



Issue Date: 06 June 2016

CASE NO.: 2016-SOX-00015

IN THE MATTER OF:

JOSEPH COLLINS
Complainant

v.

AMERIPRISE FINANCIAL SERVICES, INC.
Respondent

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
PURSUANT TO FRCP 12(b)(6)**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A¹, and its implementing regulations found at 29 CFR Part 1980. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee.

I. BACKGROUND

The *pro se* Complainant filed this current complaint with the Occupational Safety and Health Administration (“OSHA”) on June 22, 2009. In his OSHA complaint, Complainant also stated he would “pursue recourse under FINRA arbitration rules.” Complainant further states that he believes “the violation[s] of 18 USC Section 1514A are separate and distinct issues which should be addressed by the Secretary for the Department of Labor.” (Resp. Br., EX-D, p. 8).

While Complainant claims OSHA conducted a short initial informal investigation, no findings were released by OSHA. On September 24, 2009, Complainant filed a complaint against Respondent through the Financial Industry Regulatory Authority’s (“FINRA”) Dispute Resolution office. Complainant later retained legal counsel, who refiled a claim with FINRA on November 30, 2009. (Compl., pp. 2-3).

¹ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

In November 2011, Complainant, still represented by counsel, and Respondent agreed to participate in a non-binding mediation regarding the claims in Complainant's FINRA complaint. (Compl., p. 3). The claims included Complainant's allegations that he received a letter of reprimand and a \$2,500 fine as a result of his protected activity as well as reports that Respondent was in violation of SOX. (Resp. Br., EX-E, pp. 14-17). At the mediation, Complainant and Respondent, who were both represented by counsel, signed a Mediated Settlement Stipulation. (Resp. Br., EX-F, pp. 1-2).

In 2014, Respondent filed a Motion to Dismiss with FINRA, alleging dismissal of Complainant's FINRA claim was proper based upon the mediation agreement. On March 30, 2015, the FINRA arbitration panel held a pre-hearing conference with the parties. Complainant represented himself at this conference. On May 12, 2015, the panel granted Respondent's Motion to Dismiss based upon the mediation agreement. (Compl., pp. 3-4; Resp. Br., EX-F, pp. 1-2).

Prior to the panel's dismissal, on May 1, 2015, the United States Department of Labor, Office of Administrative Law Judges ("OALJ") received a letter from Complainant requesting review of the June 2009 complaint with OSHA under Section 806 of SOX. On May 12, 2015, OALJ received a second letter from Complainant in which he again requested a hearing before an administrative law judge. However, OSHA considered Complainant's contact as only an inquiry on a SOX matter over which OSHA did not have jurisdiction and did not log his communication as a complaint. Although OSHA conducted some preliminary inquiry relating to his communication, it did not issue formal findings on the matter under 29 C.F.R. § 1980.105. As a result, Chief ALJ Henley dismissed Complainant's claim without prejudice due to the lack of authority to exercise jurisdiction over his claim. *Collins v. Ameriprise Financial Servs., Inc.*, ALJ Case No. 2015-SOX-16, slip op. at 1-2 (ALJ July 2, 2015).

After the dismissal of Complainant's claim before OALJ, Complainant's OSHA complaint was dismissed by OSHA on October 5, 2015 for lack of coverage under SOX. Specifically, OSHA found Complainant was not an employee of Respondent and therefore was not covered under the Act. Complainant then filed a subsequent request for hearing before an Administrative Law Judge on October 24, 2015. The matter was assigned to the undersigned, and a notice of hearing was issued, scheduling a formal hearing in this matter on July 11-15, 2016 in Austin, Texas.

During an initial conference call with the parties on February 1, 2016, I instructed the parties to submit briefs on the issues of employee status and whether *res judicata* precludes a decision in this matter in order to enlighten the undersigned of the particular facts of this case. Both parties submitted briefs on the issues in accordance with the February 1, 2016 Preliminary Order.

On March 17, 2016, Complainant filed a twenty-five page complaint for *de novo* review ("OALJ complaint") with the undersigned, alleging the nature of his protected activity, each and every violation against Respondent, any adverse action as a result of his activity, and the relief sought in this matter. Respondent timely filed an answer to Complainant's complaint on March 30, 2016.

On April 21, 2016, Respondent's counsel filed a Motion to Dismiss under the Rule 12 of the Federal Rules of Civil Procedure on the grounds that: (1) Complainant was an independent contractor and therefore was not covered by the Act; (2) Complainant's claims are barred by *res judicata*; (3) Complainant has added new issues (some of which are irrelevant) and parties to his complaint that were not raised in his OSHA complaint; and (4) Complainant has alleged facts that are completely implausible. Respondent also incorporated into its Motion the arguments in its brief regarding independent contractor status under SOX and whether *res judicata* applies to Complainant's claim. (Resp. Mtn., pp. 6-13). In sum, Respondent alleges Complainant has failed to state a claim upon which relief may be granted under Federal Rules of Civil Procedure (FRCP) Rule 12(b)(6).

On April 22, 2016, Complainant filed a Response to Respondent's Motion to Dismiss based on FRCP Rule 12(b)(6). In his nine page response, the Complainant contended Chief ALJ Henley's remand of his claim to this Court gives credence to his argument that he has pled sufficient facts to state a claim. Complainant again set forth his allegations that Respondent created a hostile work environment, threatened to terminate him, made unfounded allegations against him, and referred to him as a "terrorist." Further, Complainant stated *res judicata* does not bar his complaint, since the issues addressed in his complaint have not been "definitively settled by any 'judicial' decision" and he was at a "distinct disadvantage" at the arbitration conference. (Comp. Opp., pp. 4-8).

On May 26, 2016, Complainant, unsolicited and without notice, filed an Amended Response to Respondent's Motion to Dismiss, contending Respondent's reliance on the *Twombly* and *Iqbal* standard under Rule 12(b)(6) is misguided as a genuine issues of material fact exist. Also, Complainant argues Respondent's Motion lacks authority granted to Complainants in SOX whistleblower cases under 18 U.S.C. § 1514A. Complainant then responded to Respondent's assertions in its Motion to Dismiss paragraph by paragraph. Specifically, Complainant argued that (1) independent contractors are covered under SOX; (2) no issue in this claim has been settled by judicial decision, thus precluding the doctrine of *res judicata* from applying; (3) his claims against the individually named respondents are proper since he included them in his OALJ complaint; (4) he has added new issues to his claim since the right of review by the undersigned ALJ is *de novo*; (5) and that he had a reasonable belief that Respondent was in violation of SOX. (Comp. Amend. Opp., pp. 1-9).

Finally, Complainant concluded his Amended Response with requests for (1) a bar on any admission of evidence showing a settlement had been reached; (2) a bar on Respondent from presenting any further evidence in defense of their reasons for his termination; (3) an order for all named parties in his complaint to appear for a deposition; and (4) an order against Respondent to pay reasonable fees and expenses for the retention of qualified legal counsel. (Comp. Amend. Opp., pp. 10-11). Although untimely, I will nonetheless address the arguments and contentions raised by Complainant in his Amended Response. I will also address the arguments in Complainant's brief submitted in accordance with the February 1, 2016 Preliminary Order, although not explicitly incorporated into his responses to Respondent's Motion to Dismiss.

II. STATUTORY FRAMEWORK

A. FRCP Rule 12(b)(6)- Failure to state a claim upon which relief may be granted

A motion for dismissal based on FRCP Rule 12(b)(6), for failure to state a claim upon which relief may be granted, is ordinarily filed before responsive pleadings are filed, though the specific defense may be raised at any time through the initial trial level. In deliberating on a motion to dismiss under Rule 12(b)(6), the complaint, documents attached to the complaint, documents that the complaint incorporates by reference, and matters of which the Administrative Law Judge may take official notice may be considered. If the parties supply affidavits or other material in support or opposition of the motion to dismiss that are considered by the Administrative Law Judge, the motion must be addressed as a motion for summary decision.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Complainant can prove no set of essential facts in support of the complaint which would entitle the Complainant to the relief sought. *Conley v Gibson*, 355 US 41 (1957). “For the purpose of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by plaintiff are considered true.” *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322, 1325 (11th Cir. 2004) citing *Hishon v. King & Spalding*, 467 US 69, 73 (1984); *Wright v. Newsome*, 759 F.2d 964, 967 (11th Cir. 1986).

In order to survive a motion to dismiss under Rule 12(b)(6), the non-moving party must amplify a claim for relief with **plausible factual content**, which if accepted as true, “allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. (2007) (emphasis added). “Whether a complaint states a claim is context-specific, requiring the reviewing court to draw on its experience and common sense.” *Twombly, Id.* at 556. “The tenant that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements [which are] supported by mere recital of conclusory statements. ... While legal conclusions can provide the complainant’s framework, they must be supported by factual allegations.” *Iqbal*, 129 S.Ct. at 1940.

III. DISCUSSION

Respondent alleges dismissal is proper on numerous grounds, each of which is discussed separately.

A. Employee Status

First, Respondent contends dismissal is proper, because Complainant was not an “employee” under the Act. While Respondent does not dispute its coverage under the Act, Respondent contends that Complainant may not assert a cause of action under Sarbanes-Oxley because he is not a covered employee. Specifically, Respondent cites the plain language of SOX Section 806, codified as 18 U.S.C. § 1514A, which prohibits discrimination against “employees.” Respondent further contends that Complainant, as an independent contractor, does not meet the definition of employee as listed in 29 C.F.R. § 1980.001. (Resp. Mtn., p. 6; Resp.

Br., pp. 5-10). On the other hand, Complainant asserts he is a covered employee for purposes of asserting a cause of action under SOX. Specifically, he contends that he was an “individual whose employment could be affected by a company or company representative,” as defined in 29 C.F.R. § 1980.001. (Comp. Amended Oppo., p. 6; Comp. Br., pp. 1-8).

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against 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 section 1341, 1343, 1344, or 1348, 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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

An **employee** is defined as “an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.” 29 C.F.R. § 1980.101(g).

Complainant contends that he was “an individual whose employment could be affected by a company or company representative,” and therefore he was an “employee” as defined in 29 C.F.R. § 1980.001. In support, Complainant points to Respondent’s degree of control over the length and content of his assignment, Respondent’s ability to discontinue his engagement at any time, and Respondent’s obvious control of its hiring decisions. (Compl., pp. 8-10).

The instant inquiry as to whether this purposefully broad language encompasses contractors for purposes of protection under the Act hinges on the word “employment.” The corresponding language in 18 U.S.C. § 1514A prohibits discrimination “in the terms and conditions of employment.” Therefore, if the term “employment” as used in the context of 29 C.F.R. § 1980.001 is construed to include contract engagements, then Complainant is an “employee” for purposes of the Act.

As with any interpretation of a statutory term, the intent of the legislation is paramount. Interpretation should strive to carry out the objectives of legislation with fidelity to its purpose, anticipated methods to achieve its purpose, and intended limitations.

The overriding objective of Congress in passing Sarbanes-Oxley was clearly to protect investors. To that end, Congress included the whistleblower provisions in Section 806 reasoning: “U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies,” 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement by Senator Leahy).

Concerning interpretation of statutory terms, the U.S. Supreme Court opined:

A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies . . . The point is the same even when the terms share a common statutory definition, if it is general enough. *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1426, 1432-1433 (2007).

Prior cases have afforded coverage to employees of non-publicly traded subsidiaries of publicly traded companies based on various theories of legislative intent or the ability of the parent company to affect employment of individuals employed by the subsidiary. See *Collins v. Beazer Homes USA*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004); *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004).

The goal of investor protection is best served by an expansive interpretation of persons eligible for protection as “employees,” as the purview of the Act is sufficiently limited by the “reasonableness test” of the employee’s belief. Only in this way can the legislation promote “whistleblowing” by as many persons as may have knowledge of fraud, while ensuring that only worthy activity is protected.

For this reason, I find that the term “employment” as used in 29 C.F.R. § 1980.101 includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a contractor or sub-contractor may be “an individual whose employment could be affected by a company or company representative.” 29 C.F.R. § 1980.001. Under this definition, the only “employment” which the employer is capable of affecting, in its terms and conditions, is the contracted for services or assignment. Therefore, I find that Respondent has not met its burden under FRCP 12(b)(6) regarding Complainant’s employee status. Accordingly, I **DENY** Respondent’s Motion to Dismiss on the grounds that Complainant was not an employee under the Act.

B. *Res Judicata*

Respondent also contends dismissal is proper under the doctrine of *res judicata*. Specifically, Respondent argues Complainant and his lawyers submitted the whistleblower claim under SOX to FINRA for binding arbitration. Respondent argues Complainant and his lawyers also decided to settle and release his claim. Further, Respondent contends the FINRA arbitration panel determined that Complainant was bound by the terms of the settlement agreement and issued an Award dismissing his claims with prejudice. (Emphasis added). Respondent argues dismissal is proper, since Complainant’s instant claim is based upon identical facts (albeit under a different legal theory) previously ruled upon by the FINRA arbitration panel. (Resp. Mtn., pp. 6-8).

In response, Complainant claims the issues presented in the instant matter have not been settled by any judicial decision, thus precluding *res judicata* from applying. Complainant also states OSHA’s failure to investigate his complaint led him to pursue his claim with FINRA. Further, Complainant states he was at a distinct disadvantage since he had to travel to New York City at his own expense while on disability. (Comp. Oppo., p. 5). Complainant also denies FINRA had jurisdiction to properly adjudicate the claims before it. (Comp. Amended Oppo., p. 8).

Collateral estoppel, or “issue preclusion,” a concept included within the doctrine of *res judicata*, “refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided.” *Hasan v. Sargent & Lundy*, ARB No. 05-099, ALJ Case No. 2002-ERA-32, slip op. at pp. 6-7 (ARB Aug. 31, 2007) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)). Collateral estoppel applies in administrative adjudication. *Id.* (citing *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 797-799 (1986)).

Our jurisprudence holds that collateral estoppel applies when: 1) the same issue has been actually litigated; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. *Hasan*, ARB No. 05-099, slip op. at p. 7 (citations omitted); *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, 199-CAA-4 (ALJ Mar. 10, 1999).

The first inquiry is whether the issues at stake in the complaint to the OALJ, 2016-SOX-00015, are identical to the issues alleged in the prior arbitration and whether they have been actually litigated. The issues at stake are identical, involving whether the investigation of his practice, \$2,500 fine, and letter of reprimand were retaliation for his alleged whistleblowing. Complainant merely restates complaints about his activities and how he has been allegedly retaliated against long after the employee-employee relationship was severed by Complainant. In fact, he has not asserted a new and distinct cause of action. Rather, Complainant's OALJ complaint repeats the same allegations of adverse action by Respondent due to his same reports of Respondent's alleged illegal practices made by Complainant. (Compl., pp. 8-26; Resp. Br., EX-E, pp. 10-18). In sum, the issues alleged in Complainant's OALJ complaint and Complainant's FINRA complaint are essentially identical.

Further, the issues asserted in this matter were actually litigated in the FINRA mediation and arbitration proceedings. Several courts have consistently held that collateral estoppel applies to arbitration awards. See *Commonwealth Ins. Co. v. Thomas A. Greene & Company, Inc.*, 709 F. Supp. 86, 88 (S.D.N.Y. 1989) ("Collateral estoppel applies as well to arbitration awards as to judicial adjudications, and thus may bar the relitigation of an issue decided at an arbitration.") (citations omitted); see also *Benjamin v. Traffic Executive Assoc. Eastern Railroads*, 869 F.2d 107, 114 (2d Cir. 1989); RESTATEMENT (SECOND) JUDGMENTS § 84(1) ("Except as stated in Subsections (2), (3) and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."); *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201, 1207-08 (1st Cir. 1987) (prior arbitration award in favor of plaintiff had res judicata effect and barred him from subsequently pursuing identical claims in federal court against same party-defendant).

While Complainant is correct in that the arbitration proceedings provide are more relaxed, the FINRA Codes of Arbitration Procedure allowed the parties (1) to file a Statement of Claim and Answer; (2) to raise cross-claims or counterclaims; (3) to select the hearing location; (4) to retain legal representation; (5) to conduct discovery; (6) to file dispositive and non-dispositive motions; and (7) to be provided an explained decision at the parties' joint request. (Resp. Br., EX-E, pp. 1-9).

The FINRA procedures are similar to the procedures provided for in 29 CFR Part 180 and 29 C.F.R. Parts 18. Also, 29 C.F.R. § 180.107 provides the ALJ broad discretion to limit discovery in order to expedite the hearing. 29 C.F.R. § 180.107(b). Further, the formal rules of evidence do not apply, and the scope of discovery may be limited by a judge's order. 29 C.F.R. § 180.107(d); 29 C.F.R. § 18.51(a). Therefore, I find the issues asserted in this matter were actually litigated in the FINRA mediation and arbitration proceedings based upon the similarities in pre-hearing procedures between the OALJ Rules of Practice and Procedure and the FINRA Codes of Arbitration Procedure as well as based upon the existing case law applying collateral estoppel to arbitration awards. Accordingly, I find that the issues at stake in the instant litigation are identical to the issues alleged in prior litigation and these issues have been actually litigated.

The second inquiry is whether the issue was necessary to the outcome of the first case. The issues of Complainant's reports of Respondent's alleged violations and Respondent's alleged retaliation present in this case were critical and necessary parts of the judgment in the

FINRA arbitration and mediation, as they are here. Complainant states again that he made several reports of Respondent's federal securities violations and repeats alleged claims of retaliation for years. The current complaint repeats the same elements of the arbitration claim, which has been dismissed by the FINRA arbitration panel. Accordingly, I find that the issues of presented in Complainant's OALJ complaint were critical and necessary to the decisions in the arbitration involving the statutes claimed in the instant matter.

The third inquiry is whether precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. Complainant has asserted that he was at a distinct disadvantage at the arbitration hearing because he had to travel from his home in Texas to New York City at his own expense while on disability. (Comp. Opp., p. 5). However, this is unfounded because, by his own admission in this matter, Complainant asserted he voluntarily filed a complaint against Respondent in FINRA Dispute Resolution and later had his attorney refile a claim with FINRA. (Compl., p. 3). Further, in his OSHA complaint, Complainant states that he will pursue recourse under FINRA. (Resp. Br., EX-D, p. 8). Clearly, Complainant has demonstrated that he voluntarily initiated arbitration and then settled and released his claims against Respondent under FINRA while represented by an attorney. Both parties are bound by the terms of the settlement agreement and order dismissing his claim with prejudice. It would be unfair to Respondent to allow Complainant to relitigate these same claims based upon identical facts. Since Complainant and his attorney chose to pursue recourse their arbitration, Complainant must now accept the arbitration decision. As Judge Learned Hand noted:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

Complainant and his attorney made a voluntary decision to arbitrate his claims against Respondent, and I find it unfair for Respondent to be burdened with any regret Complainant may have about whether his choice to arbitrate his claims was proper. Therefore, I find that precluding litigation in this matter would not be unfair to Complainant, who has already asserted the same claims in FINRA arbitration.

Accordingly, since all three elements are satisfied, I find that the allegations of Complainant's complaint are subject to collateral estoppel. Thus, Complainant's current claims for relief under SOX are hereby **DISMISSED** under the doctrine of collateral estoppel/*res judicata*.

C. Failure to Exhaust Administrative Remedies

Respondent further argues Complainant's complaint should be dismissed, because he failed to exhaust his administrative remedies. Specifically, Respondent contends the new issues, parties, and "irrelevant" causes of action added to Complainant's OALJ complaint should be dismissed due to Complainant's failure to raise these issues and name the individual parties in his OSHA complaint. (Resp. Mtn., pp. 8-11). Complainant argues he has not failed to exhaust his administrative remedies, but rather, he has followed the statutes to the best of his ability. Also, Complainant admits he has added new issues since the right of review by the OALJ is *de novo*. Further, Complainant contends he has not added new parties, as they were properly joined in his OALJ complaint. (Comp. Amended Opp., pp. 9-10). I will address each of the Respondent's arguments that Complainant has failed to exhaust his administrative remedies individually.

1. New Issues in Complainant's OALJ Complaint

Respondent contends Complainant's complaint should be dismissed, because he has added new issues in his complaint that were not raised in his initial complaint with OSHA. Respondent argues Complainant should not be permitted to proceed with these new claims and that the new claims should be stricken from his complaint. Specifically, Respondent argues Complainant failed to exhaust his administrative remedies related to his report of allegations related to Respondent's nonpayment of franchise fees in 2007, which resulted in his supervisor accusing him of terroristic threats, Respondent's refusal to sell his practice after he resigned, and Respondent's interference with his ability to receive payments under his long term disability policy. (Resp. Mtn., pp. 8-9).

I find that the issue of whether a whistleblower complainant is required to raise all allegations against a respondent in the initial OSHA complaint has not been definitively resolved. I am aware that the implementing regulation states that proceedings before an administrative law judge are *de novo*. 29 C.F.R. § 1980.107(b). This standard implies, but does not definitively state, that an administrative law judge is not required to limit consideration strictly to matters that were first raised to OSHA. However, in at least one case, the Board has held that the OSHA investigation is an absolute prerequisite and stated that where a complainant fails to file a complaint with OSHA, the ALJ had no power to adjudicate such a complaint. *Coates v. Southeast Milk Inc.*, ARB No. 05-050 (ARB July 31, 2007), slip op. at 8 n.3; see also *Parker v. Tenn. Valley Auth.*, ARB No. 99-143 (ARB June 27, 2002), slip op. at 4 (declining to address allegations of post-layoff retaliation because complaints were not investigated by OSHA).

While *Coates* is not a SOX case, I nevertheless find that the case addresses the common requirement in most whistleblower complaints that fall within the Department of Labor's authority: that is, the requirement that the initial complaint (and subsequent administrative investigation) involve OSHA. For that reason, I find that the *Coates* case may be applicable to cases, like the Complainant's that are grounded in SOX.

Moreover, at least one court, in a case adjudicated under the Sarbanes-Oxley Act, has held that the failure to file a complaint with OSHA constitutes a failure to exhaust administrative remedies, and for that reason, a matter may be dismissed. See *Zhu v. Fed. Housing Fin. Bd.*, 389 F.Supp. 2d 1253, 1271-72 (D. Kan. 2005) (citations omitted); see also *Bozeman v. Per-Se Technologies, Inc.*, 456 F.Supp.2d 1282, 1357 (N.D. Ga. 2006) (Sarbanes-Oxley complaint dismissed as to a defendant not cited in the OSHA complaint).

I find that SOX requires that all complaints be initially submitted to the Department of Labor. Under the governing regulation, OSHA has been designated to receive such complaints. 18 U.S.C.A. § 1514A(b)(1); 29 C.F.R. § 1980.103(c). Based on the above, I find that the governing regulations require submission of complaints to OSHA as a prerequisite to further action by the Department of Labor. This includes action by an administrative law judge. Consequently, I find that any allegations that were not submitted to OSHA for investigation are not properly before me, and I cannot consider them.

In sum, I conclude that the Complainant's allegations that include the following are not properly before me, for the reasons stated, and I thus am unable to consider them:

1. Any allegations regarding Complainant's reports to the State of Texas related to Respondent's nonpayment of franchise fees in 2007- not timely under SOX.
2. Any adverse action by an employee of Respondent wherein Complainant was accused of terroristic threats not contained in Complainant's complaint to OSHA- Complainant failed to exhaust administrative remedies afforded to him by SOX.
3. Any allegation of adverse action by Respondent wherein Respondent interfered with his ability to receive payment under his long term disability policy not contained in Complainant's complaint to OSHA- Complainant failed to exhaust remedies afforded to him by SOX.
4. Any adverse action by the Respondent prior to December 24, 2008 (the 180th day prior to the filing of the Complainant's initial OSHA complaint)- not timely under SOX.
5. Any other adverse action by the Respondent not contained in Complainant's complaint to OSHA- Complainant failed to exhaust administrative remedies afforded to him by SOX.

2. New Parties Added in Complainant's OALJ Complaint

SOX "provides that no company subject to the Securities Exchange Act of 1934 may retaliate against an 'employee' who lawfully cooperates with an investigation concerning violations of the Act or fraud on the shareholders." *Carnero v. Boston Scientific Corp.*, 2004 WL 1922132. at *2 (D. Mass. Aug. 27, 2004) (quoting 18 U.S.C. § 1514A(a)). Section 1514A(b), the enforcement provision, allows any "person" who alleges discharge or discrimination in violation of § 1514A(a) to seek relief by filing a complaint with the Secretary of Labor. SOX clearly requires the filing of a complaint with OSHA and findings released by OSHA as a

prerequisite to requesting a *de novo* hearing before an administrative law judge. 29 C.F.R. § 1980.106(a).

Complainant filed an administrative complaint with OSHA on June 22, 2009, naming only Ameriprise Financial Services, Inc. as the respondent. Respondent contends that Complainant's failure to name the additional individual persons as respondents in his OSHA complaint dooms any SOX claims against them. (Resp. Mtn., pp. 9-10). Complainant contends that the additional parties are properly joined, since he properly included them in his complaint for *de novo* review before the undersigned. Complainant also states in his response that the Respondent has vicarious liability. (Comp. Amended Oppo., pp. 7, 10).

While the regulations implementing SOX may provide for individual liability, Complainant still is obligated to exhaust his administrative remedies for the claims that he seeks to assert against each individual respondent. In both *Bozeman v. Per-Se Technologies, Inc.*, 456 F. Supp. 2d 1282, 1357-58 (N.D. Ga. 2006), and *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652, at *7-8 (S.D. Fla. Nov. 15, 2004), district courts were faced with motions to dismiss filed by individual defendants arguing that the plaintiffs' SOX claims asserted against them were barred for failure to file complaints with OSHA that specifically named them as parties, even though they were identified in the OSHA complaints as actors involved in the plaintiffs' terminations. Both courts agreed that merely mentioning an individual defendant in the body of a complaint as an actor, rather than naming him (or her) in the caption of the administrative complaint, fails to afford OSHA the opportunity to resolve a plaintiff's allegations through the administrative process. In *Hanna*, the district court stated, "Even if the court assumed that [the individual defendant] was placed on notice that he had allegedly violated the law, that notice has no consequence as to whether OSHA was placed on notice that it was required to investigate [the individual defendant's] actions in this case." 2004 U.S. Dist. LEXIS 25652, at *8. The courts concluded that OSHA was never provided an opportunity to issue a final decision with respect to the plaintiffs' claims against the individual defendants. See also *Levi v. Anheuser-Busch Co.*, 2008 WL 4816668, at *3 fn. 4 (W.D. Mo. Oct. 27, 2008) (noting that plaintiff failed to name a party in an administrative charge and the time for doing so had passed); *Smith v. Corning Inc.*, 2007 WL 2120375, at *2 (W.D.N.Y. July 23, 2007) (finding that plaintiff failed to exhaust administrative remedies by failing to name an individual and noting that "it is not sufficient to merely mention an individual in the body of an administrative complaint"); *Smith v. Psychiatric Solutions, Inc.*, 2009 WL 903624, at *8 (N.D. Fla. Mar. 31, 2009) (finding that plaintiff could not pursue SOX claims against parties not named in the heading of the administrative complaint).

Likewise, Complainant never provided OSHA with an opportunity to issue a decision as to his claims against the individuals named in his OALJ complaint, because he failed to specifically name them as respondents in his OSHA complaint. The mere fact that the individual respondents are named in Complainant's complaint for *de novo* review before the undersigned is insufficient. While the individual respondents may have had notice of his claim against Ameriprise, they would not have known that Complainant was pursuing a claim against them individually.

Requiring that an aggrieved employee name not only the corporate respondent but also an individual respondent affords OSHA the opportunity to adjudicate claims with respect to the specific individual. Thus, even if the individual was placed on constructive notice by being named as an actor in a complaint, courts consistently have emphasized that failing to name the individual as a respondent deprives OSHA of the opportunity to resolve the employee's allegations with respect to the individual. Because of the judicial nature of SOX proceedings, requiring that an individual defendant be named as a respondent in an administrative charge makes sense and is consistent with the statutory scheme.

Accordingly, since the individual personal respondents were not named as respondents in Complainant's complaint with OSHA, dismissal of the individual personal respondents in this matter is proper. Thus, Complainant's current claims against those parties not named in his OSHA complaint are hereby **DISMISSED** with prejudice.

3. Causes of Action in Complainant's OALJ Complaint

Respondent contends that Complainant added irrelevant new causes of action (including breach of contract, breach of good faith and fair dealing, defamation by a number of individuals, denial of due process, gross negligence and willful misconduct, and intentional infliction of emotional distress) in paragraph 168 of his complaint. Respondent argues that these causes of action must be dismissed from this action, as this action is simply an appeal from the dismissal of Complainant's Section 806 claim. (Resp. Mtn, pp. 10-11). In his Amended Response, Complainant disagrees with Respondent that these additional claims are extraneous. (Comp. Amended Oppo., p. 10).

Upon closer inspection of Complainant's complaint, it appears these alleged causes of action are stated in Complainant's list of adverse actions as well as in his requests for damages for twenty specific allegations, including breach of contract, breach of good faith and fair dealing, defamation, slander, denial of due process, gross negligence, willful misconduct, and intentional infliction of emotional distress.² (Compl., pp. 10, 24-25).

Under 18 U.S.C.A. § 1514A(c), an employee who prevails in action under subsection (b)(1) of the Act shall be entitled to all relief necessary to make the employee whole. The available remedies under SOX include reinstatement with the same seniority status that the employee would have had, but for the discrimination; back pay, with interest; and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also

² Complainant also requests damages for allegations of providing false information, threats, retribution, concealment of material facts, delay in disability claims by Riversource Life Ins. Co., an explanation to other employees as to why he was terminated, and a referral to the Department of Justice for investigation and prosecution of the named respondents in his complaint under the criminal provisions of SOX. (Comp., pp. 24-25).

for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986); *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (*Dep. Sec'y Feb. 14, 1996*) (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-08, slip op. at 4 (*Sec'y Feb. 26, 1996*) (complainant's testimony sufficient to establish entitlement to compensatory damages); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).

After reviewing Complainant's complaint, I find that several of Complainant's requests for relief are not cognizable under SOX and therefore must be struck. Such requests for damages include damages for (1) breach of contract; (2) breach of good faith and fair dealing; (3) defamation and slander; (4) providing false information to FINRA; (5) threats and defamation; (6) retribution; (7) denial of due process; (8) misrepresentation; (9) gross negligence and willful misconduct; (10) concealment of material facts; (11) intentional infliction of emotional distress; and (12) delay in disability claims. (Compl., pp. 24-26). Such requests for damages are for actions based in tort that the undersigned does not have the authority to award. Thus, any of Complainant's requests for relief that fall outside the remedies provided by SOX must be **DISMISSED** from the instant action.

D. Complainant's Reasonable Belief of Respondent's Alleged Unlawful Actions

Finally, Respondent argues dismissal is proper, because Complainant has failed to state he had a reasonable belief in Respondent's alleged unlawful actions. Specifically, Respondent contends it is not objectively reasonable to believe that, because Complainant's complaints were "universally ignored," Respondent engaged in a multi-year campaign against him, which ultimately resulted in a letter of reprimand and \$2,500 fine (which was refunded to him after his resignation). In sum, Respondent argues dismissal is proper due to his failure to establish any relationship between his allegations and the letter of reprimand and fine. (Resp. Mtn., pp. 11-12).

In response, Complainant denies Respondent's assertion that the Reserve Fund implosion is the only example of whistleblowing that could conceivably implicate SOX. Complainant also agrees that his beliefs were reasonable, although he disagrees with Respondent that reasonable belief under SOX includes both a subjective and objective component. (Comp. Amended Opp., p. 11).

Under SOX, a complainant must allege sufficient facts to show, when viewed in a light most favorable to him, that (1) he engaged in "protected activity" by providing information or a complaint to his supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act; (2) the Respondent knew, actually or constructively, of the "protected activity;" (3) the Respondent discharged him or took

another unfavorable personnel action against him; and (4) his providing the information or making the complaint aware of the violation(s) was a contributing factor to the discharge or other adverse personnel action taken by the Respondent. 29 C.F.R. § 1980.104(e).

The Complainant's allegations related to "protected activity" under SOX must set forth facts that he provided definitive and specific information to his employer about conduct that he reasonably believed constituted one of six violation types enumerated in 18 U.S.C.A. § 1514A(a). Though the employee need not cite a code section the employee believes was violated or being violated, "the reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal." *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. GA, 2006) citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). "[The] protected activity must implicate the substantive law protected in Sarbanes-Oxley ..." *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) and cases cited therein. The communication made by the employee must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquires do not constitute protected activity. When the communications are "barren of any allegations that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud" the communication is not protected activity under SOX. *Livingston v. Wyeth*, 2006WL2129794 at *10 (M.D. NC, Jul 28, 2006) *aff'd* 520 F.3d 344 (4th Cir. 2004); *Skidmore v. ACI Worldwide, Inc.*, 2008WL2497442 (D. Neb, Jun. 18, 2008); *Portes v. Wyeth Pharmaceuticals, Inc.*, 2007 WL 2363356 (S.D. NY, Aug. 20, 2007) Under SOX, the communications which may be considered as "protected activity" only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, supra*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006); *aff'd* 548 F.3d 322 (4th Cir. 2008); *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.NY, 2006).

In order for an activity to be "protected activity" under the Act, there must be not only subjective/objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but there must also be a definitive and specific expression of concern to the employer over the perceived violation(s). Without both factors, there is no "protected activity" under the Act. *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008); *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006) at page 11 and 15.

Therefore, in order to establish the first element of a *prima facie* case, Complainant must allege that the activity he engaged in is protected under the whistleblower provisions of SOX. Unless Complainant blew the whistle by providing information related to his reasonable belief that Respondent engaged in mail fraud, wire fraud, bank fraud, securities fraud, or violated a rule or regulation of the SEC or a provision of federal law relating to fraud against shareholders, Complainant's activity is not protected by SOX's whistleblower provision. 18 U.S.C. § 1514A(a)(1). SOX's whistleblower provision does not protect employees that blow the whistle on corporate fraud in general. Rather, in order to constitute protected activity under the Act, the information that Complainant provided must concern a violation of one of the federal statutes or regulations specifically articulated in the SOX whistleblower provision. As the Administrative Review Board has held:

Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. To bring [oneself] under the protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§1980.104(b), 1980.109(a). *See Getman*, slip op. at 9-10 (requiring that the employee articulate the nature of her concern). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.

Harvey v. Home Depot, U.S.A., Inc., ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 14 (ARB June 2, 2006). Therefore, any information that Complainant has provided related to his belief that Respondent violated Title VII is not, standing alone, protected activity under SOX.

In the instant matter, the facts alleged in Complainant's SOX complaint, his Responses to the Respondent's Motion to Dismiss, and his Brief do not "definitively and specifically" relate Respondent's conduct to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). On the contrary, Complainant has made rather vague and unfounded allegations that are not supported by the facts. Even assuming Complainant's allegations were true, there is no plausible connection between the allegations and the facts of the complaint.

It is not clear here which of the six enumerated categories of violations under SOX Complainant contends that Respondent violated. While a complaint need not definitively or specifically relate to one of the enumerated categories of violations, need not approximate every element of the fraud, and need not reference shareholder or investor (securities) fraud to establish protected activity under SOX, the complaint must still generally address or relate to one of the enumerated categories of corporate fraud set forth in Section 806 of the Act. *Sylvester v. Parexel Int.*, ARB No. 07-123, at 19-21, 23. Here, Complainant alleged that Respondent engaged in theft of two client accounts and misrepresented its amounts invested in Reserve Funds to clients. He also alerted Respondent of nonpayment of franchise fees in 2007. Even if read broadly, none of the alleged violations appear to fall into the six general categories of fraud covered under SOX. 18 U.S.C. § 1514A(a)(1).

Even if we assume, for the sake of argument, that Complainant's violations fell near the bounds of the listed categories of fraud under SOX, to constitute protected activity and trigger SOX's protections, Complainant must "reasonably [believe]" that the complained-upon "fraud" constitutes a violation of Sarbanes Oxley by satisfying the two part-test reasonableness test set forth in *Sylvester*. 18 U.S.C. 1514A(a)(1); *Sylvester*, ARB No. 07-123, at 14-15.

Respondent does not dispute in its Motion whether Complainant had an actual, good faith belief that the conduct he complained of was a violation of SOX. Thus, Complainant's subjective belief will not be discussed. However, Respondent does argue that Complainant's belief is not objectively reasonable. (Resp. Mtn., pp. 11-12).

To satisfy the objective component of this test, complainant must have an objectively reasonable belief that the conduct complained of constituted a violation of the law set forth in 18 U.S.C. § 1514A. The objective component is evaluated using a reasonable person standard, "based on the knowledge available to a person in the same factual circumstances with the same training and experience as the aggrieved employee." *Sylvester*, ARB No. 07-123, at 15. The complainant need not provide a citation to the precise legal provision in question and need not show there was an actual violation of the provision at issue. Rather, he must show that belief of the purported violation was reasonable given the most general elements of the fraud. *Sylvester*, ARB No. 07-123, at 15 ("a complainant can have an objectively reasonable belief of a violation of the laws in Section 806 . . . even if the complainant fails to allege, prove, or approximate specific elements of fraud . . . [i]n other words, a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation"). This is a mixed question of law and fact. If there is a genuine issue of material fact, it cannot be decided as a matter of law, but if no reasonable person could have believed the facts amounted to a violation, it may be decided as a matter of law. *Welch v. Chao*, 536 F.3d 269, 277-78 n.4 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008); see *Sylvester*, ARB No. 07-123, at 15.

Although Complainant is not a lawyer, his considerable years of experience and training as a financial advisor are considered in this analysis. *Sylvester*, ARB No. 07-123, at 15. After a thorough review of Complainant's complaint, no fact finder could find that a person of like training and experience could have an objective, reasonable belief that the conduct was a violation of SOX. Complainant has failed to draw even a generalized connection from the alleged forgery and theft to the six enumerated categories of violations in Section 806 of SOX.

In his complaint, Complainant asserts that Respondent had prior knowledge of wrongdoing at the Reserve, yet nonetheless invested more than \$100 million dollars of its own funds with the Reserve. (Compl., pp. 13-16). Complainant's complaint fails to mention that Respondent sued the Reserve Fund for failing to inform Respondent that it was going to "break the buck." This lawsuit resulted in recovery for itself, its customers, and others. (Resp. Mtn., p. 2).

Also, Complainant has failed to draw any sensible relationship between his implausible allegations regarding his alleged protected activity and the material adverse action (letter of reprimand and \$2,500 fine) taken against him. In fact, the \$2,500 fine was later refunded to Complainant. Further, I find Complainant's allegations that Respondents engaged in a multi-year campaign against him based upon his reports to authorities (which were ignored) are not objectively reasonable.

With respect to the reporting of alleged forgery and theft of client accounts, Complainant has set forth few details to substantiate this claim. (Compl., pp. 10-11; 16). Complainant's allegations that his verbal and written complaints included reports of suspected violations of state and federal laws regarding forgery and theft of a client account is a bare allegation devoid of factual support. (Compl., pp. 10, 16). Further, there is no indication from Complainant that Respondent intended to engage in this type of "fraud." Complainant did not put forth any evidence or "specific facts" further explaining this allegation of "fraud" in his complaint. Again, unlike the complainant in *Sylvester*, Complainant here has failed to draw even a generalized connection in his complaint between this alleged "fraud" and the six enumerated categories of violations in Section 806 of SOX. 18 U.S.C. § 1514A; *see Sylvester*, ARB No. 07-123, slip op. at 6, 23.

Further, on the issue of Complainant's criticisms of upper level mismanagement, negligent supervision, and creation of a hostile work environment, Complainant has set forth little or no facts to evaluate these claims. (Compl., p. 11). Complainant alleged that company managers were grossly negligent in compliance oversight over his financial planning and brokering activities and used intimidating practices in the workplace, which Complainant alleged had a detrimental effect on the company. (*Id.*) However, Complainant did not explain how these activities constitute fraudulent activity. In fact, no similarly situated person would find it objectively reasonable to believe that Respondent's decision of what tasks their managers perform on a daily basis is a violation of one of the six enumerated categories of violations in Section 806 of SOX. *See Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. 2009) (general or conclusory accusations of accounting violations insufficient to survive summary judgment); *Welch*, 536 F.3d at 279 (conclusory, general statements insufficient to establish objective belief of protected activity).

Because Complainant failed to state a claim for relief that his complaints were generally the type of fraud covered by SOX or were objectively reasonable with plausible factual content, dismissal on the basis of implausible allegations under FRCP 12(b)(6) is appropriate. Thus, Complainant's current claims for relief under SOX are hereby **DISMISSED**.

IV. CONCLUSION

In sum, Complainant failed to state a plausible claim upon which relief can be granted due to (1) his prior arbitration and settlement of the same claims asserted in complaint; (2) his failure to exhaust his administrative remedies by properly naming all issues and parties in his OSHA complaint; and (3) the lack of any objectively reasonable belief in his claims.

V. ORDER

For the reasons stated above, **IT IS HEREBY ORDERED** that Respondent's Motions to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Respondent's Motion for Protective Order and Motion to Quash as well as Complainant's Motion for Continuance, Motion for Subpoena and Production of Readily Available Discovery Materials, and Motion for Show Cause Order Why FINRA Should Not Be Added as a Third-Party Defendant are hereby **DISMISSED AS MOOT** in light of the above.

YOU ARE HEREBY NOTIFIED that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **July 11, 2016**, in **Austin, Texas**, is **CANCELLED**.

SO ORDERED this 6th day of June, 2016, at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).