

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 09 November 2018**

CASE NO.: 2017-SOX-00020

*In the Matter of:*

**PAUL WAADEVIG,**  
Complainant,

v.

**MARKETS AND MARKETS, INC.,**  
Respondent.

Appearances: Paul Waadevig, Esq.  
Self-represented Complainant

Todd A. Bromberg, Esq.  
for Respondent

Before: Steven B. Berlin  
Administrative Law Judge

**DECISION AND ORDER GRANTING MOTION TO DISMISS**

This matter arises under the employee protection provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. Part 1980. Complainant Waadevig has both a law degree and an MBA from Boston College and has practiced law in the United States. He has extensive experience in market research. He names as respondent his former employer Markets and Markets, Inc. That corporation is a wholly-owned subsidiary of MarketsandMarkets, a privately-held company based in India and providing global market research and consulting services to clients in a number of industries. The Indian parent company formed Markets and Markets, Inc. under Delaware law in or around early 2016. Respondent subsidiary operates in the U.S. and sells the same kinds of services and products as its parent.

Complainant alleges that on June 24, 2016, Respondent Markets and Markets, Inc. terminated the employment in retaliation for his reporting to managers and officers of Respondent and of its parent that both companies were fraudulently misrepresenting their research capabilities and practices. Complainant alleges that these fraudulent misrepresentations made Markets and Markets, Inc. and its parent more attractive to potential clients and would induce clients to pay higher prices for Respondent's and its parent's services and products than they would pay absent the fraud.

On May 15, 2017, Respondent moved to dismiss. It asserts that (1) given the alleged facts, this Office lacks subject matter jurisdiction, and (2) Complainant failed to state a claim on which relief may be granted. I will grant the motion based on the second of these contentions.<sup>1</sup>

### Procedural History

On or about December 16, 2016, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). He named Markets and Markets, Inc. as the sole respondent. OSHA issued “Secretary’s Findings” adverse to Complainant on January 10, 2017. Complainant submitted a request for hearing before an ALJ. The case was assigned to Judge King of this Office.<sup>2</sup> After Respondent filed the present motion to dismiss, Complainant filed an opposition and a few days later purported to file an amended complaint.<sup>3</sup> He did not seek and did not have Judge King’s permission to file the amended complaint.

Relying on the applicable procedural regulation, Respondent moved to strike the amended complaint because Complainant filed it without leave. *See* 29 C.F.R. § 18.36 (“The judge may allow parties to amend and supplement their filings.”). Respondent also filed a brief in which it asserted that its motion to dismiss should be granted even if the amended complaint is allowed.

Waadevig opposed to the motion to strike. He relied on the Federal Rules of Civil Procedure for the proposition that he could file an amended complaint as a matter of right, citing F. R. Civ. P. 15.<sup>4</sup> He argued that the applicable procedural rule of this Office, 29 C.F.R. § 18.36, was not intended “to override or impinge on the procedure as stated in FED. R. CIV. P. 15.” I conclude to the opposite: it is Rule 15 that is not intended to overrule the procedural rules of this Office, and in particular 29 C.F.R. § 18.36.

In the Sarbanes-Oxley Act, Congress provided that the applicable rules and procedures were those set out at 49 U.S.C. § 42121(b), which is part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 18 U.S.C. § 1514A(c)(2)(A). Implementing this mandate, the Secretary provided that, unless the SOX or AIR 21 implementing regulations provide otherwise, the procedures applicable to hearings at the Department of Labor under either of these two statutes are “the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of [29 C.F.R.].” 29 C.F.R. §§

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<sup>1</sup> Because Complainant’s pleaded facts and theories of recovery under the Act are not “obviously frivolous” (*see* discussion in the text below), this Office has subject matter jurisdiction. *See Sylvester v. Parexel*, ARB Case No. 07-123 (May 25, 2011), 2011 WL 2165854, slip op. at 8-9.

<sup>2</sup> Judge King stayed the litigation for a time because the parties agreed to proceed to mediation before expending further resources on the litigation.

<sup>3</sup> The amended complaint is 33 pages long. Eight pages are legal argument about the legal sufficiency of the allegations and the legal insufficiency of Respondent’s possible affirmative defenses. I strike from the pleading the argument at page 21, line 21 through page 29, line 12. Nonetheless, to the extent that any of the argument in the stricken portion is relevant to the present motion, I have considered it for that purpose.

<sup>4</sup> Complainant also relied on two sections of this Office’s former and now-obsolete procedural rules (29 C.F.R. §§ 18.2(a), 18.5(e)). Those rules were abrogated, effective June 18, 2015 (as corrected July 1, 2015), when the Secretary of Labor published new procedural regulations. The current regulations are codified at 29 C.F.R. §§ 18.10, *et seq.* The current 29 C.F.R. § 18.36 replaces the former 29 C.F.R. § 18.5. The current 29 C.F.R. § 18.11 replaces the former 29 C.F.R. § 18.2.

1979.107(a), 1980.107(a). The OALJ rules and procedures provide that the Federal Rules of Civil Procedure “apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.” 29 C.F.R. § 18.10(a). Thus, the Federal Rules of Civil Procedure apply in a Sarbanes-Oxley case only when the Act, its implementing regulations, any executive order, and the procedural rules of OALJ are all silent as to the procedure at issue

Here, the Act, its implementing regulations at 29 C.F.R. Part 1980, and executive orders are silent as to the amendment of complaints. But the OALJ rules are not. The rules address the amendment of filings at 29 C.F.R. § 18.36. That regulation therefore controls the question, not Rule 15, FED. R. CIV. P. Accordingly, a party must obtain the permission of the ALJ to amend or supplement filings at OALJ in a Sarbanes-Oxley case. *See* 29 C.F.R. § 18.36. Complainant did not do that.<sup>5</sup>

Nonetheless, I will grant Complainant permission to file the amended complaint, *nunc pro tunc*. That is because the regulatory scheme implementing the Act contemplates informal pleading, with the parties clarifying the scope of the litigation during the OSHA investigation and in the course of the litigation at this Office (OALJ).

As the regulations provide: “No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA . . . . OSHA will accept the complaint in any language.” 29 C.F.R. § 1980.103(b). Complainants frequently “file” complaints online, using a series of dropdown boxes that describe their allegations in the most general of categories. Heightened pleading requirements in the Federal Rules do not apply. *See Sylvester, supra*, slip op. at 9 (declining in a Sarbanes-Oxley case to apply *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A complainant need not show a “definitive and specific” relationship to the listed categories of fraud or securities violations that the Act addresses. *Sylvester*, slip op. at 14, citing list at 18 U.S.C. § 1514(a)(1).<sup>6</sup> If a complainant is represented and the attorney requests that OSHA close its

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<sup>5</sup> Even if F. R. Civ. P. 15 applied, it would not assist Complainant. Under Rule 15, where (as here) no responsive pleading is required, amendment of a pleading as “a matter of course” is available only if the amendment is filed within 21 days after the initial pleading was served. *See* F. R. Civ. P. 15(a)(1)(A). A respondent in a Sarbanes-Oxley case at the Department of Labor is not required to answer or otherwise plead in response to an OSHA complaint, though it may choose to file a position statement. *See* 29 C.F.R. § 1980.104(b) (“the respondent *may* submit to OSHA a written statement and any affidavits or documents substantiating its position” – emphasis added). Thus, the time for amendment as a matter of course under Rule 15 is limited to 21 days.

Complainant filed his OSHA complaint on December 16, 2016. He filed the amended complaint at OALJ on June 5, 2017. The amended complaint was filed more than 21 days after the initial pleading. Complainant was not entitled to file the amendment “a matter of course” even under Rule 15. Instead, Complainant could amend his complaint before trial under Rule 15 only with Respondent’s consent or with permission of the court. *See* F. R. Civ. P. 15(a)(2).

<sup>6</sup> The Ninth Circuit – controlling here – reached a contrary decision in *Van Asdale v. Int’l Game Technology*, 577 F.3d 989 (9th Cir. 2009). The court extended *Chevron* deference to the ARB’s prior decision in *Platone v. FLYi, Inc.*, ARB No. 04-154 (Sept. 29, 2006). The ARB overruled *Platone* in *Sylvester*. Since then the Third Circuit, also deferring to the ARB, adopted the *Sylvester* holding and rejected *Platone*. *Wiest v. Lynch*, 710 F.3d 121, 125-26 (3rd Cir. 2013). I conclude that the Ninth Circuit would do the same if it had an opportunity to revisit the issue as did the *Wiest* court. I therefore follow the ARB’s more recent decision in *Sylvester* (with its more persuasive analysis) and not *Van Asdale* on this point.

investigation to allow the complainant to pursue the matter before an ALJ, OSHA will comply despite not having investigated. That means that OSHA's closure of its investigation is not an assurance that the relevant facts have surfaced at that point in the process.

Instead, the parties' specific allegations and defenses often surface later, such as during discovery or motion practice before an ALJ. Crucially, the ALJ may not remand the matter to OSHA for further investigation. *See* 29 C.F.R. § 1982.109(c). "Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant." While presiding, "The judge may allow parties to amend and supplement their filings." 29 C.F.R. § 18.36.

The administrative practice under SOX thus contemplates that the issues and contentions in the litigation often will not clarify until well into the process before the ALJ. Consistent with this, "ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort." *Sylvester, supra*, slip op. at 10. It is for this reason that I allow Complainant to file his amended complaint (dated May 26, 2017, and file-stamped June 5, 2017). This is the operative complaint that I will consider on the present motion.

#### Facts as Alleged in the Amended Complaint

Complainant alleges the background facts that I recited above and will not repeat here. I continue where those background facts ended.

To prepare reports on industry data and trends, market research firms do "secondary research" and also interview and otherwise interact with people involved in the particular industry ("market players"). The reports address questions such as a company's growth in market share, its revenue potential, and market trends. In addition to those in the industry, hedge funds, mutual funds, and other investment companies use the research results.

After the dot.com bust in the early 2000's, the market research and consulting industry adopted generally accepted principles. Clients generally pay more for services from firms that adhere to these principles. The principles include that: analysts will request interviews at least with managers and major companies in the industry being researched; they will ask for data about such factors as revenue, units sold, and average price; and they will forecast based on historical market trends, the interviews, and the data collected.

To adhere to the principles, the market research and consulting companies found that it was useful to have "boots on the ground" in different global locations to develop contacts for interviews and data gathering.

Still, adherence to the principles is not legally required. Research and consulting companies are "virtually unregulated." Small firms exist without experienced personnel and a network of contacts. They typically charge about one-tenth as much for their reports (usually \$500 to \$1,000, compared to more established competitors, who charge \$5,000 to \$10,000 per report).

Respondent's parent company holds itself out as "the largest market research firm worldwide in terms of premium market research reports published annually." Amended complaint at 11. At least half of its total annual revenue is from sales to U.S. publicly-traded corporations. *Id.* at 12.

Respondent's parent company hired Complainant on February 2, 2015, "as the first full time employee outside of the Indian office." They gave him the title of "Vice-President, Client Partner." Complainant understood that he would be on many sales calls, conduct onsite visits, and "lead delivery of custom consulting." Complainant's being an employee in this country also supported the company's efforts to show a presence ("boots on the ground") in the U.S.

In May 2015, the parent company hired a second U.S.-based employee. Waadevig worked in Vancouver, Washington, and the other employee worked in Chicago. In August 2015, the parent company provided each of the two employees with office space and asked each to arrange for the company's name plate to be posted in the lobby of the building.

When Complainant's first paycheck was due on March 1, 2015, the parent company notified him that they had no "mechanism to pay Waadevig as an employee and, instead would pay him as a 'Vendor' with a direct wire into a US bank account." Though Waadevig "agreed to this," he insisted that the company must pay him as an employee after taking payroll deductions and paying payroll taxes. Through the remainder of 2015, the parent company paid both Complainant and the other US-based employee in the same manner: by direct wire deposits as independent contractors.

Waadevig believed that this manner of paying himself and his colleague as independent contractors was "part of a multi-year and multi-faceted scheme . . . to convince . . . clients that the company had a research presence in the United States while avoiding underlying costs . . . such as filing, oversight and corporate taxation." This included the company's use of a mail drop in Texas from 2009 to 2015 "that the company used to fraudulently claim to be a 'US company' on its website." It also allegedly included "tens or possibly hundreds of thousands of fraudulent and fake social media (LinkedIn) accounts showing research personnel in the US and other misrepresentations.

Waadevig alleges that, in connection with this scheme to create a false impression of a U.S. presence, the parent company "was using Waadevig's reputation in the market as evidence he was conducting or leading research efforts in the United States." Actually, Waadevig alleges, the parent company was excluding him from efforts "to oversee, investigate or improve any research process." Complainant alleges that the parent company thus was creating an impression of a U.S. presence but in fact was not engaged the activity in the U.S. required to produce reliable market data; rather it was "guessing or making up data broadcloth."<sup>7</sup>

An industry watchdog filed better business bureau complaints and posted to the internet, asserting that the parent company didn't really have employees in Chicago and in Vancouver, Washington as the company was indicating. Waadevig alleges that: "This complaint and other due diligence by the sophisticated purchasers at public companies could have found public records that showed the parent company had no employees in Chicago or Vancouver. From this Complainant alleges that, given the large number of clients the parent company has, "some expressly or tacitly colluded with [the parent company] because they got favorable 'third party' data while others simply were negligent."

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<sup>7</sup> Waadevig explains this misrepresentation of the parent company's research was less likely to come to light because the parent company often produced the only market report for the given industry (*i.e.*, "monopoly reports). Thus, the client could not compare a variety of reports to determine the accuracy of any of them.

Beginning in January 2016, the parent company paid both Waadevig and his U.S.-based colleague as employees.<sup>8</sup> Early that year, the parent incorporated Respondent Markets and Markets, Inc. in Delaware as a wholly-owned subsidiary. The subsidiary began to pay Complainant (and the other U.S. employee) as its employee beginning on April 1, 2016 (for work in March 2016).

After he was being paid as an employee, Complainant told the parent company's CEO that the manager of a client who was buying services wanted assurance that Complainant was "an employee of the company." Of course, by this time, there was no question that the company was treating Complainant as an employee. Complainant also asked the parent company's CEO how Complainant was supposed to report his 2015 income for U.S. tax purposes. Complainant does not disclose the CEO's answer.

In late April 2016, the parent company hired a third U.S.-based employee, Dan Holmes, as head of U.S. operations. *Id.* at 14. It authorized him to hire up to 100 new employees. *Id.* at 7.

On May 4, 2016, the company's vice-president for human resources provided Complainant "a back-dated 'Import-Export Vendor' agreement that showed Complainant as an independent contractor. From this, Complainant suspected that the parent company was engaged in "long term fraud." *Id.* at 8. The company's explanation for the written agreement was that the company was undergoing an audit.

On May 8, 2016, Waadevig asked to talk directly with outside CPAs or auditors. Respondent (or its parent) did not arrange for this. On the next day, Complainant spoke to the parent company's CEO about his individual tax returns and how to report the pay he'd received. Complainant's allegations about this conversation show it as confrontational. After the conversation, the CEO "cut off communication." A co-founder of the parent company emailed Complainant that the company does not advise contractors on their tax issues. *Id.* at 16.

The co-founder explained as follows: The parent company is based in India and wanted to hire Complainant as an employee for its expansion in the U.S. Later, the company realized that it needed a U.S.-based subsidiary to allow hiring in the U.S. The company agreed with Complainant to continue the relationship as an independent contractor until the subsidiary was established.<sup>9</sup> The parent did establish the subsidiary and made Complainant an employee of it. The company views the payments made to Complainant before contract fees until Complainant became an employee. *Id.* at 17. Waadevig alleged in the amended complaint that the parent company gave him an employment contract; therefore, the parent hired him as an employee; Waadevig did not agree to change the arrangement to independent contractor; and payment of independent contractor fees therefore was improper.

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<sup>8</sup> Complainant alleges that the parent company failed to forward to the Internal Revenue Service the withholding taxes for the first quarter of calendar 2016. He also alleges that the company had been doing business in the US for 5 years at the time and had failed to register and pay taxes. He argues in his amended complaint: "The underlying tax fraud is a contributing motive as to why Markets and Markets defrauded public companies and thus, their shareholders, but is not dispositive to the elements of a SOX claim itself." Amended Complaint at 7.

<sup>9</sup> Complainant admits in his amended complaint (at 4) that he did agree to this, though he insisted that the company needed to pay him as an employee.

Complainant pleads that he reported to Holmes “all of the fraud issues” he’d discovered. These apparently were “the fact that the partners had been representing him as being involved with the research when he was not and potential tax issues.” Amended complaint at 18. Complainant told Holmes that “he feared for his employment because he notified the [parent company’s] CEO and others of the fraudulent activity and sought to change it.” *Id.* at 17. Holmes told Complainant that he’d discussed Complainant’s issues with partners at the parent company. *Id.* at 18.

In early June 2016, Holmes assigned Complainant a joint presentation and told Complainant that he will be needed “to guide the new hires during the ramp up period.” *Id.* at 20. Complainant took this as an assurance of continued employment. *Id.*

The following day, Complainant told Holmes that he continued to question how the company treats independent contractors. Complainant had a conference call two days later with the parent company’s co-founder and its chief financial officer to discuss “irregularities” in the company’s tax reporting (related to its business presence in Vancouver and Chicago), and he demanded an employment agreement for 2015. *Id.* at 20.

Holmes, Complainant, and the parent company signed an employment agreement for Complainant’s employment on June 15, 2016. It states that Complainant had been an employee since January 1, 2016.

Although Holmes saw a role for Complainant in the U.S.-based company, Respondent terminated the employment on June 24, 2016.<sup>10</sup> *Id.* at 21.

### Discussion

*Motions to dismiss.* Motions to dismiss are proper “for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” 29 C.F.R. § 18.70(c). As discussed above, *see* fn. 1, I consider this motion as for a dismissal for failure to state a claim upon which relief may be granted.

Such motions are disfavored in Sarbanes-Oxley cases because the claims “involve inherently factual issues such as ‘reasonable belief’ and issues of ‘motive.’” *Sylvester, supra*, at 10. When a complainant is self-represented, an administrative law judge must construe the complainant’s pleadings liberally, while remaining mindful to remain impartial and not become an advocate for the self-represented complainant. *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, slip op. at 6 (ARB Apr. 25, 2003); *Pik v. Credit Suisse AG*, ARB No. 11-034 (ARB May 31, 2012).

In the present case, however, Respondent bases its motion on Complainant’s allegations that are objectively discernable. Motive is not relevant. I will consider reasonable belief but focus on what is objectively reasonable. Complainant is self-represented. But he is a lawyer, with a U.S. law degree and MBA, and legal practice experience.

*Scope of Sarbanes-Oxley protection.* The Sarbanes-Oxley Act provides, in pertinent part:

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<sup>10</sup> Respondent offered Waadevig one month’s severance pay in return for a release of all claims. Waadevig declined.

*Whistleblower protection for employees of publicly traded companies.*—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . 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 federal agency, Congress, or the employee’s supervisor or other person working for the employer who has authority to investigate, discover, or terminate misconduct].

18 U.S.C. § 1514A(a) (some citations omitted); 29 C.F.R. § 1980.102(b)(1).

It is undisputed that Respondent is not a publicly-traded; it is a wholly-owned subsidiary of a privately held Indian company. It is neither a company with a class of securities registered under section 12 of the 1934 Act, nor a company required to file reports under section 15(d) of that Act.

But that is not Complainant’s argument to bring Respondent within the Act’s coverage. Rather, Complainant asserts that the Act protects him because Respondent is a contractor of publicly-traded corporations. Though I take the factual allegation as true, I find that it is legally deficient under the circumstances presented.

At the outset, Complainant does not plead that Respondent is a contractor or subcontractor of a publicly-traded company. Complainant pleaded that Respondent’s Indian parent company is among the largest firms in its industry and that more than half of its revenue is from clients who are publicly-traded. But Complainant did not name the Indian parent company as a party respondent. He could have named the parent company in the initial OSHA complaint, could have moved to join the parent company before the administrative law judge, or at the least could have named the parent company when he filed his amended complaint. He did none of these. He named only the subsidiary, Markets and Markets, Inc., a Delaware corporation. I found no allegation in the amended complaint that would make Respondent a contractor of a publicly-traded corporation, and Complainant cites none in his opposition to Respondent’s motion.

But, as I would not grant Respondent’s motion on this point without giving Complainant an opportunity to amend his complaint a second time, I will assume for the present purposes that Respondent was, at a time it employed Complainant, a contractor of a publicly-traded company. I therefore turn to the question of whether SOX protects the employee of a contractor when he reports conduct such as Complainant allegedly reported here.

*Limitations on contractor liability.* In 2014, the Supreme Court construed SOX to protect the employees of the contractors of publicly-traded companies in certain circumstances. *See Lawson*

*v. FMR LLC*, 571 U.S. 429, 459 (2014), citing favorably 29 C.F.R. § 1980.101 (which – in subsections (e) and (f) – extends protection to employees of contractors) (571 U.S. at 455). In *Lawson*, two former employees of private companies that contracted to advise or manage mutual funds brought SOX claims against their former employers. 134 S. Ct. 1158, 1161, (2014). The Supreme Court held that “based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, [§ 1514A] shelters employees of private contractors and subcontractors [of publicly-traded companies], just as it shelters employees of the public company served by the contractors and subcontractors.” *Id.* at 1158.

In finding coverage, the Court considered SOX’s whistleblower provision’s purpose “to ward off another Enron debacle.” *Id.* at 447-50. Quoting the ARB’s opinion below, the Court stated that “Congress plainly recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [Enron] officers . . . perpetrated.” *Id.* Contractors such as Enron’s outside auditors at the Arthur Anderson accounting firm facilitated the fraud. *Id.* Congress understood that “outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract.” *Id.* at 448. “Outside professionals” are “gatekeepers who detect and deter fraud.” *Id.* at 449. “Fear of retaliation was the primary deterrent to such reporting by the employees of Enron’s contractors.” *Id.* at 448. “Two of the four examples of whistleblower retaliation recounted in the Senate Report involved outside professionals retaliated against by their own employers.” *Id.* at 448-49. “From this legislative history, one can safely conclude that Congress enacted § 1514A aiming to encourage whistleblowing by contractor employees who suspect fraud *involving the public companies with whom they work.*” *Id.* at 449 (fn. omitted) (emphasis added).

The Court also relied on the structure of mutual funds. “Virtually all mutual funds are structured so that they have no employees of their own; they are managed, instead, by independent investment advisers.” *Id.* at 450. Given the vital role mutual funds play in managing over \$14 trillion in investments, the employees of the managing firms must be protected because they “are the only firsthand witnesses to the [shareholder] fraud.” *Id.* at 451.

The *Lawson* majority addressed a concern that the protection of employees of contractors of publicly-traded companies would be over-inclusive. It noted with approval the Solicitor General’s argument that the word “contractor” referred to a company “fulfilling its role as a contractor for the public company, not the contractor in some other capacity.” *Id.* at 453. It should involve “a person who is in a position to detect and report the types of fraud and securities violations that are included in the statute.” *Id.* It refers to the contractor “working for the public company.” *Id.* Ultimately, the Court did not reach the issue of specific limitations on its holding because the two employees at bar clearly fell within the parameters of what the Court viewed as protected. *Id.* at 454.

In the four years since *Lawson*, the trial courts have developed a substantial body of cases delineating the limitations that the *Lawson* Court contemplated but did not reach.<sup>11</sup> A recent

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<sup>11</sup> I find no controlling authority in the developing caselaw. The Ninth Circuit, which is controlling in this Washington-based case, has not reached the question of the scope of contractor liability under SOX. Nor did I find other appellate decisions that address the issue. Neither party cites any appellate authority.

decision out of the Southern District of New York grants a dismissal and summarizes the developing caselaw:

Since *Lawson*, federal courts that have addressed the scope of § 806’s “contractor” provision have found that it does not cover situations where, as here, the plaintiff employee does not allege fraud related to or engaged in by a public company. In other words, the contractor provision does not apply where a public company has no involvement in the conduct Congress sought to curtail by passing SOX. For instance, in *Gibney v. Evolution Marketing Research, LLC*, an employee sued his former employer, a private contractor of a public company, after the employer allegedly fired him for complaining that the employer was overbilling a publicly traded company for which it provided marketing services. 25 F. Supp. 3d 741, 742 (E.D. Pa. 2014). The court held that the allegations failed to state a claim, concluding that plaintiff was “advocat[ing] for an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*.” *Id.* at 747 (noting that the case “does not implicate the peculiar structure of the mutual fund industry” and that denying plaintiff coverage would not “‘insulate’ an entire industry from § 1514A protection”). In particular, the court found that “[n]othing in the text of § 1514A or the *Lawson* decision suggests that SOX was intended to encompass every situation in which any party takes an action that has some attenuated, negative effect on the revenue of a publicly-traded company, and by extension decreases the value of a shareholder’s investment.” *Id.* at 747–48 (“Plaintiff has not alleged that he blew the whistle on fraud committed by Merck (either acting on its own or acting through contractors like [defendant]). Rather, [p]laintiff is alleging that [defendant] committed fraud against Merck. Thus, based on Plaintiff’s allegations, Merck is the victim of fraud rather than its perpetrator.”). Numerous other courts have reached similar conclusions. *See, e.g., Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 WL 1080937, at \*4 (N.D. Tex. Mar. 21, 2017) (relying on *Lawson* and *Gibney* and concluding that “Plaintiff’s allegations of fraud are too far removed from potentially harming the shareholders of a public company to be covered under § 1514A”); *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017) (dismissing SOX claim, finding that the “purported whistleblower employed by a private company cannot invoke the protections of section 1514A simply because her employer happens to contract with public companies on matters unrelated to the alleged whistleblowing”); *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015) (finding that “§ 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company”).

*Baskett v. Autonomous Research LLP*, No. 17-CV-9237 (VSB), 2018 WL 4757962, at \*8 (S.D.N.Y. Sept. 28, 2018) (Broderick, J.).

I have reviewed the cases that Judge Broderick discusses in *Baskett* and find his analysis persuasive. For example, in *Anthony*, the court found that covered contractor’s employees are those who are “firsthand witnesses to corporate fraud at a public company—for example, the lawyers and accountants in the Enron scandal who facilitated and contributed to the fraud.” 130

F. Supp. 3d at 647, 652. That is because section “1514A [is] concerned with public company fraud, whether committed by the public company itself or through its contractors.” *Id.* Accordingly, the *Anthony* court dismissed the claim.

I am aware of, but find unconvincing, *Limbu v. UST Global, Inc.*, 2017 WL 186674 (C.D. Cal. 2017), slip op. at 4. There – without analysis or explanation – the court declined to impose any limitations on contractor liability absent controlling authority from the Supreme Court or the Court of Appeals. To the contrary, when the Supreme Court expressly reserved the question of the limitations on contractor liability, it left it to the lower courts to develop the law on the issue. That is what all of the other lower courts to confront the issue have done. Nothing in *Limbu* leads me to question the consistent rulings coming down from the other district courts that have considered the issue. The vast majority of the lower court cases interpreting *Lawson* limit contractor liability consistent with the Congressional purpose of avoiding another debacle similar to Enron; the concern is fraud against shareholders by executives and managers at publicly-traded corporations as well as by the contractors and agents of those corporations who facilitate or cover up the fraud – especially when part of the contractor’s function to find and report inaccurate representations or fraud. It is the employees of contractors who see indications of fraud relating to the publicly-traded company whom the statute protects.

Turning to Waadevig’s allegations, they generally fall into two areas. The first is the parent company’s paying Waadevig for several months in 2015 as an independent contractor or vendor, when he in fact was an employee. Complainant believes that the parent company did this as part of a scheme to avoid paying taxes, including payroll taxes and business activity taxes. Complainant argues that, when the parent company paid him for his work through a wire transfer, this constituted wire fraud within the scope of SOX.

Second, Complainant alleges – somewhat inconsistent with his first area of contention – that the parent company misrepresented to clients and prospective clients that Waadevig was an employee, and that it did this to induce the clients to buy reports from the parent company and to pay considerably higher prices for those reports (up to \$10,000 for a report that otherwise might have been worth \$1,000).<sup>12</sup> I find neither of these alleged violations to come within the limited scope of contractor liability under SOX.

*Non-payment of payroll taxes, failure to register as a business entity operating in the U.S., and failure to pay business taxes.* Complainant’s allegations concerning the manner in which the parent company paid him do not concern Respondent (the subsidiary). Complainant concedes in his amended complaint that, at all the times he worked for Respondent, Respondent paid him as an employee.

SOX requires that the employee have a reasonable belief that the employer’s conduct about which the employee is complaining violates one of a specified list of legal provisions (including bank fraud, wire fraud, mail fraud, securities fraud, and violation of securities regulations). This “require[s] a complainant to have a subjective belief that the complained-of conduct constitutes a

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<sup>12</sup> This allegation is inconsistent with the first because, in the first, Complainant insists that he was an employee and should have been paid as one, and in the second, he asserts that the parent company’s holding him out as an employee was fraudulent.

violation of relevant law, and also that the belief is objectively reasonable, “‘*i.e.* he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience.’” *Sylvester, supra*, slip op. at 11. Complainant here does not allege a subjective belief that Respondent failed to pay payroll taxes or other business taxes or to register to do business in jurisdiction where it was required to do so. His claim against Respondent based on this theory therefore is legally deficient.

But I do not conclude the analysis here; were I to rely on this, I would find against Complainant on this theory as to Respondent, but I would give Complainant an opportunity to move to join Respondent's parent company as a party respondent. As I will be dismissing the complaint without leave to amend a second time, I instead reject Complainant's theory on another ground.

Specifically, these allegations are unrelated to any publicly-traded client of Respondent or its parent company. They might potentially relate to an unlawful failure to pay taxes and fees owed to the federal, state, or local governments. Respondent or its parent conceivably could have some liability to Complainant, for example, for failure to pay Social Security or other payroll taxes on Complainant's account. But none of this concerns fraud that would affect investors in a publicly-traded company.

*Respondent's holding itself out as Complainant's employer.* Again, these allegations do not concern the named Respondent. At all times that Complainant worked for Respondent, Respondent treated him as an employee and paid him as an employee. Complainant's claim against Respondent is legally deficient for this reason. But, as before, I will reject Complainant's second theory on another ground.

In particular, this second theory (even as considered as both Respondent and its parent company) fails for the reasons discussed in *Baskett* and the several cases cited there. Under this theory, any publicly-held company that was a client or potential client of Respondent (or its parent) could have been the victim of a fraud Respondent (or its parent) perpetrated. These clients or potential clients could have paid as much as about \$9,000 extra for reports they bought, and they would have been more likely to buy the reports. This would be a result of Respondent's (or its parent's) holding themselves out as having a greater presence in the United States than they had.

But, much as in *Gibney*, any potential adverse impact on shareholders of publicly-traded companies such as those Complainant specified (IBM, Cisco, Intel, Microsoft, and the majority of Fortune 500 companies) is too attenuated to come within the intended scope of SOX. Moreover, this is not a case where the publicly-traded company has no employees, and only the contractor's employees could witness the fraud and report it.

Here, Complainant's allegations fail to include reasonable suspicion of fraud (or violation of securities laws) that was occurring *at the publicly-traded company*. Nor does he allege a contractor's facilitation, contribution to, or cover-up of shareholder (or other) fraud occurring at the publicly-traded company. At the most, it concerns fraud at the contractor's company being visited upon the publicly-traded company.

It was not Congress' intent to federalize all contractor fraud; the focus of SOX is more limited and focused on protecting the investing public and avoiding a recurrence of anything like the

Enron debacle. Complainant's allegations do not touch the role of contractors that concerned Congress in SOX.

*Speculation about collusion of managers at publicly-traded corporations.* Curiously, Complainant alleges that, in 2015, complaints filed with the Better Business Bureau and posted on social media indicated that "Markets and Markets was 'an Indian sweat shop' that didn't really have employees in the US," and "that the Vancouver, WA and Chicago, IL offices were not staffed with real employees because there was no public filing of any employees in those areas."<sup>13</sup> Complainant alleges that, with due diligence, the parent company's publicly-traded company clients could have found this information. Amended Complaint at 6. If anything, this detracts from Complainant's theory because it makes his contention that he believed there was fraud objectively unreasonable.

One of the elements of fraud is that the defrauded person must reasonably rely on the misrepresentation. If a reasonable purchaser of Respondent's (or its parent's) services or products would have known Respondent (or its parent) was exaggerating its presence in the U.S., the purchaser could not reasonably have relied on those misrepresentations. As the purchaser knew or should have known the representations were false (or at least exaggerated), there would be no fraud.

The objective component of the "reasonable belief" standard 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" "The 'objective reasonableness' standard applicable in SOX whistleblower claims is similar to the 'objective reasonableness' standard applicable to Title VII retaliation claims.'" *Sylvester, supra*, slip op. at 12 (citations omitted).

Here, Complainant has a law degree from Boston College and has practiced law in the United States. Any person completing first-year torts at a law school knows the elements of fraud. A reasonable person with a law degree, admitted to the bar, and having practiced law in the U.S. would know that an element of fraud is that the defrauded person must have reasonably relied on the misrepresentation. Complainant's allegation negates this element. A reasonable person with the same training and experience as Complainant would understand that neither Respondent nor its parent engaged in fraud.

Perhaps in an effort to evade this result, Complainant adds that, given the number of its U.S. clients, "it is *likely* that some expressly or tacitly colluded with [Respondent or its parent] because they got favorable 'third party' data while others simply were negligent." Amended Complaint at 6 (emphasis added). As is apparent from Complainant's use of the word "likely," this allegation is speculation. Although the heightened pleading requirements in *Twombly* and *Iqbal* do not apply, Complainant must allege something more than speculation as the basis of his theory of recovery: speculation falls short of a subjectively held reasonable belief and thus is legally deficient as a pleading in a SOX claim.

Moreover, the allegation of collusion by publicly-held corporation's managers is objectively unreasonable. No reasonable person with legal training, an MBA, and experience in market

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<sup>13</sup> Accordingly to Complainant's allegations, the parent company did have one person working for it in Vancouver (Complainant) and another working for it in Chicago by August 2015.

research would believe that managers at publicly-held corporations would risk their careers and possible personal legal exposure to collude with a company like Respondent (or its parent) to generate fraudulent favorable market reports on which investors would rely to their detriment. It is unreasonable to assume that managers are routinely looking for ways to defraud the public – even where there is nothing in it for themselves. This would be entirely different if Complainant could point to circumstances that reflected fraudulent collusion, but he does no more than simply assert it out of thin air as “likely.” That is objectively unreasonable and legally insufficient under SOX’s requirement that the complainant must have a reasonable belief that there has been a violation of one of the listed areas of fraud or securities regulation. Finally, Complainant never alleges that he reported to either Respondent or its parent that he believed they were colluding with managers at publicly-held corporations to perpetuate the parent company’s fraudulent image of having a U.S. presence in return for giving the corporate client a positive market review.

*Leave to amend.* Complainant Waadevig is a lawyer who has practiced law. Representing himself, Mr. Waadevig initiated the case by filing an 11-page complaint with OSHA. He attached exhibits more than one-half inch thick. OSHA concluded that the gravamen of the complaint was that Respondent’s parent company paid him as an independent contractor, rather than as an employee, and made the payments by wire deposit to his bank. OSHA concluded that the complaint must be dismissed because no objectively reasonable person would conclude that the employer’s paying Complainant by wire deposit constituted wire fraud.

Complainant filed a detailed, 4-page objection to OSHA’s findings, and requested a hearing before an ALJ. This gave him an opportunity to supplement his initially-filed complaint, and Complainant took that opportunity. He emphasized his theory that Respondent’s (or its parent’s) fraud included false representations to clients and prospective clients that he was an employee, and that Respondent (or its parent) made these representations (among other ways) by “email, social media, telephonic or other electronic medium,” constituting wire fraud. He summarizes supporting factual allegations and offers legal arguments, including citations to authority.

After Respondent filed its motion to dismiss, Complainant filed an opposition. But he did not stop there. At this point, he was aware of Respondent’s arguments as to why his complaint failed to state a claim on which relief could be granted. He was aware of the authority on which Respondent relied, including such cases as *Gibney* and *Anthony*. Rather than await a ruling from Judge King on the fully briefed motion, he chose to file an amended complaint, believing that he had a right to do so as a “matter of course.”

The amended complaint is not a simple clarification of matters that Complainant previously pleaded. It is 33 typed pages long on lined pleading paper and includes extensive factual allegations as well as eight pages of legal argument (with numerous citations) and a prayer for relief.<sup>14</sup> The additional factual allegations include substantial material related to Complainant’s second theory discussed above (that Respondent or its parent were defrauding clients and potential clients by representing that Complainant was an employee). It includes the allegation about “likely” collusion.

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<sup>14</sup> Complainant pleads that his economic damages for the first year following the termination total \$2,733,600, based on a salary of \$185,000 per year plus commissions.

As I stated in the discussion above, had I concluded that Complainant's claims as to Respondent failed but that he might be able to proceed against Respondent's Indian parent company, I would have allowed him leave to amend to add the parent company. Throughout the discussion above, I declined to base my ruling on any analysis where Complainant might have been able to cure a pleading defect by amending the complaint.

Complainant thus already has taken an opportunity to amend his complaint to address the specific arguments that I have adopted in the decision above. He is a trained lawyer, was aware of the authority on which Respondent was relying in its motion, raised numerous facts to support his theory, and offered legal argument (including citations to authority) in opposition to the motion. The most recent amended complaint was his third opportunity to plead a legally sufficient claim. On his OSHA complaint and his request for hearing he also pleaded extensive facts, and on the request for hearing, he offered legal argument, citing authority. At this point, I can only conclude that Complainant has made his best effort to plead a sufficient claim. That effort has proved unavailing.

#### Conclusion and Order

For the foregoing reasons, Respondent's motion to dismiss is GRANTED. Complainant's complaint is DISMISSED.

SO ORDERED.

STEVEN B. BERLIN  
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](mailto: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).