UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JENNIFER SHARKEY,

Plaintiff,

10 Civ. 3824

-against-

ORDER

J.P. MORGAN CHASE & CO., JOE KENNEY, ADAM GREEN, and LESLIE LASSITER in their official and individual capacities,

Defendants.

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A P P E A R A N C E S:

Attorney for Plaintiff

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Sweet, D.J.,

Defendants J.P. Morgan Chase & Co. ("JPMC") and Joe Kenney ("Kenney"), Adam Green ("Green") and Leslie Lassiter ("Lassiter") (collectively, the "Defendants") have moved for summary judgment, pursuant to Fed. R. Civ. P. 56, on the remaining claim of Plaintiff Jennifer Sharkey ("Sharkey" or the "Plaintiff") alleged in the Amended Complaint.

For the reasons set forth below, Defendants' motion is granted.

Prior Proceedings

On October 22, 2009, Sharkey filed a timely complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor ("OSHA") alleging violations of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley" or "SOX"). On or about April 12, 2010, OSHA issued its findings and preliminary order dismissing her complaint. *See* OSHA Order (Apr. 12, 2010) (Ex. AA to the Declaration of Michael D. Schissel, dated August 12, 2013 ("Schissel Decl.")) ("OSHA

Order"). Sharkey filed her complaint with this court on May 10, 2010, alleging the same claims under SOX.

On June 1, the Defendants moved to dismiss the complaint. The Opinion and Order dated January 14, 2011 of this court (the "January 14 Order") held that Sharkey engaged in a protected activity under SOX when reporting with respect to a third party, the Suspect JPMC Client ("Client A" or the "Suspect Client"), but that the illegal activity reported was not adequately alleged in the original complaint. *Sharkey,* 2011 WL 135026, at *4-8. Sharkey was granted leave to replead her SOX claims, but Plaintiff's state law breach of contract claim was dismissed with prejudice. Sharkey filed her Amended Complaint ("AC") on February 14, 2011.

The AC contains a single claim for an alleged violation of the whistleblower provision of SOX, namely that Plaintiff blew the whistle on Client A, for which JPMC retaliated by terminating Plaintiff's employment. The AC includes twelve paragraphs alleging that Sharkey believed Client A was violating one or more of the enumerated SOX statutes in addition to money laundering (AC ¶¶ 1, 17, 20, 26-27, 36-38, 43-44, 52, 57), and thirty paragraphs and subparagraphs outlining

the purported factual basis that gave rise to that belief (AC ¶¶ 25.a-25.g, 27.a-27.q., 28-37).

On February 3, 2011, Defendants filed a motion to dismiss the AC on the grounds that (1) this court lacks jurisdiction because the newly pled allegations in the AC were not contained in Sharkey's OSHA complaint, (2) while the AC contains additional factual allegations regarding the purported suspicious activities of JPMC's client, it fails to state with any level of specificity what it is she allegedly reported to JPMC supervisors that constituted whistleblowing, (3) the AC does not meet the pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) because Sharkey still does not identify which statute enumerated in SOX she believes JPMC's client violated, and (4) the AC fails to allege that Defendants knew or should have known that she engaged in protected activity because the AC fails to disclose which purported communications or disclosures constituted her alleged whistleblowing. On August 19, 2011, Defendants' motion to dismiss was denied ("August 19 Opinion"). *See Sharkey v. JP Morgan,* 805 F. Supp. 2d 45 (S.D.N.Y. 2011).

On June 14, 2013, Defendants submitted a letter (the "June 14 Letter") moving to strike the testimony of Plaintiff's expert, Anne Marchetti ("Marchetti"). This letter was treated as a motion, and was heard and marked fully submitted on September 18, 2013. By order of October 9, 2013, Marchetti was determined able to testify as to those matters and transactions which, as an accountant, might trigger concern under SOX (so called "red flags"), but was precluded from testifying as to whether Plaintiff's belief in suspecting Client A and recommending termination was "reasonable," or further bolstering Plaintiff's testimony as to internal matters of which Marchetti has no personal knowledge.

On August 12, 2013, Defendants' submitted the instant motion for summary judgment against Plaintiff. This motion was heard and marked full submitted on October 9, 2013.

Facts

Knowledge of the underlying dispute in this case is assumed and described in the August 19 Opinion. The facts below are repeated in part as relevant to the instant motions and set forth in Defendants' Statement of Undisputed Material Facts

("Stmt.") and Plaintiff's Counter Statement of Undisputed Material Fact ("Counter Stmt."), pursuant to Local Rule 56.1.

The Parties

Sharkey was hired by JPMC in November 2006. (Counter Stmt. ¶1.) From the spring of 2008 through August 5, 2009, Sharkey, as a Private Wealth Manager in JPMC's Private Wealth Management ("PWM") Division, was supervised by Lassiter, who was the head of the PWM unit in which Plaintiff worked. Lassiter reported to Green, then the head of PWM's Northeast Region, who in turn reported to Kenney, then the Chief Executive Officer of PWM. (*Id.* ¶¶ 3-4.)

The KYC Process and Client A

Client A is a client of JPMC engaged in multiple businesses. (Stmt. ¶ 7.) As a Private Wealth Manager, one of Plaintiff's responsibilities was, for each client, to oversee and complete the Know Your Customer ('KYC')[1] due diligence

[1] As Plaintiff describes, "KYC is a policy implemented by banks to conform to a Customer Identification Program . . . mandated by the Bank Secrecy Act, Title III of the USA PATRIOT Act, and federal regulations to prevent, *inter alia*, money laundering and terrorist financing." (AC ¶ 44 (citing 31 C.F.R. 103.121).)

process and associated forms. (*Id.* ¶ 5.) This process is used, in part, to identify potential "high risk factors" associated with JPMC clients. (*Id.* ¶ 6.) The KYC process for Client A had already begun when Plaintiff was assigned Client A in early 2009. (*Id.* ¶ 9.)

Prior to Plaintiff's involvement with Client A, the JPMC Risk Department had identified potential risk factors related to the client. (*Id.* ¶¶ 9-10.) In April 2009, Kathie Gruszczyk ("Grszczyk"), a JPMC Risk Manager, sent Plaintiff a memorandum summarizing these potential risks for Plaintiff's follow-up. (*Id.* ¶ 10.) Most of the information in that memorandum was collected by the Risk Department before Plaintiff was ever assigned to Client A. (*Id.* ¶ 9.) Plaintiff testified that, to her, the most significant information in the memorandum was the following:

- Client A and his businesses had 50 bank accounts, some of which had zero balances;
- Client A was in the diamond and prepaid calling card businesses;
- Corporate documents for some of Client A's businesses were not in JPMC's files;
- No records for one Client A entity were found during a background check performed in 2007;

- One of Client A's businesses was incorporated in Israel;
- Client A had made requests to wire money from Colombia;
- Client A had not provided all documentation requested by prior bankers;
- Client A had been involved in businesses that went bankrupt in the mid-1990s.
- Client A executed trades in an escrow account owned by a law firm (the "Ostrager Account") and Plaintiff was unable to corroborate Client A's statement that he was authorized to trade in that account;
- Client A failed to provide all documents requested by Plaintiff; and
- Plaintiff was unable to confirm addresses for some Client A businesses.

(*Id.* ¶ 11.) Sharkey also testified that the following additional information contributed to her belief regarding Client A:

- It was unclear whether Client A's businesses were foreign or domestic, which Gruszczyk stated was a "risk concern";
- It was unclear how Client A's businesses interacted with each other, or who owned Client A's businesses, which Gruszczyk stated was a "risk concern";
- The source of wealth of the principals of Client A's businesses was unknown, and one owner/signer on certain Client A accounts is a "politically exposed person," which Gruszczyk stated was a "risk concern";
- Although Client was purportedly interested in cooperating with Sharkey, Plaintiff maintains that after the first or second time she spoke with him, he "was unable to get to the phone, he wouldn't return [her] phone calls [and JPMC] couldn't get the information" to fulfill the KYC requirements;

- As Gruszczyk acknowledged, JPMC had caught Client A in "lies," and he was giving Sharkey the "run around;"
- As Gruszczyk acknowledged, Client A had judgments/liens filed against him for over $33,000,000, and banks that worked with Client A claimed over $50,000,000 in losses when a business run by Client A was forced into bankruptcy;
- JPMC Risk Officer Janice Barnes noted that Merrill Lynch alleged Client A's business engaged in "systematic manipulation of its books" and "substantial fraud," producing "an account of disappearing assets that read[] like a whodunit mystery"; and
- Client A was in "the diamond/gem business," and had requested wire transfers from Colombia for the sale of emeralds.

(Counter Stmt. ¶¶ 11, 44, 45.)

The Ostrager Account

In the course of the KYC process, Plaintiff learned that Client A had been executing trades in an escrow account, the Ostrager Account, at JPMC that was owned by a law firm (the "Ostrager Firm"). (*Id.* ¶¶ 12-13.) The Ostrager Firm represented and still represents Client A in multiple litigations concerning the infringement of patents owned by Client A. (*Id.* ¶ 12.) The Ostrager Firm deposited proceeds from those litigations into the escrow account, and then authorized Client A to enter into trades with funds from the accounts. When Plaintiff brought Client A's trading in that

account to Lassiter's attention, Lassiter told Plaintiff "to find out . . . what were the reasons for it, and to make sure we had appropriate documentation." (*Id.* ¶ 13.) Plaintiff could not locate a written authorization, but she asked Client A if he was authorized to trade in the account. (*Id.* ¶ 14.) Client A explained to Plaintiff that the funds in the escrow account were proceeds from patent litigations, and that the Ostrager Firm had authorized him to trade in the account. (*Id.*) Plaintiff attempted to contact the Ostrager Firm to confirm such authorization. (*Id.* ¶ 15.) She then was told to contact a specific individual at the firm, whom she did not reach despite multiple messages. (*Id.* ¶ 15.)

After Plaintiff was terminated, JPMC confirmed with the Ostrager Firm that Client A was authorized to trade in the escrow account, and JPMC employees located the written authorization in JPMC's files that Plaintiff contended she could not find. (*Id.* ¶¶ 25-26.)

In addition, Plaintiff contends that she asked Client A to provide certain corporate documentation and information required by the KYC process, and that Client A produced some, but not all, of that information. (*Id.* ¶ 20.) Plaintiff does

not identify what information Client A had not produced, but JPMC has since obtained KYC information from Client A. (*Id.* ¶ 25.)

Plaintiff's Purported Concerns and Written Recommendations Concerning Client A

Based on the above information regarding Client A, Plaintiff claims she became concerned that Client A was possibly engaging in illegal activity, and voiced those concerns to her supervisor Lassiter and to Gruszczyk in the JPMC Risk Department. (*Id.* ¶ 16.) Plaintiff also began to suggest to Lassiter that the PWM Department at JPMC exit its relationship with Client A. (*Id.*) When Lassiter asked Plaintiff for the reasons, she responded primarily by saying that Client A was in the gem business, he was Israeli, he had not provided all KYC information, he had multiple bank accounts and he was trading in the Ostrager Firm account. (*Id.* ¶ 16.) Lassiter urged Plaintiff to obtain the missing KYC information and confirmation from the Ostrager firm, and told her that more information was necessary, given that the other facts, without further specifics, were insufficient to exit a client. (*Id.* ¶ 17.) Lassiter and the Risk Department urged Plaintiff at various points to complete her KYCs, including the ones for Client A.

(*Id.* ¶ 18.) Independently of Client A, Lassiter maintains that Plaintiff was of the slowest under her supervision to complete her KYC forms in timely manner. (*Id.*)

Eventually, Lassiter asked Plaintiff to put in writing by the end of July 2009 any concerns she had about Client A and her recommended course of action. (*Id.* ¶ 19.) On July 24, 2009, Plaintiff sent an email to Gruszczyk, Lassiter and three others (excluding Green and Kenney), stating that the information collected felt "uncomfortable regarding the [Client A] family relations and the nature of its businesses as well as its related entities," and that she had not received "all the documentation and identification needed to satisfy our standard Know Your Client requirements." (*Id.* ¶ 20.) Plaintiff recommended "that we discuss a simple way to detach the relationship from the PWM metro business." (*Id.*) Plaintiff did not recommend that all lines of business at JPMC sever their relationships with Client A but instead stated: "I want to be mindful of the fact that other LOB's [lines of business] within the firm have relationships with this client and/or its related entities and may wish to retain some or all of their business." (*Id.*) Plaintiff did not mention any illegal conduct or specific

unlawful activity in which she suspected Client A to be engaged. (*Id.*)

After reviewing Sharkey's e-mail, Lassiter and Gruszczyk discussed it with Plaintiff (*id.* ¶ 21), and Lassiter agreed to terminate JPMC's relationship with Client A in reliance on Plaintiff's representation that Client A had not provided all KYC documentation that Plaintiff claimed she had requested. (*Id.*) Gruszczyk purportedly later sent Plaintiff sample letters used by JPMC to exit client relationships. (*Id.* ¶ 22.)

After JPMC terminated Plaintiff, JPMC learned that Plaintiff had not informed Client A that KYC documents were still outstanding. (*Id.* ¶ 24.) Client A was surprised to learn that JPMC believed Client A still owed KYC documents to the bank. (*Id.*) Promptly after learning that documentation was missing, Client A provided all information necessary to complete the KYC process. (*Id.* ¶ 25.) Given that the documentation issues noted by Plaintiff in her July email had been resolved, Lassiter reversed the decision to exit the client, and Client A remains a client of JPMC today. (*Id.* ¶ 27.) No exit letters were ever sent to Client A, and documents produced by Defendants

in August 2013 outline plans by PWM management to expand the relationship. (Counter Stmt. ¶ 7.)

Plaintiff's Performance Concerns and Subsequent Termination

Private Wealth Managers are expected to understand JPMC's array of financial products, generate new business for JPMC, and complete the KYC process for new and existing clients. (Stmt. ¶¶ 5-6.) Less than a year after Plaintiff became a Private Wealth Manager, her supervisors began noting issues with her performance. (*Id.* ¶ 28.) For example, Green was concerned about Plaintiff's insufficient knowledge and understanding of various JPMC financial products, as well as the informal nature of her interactions with clients. (*Id.*) During the 2009 mid-year talent review of the hundreds of employees within PWM, Mr. Green placed Plaintiff on a "watch list" consisting of "a list of people who were struggling." (*Id.* ¶ 30.) Additionally, during that talent review, Green recalled being concerned about Plaintiff's continued failure,

> To demonstrate a sufficient grasp of our investments product set or skill to communicate that well with clients and prospects. She had shown sloppy work. She continued to, in the case of some client relationships, approach[] them in an overly casual way, which we thought resulted in those relationships

> developing less quickly or well than we hoped. And she exercised poor judgment . . . [in] her selection of an invitee to a client event.

Id. ¶ 28.

Kenney too was concerned about Plaintiff's invitation of a non-JPMC mortgage broker to a major JPMC-hosted client event. (*Id.*) By bringing a mortgage broker to the event, Kenney believed that Plaintiff exercised poor judgment, given that JPMC is,

> Already in the mortgage business, and bringing somebody in that stands between us and our clients is something that doesn't make sense at all, because we do mortgages, we're one of the best out there at doing it, and brining in a mortgage broker to then either go shop it or just step in between, trying to get paid for us doing business with our normal clients doesn't make any sense whatsoever.

Id. While Green and Kenney were prepared to consider Plaintiff's termination during the mid-year talent review, Lassiter "was in favor of more time to evaluate. . . . She was generally more supportive and more optimistic about [Plaintiff's] potential than" Green or Kenney. (*Id.* ¶ 31.)

Lassiter was, though, concerned that Plaintiff's revenue generation over-estimated her efforts in developing

business, and by the lack of confidence Plaintiff's fellow co-workers had in her efforts, especially regarding Sharkey's ability to follow-up with clients. (*Id.* ¶ 28.) Moreover, Lassiter found that Plaintiff failed to perform adequate KYC due diligence and possessed a casual attitude toward her job responsibilities, her KYCs in general, and her approach to Client A's KYCs specifically. (*Id.*) Plaintiff also was unable to pass the Series 7 exam on her first two attempts. (*Id.* ¶ 28.)

In April and May 2009, Lassiter had at least two meetings with Plaintiff to discuss these performance issues. (*Id.* ¶ 29.) During one of those meetings, Lassiter asked Plaintiff to work on these issues with the hope that Plaintiff would remedy them. (*Id.*) Lassiter has acknowledged that Sharkey had developed "significant client relationships," and Green commented that "by the middle of 2009, [Sharkey's] performance versus metrics exceeded expectations." (Counter Stmt. ¶ 28.)

Shortly after the mid-year talent review, in late July 2009, the officer manager of a significant PWM client ("Manager T") contacted Lassiter and complained that she had been unable

to contact Plaintiff and that Plaintiff had not returned her calls, going so far as to refer to Plaintiff as a "phantom." (Stmt. ¶ 32.) Lassiter relayed the conversation to Plaintiff and asked whether she had returned Manager T's calls. (*Id.* ¶ 33.) Plaintiff responded that she had in fact returned Manager T's calls. (*Id.*) Believing Plaintiff, Lassiter called Manager T, and after her second conversation, Lassiter again asked Plaintiff whether she had spoken with Manager T. (*Id.* ¶ 35.) Plaintiff again said that she had. (*Id.*) Lassiter pressed Plaintiff, who then admitted that she had not returned Manager T's calls, thereby acknowledging that she had lied to Lassiter about the incident.[2] (*Id.* ¶ 36.) Lassiter maintains that this caused her to lose trust and confidence in Plaintiff, and became a problematic situation with an important client, namely Manager T. (*Id.* ¶¶ 37, 41.) Lassiter is aware of at least three other employees who lied to her and/or other members of PWM, but were not terminated. (Counter Stmt. ¶ 41.)

Lassiter informed Steven Grande ("Grande"), the Human Resources manager responsible for the northeast region's PWM

[2] Sharkey disputes Lassiter's account of the so-called "Manager T incident." (Counter Stmt. ¶ 36.) However, Sharkey, when asked in her deposition whether she had contacted the client, responded, "I don't know what you're referring to." (*Id.*) At no point in her deposition did Sharkey explicitly state that she had not told Lassiter originally that she called Manager T, and subsequently acknowledged that she had not.

business, of the incident. (Stmt. ¶ 37.) Grande advised Lassiter that, under JPMC's written personnel policy, dishonesty was grounds for termination. (*Id.* ¶ 38.)

Following this conversation, by e-mail on July 21, 2009, Green wrote to Kenney, "FYI, just as I was running out, Leslie posted me on an incident regarding Jennifer Sharkey. I sent her to Grande, but it is highly likely we terminate her right away. As you recall, she is ranked yellow and watch list." (Counter Stmt. ¶ 41.) Kenney responded, "Okay, sometimes it doesn't take long for people to step on their own feet." (*Id.*)

Grande then consulted with his supervisor, Lee Gatten ("Gatten"), as well as Linda Padilla ("Padilla"), both in JPMC's Employee Relations Group, and Green. This group collectively decided that Plaintiff's conduct merited termination. (Stmt. ¶ 41.) During the conversations, neither Client A nor any concerns Plaintiff had expressed about Client A in the past were mentioned. (*Id.* ¶ 40.) The discussion concerned only whether, in light of Plaintiff's dishonesty and past performance problems, her employment should be terminated. (*Id.* ¶ 41.) According to Lassiter, Plaintiff's final act of dishonesty "was

the straw that broke the camel's back. That there had been issues before, and now she had been untruthful, and I just didn't see how we could move forward." (*Id.* ¶ 41.)

On August 5, 2009, Lassiter informed Plaintiff of her termination for lack of judgment, JPMC's loss of confidence in her, and her untruthfulness related to the Manager T incident. (*Id.* ¶ 42.) Grande had a similar conversation with Plaintiff. (*Id.*) During these conversations, Plaintiff did not mention Client A or the KYC process, or deny that she had lied to Lassiter. (*Id.* ¶ 43.)

OSHA Proceedings

On October 22, 2009, Plaintiff filed a Complaint with OSHA. On April 12, 2010, after a full investigation, including document production and witness interview, OSHA issued preliminary findings and an order dismissing the Complaint because "Complainant did not engage in protected activity under SOX." OSHA Order.

The Applicable Standard

1. Summary Judgment

Summary judgment is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *SCS Commc'ns, Inc. v. Herrick Co.*, 360 F.3d 329, 338 (2d Cir. 2004). In determining whether a genuine issue of material fact does exist, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18 (2d Cir. 2002).

In addition, courts do not try issues of fact on a motion for summary judgment, but rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). "Unsupported allegations do not create a material issue of fact." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). "The mere existence of a scintilla of evidence in support of the nonmoving party's position is likewise insufficient; there must be

evidence on which the jury could reasonably find for" Plaintiff. *Andaya v. Atlas Air, Inc.*, No. 10 CV 7878, 2012 WL 1871511, at *2 (S.D.N.Y. Apr. 30, 2012).

2. SOX Whistleblower Claims

On a motion for summary judgment on a SOX whistleblower retaliation claim, the plaintiff bears "the initial burden of making a *prima facie* showing of retaliatory discrimination." *Leshinsky v. Telvent GIT, S.A.*, 2013 WL 1811877, at *6 (S.D.N.Y. May 1, 2013). In order to do so, an employee must demonstrate that "(1) she engaged in protected activity; (2) the employer knew that she engaged in protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Id.* (quoting *Bechtel v. Administrative Review Bd., United States Dep't of Labor*, 710 F.3d 443, 447 (2d Cir. 2013)). If a plaintiff proves these four elements, a defendant may "rebut this *prima facie* case with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior." *Betchel v. Admin Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 451 (2d Cir. 2013) (citations omitted). "The

defendant's burden under Section 806 is notably more than under other federal employee protection statutes, thereby making summary judgment against plaintiffs in Sarbanes-Oxley retaliation cases a more difficult proposition." *Id.*

I. Defendants' Motion for Summary Judgment is Granted

SOX provides whistleblower protection for employees of publicly traded companies if,

> any officer, employee, subcontractor, or agent ... discharge[s], ... threaten [s], [or] harass [es], ... an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by— (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

18 U.S.C. § 1514A. Sharkey has alleged that her termination was motivated, at least in part, by reporting violations that are

protected activities under SOX regarding Client A and as such Defendant's motion should be denied.

1. Plaintiff did not Engage in Protected Activity because She did not Have a Reasonable Belief of Illegal Activity Enumerated in SOX § 806

In order to qualify as protected activity, "an employee's complaint must definitively and specifically relate to one of the six enumerated categories" of misconduct contained in SOX § 806, i.e. mail fraud, wire fraud, bank fraud, securities fraud, violation of an SEC rule or regulation, or violation of a federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); *see also Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476-77 (5th Cir. 2008); *Fraser I*, 2005 WL 6328596, at *8 ("Protected activity must implicate the substantive law protected in [SOX] definitively and specifically."). General inquiries do not constitute protected activity. "[I]n order for the whistleblower to be protected by [SOX], the reported information must have a certain degree of specificity . . . . [A] whistleblower must state particular concerns which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal." *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8, 2004 DOLSOX LEXIS 65, at *33-34, 2004 WL 5030304(U.S.D.O.L. June 15, 2004).

The complaining employee's belief that his employer's conduct violated one of the enumerated categories must be both objectively and subjectively reasonable. *Leshinsky v. Telvent GIT, S.A.*, 10 Civ. 4511 (JPO), 2013 WL 18811877 (S.D.N.Y. May 1, 2013).

Sharkey's reports to Defendants as to Client A do not constitute protected activity. Plaintiff fails to "definitively and specifically" relate her allegations to one of the six enumerated categories of misconduct under SOX. Each of the enumerated categories require a "scheme or artifice to defraud." 18 U.S.C. § 1514A(a)(1); *Sharkey II*, 805 F. Supp. 2d at 55. Plaintiff utters the words that her allegations support that Client A was engaged in mail, wire, bank or securities fraud, but does not explain how her facts support a scheme or artifice to defraud, fraudulent intent, who was being defrauded by Client A, the nature of the purported fraud, or most importantly, how these allegations meet the elements of the enumerated categories required under SOX. *See Nielsen v. AECOM Tech. Corp.*, No. 12 Civ. 5163 (KBF), 2012 WL 6200613, at *6 (S.D.N.Y. Dec. 11, 2012) (dismissing claim for failure to allege facts resembling or directly and specifically relating to basic elements of enumerated statutes); see *also Andaya*, 2012 WL 1871511, at *4

("What is missing from these allegations is criminal conduct, shareholder fraud, or fraudulent intent").

Plaintiff's cited precedent involves concrete allegations of potential wire or mail fraud of fraud against shareholders, and the resulting opposition of the defendants at issue. *See, e.g., Leshinsky v. Telvent GIT, S.A.*, 2013 WL 181187, at *5-15 (S.D.N.Y. May 1, 2013) (denying summary judgment where plaintiff complained that a company proposed using a low overhead rate internally, while providing a higher rate to make it appear that the company had reduced its profit, and was then cut off from involvement in the process and later terminated); *Mahony v. Keyspan Corp.*, 2007 WL 805813, at *1-2 (E.D.N.Y. Mar. 12, 2007) (plaintiff reported another's concerns about certain accounting practices of a public company, which could result in financial statements that were misleading to shareholders); *Perez v. Progenics Pharmaceuticals, Inc.*, 2013 WL 3835199, at *1-4 (S.D.N.Y. Jul. 24, 2013) (plaintiff complained about press statements he believed were inconsistent with the actual results of a clinical trial and therefore illegal and was almost immediately terminated). In contrast, Plaintiff does not even mention the elements required by the statutes, or explain how the alleged misconduct qualifies for a specific category

enumerated under SOX. Instead, Plaintiff relies almost exclusively on her purported belief that Client A was engaged in money laundering, which is not a criminal statute specified in SOX nor is it an SEC regulation or a law relating to fraud against shareholders.[3] Even if Plaintiff reasonably believed[4] that Client A was engaged in money laundering, such belief cannot form the basis for a SOX whistleblower claim. *See Sharkey v. J.P. Morgan Chase & Co., et al.*, 805 F. Supp. 2d 45, 56 (S.D.N.Y. 2011) ("SOX prohibits an employer from retaliating against an employee who complains about any of the six enumerated categories of misconduct"). Sharkey has thus failed to report information with "a certain degree of specificity" or "particular concerns, which, at the very least, reasonably identify," conduct implicated by the enumerated statutes. *See*,

[3] Plaintiff also cites to the Patriot Act, which too is not an enumerated statute in SOX.

[4] Plaintiff previously alleged facts sufficient to support a motion to dismiss as to her reasonable belief, including allegations that Client A (1) refused to provide complete business and financial information; (2) traded in the Ostrager Account without proper authorization; (3) stymied Plaintiff's efforts to comply with KYC requirements under the Bank Secrecy Act, Patriot Act, and other federal securities laws; and (4) dealt in merchandise from Colombia. *See Sharkey*, 805 F. Supp. 2d at 55-56. Discovery has since yielded evidence that Client A did have authorization to trade in the Ostrager Account, that Client A told Plaintiff the source of the funds in the Ostrager Account, and that Client A did in fact want to comply, and ultimately did comply, with his business and financial information. (*See* Stmt. ¶¶ 12, 20, 25.)

Sharkey v. J.P. Morgan Chase & Co., et al., No. 10 Civ. 3824 (RWS), 2011 WL 135026, at *6 (S.D.N.Y. Jan. 14, 2011).

Further, Sharkey's belief was not subjectively reasonable. When Plaintiff reported her concerns to her supervisor, Sharkey stated that she "felt uncomfortable regarding the [Client A] family relationship and the nature of its businesses as well as its related entities" and recommended that JPMC "detach the relationship from the PWM metro business." (Stmt. ¶ 20.) Plaintiff went on to say: "I want to be mindful of the fact that other LOB's [lines of business[within the firm have relationships with this client and/or related entities and may wish to retain some or all of their business." (*Id.*) This communication "did not express any specific concern about any fraud enumerated in SOX § 806," but merely that Sharkey felt "uncomfortable" in certain areas relating to Client A's businesses. *Fraser v. Fiduciary Trust Co., Int'l*, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009). As a Private Wealth Manager with eleven years of experience in the financial industry, it is unrealistic to infer that Plaintiff, if she had a subjective belief of illegal activity by Client A, would have not made that belief explicit, or stated to her supervisors that other areas of the firm might wish to retain

Client A's business. *See Fraser v. Fiduciary Trust Co., Int'l*, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009) (in granting summary judgment for employer, court noted that employee's three-month delay between drafting and sending email complaining of activity "casts doubt on [his] subjective belief that the [complained-of-activity] constituted a violation."), *aff'd*, 396 F. App'x 734 (2d Cir. 2010).

Regardless, Plaintiff could not have had a reasonable belief that JPMC was violating the Patriot Act in failing to remove Client A, even if such conduct were actionable under SOX. Plaintiff was given the initial information regarding concerns with Client A from Defendants, and told to follow-up. (Stmt. ¶ 10.) When Plaintiff expressed initial concerns after reviewing this information, Lassiter encouraged her to develop facts about her concerns, and supported her decision to terminate. *See Harp*, 558 F.3d at 725-26 ("The conclusion that [plaintiff] did not reasonable believe a fraud was being committed is further buttressed by [supervisor's] subsequent actions in the case," including that supervisors never told plaintiff to stop investigating the issue). Upon Plaintiff's recommendation for termination on the basis that Client A refused to provide KYC information, Defendants agreed and began taking steps to exit

the relationship. (Counter Stmt. ¶ 22 (citing Ex. 33: "we have decided to exit the relationship and will be sending a letter this week"); *see also* Ex. 48 (Grusczyk to Plaintiff: Mr. Kenney "said the decision to exit was a good one.")). There are thus no facts on which Plaintiff could have reasonably believed that JPMC was prepared to violate its obligations under the Act: if anything, the facts show JPMC was trying to meets its KYC obligations regarding Client A. *See Harp v. Charter Commc'ns., Inc.*, 558 F.3d 722, 725-26 (7th Cir. 2009) (affirming summary judgment in favor of defendant partly because supervisor supported plaintiff's investigations and encouraged formal documentation of concerns); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 481 (5th Cir. 2008) (as "[employer] did not intentionally cause the AS400 problem, did not conceal it, and attempted to correct it, a reasonable person could conclude that [employer]'s conduct . . . did not violate some provision of federal law relating to fraud against shareholders.").

2. Plaintiff's Statements to JPMC About Client A were not a Contributing Factor in her Termination

Even if Plaintiff's allegations supported a potential violation, Defendants have established that they would "have

taken the same unfavorable personnel action in the absence of the protected behavior." *Leshinsky v. Telvent GIT, S.A.*, 2013 WL 1811877, at *6 (S.D.N.Y. May 1, 2013) (quoting *Bechtel v. Administrative Review Bd., United States Dep't of Labor*, 710 F.3d 443, 447 (2d Cir. 2013)). Under JPMC's Corrective Action Policy, dishonesty is independent grounds for immediate termination.

To establish a SOX whistleblower claim, Plaintiff must prove that her alleged protected activity, namely her statements to JPMC about Client A, contributed to her termination. *See Bechtel*, 710 F.3d at 451; *Pardy v. Gray*, No. 07 Civ. 6324, 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) ("[A] contributing factor means any factor which, alone or in connection with other factors[,] tends to affect in any way the outcome of the decision.").

Plaintiff relies exclusively on the temporal basis between her alleged protected activity and her termination to establish to causation. "Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation.

However, its presence does not compel a finding of causation, particularly when there is a legitimate intervening basis for the adverse action." *Fraser v. Fiduciary Trust Co., Int'l*, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009) (quoting *Tice v. Bristol-Myers Squibb Co.*, 2006-SOX-20, 2006 WL 3246825, at *20 (U.S.D.O.L. Apr. 26, 2006)). In such cases, "mere temporary proximity[5], [] does not compel a finding of retaliatory intent." *Pardy v. Gray*, No. 07 Civ. 6324 (LAP), 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008).

Here, the undisputed statements of fact indicate that the legitimate intervening basis for Sharkey's termination was her dishonesty to her supervisor, and her past performance deficiencies[6]. (Stmt. ¶ 28-32, 35-37, 41); *see also Miller v.*

[5] Plaintiff alleges that she began "blowing the whistle" on Client A as early as April 2009, over three months prior to her termination. (*See* Stmt. ¶¶ 10, 16-17.) This time frame is insufficient for temporal proximity. *See Fraser v. Fiduciary Trust Co., Int'l*, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009) (in granting summary judgment for employer, court noted that employee's three-month delay between drafting and sending email complaining of activity "casts doubt on [his] subjective belief that the [complained-of-activity] constituted a violation.")

[6] Plaintiff's use of *Perez*, 2013 WL 3835199, at *9 to show that where there is a dispute as to the conduct prompting termination summary judgment is inappropriate, is inapposite. In *Perez*, there was no clear evidence of insubordination or wrongdoing independent of the conduct relating to the protected activity by the plaintiff to justify termination. Here, there is clear evidence of performance deficiencies by Sharkey unrelated to the allegations regarding Client A. Thus, the instant case is distinguishable from Plaintiff's cited authority, in which the intervening acts were

Stifel, Nicolaus & Co., 812 F. Supp. 2d 975, 989 (D. Minn. 2011) ("lack of causal connection between Plaintiff's complaints and termination is bolstered by Plaintiff's on-going performance issues and the intervening events of May 2008 . . . . There is no competing evidence-aside from Plaintiff's personal views-that [employer] was incorrect in its assessment of her lagging performance. And even if [employer] misjudged her performance, 'federal courts do not sit as super-personnel department that reexamines an entity's business decision.'" (quoting *Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 801-02 (11th Cir. 2011)). Defendants establish an extensive record of these deficiencies: Sharkey was on "watch list" consisting of "a list of people who were struggling" in 2009 (Stmt. ¶ 30), there were concerns about her "sloppy work," inappropriate "client relationships," inability to "follow-up," incapacity to handle the material, and ultimately her dishonesty. (*Id.* ¶¶ 28, 30, 36. Thus, even if

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unrelated to plaintiff's protected activity. *See id.* (citing *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 727 (7th Cir.2009) (intervening event was employer's revenue issues that resulted in widespread layoffs); *Fraser v. Fiduciary Trust Co. Int'l ("Fraser III")*, No. 04-CV-6958, 2009 WL 2601389 (S.D.N.Y. Aug. 25, 2009) (granting summary judgment where alleged protected activity was reporting inaccuracies about an internal document with respect to assets under management, but "the legitimate intervening basis for [plaintiff's] termination was [defendant's] determination that [plaintiff] was attempting to establish an unauthorized hedge fund"); *Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F.Supp.2d 975, 989 (D.Minn.2011) (granting summary judgment where plaintiff was terminated as a result of intervening events, specifically on-going performance issues and a major customer's complaint about plaintiff's performance)).

Plaintiff were able to establish a *prima facie* case for whistleblowing, on the undisputed record, JPMC terminated Plaintiff for reasons unrelated to her alleged protected activity and which, in and of themselves, were valid grounds for termination. *See Halloum v. Intel Corp.*, ARB Case No. 04-068, 2006 WL 618383, at *6 (ARB Jan. 31, 2006) (finding that although employee proved all four elements of whistleblower claim, employer "demonstrated that [employee] did not integrate himself into [employer's] workforce and that he failed to perform up to expectations. These were sufficient, non-discriminatory reasons to seek his termination as an employee. The record also indicates that [employer] could have fired [employee] immediately after learning that he had surreptitiously recorded conversations with employees.") (internal citations omitted); *see also Pardy*, 2008 WL 2756331, at *6 (granting employer's summary judgment motion where employer proved by clear and convincing evidence that employee was terminated for reasons separate from alleged protected activity). As such, Plaintiff has failed to show a causal connection between her purported protected activity and Defendants' decision to terminate her employment. *Kim v. Boeing Co.*, 487 F. App'x 356, 357 (9th Cir. 2012) ("Because [employer] presented clear and convincing evidence of its belief that [employee] had been insubordinate

and was subject to discharge on that basis we need not reach the question of whether [employee] made out a *prima facie* case. Although [plaintiff] denied he was subordinate, he presented no evidence giving a materially different account of his conduct.").

Even without Defendant's legitimate intervening basis for discharging Sharkey, there is no evidence establishing that Plaintiff's actions regarding Client A in any way contributed to her termination. Several people were involved in the decision to terminate Plaintiff, in particular Lassiter, Green, and Grande, all of whom were deposed. Each testified that Client A was never mentioned in the discussions about whether to terminate Plaintiff, but rather that the decision was based on Sharkey's dishonesty to her immediate supervisor following a history of performance-related concerns. (Stmt. ¶ 28-32, 35-37, 41.) There is no evidence that Green or Kenney were even aware of Plaintiff's alleged concerns about Client A. Far from a "post-hoc explanation" for a termination decision or a "pre-textual motive", Defendants clearly explained the reasons for termination to Sharkey, who did not at the time dispute the accusations of dishonesty or voice concerns that her termination was related to her stance regarding Client A. (Stmt. ¶¶40-41);

see also Weiss v. JPMorgan Chase & Co., 332 F. App'x 659, 663 (2d Cir. 2009). Plaintiff contends that Kenney's response to Green's e-mail about Sharkey's performance concerns, which corresponds in time to Plaintiff's dishonesty to Lassiter, that "Okay. Sometimes it doesn't take long for people to step on their own feet," shows that the Defendants were waiting for an excuse to fire Sharkey. (Counter Stmt. ¶ 41.) Rather, this conversation confirms a history of problems with Sharkey's conduct independently justifying termination.

Conclusion

Because Sharkey has not sufficiently presented what fraud existed or how it implicates an enumerated category under SOX, and because there was independent cause for her termination, Defendant's motion for summary judgment is granted.

It is so ordered.

New York, NY
December 11 , 2013

ROBERT W. SWEET
U.S.D.J.