, Berman was obligated under Sarbanes-Oxley, Dodd-Frank, and U.S. securities laws to "detect and report (to both Neo and WPP) accounting irregularities, fraud and material compliance failures." (Compl. ¶ 19.)

B. Berman's Protected Activities

Berman alleges that during his employment at Neo, he "detected" "accounting irregularities, accounting fraud and material compliance failures (*i.e.*, compliance failures under WPP policies, GAAP and U.S. Securities Laws)." (Compl. ¶20.) Berman "asserted his authority" as accounting director "to prevent Neo from consolidating fraudulent accounting into WPP's consolidated financial statements that were to be presented to public investors of WPP PLC . . . ." (Compl. ¶ 1.) Berman also alleges generally that he had a reasonable belief that he was reporting conduct that violated "policy, law, and GAAP" (Compl. ¶ 21), "WPP policies" (Compl. ¶ 23), and "Sarbanes-Oxley, Dodd-Frank and U.S. Securities Laws" (Compl. ¶ 24).

In his complaint, Berman identified four specific transactions or types of transactions made by Neo that he reasonably believed to be violations: (1) delayed payments to media companies; (2) improperly recognized revenues; (3) reversed accounting reserves; and (4) lenient

payment terms. In connection with one of these transactions, Berman alleges that the conduct "possibly" violated the law; in connection with some of these transaction, Berman alleged that the conduct was "intentionally fraudulent." (Compl. ¶¶ 33, 35, 37, 40.)

1. Delayed Payments to Media Companies

As part of its usual business practice, Neo receives deposits of cash from its clients for the purpose of purchasing advertising. In August 2012, Berman noticed that the money held on deposit for its clients was "increasing at a greater than expected level." (Compl. ¶ 33.) After investigation, Berman concluded that "Neo was purchasing advertising . . . , and knowingly delaying payments to the media companies that run the advertisements." (Id.) Neo improperly utilized its clients' capital for its own purposes, thereby "improving its own cash flow and cash position." (Id.)

Berman noted that this practice of delayed payment concerned primarily the account of IBM, a large Neo client. Bradley Rogers, a non-accounting senior officer of Neo, implemented, or at least approved, a practice by which advertisements purchased for IBM would not be paid for unless the vendor complained. As a result of these delayed payments, Neo was able to use IBM's capital for its own purposes. This improper holding of client money was "intentionally fraudulent and intended to permit Neo to circumvent GAAP accounting and WPP policies." (Compl. ¶ 33.) Berman alleged that the conduct also was "possibly in violation of law." (Compl. ¶ 35.) Berman reported this practice to his supervisors and "caused [it] to be reviewed and corrected by WPP finance and compliance officers." (Compl. ¶ 36.) Rogers was "angry" at Berman for objecting to this practice and "sought to retaliate against him." (Compl. ¶ 36.)

2. Improperly Recognized Revenues

In January 2013, Rogers attempted to inflate Neo's profits by "improperly recognizing revenues that were not yet permitted to be recognized under GAAP and WPP policies." Berman does not allege which revenues were set to be improperly recognized. He alleges, nonetheless, that these transactions were "intentionally fraudulent" and were intended to "falsely inflate Neo's profits."(Compl. ¶ 37.) Higher profits would result in executive bonus compensation and employee promotions. Berman reported these improper accounting transactions to his supervisors and the transactions were cancelled. As a result of the reporting, however, Rogers was "angry" with Berman and "sought to retaliate against him." (Compl. ¶ 38.)

3. Reversed Accounting Reserves

In February 2013, Rogers attempted to "improperly and fraudulently 'reverse' accounting reserves directly into Neo's profits." (Compl. ¶ 40.) Such conduct would have "caused Neo to consolidate fraudulent accounting results into WPP's publicly issued financial statements." (Compl. ¶ 40.) Berman alleges that he attempted to prevent these "fraudulent" reversals, but that he believes that one or more accounting officers "overruled" him, thereby permitting Neo to record the "fraudulent accounting transactions." (Compl. ¶ 41.) These fraudulent transactions violated GAAP and allowed Neo employees to receive executive bonuses and promotions, including a promotion for Rogers. He does not allege that he reported this conduct to a supervisor.

4. Lenient Payment Terms

Finally, in March 2013, a "senior level executive" attempted to provide a client, with whom the executive had a personal relationship, with "favorable" and "lenient" payment terms. (Compl. ¶ 43.) Berman reported that this client should have been deemed a "cash in advance"

account when the client's nonpayment became a "collection issue." (Id.) Furthermore, an "accounting reserve" should have been established in the March 2013 financial statement. (Id.) Berman "attempted to record and assure that Neo's financial statements correctly reported these matters in compliance with GAAP and WPP policies." (Id.) As a result, the senior level executive was "angry" at Berman and "sought to retaliate against him." (Id.) Berman does not allege that this conduct violated any law or was intentionally fraudulent. He also does not allege that he reported this conduct to a supervisor.

Even after Berman was terminated, he attempted to ensure that Neo complied with the law, GAAP, and WPP policies by reporting these violations to the Chief Financial Officer-North America of Ogilvy & Mather. In addition, Berman, through his own counsel, communicated with Neo's counsel to further his efforts in correcting these violations. On August 12, 2013, Berman's attorney utilized WPP's and Neo's internal compliance program by sending a letter to the Chair of the Audit Committee of the Board of Directors of WPP PLC notifying them of the violations. The Audit Committee agreed to have an internal auditor interview Berman regarding the improper and fraudulent activity, but WPP refused to admit any wrongdoing, take any action to correct the violations, or reinstate Berman's employment. As a result, on October 31, 2013, Berman reported these violations to the Securities and Exchange Commission ("SEC") by filing a Form TCR within 120 days of his use of defendants' internal compliance program. Between November 7 and November 14, 2013, Berman cooperated with an SEC accounting investigator.

C. Defendants' Retaliation

Because of these protected reporting activities, Berman alleges that Neo retaliated against him through adverse personnel actions, including the termination of his employment on April 30, 2013. Defendants also refused to provide Berman with other employment opportunities with

WPP, halting efforts to re-employ him in a different business unit. While defendants informed Berman that his termination was related solely to a "consolidation of finance teams," this explanation was pre-textual as defendants began advertising for a replacement shortly after Berman's termination. (Compl. ¶ 66.) Although defendants also attempted to characterize Berman's termination as voluntary, Berman never volunteered to be terminated. Rather, he refused to work for company officers who insisted on silence in the face of accounting fraud and other unlawful conduct.

II. Procedural Background

Berman filed his complaint on January 28, 2014, and on February 13, 2014, the Honorable Lewis A. Kaplan referred the matter to my docket for general pretrial supervision and to report and recommend on any dispositive motion. On April 18, 2014, defendants filed a motion to dismiss the complaint in its entirety, with supporting memorandum of law. On May 6, 2014, Berman filed a letter requesting a conference regarding defendants' use of improper settlement disclosures in the motion to dismiss. The Court held a telephone conference on May 9, 2014, and indicated that Berman could raise his arguments regarding the use of the settlement statements in his opposition papers. On May 21, 2014, Berman filed his opposition, and on June 11, 2014, defendants filed their reply. On July 29, 2014, the Court heard oral argument on defendants' motion.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must take "factual allegations [in the complaint] to be true and draw[ ] all reasonable inferences in the plaintiff's favor." Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009) (citation omitted). The Court's

function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985) (citation omitted). The Court should not dismiss the complaint if the plaintiff has provided "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While the Court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that [the Court] must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id.

The Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken. See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002); Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." Chambers, 282 F.3d at 153 (citation and internal quotation marks omitted).

II. Preliminary Matters

Defendants submitted documents along with their motion to dismiss that were not attached to Berman's complaint and ask the Court to consider them. These documents include correspondence between counsel for Berman and counsel for defendants, two different drafts of Berman's complaint, and excerpts from the Ogilvy & Mather U.S. Employee Handbook.

"If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. Proc. 12(d). Thus, the Court must determine whether it can properly consider the submitted documents as part of the pleadings in resolving this motion, whether the Court should consider them and convert this motion to dismiss to a motion for summary judgment under Rule 56, or whether the documents should be excluded altogether. See Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria, 265 F.R.D. 106, 122 (S.D.N.Y. 2010).

The Court has not and need not consider the correspondence between counsel or the prior drafts of Berman's complaint to reach a decision in this matter.[1] The Court may consider the excerpts from the employee handbook without converting the motion to dismiss to a motion for summary judgment because two of Berman's claims, breach of express and implied contract, are based on the policies and codes of conduct established by Berman's employer. Berman claims that these codes "obligated" him to report unlawful conduct and "prohibited retaliatory conduct." (Compl. ¶¶ 84-85.) Given that the Complaint references the codes and policies and two of Berman's claims "rel[y] heavily upon [the handbook's] terms and effect, . . . the document [is] integral to the complaint," and the Court will consider it on the motion to dismiss. Chambers, 282 F.3d at 153.

[1] The Court further concludes that the submission of redacted settlement materials did not violate Federal Rule of Evidence 408 as it was not submitted "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Because the Court did not rely on them in reaching its conclusion, the Court need not engage in a Rule 403 analysis. In any event, given that Berman's complaint references communications between his counsel and Neo, he can hardly be heard to complain about the use of these redacted settlement communications. Berman's request to strike these exhibits is denied.

III. Dodd-Frank Anti-Retaliation Claim

Berman brings this suit, in part, under the Securities Whistleblower Incentives and Protection provisions of the Dodd-Frank Act, alleging that defendants violated Section 922, 15 U.S.C. § 78u-6(h)(1)(A). Section 922 provides that:

> [n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 *et seq.*), [the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*), including section 10A(m) of such Act (15 U.S.C. § 78f(m))], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u–6(h)(1)(A) (emphasis supplied). The Act provides for a private right of action for an individual "who alleges discharge or other discrimination in violation of subparagraph (A)." 15 U.S.C. § 78u–6(h)(1)(B)(i); see also Murray v. UBS Sec., LLC, 12 Civ. 5814 (JMF), 2013 WL 2190084, at *2 (S.D.N.Y. May 21, 2013).

A. Berman as a Whistleblower

Defendants contend that Berman cannot avail himself of the anti-retaliation provisions of the Dodd-Frank Act because he was not a "whistleblower" at the time of the alleged retaliation. The Act defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6) (emphasis supplied). Upon one reading of the statute, only those who report to the SEC are protected from the prescribed employer actions.

Defendants argue that because Berman did not contact the SEC until October 31, 2013, he was not a whistleblower at the time of any adverse employment actions and, therefore, not protected under the Dodd-Frank Act for alleged retaliatory conduct that occurred in April and July 2013.

Berman, however, argues that subsection (iii) of Section 922, 15 U.S.C. § 78u-6(h)(1)(A)(iii) (hereinafter "subsection (iii)") protects him in making disclosures that are required or protected by Sarbanes-Oxley. Sarbanes-Oxley protects certain internal disclosures but does not require that those disclosures be reported to the SEC. Specifically, Sarbanes-Oxley protects employees that report to a "person with supervisory authority over the employee" information regarding conduct that the employee "reasonably believes constitutes a violation of sections 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities 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(1)(c). Berman contends that because subsection (iii) includes a provision that expressly protects internal disclosures under Sarbanes-Oxley, he is protected under Dodd-Frank. Thus, the Court must determine as a threshold matter whether disclosure to the SEC is required for Berman to receive the protections of the Dodd-Frank anti-retaliation provisions.

Several district courts in this circuit have already considered this issue, each of them endorsing Berman's interpretation of the statute. See Yang v. Navigators Grp., Inc., 13 Civ. 2073 (NSR), 2014 WL 1870802 (S.D.N.Y. May 8, 2014); Rosenblum v. Thomson Reuters, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); Egan v. TradingScreen, Inc., 10 Civ. 8202 (LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011); Murray, 2013 WL 2190084; see also Ahmad v. Morgan Stanley, 13 Civ. 6394 (PAE), 2014 WL 700339 (S.D.N.Y. Feb. 21, 2014) (finding the analysis in Murray and Egan persuasive, although the court did not need to reach the issue).

Furthermore, in 2011, the SEC formally promulgated a rule clarifying the relationship between the definition of a whistleblower under Dodd-Frank and the anti-retaliation provision protecting conduct also protected under Sarbanes-Oxley:

> For purposes of the anti-retaliation protections afforded by [Dodd-Frank], you are a whistleblower if:
>
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. § 1514A(a) [the Sarbanes-Oxley Act]) that has occurred, is ongoing, or is about to occur, and;
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. § 78u–6(h)(1)(A) [the Dodd-Frank Act]).
>
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

17 C.F.R. § 240.21F-2(b)(1). In the comments to the rule, the SEC explained that "[t]his change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission." Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01, at *34304, 2011 WL 2293084 (June 13, 2011). The comment specifically recognizes that subsection (iii) protects individuals who report to persons with "supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct." Id. According to the SEC's own rules, the Dodd-Frank anti-retaliation provision applies to employees who make disclosures protected under Sarbanes-Oxley. They do not require that a report be made to the SEC.

To determine whether the Court may defer to the SEC's interpretation of subsection (iii), the Court must engage in the two-step statutory analysis established in Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984). First the Court must ask "whether Congress has

directly spoken to the precise question at issue. 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." Id. at 842-43. If the statute is either "silent or ambiguous with respect to the specific issue," the Court proceeds to step two and asks "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. While a court may not defer to an agency interpretation that is "arbitrary, capricious, or manifestly contrary to the statute," it must defer to a "reasonable" one. Kar Onn Lee v. Holder, 701 F.3d 931, 936 (2d Cir. 2012) (citation and quotation marks omitted). Even if an agency's position does not qualify for Chevron deference, it "may merit some deference . . . given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." U.S. v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (internal citations omitted)).

"The plainness or ambiguity of statutory language is determined 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." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). "[A]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context." Zuni Public Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 98 (2007) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994) (alterations in original)). If the language of the statute is ambiguous, the Court will "resort first to canons of statutory construction, and if the [statutory] meaning remains ambiguous, to legislative history . . . ." Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 116 (2d Cir. 2007) (quoting Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 423 (2d Cir. 2005)

(alteration in original)). If the statute is still ambiguous, the Court should proceed to Chevron step two and defer to the agency's reasonable interpretation. Id.

Defendants urge the Court to follow the Fifth Circuit Court of Appeals, the only court of appeals to have considered the issue, in concluding that the anti-retaliation provision is unambiguous. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013). The Fifth Circuit, relying on canons of statutory construction, concluded that the anti-retaliation provision mandates that an individual first establish that he meets the statutory definition of a whistleblower before he can benefit from the protections of subsection (iii). Under its interpretation, the "statutory language clearly answers two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity." Id. at 625. Thus, providing information to the SEC is essential to Dodd-Frank protection. To conclude otherwise would effectively "read the words 'to the Commission' out of the definition" of a whistleblower, thereby violating the "surplusage cannon," which requires every word to be given effect. Id. at 628.

The Fifth Circuit addressed the purpose served by subsection (iii) if a whistleblower was still required to report to the SEC. It concluded that this section "protects those individuals who qualify as whistleblowers from retaliation on the basis of other required or protected disclosures." Id. at 628. The court provided the following illustration: a mid-level manager reports a securities law violation to his company's CEO and to the SEC on the same day. His CEO, unaware of the report to the SEC, fires the manager. The manager would plainly be a whistleblower because he filed a report with the SEC. He would not be protected, however, under subsections (i) and (ii) because he was not fired *for reporting to the SEC*. He was fired for reporting to his supervisor, conduct protected only under subsection (iii). Id.

The Court recognizes that the reading adopted by the Fifth Circuit is a reasonable one. As noted above, however, other courts have reached a different conclusion, finding subsections of the statute to be in tension one another. See Yang, 2014 WL 1870802, at *13 ("Considering the context of 15 U.S.C. § 78u-6, the Court finds that the statute does not clearly and unambiguously limit whistleblower protection to individuals who report violations to the SEC where the anti-retaliation provision simultaneously incorporates SOX-protected reporting to supervisors."); Rosenblum, 984 F. Supp. 2d at 147 ("When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous."); Egan, 2011 WL 1672066, at *5 (concluding that given the narrow definition of whistleblower requiring an individual to report to the SEC, subsection (iii) is best understood as "a narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower."). In light of the broader context of the protections afforded under the Dodd-Frank Act and the tension between the restrictive definition of a whistleblower and the broad inclusiveness of acts protected under Sarbanes-Oxley, the district courts' interpretations also are reasonable.

The very existence of these "'competing, plausible interpretations' of the statutory provisions compels the conclusion that 'the statutory text is ambiguous in conveying Congress's intent." Murray, 2013 WL 2190084, at *5 (quoting Cohen, 498 F.3d at 120); see also Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 58 (2d Cir. 2004) (concluding that "divergent, but plausible, constructions of the word 'and'" rendered a statute's provision "not clear and unambiguous"). Recognizing divergent but reasonable interpretations of the relationship between the subsections of Section 922, the Court joins the other district courts in this circuit that have considered this issue and concludes that the tension between a narrow reading of the term

"whistleblower," which requires a report to the SEC, and the anti-retaliation provisions' inclusion of internal disclosures not reported to the SEC renders the statute ambiguous.

Given this ambiguity, the Court defers to the SEC's interpretation, which explicitly states that an internal report to a supervisor is sufficient to secure protection. Furthermore, because the SEC's interpretation is a "reasonable" one, the Court is obligated to give it deference. Kar Onn Lee, 701 F.3d at 936. If "the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment 'controlling weight.'" U.S. v. Haggar Apparel Co., 526 U.S. 380, 392 (1999) (quoting NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)). See also Khazin v. Ameritrade Holding Co., 13 Civ. 4149 (SDW)(MCA), 2014 WL 940703, at *6 (D. N.J. Mar. 11, 2014) (finding the SEC's interpretation reasonable because it "harmonizes the contradictory provisions of the Dodd-Frank Act while not rendering any word or section superfluous"); Murray, 2013 WL 2190084, at *7 ("[B]ecause the SEC's rule clarifies an ambiguous statutory scheme the SEC was charged with enforcing and reflects the considerable experience and expertise that the agency has acquired over time with respect to interpretation and enforcement of the securities laws, this Court defers to the SEC's interpretation."). Therefore, Berman is not excluded from protection under the Act solely because the alleged retaliation occurred before he reported to the SEC.

B. Berman's "Reasonable Belief"

Defendants argue, in the alternative, that Berman has not adequately alleged that he possessed a reasonable belief that the reported violations constituted violations of Sarbanes-Oxley or other federal securities laws. Under the SEC's implementing regulations, to be protected from retaliation as a whistleblower under Dodd-Frank, one must: (i) "possess a

reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C § 1514A(a) [the Sarbanes-Oxley Act]) that has occurred, is ongoing, or is about to occur;" and (2) "provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. § 78u–6(h)(1)(A)) [the Dodd-Frank Act]." 17 C.F.R. § 240.21F–2 (emphasis supplied).

The Court of Appeals for the Second Circuit recently addressed the proper standard on a 12(b)(6) motion for analyzing the reasonableness of a whistleblower's asserted belief that the complained of conduct was protected by Sarbanes-Oxley. See Nielsen v. AECOM Tech. Corp., 13 Civ. 0235, 2014 WL 3882488 (2d Cir. Aug. 8, 2014). The Court of Appeals held that "a plaintiff 'must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation.'" Id. at *5 (quoting Livingston v. Wyeth, Inc., 520 F.3d 344, 352 (4th Cir. 2008)).[2] Accordingly, a reasonable belief contains both subjective and objective components, and a plaintiff must allege both in order to plead a claim of retaliation protected under Sarbanes-Oxley. Id. See also Yang, 2014 WL 1870802, at *9; Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 444 (S.D.N.Y. 2013). This Court interprets the SEC's definition of a whistleblower under Dodd-Frank – one who "possesses a reasonable belief" that the reported information relates to a possible violation of securities law or Sarbanes-Oxley – as the Court of Appeals interpreted the identical provision under Sarbanes-Oxley.

[2] In so holding, the Court of Appeals expressly abrogated the requirement that, to be afforded protection under Sarbanes-Oxley, a plaintiff's communication must relate "definitively and specifically" to a listed category of fraud or securities violations. Nielsen, 2014 WL 3882488, at *6.

"The objective prong of the reasonable belief test focuses on the 'basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.'" Nielsen, 2014 WL 3882488, at *6 (quoting Sharkey v. J.P. Morgan Chase & Co., 805 F. Supp. 2d 45, 55 (S.D.N.Y. 2011) (internal quotation marks omitted)). See also Perez v. Progenics Pharm., Inc., 965 F. Supp. 2d 353, 364(S.D.N.Y. 2013) ("In assessing the reasonableness of a plaintiff's belief regarding the illegality of the particular conduct at issue, courts look to the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience.") To satisfy the objective prong, a plaintiff must allege sufficient facts about the nature of the alleged violation for the Court to evaluate whether the belief that the conduct was illegal was reasonable; a "formulaic recitation of the elements" of the claim is not enough. Twombly, 550 U.S. at 555. Thus, while "the employee is not required to communicate *to the employer* which laws the employer's conduct allegedly violated," Yang, 2014 WL 1870802, at *8, to state a claim of retaliation, Berman must plead enough facts to put defendants on notice of what conduct Berman reasonably believed was unlawful and why.

In addition, "Dodd-Frank does not protect whistleblowers who report violations of any laws or regulations subject to the SEC's jurisdiction." Egan, 2011 WL 1672066, at *6. Rather, it protects "disclosures that are *required or protected* under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A)(iii) (emphasis supplied). Thus, the claim must also plead that the reporting was required or protected under these laws.

Accordingly, to state a claim of retaliation under Dodd-Frank, a plaintiff must allege facts that establish both that he subjectively and objectively held a reasonable belief that the reported conduct violated Sarbanes-Oxley or federal securities laws *and* that "a law or rule in the SEC's

jurisdiction explicitly requires or protects disclosure of that violation." Egan, 2011 WL 1672066, at *6.

Berman alleges generally his belief that he was reporting conduct that constituted securities violations, including shareholder fraud:

> Plaintiff reasonably believed that Defendants were engaging in conduct that was in violation of GAAP, WPP compliance and accounting policies, Sarbanes Oxley, Dodd Frank and U.S. Securities Laws. Such activities included presenting to investors of WPP PLC financial and accounting information that was not in compliance with GAAP, and that was intended to defraud such investors in violation of the regulations of U.S. Securities Laws.

(Compl. ¶¶ 72-73.) These bald conclusory statements – and others like them in the complaint – are insufficient as a matter of law to make out a claim that he reasonably believed he was reporting violations of law. Such statements do not plausibly plead an objectively reasonable belief that defendants' conduct constituted shareholder fraud or any other violation of the laws under Sarbanes-Oxley. More must be alleged to permit defendants and the Court to assess whether someone with Berman's training and expertise would also think that the complained of conduct was unlawful. See, e.g., Twombly, 550 U.S. at 555 (a complaint must contain "enough facts to state a claim to relief that is plausible on its face," "rais[ing] a right to relief above the speculative level").

Of the four specific instances of conduct Berman identifies, only one – the Delayed Media Payments – contains a specific allegation that the conduct was "possibly in violation of the law." (Compl. ¶ 35.) The facts alleged, however, provide no evidence of any violation of securities law or other relevant laws. Berman alleges merely that payments to third-party vendors were delayed, perhaps improperly, but eventually paid with funds held by Neo on behalf of its clients. There is, for example, no allegation of mail or wire fraud, such as an allegation that Neo fraudulently billed clients. Cf. Gladitsch v. Neo@Ogilvy, 11 Civ. 0919 (DAB), 2012 WL

1003513 (S.D.N.Y. Mar. 21, 2012) (denying a motion to dismiss because the plaintiff had sufficiently plead a reasonable belief that the overbilling of IBM constituted wire, mail, and shareholder fraud, all of which were specifically identified in the complaint). Nor is there a claim that Neo improperly reported its temporary improved cash position in its financial reports, thereby misleading shareholders. Indeed, Berman alleges that after he reported this conduct to his supervisors, it was "reviewed and corrected" internally, thus preventing any potential shareholder fraud based on reporting Neo makes to its publicly-traded parent company. (Compl. ¶ 36.) Given the facts alleged, Berman has failed to plead that, as the finance director of Neo, he possessed an objectively reasonable belief that the delayed media payments constituted a violation of Sarbanes-Oxley or other any other securities law. Cf. Rosenblum, 984 F. Supp. 2d 141 (denying a motion to dismiss because plaintiff had pled adequately a claim under subsection (iii) where the complaint specifically alleged that the defendants' early release of a product constituted insider trading and violated an SEC regulation and section 10b of the Securities Exchange Act of 1934).

The other three alleged violations – the Improperly Recognized Revenues, Reversed Accounting Reserves, and Lenient Payment Terms – are alleged only to be "fraudulent" or violations of GAAP or WPP policies. While violations of GAAP may also be violations of federal securities laws, they are not necessarily so. See Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000) ("[A]llegations of GAAP violations or accounting irregularities, standing alone, are insufficient to state a securities fraud claim. Only where such allegations are coupled with evidence of 'corresponding fraudulent intent,' might they be sufficient." (quoting Chill v. Gen. Elec. Co., 101 F.3d 263, 270 (2d Cir. 1996)) (internal citation omitted)); see also, Day v. Staples, 555 F.3d 42, 57 (1st Cir. 2009) ("[M]erely stating in conclusory fashion that a company's book

are out of compliance with GAAP would not in itself demonstrate liability" for securities fraud (citation and quotation marks omitted)).

Berman does allege fraudulent intent with regard to the Delayed Media Payments, Improperly Recognized Revenues, and Reversed Accounting Reserves. But his general conclusory allegations of fraud are insufficient to establish an objectively reasonable belief that these transactions were violations of Sarbanes-Oxley or other federal securities laws. See Nielson, 2014 WL 3882488, at *6 (concluding that the complaint's statement that fraudulent practices which potentially exposed the company to "extreme financial risk . . . constituted potential shareholder fraud" was "insufficient as a matter of law to make out a claim under [Sarbanes-Oxley]"). If Berman sought to bring a claim of securities fraud, he has failed to "allege[] enough facts to support a strong inference of fraudulent intent." Ganino v. Citizens Utils. Co., 228 F.3d 154, 169 (2d Cir. 2000); see also id. at 168 ("It is well settled in this Circuit that a complaint alleging securities fraud must satisfy the [heightened] pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.") Accordingly, Berman's identification of GAAP or internal WPP policy violations, even coupled with a general allegation of fraudulent intent, is not sufficient to establish an objectively reasonable belief that these actions violated federal securities laws or constituted securities fraud. See Nielsen, 2014 WL 3882488, at *7, 8 (holding that "trivial and conclusory" statements and "bare and unsupported conclusions" about shareholder, mail, and wire fraud could not sustain a claim under the Sarbanes-Oxley Act).

Furthermore, Berman fails to allege that he reported the Reversed Accounting Reserves or the Lenient Payment Terms to a supervisor. As for the Reversed Accounting Reserves, Berman alleges that he "once attempted to prevent these accounting transactions," but Neo was able to report the fraudulent results to WPP despite his efforts. (Compl. ¶ 41.) He believes that an

accounting officer over-ruled him. This is the only direct allegation that fraudulent information was reported to WPP, and it is unclear from the complaint whether that information in fact was presented in publicly issued statements. Even if Berman sufficiently plead shareholder fraud regarding the Reversed Accounting Reserves, he failed to plead that he engaged in protected activity. Nowhere does Berman allege that he reported this conduct to a supervisor, and the Court cannot assume that Berman's preventative attempts were actually reports made to supervisors.

The Lenient Payment Terms claim suffers from the same failure. Berman alleges that he "reported that the client was required, under WPP policies, to be deemed a 'cash in advance client.'" (Compl. ¶ 43.) He further alleges that he "attempted to record and assure" that Neo's financial statements were in compliance with GAAP and WPP policies. (Id.) Berman, however, fails to allege that he reported this conduct *to a supervisor*, as required by Sarbanes-Oxley. Therefore, even if Berman sufficiently pled a violation of the law with regard to the Reversed Accounting Reserves and Lenient Payment Terms (and it is particularly unclear how favorable business terms to a longtime client could, without more, violate the law), he has failed to plead sufficiently that he reported these violations to a supervisor.

In sum, the connection between Berman's four identified transactions and shareholder fraud or any other violation of federal securities law is "simply too tenuous." Nielsen, 2014 WL 3882488, at *6. Accordingly, the Court recommends that Defendants' motion to dismiss be granted as to the Dodd-Frank anti-retaliation claim. Because "leave to amend a complaint is granted "freely . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), and because Berman requested leave to amend should his complaint be deemed insufficient, the Court recommends

that Berman be given an opportunity to remedy these deficiencies, if he can, in an amended complaint.

IV. Breach of Contract

Defendants also seek to dismiss Berman's claims for breach of express and implied employment contracts. In his complaint, Berman alleges that "[d]efendants' policies and codes of conduct and ethics" prohibited them from "taking adverse personnel actions" against Berman "as a result of his efforts to protect Defendants against unlawful conduct and accounting irregularities and fraud." (Compl. ¶ 83.) Berman was obligated under these policies and codes to report unlawful conduct to his supervisors and these same policies and codes "expressly prohibited retaliatory conduct, and created an express contract that benefitted and protected [Berman] from retaliatory conduct." (Id. at 84-85.) Berman also contends that these anti-retaliation provisions created an implied contract. Berman does not claim that a separate employment contract, apart from the policies and codes, included an express limitation on his employment. Nor did he attach any employment contract to his complaint or opposition to this motion.

"In New York, it has long been 'settled' that 'an employment relationship is presumed to be a hiring at will, terminable at any time by either party." Baron v. Port Auth. of New York and New Jersey, 271 F.3d 81, 85 (2d Cir. 2001) (quoting Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 333 (1987)). This presumption can be rebutted by demonstrating that there was an "express limitation in the individual contract" such that the employer's right to terminate was constrained. Id. (citing Gorrill v. Icelandair/Flugleidir, 761 F.2d 827, 851 (2d Cir. 1985)).

"Policies in a personnel manual specifying the employer's practices with respect to the employment relationship, including the procedures or grounds for termination, may become a part of the employment contract." Baron, 271 F.3d at 85.

> To establish that such policies are a part of the employment contract, an employee alleging a breach of implied contract must prove that (1) an express written policy limiting the employer's right of discharge exists, (2) the employer (or one of its authorized representatives) made the employee aware of this policy, and (3) the employee detrimentally relied on the policy in accepting or continuing employment.

Id. (citing Lobosco v. New York Tel., 96 N.Y.2d 312, 316 (2001)). This is a "difficult pleading burden." Id. (quoting Sabetay, 69 N.Y.2d at 334-35.) "[R]outinely issued employee manuals, handbooks, and policy statements should not *lightly* be converted into binding employment agreements . . . ." Id. (quoting Lobosco, 96 N.Y.2d at 317) (emphasis and alteration in original).

The Court finds that the Ogilvy & Mather U.S. Employee Handbook was not a part of Berman's employment contract and did not limit defendants' right to terminate Berman at will. The handbook contains a disclaimer that plainly articulates the non-contractual nature of the handbook:

> No provision of this handbook is to be construed as a contract or guarantee of employment or a contract or guarantee of the terms and conditions of employment. Although we hope that your employment will be mutually rewarding, both you and Ogilvy retain the right to end the employment relationship at any time and for any reason with or without cause or notice.

(Brochin Aff., Exh. H.) This unambiguous disclaimer is fatal to Berman's breach of contract claims, barring an action for breach of an express or implied contract. See Baron, 271 F.3d at 87 (holding that the disclaimers in the employee manuals were "sufficiently clear to defeat *as a matter of law* the plaintiff's implied contract claim" (emphasis added)); Id. ("Even if we were to agree with the plaintiffs that [prior case law] stands for the proposition that a disclaimer in an employee handbook, no matter how unambiguous, does not as a matter of law preclude a finding

that the specific provisions of the handbook are express limitations, we would be compelled to conclude that any such holding is no longer good law."); Hecht v. Nextel of New York, 10 Civ 8740 (PAE), 2012 WL 2421874, at *7 (S.D.N.Y. June 27, 2012) ("It is well settled under New York law that a disclaimer in an employment handbook indicating that it is not a contract precludes a breach of contract claim." (quoting House v. Wackenhut Svcs., Inc., 10 Civ. 9476, 2011 WL 6326100 (CM), at *4 (S.D.N.Y. Dec. 16, 2011))); Ubal-Perez v. Delta Air Lines Inc., 13 Civ. 2872 (SJ)(JMA), 2014 WL 223227, at *6 (E.D.N.Y. Jan. 21, 2014) (finding an employer's disclaimer that preserved the right to terminate employment for any reason was "fatal" to the breach of contract claim). A "plaintiff cannot reasonably impose an express or implied contractual obligation on [its employer] that would limit its right to terminate plaintiff's employment" where the employer "has made clear through its employee manual – upon which plaintiff claims reliance – that it may terminate employment." Lobosco, 96 N.Y.2d at 316-17. Even if the manual contains other provisions which could be construed as employment obligations or promises, "[a]n employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer." Id. at 317.[3]

Given the clarity of defendants' disclaimer, which explicitly preserves the right to terminate an employee without cause or notice, Berman's breach of contract claims should be dismissed with prejudice.

[3] Berman relies on Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 465-66 (1982), to support his breach of contract claim. But the Weiner exception to at-will employment is a "narrow" one. See Azzolini v. Marriott Int'l, Inc., 417 F. Supp. 2d 243, 247 (S.D.N.Y. 2005). "The Weiner exception seems to encompass those employee handbooks which explicitly state that employees can only be terminated for just and sufficient cause." Id. The employee handbook here has no such provision. In addition, Loli v. Standard Chartered Bank, 160 F. App'x 20 (2d Cir. 2005), cited by Berman for the proposition that an employer's "speak up policy" creates a question of fact as to an implied contract, is distinguishable: no mention is made of an express disclaimer in the company publication.

CONCLUSION

Accordingly, I recommend that defendants' motion to dismiss be GRANTED but that Berman be granted LEAVE TO AMEND his retaliation claim under the Dodd-Frank Act.

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from the service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ .P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2) (C), (D), (E), or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Gregory H. Woods at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Woods. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

SARAH NETBURN
United States Magistrate Judge

DATED: New York, New York
August 15, 2014