UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BERMAN,

Plaintiff,

v. 14 CV 523 (GHW)

NEO@OGILVY LLC, et al.,

Defendant.

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New York, N.Y.
July 29, 2014
11:30 a.m.

Before:

HON. SARAH NETBURN,

Magistrate Judge

APPEARANCES

JARDIM, MEISNER & SUSSER
Attorneys for Plaintiff
BY: RICHARD S. MEISNER

DAVIS & GILBERT
Attorneys for Defendant
BY: HOWARD J. RUBIN
DAVID FISHER
JENNIFER TAFET KLAUSNER

THE DEPUTY CLERK: In the matter of Berman v. Neo@Ogilvy, 14 CV 523. Counsel, please state your name for the record.

MR. MEISNER: Your Honor, Richard Meisner for plaintiff Dan Berman. I'm with the firm of Jardim, Meisner & Susser.

THE COURT: Good morning.

MR. RUBIN: Howard Rubin of Davis & Gilbert for the defendants.

MS. KLAUSNER: Jennifer Klausner of Davis & Gilbert for the defendants.

MR. FISHER: And David Fisher, Davis & Gilbert for the defendants.

THE COURT: Thank you. So we're here on the defendants' motion to dismiss. So why don't I ask you to begin.

MR. RUBIN: Thank you, your Honor.

This all started when plaintiff indicated that he wanted to leave the job that he was in and try to find another job within the same holding company. And there is no dispute about the fact that in fact people at Ogilvy did try to find him another job.

Then, when it came time to do a reduction in force, because in fact, WPP, the parent company, was moving many of the accounting functions to India, it may or may not be a good

idea, but they started doing that, there was a reduction in force. And it was not surprising that they included in that reduction in force somebody who already indicated that he was going to be leaving anyway.

THE COURT: He was terminated as part of that reduction in force?

MR. RUBIN: Yes.

THE COURT: That was in April 2013?

MR. RUBIN: Yes.

THE COURT: Okay.

MR. RUBIN: Then he didn't like the severance that he was offered. And as he indicates in paragraph 51 of his complaint after his termination, he went to the CFO of Ogilvy in North America to try to get --

THE COURT: Is that Mr. Rogers?

MR. RUBIN: No, that would have been people higher than Mr. Rogers. Mr. Rogers would have been at the Neo, its parent is Ogilvy, that would have been Renee.

And he says that he tried to cause them to comply with GAAP policies and the law. All of this took place after his termination. And that's when he started making some of the monetary demands that has been in issue before you in some of the letters that we attach.

THE COURT: Let me ask another question. In the complaint he makes reference to this and in the briefs it comes

out a little bit more fully. It sounds like there was also an opportunity where the company was working with him, I don't know if that was post-termination, trying to either get a better package for him or maybe in fact find some place for him.

I understand the plaintiff to be alleging that another of the adverse employment actions, not just his termination, but there was a time where people stopped talking to him. Not exactly clear to me about what, but it sounds like the company, and whether that was Neo or more likely the parent, was making efforts to accommodate him in some way and then at some point that stopped.

MR. RUBIN: Yes, I can explain that.

Yes, both before his termination and after his termination, the parent company, parent companies, because it is a series of companies, were in fact helping him to find another job. There is nothing about --

THE COURT: Internal?

MR. RUBIN: Internally. There is nothing about improving his package, but trying to help him find another job. And the allegation is at some point they stopped that. It is clear that it wasn't until long after they stopped that or they claimed to have stop that, that he first went to the SEC. There is no active retaliation whatsoever that has been alleged that allegedly took place after he went to the SEC.

THE COURT: Which was in October.

MR. RUBIN: Right.

THE COURT: That date I think obviously is relevant to my decision on exactly what is the definition of whistleblower.

MR. RUBIN: Yes.

THE COURT: But I do think, and I'd like help from the parties to talk a little bit to get a better sense of the chronology and whether or not there is any adverse conduct that predates any of the reportings, including but not limited to the SEC reporting.

MR. RUBIN: Well, I don't believe there is any adverse conduct that precedes when he first claims to have reported things within the company. So we would admit to that. He claims to have reported, we would say in the ordinary course of doing his job, he would say things like, the media payments are late. They weren't. But in any event, he says he said that. That's not any kind of allegation of a violation of the SEC laws or securities laws or SOX. I can go into that in great length.

He claims that -- again, there is no specificity in the complaint at all. I'm perfectly happy to explain all of the things that he says he reported to his superiors in the course of doing his job. We were a little hamstrung in that as we made very clear in our brief because he hasn't put any of that in the complaint. He hasn't put it in the complaint

because if he did, we would all be able to explain why that could not be a violation of Sarbanes-Oxley or any securities laws.

THE COURT: Let me jump to my big question, which is what is the appropriate pleading standard for me to apply? Let's look at the reasonable belief prong here. What is the appropriate standard for pleading?

I've read closely the complaint, and I've obviously read closely the briefs. There are some allegations that the plaintiff makes about some conduct being in violation of the law. Is that enough to satisfy the pleading requirements in your view? There are other protected activities where the allegation is merely a violation of GAAP or WPP policies. I think that's a little bit tougher to satisfy a pleading standard, but I'd like your view.

The cases, and there are not that many of them as I'm sure you know, and it appears that most of the cases that really delve into sort of a prima facie showing are actually in the summary judgment context, which I appreciate is a different standard.

So I'd like your opinion, and if you have cases that could guide me as to what you think is the appropriate standard for a 12(b)(6) motion on a reasonable belief prong.

MR. RUBIN: Absolutely, your Honor. And putting aside eventually we went to get to talking about the *Asadi* decision

and whether or not he can be a whistleblower. If we prevail on that, all the rest of this falls by the wayside.

I'd like for your Honor, first of all, as I said correctly, it is not enough to say something violates GAAP or it violates WPP policy. It would have to make the claim, not only in the complaint but I would say even in his discussions with officials at the company, that it violates the securities law or Sarbanes-Oxley.

I would refer your Honor to two cases in the Southern District of New York on motions to dismiss. Also one case we cited is *Fraser*, that is a Second Circuit decision but that is a summary judgment case. But two motions to dismiss that are right on point which is *Nielsen v. Aecom*, which was decided in December of 2012 by Judge Forrest, Katherine Forrest. And *Sharkey*, which is January 2011, decided by Judge Sweet. And those are both motions to dismiss.

And the language in *Nielsen* is particularly appropriate because in that case -- someone could say the color of these walls is white and that violates the securities laws. But that's not enough to make a complaint because obviously, the color of the walls has nothing to do --

THE COURT: You'll be given an opportunity, sir. You will be given an equal opportunity. It is their motion so I let them begin.

MR. MEISNER: Thank you, your Honor.

MR. RUBIN: In *Nielsen*, it says that plaintiff asserted that he engaged in a protected activity in that he reasonably believed that reporting Hann's procedurally-improper approvals of fire safety designs amounted to both shareholder fraud by defendants and violations of the United States mail and wire fraud statutes. Neither of those theories supports the proposition that plaintiff's reporting of Hann's rubber stamping of fire safety drawings constituted a protected activity.

First, plaintiff fails to plausibly allege that he reasonably believed that his reporting of Hann's approvals constituted a protected activity. To have an objectively reasonable belief that there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud.

Citing a bunch of cases.

Thus, the employee must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and risked loss. There is no allegation or indication that Aecom represented anything at all about the approval procedure for fire safety drawings. Without an allegation about defendants' statements to shareholders regarding the subject of plaintiff's reporting to AME management, there is no basis to find that defendants misrepresented anything or omitted material facts to

its shareholders.

THE COURT: I'll read the decisions. It's probably easier for me to read it.

MR. RUBIN: The *Sharkey* case as well, motion to dismiss, district court here both dismissed because the complaint did not make out allegations from which the judge could conclude that the plaintiff reasonably believed that there was a violation of securities laws.

There is two issues. One is reasonably believed. And the other is whether, even if you believed it wholeheartedly and said it is a violation of securities laws, whether it actually it relates to securities laws at all.

THE COURT: Right. There is a line of cases that I'm familiar with which seem to emphasize that the pleading requirement must identify the conduct, but need not identify with specificity the violation. I'm sure you are familiar with this line of definitive and specific test, right. So it sounds like at least the cases are leaning, are trending in that way. I don't know there has been a circuit decision in our court about that.

MR. RUBIN: First of all, we understand completely he doesn't have to say it violates this section and this subsection and this subsection of that. We understand he doesn't have to cite the exact law. But here, in the complaint, he isn't specific at all. On two of the categories,

which are the releasing of account reserves and recognizing revenue, he's not specific at all about what revenue is recognized, what reserves were released, in any way that we can form any belief about how those can relate to the securities law at all. There is no specificity. I understand he doesn't have to cite the section of the law. But these cases say he has to say it violates some law, and he's got to be specific about the allegations. And I'm sure when you read *Nielsen* and *Sharkey*, which are recent decisions in this court, you'll find that we're right about that argument.

THE COURT: Let me ask you another question on this topic. Do you think if the allegation was sufficient from a pleading perspective to identify the reasonably held belief that certain transactions constituted a violation of the mail fraud statute, let's say, does the complaint need to also plead that that was reported to the supervisor? Or is it enough to have it in the complaint but maybe in the actual conversation to the supervisor it was less specific or less focused?

MR. RUBIN: I believe it has to be to the supervisor so that the company is in a position to deal with it. The whole idea of whistleblowing is you're supposed to tell the company what it's done that's wrong so they can theoretically correct it. If we were supposed to have retaliated for reporting this, he would have had to be specific about what he reported.

THE COURT: Do you want to talk to me about *Asadi* and the whistleblower statute?

MR. RUBIN: I sure do. There is no beating around the bush here. There's two lines of cases. There is the Fifth Circuit decision in *Asadi* and a few district courts that follow it. A whole lot of district courts that go the other way on the issue of what it means to be a whistleblower.

The Second Circuit has the issue in front of it now in the *Liu* case. In the oral argument, the judges asked questions about it and presumably a decision will come down. It is also now before the Eighth Circuit. The exact issue, a magistrate judge dismissed a case on this exact ground --

THE COURT: Then I'm sure it's correct.

MR. RUBIN: So am I. But the district court went the other way, but then immediately certified it for interlocutory appeal to the Eighth Circuit.

THE COURT: Let me ask you a question. Looking at what I'm going to call Subsection III, which suggests that a whistleblower would be protected from reporting to something other than the SEC. Is there a scenario where somebody, under your definition of whistleblower, and the *Asadi* definition of whistleblower, which means you --

MR. RUBIN: The statute's definition of whistleblower.

THE COURT: Fine. Where you need to have reported to the SEC. Is there a scenario where an individual who reported

to the SEC would need the protection provided under Subsection III which isn't already provided under Subsection I?

Subsection I protects people who report to the commission. Your reading of the statute is that you need to report to the commission, and then if you do, you are protected from certain conduct. One of which is reporting to the commission.

So if reporting to the commission is a condition precedent, then who would fall under Subsection III that wouldn't already fall under Subsection I?

MR. RUBIN: Let me start by saying your question started with the phrase "a whistleblower." And in fact, a whistleblower is defined as somebody who went to the SEC. That's exactly what *Asadi* says. It is literally defined exactly as somebody who went to the SEC.

By contrast -- I am going to come back to the question. By contrast, Sarbanes-Oxley does not say it is a whistleblower who is entitled to protection. It says an employee is entitled to protection. Dodd Frank specifically says -- this is critical to this issue and critical to the decision in *Asadi* -- specifically says only a whistleblower is entitled to protection. And a whistleblower is defined, again, as somebody who went to the SEC. I'm sure you read or certainly will read *Asadi*, and I've got lengthy quotes from it here because it is right clearly exactly on point. It provides

a hypothetical where somebody could report to the SEC, but the company doesn't know that, and in the meantime is also reporting something internally. He would qualify as a whistleblower because he went to the SEC. But he might be terminated because of something he reported only internally. Or he might report different things internally and to the SEC. But the statute is very clear and *Asadi* is very clear that the definition of whistleblower is not ambiguous.

THE COURT: You think Congress wrote Subsection III to protect individuals who report both to the SEC and to some internal mechanism, and they face adverse consequences, and the employer who fired them didn't know that they had reported to the SEC so they couldn't be retaliated against just for that? You think that's the category that Subsection III was intended for?

MR. RUBIN: I hesitate to put my mind into the mind of the current congresses that we've had for a while, quite frankly, but that's the way the statute reads. That's exactly what the Fifth Circuit said. I'm not alone in this. I would feel less comfortable making this argument if I was the only one who said it.

Why would you have a definition of whistleblower that literally starts, it says exactly that somebody reported to the commission. That is unambiguous. Almost everybody says that is unambiguous. It is only later if you start raising some of

the questions that you're raising that the argument's been made that it is ambiguous. But the *Asadi* court has an answer to it. It says it is only ambiguous if you wanted to find somebody who reported internally as an additional category of whistleblower, which the statute doesn't allow for.

THE COURT: Let me ask you an esoteric question.

MR. RUBIN: These haven't been esoteric enough?

THE COURT: I'm struggling with the definition of ambiguous. It seems there are some cases that suggest that for purposes of deciding whether or not to read the plain language of a statute versus to look to the agency's regulations, you have to decide whether it is ambiguous or not, and there are some cases that suggest that the mere fact that you can hypothesize another interpretation of the, quote unquote, plain language suggests that it must be ambiguous and therefore you have to move on to the second analysis.

MR. RUBIN: I believe only the former applies. The fact that clever people can hypothesize a hypothetical that isn't conferred perfectly by a statute, if that were the grounds to go to the regulations and guidelines of an agency, we would be doing that a lot more often. It seems to be very clear that it has to be ambiguous. And the Fifth Circuit is very clear in describing why it is not ambiguous.

THE COURT: Meaning ambiguous on its face. Not can we sit around the table and come up with other interpretations

that make a fair amount of sense.

MR. RUBIN: Right. Pretty clever lawyers can come up with an awful lot of hypotheticals that Congress may or may not have thought of exactly as it was going through the whole statute passing and everything that goes back and forth in the amendment process.

However, you look first to the statute, and you've indicated if the statute is clear, you never get to the issue of the regulations or guidelines by an agency.

Here the statute is clear. That's a definition of whistleblower, it stands on its own, and the only people who get protection are whistleblowers. When it comes to defining who is protected, it is a whistleblower is protected. When you ask what is the whistleblower protected from, "protected from" is complain to the SEC, being part of an SEC investigation or internal complaints, but that's only a whistleblower.

Again, it is different than Sarbanes-Oxley. He could have brought his claim under Sarbanes-Oxley here but he didn't. He went with Dodd Frank. Dodd Frank has a definition of whistleblower that he does not qualify for under the *Asadi* line of cases.

And there is the other issue which we started discussing earlier which is we don't believe he has a reasonable belief as to any of the allegations that were made. A really clear example is the late media payments. To me,

that's the 13th chime of the clock, which is not only is itself not correct, but it calls into question all the earlier 12 chimes or in this case any other allegation.

The client pays Neo some money to pay the media. Neo pays the media. It never hits the profit loss statement. It is not reported to shareholders. If assuming we paid a little bit late, which we didn't, we gained some interest. That interest is reported. There is no claim that the interest was not accurately reported. That's additional money for the shareholders. All he says is that might possibly violate some law and never says what law.

THE COURT: It goes back to my pleading questions to you as to whether or not -- because in the delayed media payments, as I read the complaint, there is an allegation of a violation of the law. Whereas I think in some of the other reporting transactions, there is only allegations of violations of GAAP or WPP I think.

MR. RUBIN: That's correct.

THE COURT: I'm no expert here on GAAP, but I am assuming you could violate GAAP and not engage in your accounting in the best recommended practices and still not commit fraud. I don't assume that a violation of GAAP is necessarily a violation of the securities laws. It might be, but I don't think it necessarily is.

MR. RUBIN: I agree with that. My point is, when you

take something that is so obviously and clearly on its face not a violation of any law at all, the mere fact that you stamp it with "I think that's a violation of law" doesn't satisfy the reasonable belief requirement. Because it has to be objectively reasonable, and subjectively reasonable.

So it is not only what somebody in Mr. Berman's position as a sophisticated financial person understand very clearly that there is no violation of law paying a vendor later than the vendor wanted to be paid, who has been defrauded? The vendor got paid late. The client who paid us doesn't care. It is done.

So the mere fact that you say the walls are white and that's a violation of the securities law doesn't mean that the Court has got to, looking at that, say that objectively or subjectively somebody can conclude have a reasonable belief that violates the law. That falls into that category and that's what you'll find in *Nielsen* and *Sharkey* and *Fraser*, although it is a summary judgment case.

THE COURT: I'll look at those cases.

MR. RUBIN: On to the client that supposedly should have been a cash in advance client, it is a bad business decision. Some clients pay late. As we indicated, his brief seems to contradict the complaint all together about what position he took and which side of that discussion he was on. In any event, whether we had a client that paid late, where is

the fraud? Where is the violation of the securities law? What was reported to the public that misled them in any way? How are shareholders hurt by that?

Again, there is really no claim that that violates the law. There is no indication of what law it violates. So that really also falls by the wayside for the same reason.

On the others we've argued he is so unspecific about what it is he's claiming that we don't have a way to explain it to you. I could now because I know what went on in the company. Even he says that some of the things he reported were corrected or were done the way he asked them to be done. Those kind of decisions under GAAP as to when to recognize revenue, when to release reserves, those aren't securities law violations or Sarbanes-Oxley. Those are judgment calls that are made every day in businesses.

I can give you an example right from here. In December we don't know how much the telephone bill is going to be for the year. Telephone bill. That is an actual example. So you accrue an amount for the telephone bill. Then comes January, or February, you get the telephone bill. You now know that while you reserved $100,000, it came in as $75,000. So you've got $25,000 too much that you have accrued. It is time to reverse that and allow the $25,000 to flow into income. That is an actual example of one of the things that we're talking about here. It is even smaller than that --

THE COURT: I understand your point. Unless you have anything other that you want to mention, I am going to give Mr. Meisner an opportunity.

MR. RUBIN: Breach of contract claim.

THE COURT: I think that issue has been well briefed, so unless there is anything in particular you want to raise.

MR. RUBIN: Just the *Lobosco* case. It is a New York breach of contract state law issue, almost identical to this. There is a code of conduct with a complete disclaimer just like this case. There is the requirement that you report any wrongdoing, just like this case. In *Lobosco*, which is a better case for the plaintiff, there is a no reprisal statement that says there will be no reprisal if you report this. That doesn't exist in this case, with only one thing, which is an anonymous call to the parent company's hotline, something that is admitted he did not do here.

In any event, the New York Court of Appeals is very clear and Second Circuit has embraced it in *Baring* and the Southern District in *Sharkey* saying that the disclaimer trumps anything else that's in the manual, and therefore, the case has to be dismissed.

THE COURT: Thank you very much. Mr. Meisner.

MR. MEISNER: Thank you, your Honor. Wow, I am not sure really where to start. Let's start with the specificity of the accounting fraud. My client -- we could not have been

more clear. We have pled near criminal, the highest level, the holiest grail of accounting SEC violations right in the complaint. Mr. Berman pleads that --

THE COURT: What paragraph?

MR. MEISNER: I'm sorry. 39. But I'm pulling out the attachment to defendant's papers and not the signed complaint. On that I'm looking at 39.

I'll just summarize it. Bradley Rogers is attempting to conduct accounting transactions in which he's going to reverse accounting reserves directly into profits. We do not reserve telephone bills. Reserves are set based upon FASBY rules and regulations, specific accounting regulations and rules that are subject to the SEC laws.

So, for a non-accountant to try to take a reserve that's set up in accordance with WPP policy, and accounting laws, and to then try to decide on his own, without using the regulations, without talking to auditors, external or internal, or even talking to Mr. Berman whose job it was to approve those reversals, rolling them into profits, it is the classic, it is the highest level of accounting fraud that we know in this country.

THE COURT: I'm not looking at Mr. Berman's certification because I don't think that's appropriate for me to look at, at a motion to dismiss stage. I have looked at it, and I appreciate it is I think significantly more facty, as we

say, than the complaint. But is there something in the complaint that you can point to? Paragraph 39 is not what I think you think it is in the complaint. Is there another paragraph? What is your best example here?

MR. MEISNER: Let me go on to continue. What I'm trying to say is that the executives of Neo were not entitled, not allowed under law or under WPP policy to move reserve money out of reserves into profits. And further, Mr. Berman pleads that Bradley Rogers did this in order to reach certain levels of revenue and profits that would have allowed him to accrue a personal bonus for himself and his executive team.

Now, Mr. Berman, whose job it was to sign off on all of these transactions, objected to these things. He said you can't do it. And, let me -- here it is, why does Mr. Berman have that job, what is the problem with all these reserves. The problem is, all of Neo's and Ogilvy's financial accounting rolls back up to WPP, a publicly traded in the United States. To present fraudulent and false accounting results to shareholders who invest in the company.

THE COURT: I want to unpack a little bit about what you're saying here. I have a couple of questions. I have for you the same question I asked defendants, which is what is the appropriate pleading standard in a 12(b)(6) motion. So I'd like to hear from you what you think the standard is. With respect to how much -- I hesitate to use the word

"specificity," because that invokes this definitive and specific test which is not really what I'm talking about. But, how much do you need to plead in order to satisfy Rule 8 -- hold on --

MR. MEISNER: I'm sorry.

THE COURT: Then relatedly, in connection with what you're telling me about all of these, I'll call them shenanigans about how people were dealing with revenue and whatnot. If we're talking about a non-public entity, and maybe the way that they were managing their profits and P and L was not GAAP consistent. But, so long as the reporting to the shareholders ultimately through the parent company's reporting was accurate, is there still a violation that is relevant for the retaliation provisions?

MR. MEISNER: Yes, your Honor.

THE COURT: That's a lot to answer.

MR. MEISNER: No, that's okay. Yes, your Honor. First what I would say is what is not the standard is citing specific U.S.C. citations and the specific rules. Mr. Berman is so --

THE COURT: There is somewhere between "possibly violates the law", and "15 U.S.C. Section 832."

So, my question for you is where on that spectrum do you need to satisfy in order to survive a motion to dismiss?

MR. MEISNER: Your Honor, we're so far over the line

here. Mr. Berman has alleged it is unlawful conduct. I'm going to say he's alleging near criminal conduct where there is an intention to mislead the parent corporation and with the result misleading public company shareholders who have invested in this company.

THE COURT: Can you show me in the complaint, not in his certification, give me your best paragraph for where you think you are so far over the line on the pleading standard.

MR. MEISNER: I'm not entirely sure. I would say that -- can I read it? Because I'm looking from 36 to 40, it is talking about January of 2013, Bradley Rogers attempted to execute accounting transactions that were -- that would improperly and fraudulently improve the financial results of Neo. And the reason he did that was so that he could accrue bonuses for himself. Then I go on to say, here it is. That, and by the way, in that situation, Mr. Berman blocked him. Dodd Frank is a retaliation claim. Okay. Imagine the lower-level accountant who is the GAAP CPA who goes in and says hey, you are the boss, you are the CEO of my unit, but you made an accounting mistake and you can't accrue a bonus for you or me. I am an accountant and I've got reporting lines to the audit committee and CFO here and higher above. You cannot -- you cannot take those transactions for the purpose of -- and therefore, your reserving yourself a bonus violates our policy. Right. So, that's when he started to get the retaliation. It

then rolls into very, very specific conduct. Which is again, reversing reserves, reversing reserves is a no-no. It is the third rail. It is the holy grail. The CEO of a unit may not reverse reserves into profits. It is how all the biggies go down. It is very specific, it is very serious. It is the highest level of civil misconduct under SEC law. I am going to say for today it is near criminal. Then we can all talk about, well, did he do it to accrue bonuses for himself. I don't know yet. I'd like some discovery. This is a motion --

THE COURT: Does it matter why they did it?

MR. MEISNER: Well, well, it does matter because, because the defendant started their argument saying something about Mr. Berman was terminated because of outsourcing to India, which I find preposterous. And Mr. Berman's side of the story is very well-pled. That's not the case. Maybe it does relate.

However, just to reiterate, it would seem to me that there is some very, very serious allegations that are so far over the line that they almost touch criminal conduct. And they clearly touch the third rail of accounting and SEC regulation, which is financial statements need to be pristine. Sarbanes-Oxley and Dodd Frank says little guys like Mr. Berman who are mere CPA accountants, they cannot be touched. And if they say that's a bad account -- if they say that's a bad transaction and if they say you cannot reverse reserves into

profits, he needs to be protected.

All this stuff, the vendor stuff, come on. That's a flavor of what we're dealing with here. Yeah, okay. It doesn't violate a law I guess. But guess what? It violates WPP policy. You can't use client money. That money --

THE COURT: Is that enough to invoke the protections of Dodd Frank?

MR. MEISNER: No.

THE COURT: Let's say their conduct all was contrary to GAAP, and violates WPP policy. I'll grant you that for purposes of this argument. Is that enough for your client to invoke the protections of Dodd Frank? I'm not convinced that it is. I think you need to allege that you had a reasonable belief of a violation of the covered laws.

And so my question comes back to what exactly do you need to plead in order to overcome the motion?

MR. MEISNER: Well, first of all, I think the cases are clear, and I won't cite one. Reasonable belief is a factual -- is a factual question. I have no idea how defendants are going to claim in a motion to dismiss based on pleadings that my guy didn't have a reasonable belief. Give me a break. He was the GAAP accountant for that unit and his job --

THE COURT: I tend to agree with you. But I'd like to focus on the violation part. Right. So I think the cases, and

I agree that there are plenty of cases that say it is a fact question whether the belief was reasonable. But looking at what you need to allege, let's look at the favorable terms conduct where Mr. Berman alleges that there was a client who was in default and the company decided to do a favor and help out and maybe roll something over or not enforce payments. I don't know exactly what was done. But there was some sort of favorable payment plan. So, I don't think it is alleged in the complaint there was a violation of the law there.

MR. MEISNER: I've got a little red herring problem going over here. Some of these vendor, using vendor money inappropriately issues, policy issues, I am going to reserve on that and try to direct your attention right back to what I'm calling the third rail, holy grail of intentionally putting out false numbers and circumventing accounting rules, SEC regulations, internal policies intended to prevent this stuff. Circumventing all that stuff so they can paint a fake picture of Neo's unit's accounting which of course then tainted Ogilvy. So I'm --

THE COURT: This is what you've got in paragraph 40 which the defendants are calling the reversed accounting reserves. Is that what you are saying is the third rail?

MR. MEISNER: Yes, your Honor.

THE COURT: Let's focus on that one then. Do you allege in the complaint that this was reported to any

supervisor? And do you allege in the complaint, notwithstanding your representation to me today this is the third rail, do you allege in the complaint that it violates any of the covered laws?

MR. MEISNER: Yes, your Honor. We allege that, it was reported -- that Mr. Berman threw himself, threw himself into the head of the business unit, objected to it. He objected to various financial officers at Neo. Then when -- see, your Honor, in Sarbanes-Oxley, in compliance world, there is a concept of moving up the ladder. Right. We don't -- Mr. Berman has an important job at the company. He is in charge of Sarbanes-Oxley compliance. He has to sign, he's responsible for signing Neo's books and saying the accounting works. Okay. He doesn't run to the SEC.

He's dealing with a cancer. He's trying to kill a cancer. He is not going to kill the body. His job is to first go to the business person who is trying to conduct bogus accounting. Then he should go to the CFO of the business unit. Then he should go to his business comptroller. Then he should go to the CFO of his division. Then he should go to the corporate control. Then to the internal audit. Then the CFO. Then he should go to the audit committee or then he should go to counsel for the company.

And then, when everybody says go way, go away, go away, we don't pay severance, we don't do anything, you are a

liar, we sent your job to India, all that baloney, they forced him to go to the SEC.

He did the right thing. He slowly escalated, he went up the chain, up the ladder, tried to cure the body. Of --

THE COURT: Right. But I assume you are not alleging that the adverse employment conduct that your client experienced was as a result of going to the SEC. Because that happened at the very end of this chapter. Right?

MR. MEISNER: I believe that's correct, your Honor. But, but after he reported to the audit committee, that's when they shut down communications and would no longer help him look for a new job at another division.

THE COURT: I'm just looking at your complaint. And we are talking again about the reversed accounting reserves. In paragraph 41 you say plaintiff once attempted to prevent those accounting transactions. And then later in that paragraph it says that one or more accounting officers of defendants overruled plaintiff. So that suggests that he went to some accounting officer and complained about this and was not heard. Is this the allegation here?

MR. MEISNER: That's --

THE COURT: That's the reporting.

MR. MEISNER: That's one. Remember, your Honor, this is a retaliation complaint. So no whistleblower gets fired two seconds after blowing the whistle. Right. They get fired

in a convenient time.

THE COURT: Is there another reporting with respect to this particular conduct, the reversed accounting reserves?

MR. MEISNER: I'm sorry, your Honor. I'm not understanding the question. There is the first -- I'm sorry.

THE COURT: You allege in the complaint four transactions that your client thought were inappropriate. And my job here on this motion to dismiss is to see whether or not you've alleged enough facts to survive a 12(b)(6) motion.

So you're telling me that the most egregious conduct, the third rail, to use your words, is the reversed accounting reserves. That everybody knows you cannot do that. So since that's your strongest claim, I want to look to see whether or not you've pled enough here to allege that it was reported to a supervisor, and that Mr. Berman reasonably believed there was a violation of the covered laws.

There is a slightly vague allegation that he once attempted to prevent this from happening, and we hear that the defendants overruled this attempt. So I guess I can infer from that he did report to somebody. It is not exactly clear to whom he reported or when. But there doesn't appear to be any allegation of a belief that there was a violation of any of the laws.

MR. MEISNER: Yes, your Honor. There is -- in the pleading itself, he does not particularly name the officers,

but I can -- I know he did report to business person, he objected to business person, he reported it to within his unit and then above. So, it would seem to me that it meets the pleading standard in any event at this stage. He should be permitted an opportunity -- if that really is the standard, which I don't think it is, but if it is, he should be provided an opportunity to replead or amend. Look where we are in the stage here.

THE COURT: Let me ask you another question which is about chronology. The biggest adverse consequence to your client was that he was terminated. That happened in April 2013. It is not clear entirely, I don't think from the complaint, when some of these reports were made to supervisors. So, and then we have the October reporting to the SEC. But I don't think anything adverse to your client happened in November or beyond. So I think we're looking at the primary adverse consequence was in April. There may have been some additional adverse consequences that maybe bookended that date related to efforts to secure him a position at another entity.

But can you tell me when the reportings happened relative to which adverse consequence to your pleading?

MR. MEISNER: To the extent I don't have them pleaded in here, they can be corrected. I just -- you're asking me to provide more detail I don't have handy. Mr. Berman is in the courtroom. If it is relevant to the motion we can certainly

have him raise his right hand and answer that question.

THE COURT: That's all right.

MR. MEISNER: Going back to the general issue, look, Mr. Berman has pleaded a very, very strong and very serious -- the utmost, most serious claim you can possibly claim in SEC world. Presenting shareholders with fake -- with fraudulent information done intentionally, done in certain cases in order to enrich executives. It is unbelievable. He was a SOX signer where his job was to oversee and make sure these numbers were clean.

He's pled retaliation, he's pled trying to stop this stuff by going to very senior officers at Neo, he's pled he's gone to accounting officers. You see from the motions from the complaint that he continuously tried to act on behalf of shareholders. He never acted as a guy that said, hey, yeah, I want a bonus too, go ahead and reverse the stuff, it's fine, I get a bonus too.

He's constantly, continuously, he fought lawyers, he fought audit committees, he fought a global internal auditor, he slowly raised this thing to try to prevent the cancer. That's important here.

So as pleading standard, the significance and the seriousness of what he's pleading is so overwhelming that I don't see how on a motion to dismiss I am out of here. Because he didn't insert a date or he didn't want to put a name, a

particular name, perhaps out of respect into the complaint. More so, it is a motion to dismiss. I don't understand, my certification is too facty I guess. But defendants' motion is based on a certification as well, and I don't know how they get to put all this additional information at this stage in order to try to dismiss my complaint.

Not only that, the certification that they put in, it is a certification of their own attorney. In other words, attorneys for defendant, they're relying on a certification of a fact witness that they wrote themselves. I can't even comprehend how we can base a motion to dismiss on that.

If that's not enough, they're using privileged documents that I wrote intended to, number one, kill the cancer, and number two, get this thing settled, because let's face it. It is a private right of action, it is a serious cause of action. My guy was fired, and he has real damages.

So I don't like the innuendo through redacted privileged documents that my guy's like some kind of extortionist.

By the way, those redactions, I can't tell you how artistic they were. They weren't just redacted. They were intentionally redacted to make my guy look bad, and he took out all his superhero conduct where he's trying to kill the cancer. I am very disturbed that's the basis for the motion.

THE COURT: Let me ask you to give me your argument on

the *Asadi* case and whether or not the Court should rule consistent with the Fifth Circuit that your client is not entitled to the protection because he never went to the SEC.

MR. MEISNER: Your Honor, I'm sure the Fifth Circuit is a very nice circuit, and I'm sure the Eighth Circuit is a very nice circuit.

I have not been to those circuits. I'm in this circuit. And in this building, and over at Pearl Street, the judges, they fall on my client's side here.

And if I can give you some substance on the matter, I'll just go back to my kill cancer analysis. Which is Mr. Berman is an accountant. He's part of the body. His job within the body is to keep it clean. So, when he sees a problem, he'll see an accounting problem, he'll fix it. Oops, sorry, mistake. Accounting issue, mistake, no problem, we'll fix it. That's his job.

When he goes to a very senior executive and says accounting problem. No, it's not, I'll take care of it, go away, leave me alone, and that's not cured to his satisfaction, he doesn't run to the SEC. He's not going to kill the body. He runs to the next person, whoever it is. I don't have the facts with me. Maybe he runs to the CEO of the company.

THE COURT: I understand and I am sympathetic. So the argument that why would you want to encourage preemptory running to the SEC when maybe you can solve the problem

internally. But, that is maybe what you and I might agree if we were Congress, but we do have a statute.

MR. MEISNER: Yes.

THE COURT: That is reasonably plain on its face.

MR. MEISNER: Yes, your Honor. It is a statute that has some issues that the SEC says, hey, they fall on Mr. Berman's side. And this district, this circuit --

THE COURT: We only get to the regulations if we find that the statute is ambiguous.

MR. MEISNER: Here's why, but here's why, your Honor, it is ambiguous for this reason. Because Dodd Frank's different. It is a retaliation claim. I didn't bring a Sarbanes-Oxley claim here. That's not a retaliation claim. That's like corporations have to be crystal clean. We're talking about Dodd Frank, the anti-retaliation provision. It is inconceivable that that statute would only protect people who go to kill the body and go straight to the SEC. That's not just how retaliation is. The statute is ambiguous, and it is so ambiguous that everybody is writing about it. The SEC's writing about it. The articles -- it is ambiguous. Frankly, it is all falling, the majority is falling on Mr. Berman's side. And look, I'm not a legal scholar. So I am sure the law review articles will get it right. Not me.

But it would seem to me ambiguous, it is different because it is a retaliation claim, it is not a Sarbanes-Oxley

claim. And just it doesn't make any sense in a retaliation scenario that that statute precludes the protection of Mr. Berman for making sure the books are clean there and getting canned unceremoniously. Thank you.

THE COURT: Let me ask you one last question which is since I let the defendants speak about the breach of contract claim. Can you give me your best case for your client's position that there was a breach of contract here.

MR. MEISNER: It is a bit of a tail wagger, your Honor. I got to tell you, I would love discovery on that. I'll tell you why. Because that company, WPP, Ogilvy, whatever, Neo, their employee handbooks and their codes, they stink. I can't find them. They are not on the Internet. It is unclear. They are not good. And they're unclear. They're vague.

So you know there is a contract issue here. I know there is cases and this case and that case, I get all that. I would love discovery. Because I want to see all these employee handbooks, policies, who to blow the whistle to. I want to see that stuff because I think there is a contract there. I really do.

THE COURT: Okay. Good.

MR. MEISNER: Thank you.

MR. RUBIN: Couple of very quick responses.

THE COURT: Sure.

MR. RUBIN: As the Fifth Circuit in *Asadi* said, if you interpret Dodd Frank to the way plaintiffs want it interpreted then you make SOX moot. SOX allows for employee complaints without having gone to the SEC.

THE COURT: SOX has a more strict statute of limitations.

MR. MEISNER: SOX does not have a private right of action for people like Mr. Berman.

MR. RUBIN: SOX also has a big retaliation provision. It is not just Dodd Frank that has that.

Second, the argument was just made that Mr. Rogers accrued a bonus for himself. That is not only nowhere in the complaint, it is complete Alice in Wonderland. The argument that has been made in the complaint in the briefs is that some of the accounting --

THE COURT: Mr. Meisner, can you stay seated please.

MR. RUBIN: Some of the accounting things that they're arguing about would increase profits which might permit him to get a bonus. He didn't literally say I'm going to put a bonus for myself, I am going to accrue a bonus for myself, which is actually what was argued here when you see the transcript. That was just made up for effect right now. And the facts, when they come out, would be that none of this stuff he could have done would have affected his ability to get a bonus anyway. But that's almost beside the point.

When your able staff looks further into GAAP, to say that reserves can never be reversed, reserves are always reversed. It is a question of when and under what circumstances. People have different opinions. There are a number of other financial people at these companies higher up the chain than Mr. Berman. They are entitled to have an opinion under GAAP also. The notion that reserves can never be reversed, that's just silly. They're always reversed or they're written off. Something is done with the reserve. And people look at it and they say have the bills now come in? Is it now time? Have we been paid? When do we reverse this.

So it is not the third rail that these were reversed. There is a difference of opinion about under what circumstances these should have been reversed.

Again, if we had facts here that, because this wasn't a motion to dismiss, we could explain this to you in detail and you would see how none of this has anything to do with security law violation or Sarbanes-Oxley.

You raised a very good question which is what the impact of any of this on WPP's the ultimate parent company's accounting. Neo is a tiny, little subsidiary of another company, Ogilvy, which is yet still a pretty small subsidiary of WPP. There is actually no allegation here that all of this gets all the way through to WPP's accounting. It wouldn't. This is less than a rounding error. The amounts of money we're

talking about here, which, again, are not in the complaint so we're not a position to point them out to you, but we would be glad to do so, would not even reach the rounding level at WPP. It is a $33 billion company. The notion that any of that is influenced by what the bonus was or what the reserve on accounting for telephone bills or any of these other minor little things we're talking about here, the notion that shareholders of that company could have been misled by any of this is just pure fantasy.

THE COURT: And absent it getting sort of out to the shareholders or to the parent company, none of the conduct could ever be a violation of any of these covered laws. Is that what you are saying to me?

MR. RUBIN: Yes. Both of these laws are about misleading shareholders. This whole idea came out of Enron. It is not about protecting Ogilvy's client or Neo's client and whether its vendor bills were paid on time or CBS or AOL, whether the vendor got their bills paid on time. It is not about whether we were good to a client by not pursuing them vigorously enough when they didn't pay their bills. It is about shareholders. It is to protect shareholders. None of this stuff ever would get to the level of making any difference to the shareholders of WPP, which is publicly available information. The annual reports are online. These numbers would have no impact on that at all. They would not impact on

the bonuses of any of these people either.

THE COURT: Thank you very much. Mr. Meisner, if you're very brief.

MR. MEISNER: Very brief. Materiality is not relevant here. And in any event, the accounting was material to the business unit. It was material to Mr. Berman's job within that unit. And again, this is a retaliation claim. So trying to keep your books clean and then getting terminated for the favor, is relevant.

By the way, I did not say reserves cannot be reversed. I said they have to be reversed in accordance with particular GAAP FASBY rules. And would need to be approved by internal auditors of internal accountants and outside auditors.

THE COURT: Thank you, everybody. I appreciate it.

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