

Plaintiff's breach of contract and Texas Payday Law claims.¹ Likewise, having considered the argument, testimony, submissions on file, and applicable law, the Court finds Plaintiff cannot prevail on his Sarbanes-Oxley claim.² Accordingly, pursuant to Federal Rules of Civil Procedure 50(a) and 52(a), the Court now enters the following findings of fact and conclusions of law. Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

INTRODUCTION

This is an employment discrimination case. Plaintiff Chandrashekhar B. Thanedar ("Thanedar") alleges Defendants Time Warner, Inc. ("TWI"), Time Warner Cable, Inc. ("TWC"), Texas and Kansas City Cable Partners, L.P. ("TKCCP"), Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N"), Time Warner Communications of Houston, L.L.P. ("TWCH"), and Time Warner Entertainment Company, L.P. ("TWE") (collectively, "Defendants") unlawfully terminated his

¹Plaintiff's breach of contract claim and Texas Payday Law claim, TEX. LAB. CODE ANN. § 61.001 *et seq.*, were tried to a jury.

²Plaintiff's claim under the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A *et seq.* ("Sarbanes-Oxley"), was tried to an advisory jury. *See Schmidt v. Levi Strauss & Co.*, No. C-04-01026 RMW, 2008 WL 859795, at *4 (N.D. Cal. Mar. 28, 2008) (explaining Sarbanes-Oxley creates no right to a jury trial); *Murray v. TXU Corp.*, Civ. A. No. 3:03-CV-0888-P, 2005 WL 1356444, at *3 (N.D. Tex. June 7, 2005) (finding Sarbanes-Oxley provided no right to a trial by jury but noting the court would consider a request to convene an advisory jury).

employment with Time Warner Cable–Houston Division in Houston, Texas because he allegedly made “whistleblower” complaints about alleged financial irregularities in violation of the Sarbanes-Oxley Act. In addition to his Sarbanes-Oxley claim, Thanedar is suing Defendants for breach of contract and failure to pay him an earned bonus in violation of Texas law. Thanedar seeks damages totaling \$3,400,000.

BASIS FOR PRECLUSION ORDER

At the outset, the Court notes that although Thanedar is a *pro se* litigant, he is no stranger to the courthouse. Indeed, this is the second time Thanedar has pursued legal action against Defendants. Thanedar’s past filings, the pending lawsuit, and his indefensible behavior demonstrate a proclivity toward prosecuting frivolous and vexatious lawsuits that has not gone unnoticed by the Court. Because of the vexatious nature of Thanedar’s past and pending complaints, and the obstinate manner in which the complaints were subsequently prosecuted, the Court determines further action is warranted to prevent him from filing future meritless and abusive actions related to these claims. Because the Court is “authorized to enjoin future filings when necessary to deter vexatious filings which clog the judicial machinery with meritless litigation or are a flagrant abuse of the judicial process,” the Court briefly recounts the factual basis for its decision to enjoin further filings by Thanedar. *See Kaminetzky v. Frost Nat’l Bank*, 881 F. Supp. 276, 278 (S.D. Tex. 1995).

A. First Lawsuit

On October 29, 2004, Thanedar filed his first lawsuit (“First Lawsuit”) against Defendants asserting various claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Thanedar, an Asian Indian male, asserted Defendants terminated his employment at Time Warner Cable–Houston Division because of his race and in retaliation for engaging in protected activity. Although initially represented by legal counsel, Thanedar’s attorney filed a motion to withdraw from the representation because, *inter alia*, Thanedar refused to cooperate or communicate with him and “indicated a lack of trust regarding the judgment and abilities” of his attorney. After the court (United States District Judge Melinda Harmon) granted the motion to withdraw, Thanedar proceeded *pro se*.

Thereafter, Thanedar filed a motion for continuance. However, because Thanedar failed to prosecute his case or retain new legal counsel, the court denied Thanedar’s motion for a continuance and instead granted Defendants’ motion to compel discovery. Despite the fact that such rulings are not “final orders” subject to appellate review, Thanedar nevertheless filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Thanedar also moved the court to stay the First Lawsuit pending resolution of his appeal to the Fifth Circuit. After the court denied Thanedar’s motion for stay pending appeal, Thanedar, undaunted, filed a writ

of mandamus. The Fifth Circuit subsequently denied Thanedar's motion to stay pending appeal and motion for writ of mandamus.

The record also reflects Thanedar refused to appear for his deposition, respond to Defendants' discovery requests, and comply with the court's instructions. Indeed, the court twice admonished and ordered Thanedar to follow its orders. Thanedar refused to heed the court's warnings, and on February 6, 2006, the court granted Defendants' motion to dismiss Thanedar's claims because he failed to comply with reasonable discovery requests and failed to prosecute his claim. In its order of dismissal with prejudice, the court acknowledged "[Thanedar's] persistent pattern of dilatory and contumacious behavior" and noted that its previous warnings "failed to produce any change in [Thanedar's] behavior." *See Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, No. 4:04-4188 (S.D. Tex. Feb. 8, 2006) (Harmon, J.) (order dismissing with prejudice Thanedar's lawsuit).

The Fifth Circuit affirmed Judge Harmon's dismissal of the First Lawsuit, finding no abuse of discretion in light of "Thanedar's serially contumacious conduct." *Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, 227 F. App'x 385, 2007 WL 1425532, at *1 (5th Cir. May 10, 2007). Likewise, the United States Supreme Court denied Thanedar's petition for writ of certiorari. *Thanedar v. Time Warner Commc'ns of Houston, L.L.P.*, 128 S. Ct. 1077 (2008) (mem.).

B. Second Lawsuit

Four months after dismissal of the First Lawsuit, Thanedar filed the instant lawsuit (“Second Lawsuit”) against Defendants (originally assigned to United States District Judge Kenneth Hoyt). As in the First Lawsuit, Thanedar initially retained legal counsel to file the Second Lawsuit. Thanedar’s attorney, however, moved the court to withdraw from the representation because “fundamental disagreements” existed between Thanedar and his attorney “concerning the strategy for prosecuting [the] litigation, the management of [the] litigation, and . . . the manner in which plaintiff communicates with counsel.” Thus, after the court granted the motion to withdraw, Thanedar again proceeded to prosecute his case *pro se*.

On January 4, 2008, Judge Hoyt assessed costs against Thanedar based on his “troubling and indefensible” conduct during his deposition. Thanedar asserted 325 objections to questions asked of him, and after objecting, refused to answer the question because “he intended to assert objections and refuse to answer any question he deemed helpful to the [D]efendants.” Describing Thanedar’s conduct as “irresponsible and indefensible,” the court noted that just because Thanedar “is proceeding *pro se*[,] does not give license for him to indiscriminately play the role of lawyer and client as the circumstances of his mind dictate.” Accordingly, Judge Hoyt ordered Thanedar to submit to a second deposition, answer all questions asked after

stating his objections, and pay costs to Defendants in the amount of \$6,657.63.

By agreement of the judges, the Second Lawsuit was transferred to the undersigned for the purposes of trial on May 21, 2008. During trial, Thanedar—on more than one occasion—accused opposing counsel of lying, made insulting comments directed at opposing counsel in front of the jury, and generally demonstrated dilatory, belligerent, and unreasonable conduct.

Although the courts are generally accessible to all individuals, litigants who abuse the process may be denied access to the judicial system. *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). Put simply, there is no constitutional right of access to the court to prosecute frivolous or malicious actions. *Kaminetzky*, 881 F. Supp. at 277. Consequently, a litigant may be enjoined from filing pleadings and complaints when necessary “to deter vexatious and frivolous filings or to protect the integrity of the courts and the orderly and expeditious administration of justice.” *Id.*

Thanedar’s pattern of abusive litigation and egregious conduct, as depicted above, demonstrate one of the grossest abuse of the federal civil process the undersigned has observed in the course of twenty-two years on the federal bench. Thus, to prevent the unnecessary and costly expenditure incurred by the judicial system and Defendants in adjudication of and defending against these types of

actions, the Court finds it is necessary to enjoin further filings by Thanedar without leave of Court. *See infra* pp. 40-41; *Kaminetzky*, 881 F. Supp. at 278.

FINDINGS OF FACT

1. From 2000 to 2004, Time Warner Cable–Houston Division employed Thanedar as its Director of Finance.³
2. Thanedar did not have an employment contract with Time Warner Cable–Houston Division.⁴ He was an at-will employee.
3. At the time of Thanedar’s employment, Time Warner Cable–Houston Division was part of a partnership between Comcast Corporation (“Comcast”), which owned a fifty percent interest and is not a party to this lawsuit, and certain TWC entities, which owned the remaining fifty percent of the partnership.
 - This partnership was known as TKCCP.
 - George “Fritz” Fryer (“Fryer”), former Vice President of Finance for Time Warner Cable–Houston Division, testified that TWI accounted for

³Thanedar testified he has a master’s degree in business administration (“MBA”) from the University of New Orleans and a bachelor’s degree in law, a bachelor’s degree in accounting, and a graduate degree in cost and works accounting from universities in India. He passed the Certified Public Accountants (“CPA”) exam in 1983, but his status is inactive. Thanedar testified he has been unemployed for the past two years.

⁴Thanedar’s offer of employment letter states he worked for Texas Cable Partners, L.P. which later became TKCCP. The Court notes Time Warner Cable–Houston Division ceased to exist in January 2007.

its investment in TKCCP using the equity method. The financial results of TKCCP were not consolidated with the financial results of TWI.

- Ron McMillan (“McMillan”), former President of Time Warner Cable–Houston Division, also testified that TKCCP’s financial results were not consolidated with TWC’s financial results either.
- TKCCP was not a wholly-owned subsidiary of TWI.
- Time Warner Cable–Houston Division had its own independent board of six directors. The board of directors could, and did, reject budgets previously presented to and approved by TWC.
- TWC is a subsidiary of TWI, but TWC and TWI do not share common management.
- TKCCP’s management agreement provided that TWI’s internal audit department would supply audit resources to TWC operating divisions, such as Time Warner Cable–Houston Division.
- TWI, the parent corporation, is the only party to this lawsuit that was publicly traded during Thanedar’s employment with Time Warner Cable–Houston Division.
- TWI had no involvement, oversight, or input regarding employment decisions relating to salary, performance evaluations, and hiring and

firing employees at Time Warner Cable–Houston Division.

- Moreover, Marla Barnard (“Barnard”), former Vice President of Human Resources (“HR”) for Time Warner Cable–Houston Division, testified she never consulted TWI on any HR-related issue.
 - Although Time Warner Cable–Houston Division employees received TWI stock options, TWC offered the stock options, not TWI.
 - When eligible, Thanedar will receive pension benefits from TWC and TWE-A/N, not TWI.
 - Thanedar received no earnings from TWI.
4. In the spring of 2003, Thanedar applied for the position of Controller at Time Warner Cable–Houston Division. Thanedar did not receive the promotion. Instead, Richard Gray (“Gray”), an outside applicant, was hired as Controller.
 5. On June 17, 2003, Thanedar filed a complaint with Barnard about his pay grade and salary. Thanedar asserted his pay grade and salary should be equal to or higher than the Controller position. According to Thanedar, the differences in grade and salary between the two positions was “discriminatory and not based on merit.”
 6. Barnard testified that she thoroughly investigated and researched Thanedar’s allegations and concluded Thanedar’s assigned pay grade and salary were

correct based on his role and responsibilities.

7. On July 9, 2003, Thanedar filed an Open Door Review Request with McMillan complaining, *inter alia*, about process-improvements in his department.
8. On August 29, 2003, Thanedar again filed a complaint with Barnard and HR, this time requesting a formal written response “as to why [his] internal bid for the Controller’s position was denied and a less experienced and less qualified candidate [was] favored.”
9. After Barnard investigated Thanedar’s new complaints, she informed him that Gray, a CPA, was selected for the Controller position because he had an MBA, a great deal of financial experience, including experience as Controller of a cable communications business, broad management and team-building experience, experience with a particular type of computer software, and strong interpersonal, analytical, and problem-solving skills.
10. On September 12, 2003, Thanedar filed a charge of discrimination (“Original Charge”) with the Equal Employment Opportunity Commission (“EEOC”), asserting he was not promoted to Controller because of his Indian heritage.
11. On October 17, 2003, Fryer reprimanded Thanedar for excessive absences. Although Fryer was concerned about Thanedar’s absenteeism, he was more concerned about Thanedar’s primary method of communication: email. Fryer

admonished Thanedar that more in-person communication was necessary.

12. On November 11, 2003, Thanedar filed an amended charge (“Amended Charge”) of discrimination with the EEOC, alleging, *inter alia*, that Fryer unlawfully retaliated against him for filing the Original Charge by writing him up for attendance issues.
13. To improve communication between Fryer and Thanedar, Barnard set up a series of meetings between the two. Fryer and Thanedar agreed to meet weekly beginning the week of December 8, 2003. The meetings, however, did not improve communication between Thanedar and Fryer.
14. In December 2003, Fryer prepared and presented Thanedar with his performance evaluation for 2003.
15. In Thanedar’s 2003 performance evaluation, Fryer questioned “whether [Thanedar] has the willingness to effectively resolve problems without creating other problems[,] and this leads me to question his judgment, problem solving abilities and communication skills.” Moreover, Fryer observed that Thanedar:
 - assumed a “narrow view of his job responsibilities”;
 - refused to accept responsibility for tasks assigned to him; and
 - required “more structure” and direction than necessary.
16. Fryer asked Thanedar to review the 2003 performance evaluation over the

Christmas vacation, and they agreed to meet to discuss the evaluation after the holidays at a scheduled time. Thanedar did not attend the scheduled meeting.

17. On January 20, 2004, Thanedar met with Fryer and Barnard to discuss his 2003 performance evaluation. During this meeting, Thanedar again complained of on-going harassment and discrimination.
18. Also, for the first time, Thanedar complained of alleged accounting irregularities within Time Warner Cable–Houston Division’s finance department and called for a Sarbanes-Oxley review.
19. Specifically, Thanedar alleged that:
 - accruals and related expenses for Road Runner Affiliate Fees, Taxes, and Legal Fees were not accurately recorded during the 2003 annual close process;
 - Programming Expenses were misstated or not properly calculated;
 - Accounts Payable and accrual accounts were not properly stated;
 - Subscription Revenue was understated by \$1 million for the year ended December 31, 2003;
 - Subscription Revenue was not properly cut off during the 2003 close process;
 - Pay-Per-View revenue was not accrued for in the period after the billing

system close;

- Installation Revenue was not accounted for properly;
 - Time Warner Cable–Houston Division did not consistently follow Corporate Accounting Policies;
 - Internal Control Questionnaires were not being completed appropriately;
- and
- account reconciliations and journal entries were not adequately supported or documented.

20. Thanedar informed Fryer and Barnard that he intended to take further action regarding his allegations of financial irregularities.
21. Although there was a confidential hotline available to all Time Warner Cable–Houston Division employees, and the line was well-known to employees in January 2004, Thanedar directly telephoned Anthony DePaoli (“DePaoli”), former Director of Internal Audit for TWI. Thanedar relayed his aforementioned allegations to DePaoli on January 27, 2004.
22. DePaoli told Thanedar he wanted to schedule a formal meeting to discuss Thanedar’s complaints.
23. On January 29, 2004, DePaoli and Steve Fiedler, Vice President of Internal Audit for TWI, conducted a conference call with Thanedar to listen to his

complaints.

24. As previously noted, DePaoli testified that TKCCP's management agreement provided that TWI's internal audit department would supply audit resources to TWC operating divisions, such as Time Warner Cable–Houston Division, that did not have internal auditors.
25. On February 10, 2004, based on Thanedar's allegations of accounting irregularities, a team of auditors, including DePaoli, traveled to Time Warner Cable–Houston Division to perform audit tests to either corroborate or refute the allegations. The audit took several weeks to perform.
26. When DePaoli and the audit team were in Houston investigating Thanedar's original allegations, Thanedar raised new allegations of financial irregularities. To be prudent, DePaoli expanded his investigation beyond Thanedar's initial complaints to encompass the new allegations.
27. DePaoli testified that after conducting the audit:
 - he “could not corroborate the allegations being made”;
 - there was “no evidence of any intentional deception”;
 - he “did not conclude the journal entries and reversing journal entries were inappropriate or there was any ill intent”; and
 - no misstatements regarding revenue existed.

28. DePaoli informed Ernst & Young, L.L.P., external auditors for TWI, of the allegations and resulting investigation so that it could ensure the financial accuracy of the report. DePaoli also informed executives of TWC about the audit investigation and results.
29. In his report summarizing the audit results, DePaoli identified Thanedar as the employee who made the allegations of financial irregularities.
30. Although DePaoli testified it was not necessary to identify Thanedar in the report, he explained Thanedar himself made little effort at maintaining confidentiality. For example, Thanedar did not avail himself of the confidential hotline that was available to him, he directly informed Fryer, Barnard, and DePaoli of his allegations, and he continued to make allegations of financial irregularities to other employees within the office.
31. Procedures for handling Sarbanes-Oxley “whistleblower” complaints existed in January 2004, and DePaoli testified he abided by and followed the procedures.
32. On March 12, 2004, Thanedar complained to Fryer about his 2003 Houston Incentives Plan (“HIP”) scores. Fryer did not rate Thanedar at 100% for all areas because he did not fulfill his stated objectives. As a result, Fryer docked Thanedar’s bonus for 2003. Fryer testified that:

- he rated Thanedar at 70% for Leadership Program because Thanedar missed two key meetings;
 - he rated Thanedar at 80% for Internal Training and Development for Accounting and Finance because Thanedar did not invite outside speakers to speak at quarterly meetings as instructed;
 - he rated Thanedar at 50% for the HEROES project because Thanedar's "involvement in that project was minimal at best."
33. On April 29, 2004, less than two months after DePaoli conducted the investigative audit of the Time Warner Cable–Houston Division, Thanedar sent an email to McMillan calling for a second Sarbanes-Oxley review of Time Warner Cable–Houston Division's revenues.
34. McMillan testified Thanedar's accusations were "groundless," "unfounded," "irresponsible," and "not acceptable behavior" in light of the fact that DePaoli had just performed an audit based on Thanedar's original complaints and found no irregularity.
35. According to McMillan, Thanedar was attempting a "resurrection" of his original financial irregularity claims despite the fact that the audit refuted such claims.
36. No Time Warner Cable–Houston Division employee, other than Thanedar, ever

made allegations of financial wrongdoing.

37. In April 2004, Fryer formally reprimanded Thanedar for violating Minor Work Rule Number 7, Major Work Rule Number 12, and Major Work Rule Number 16. According to Fryer's written reprimand, Thanedar:

- failed timely to complete documentation for reconciling courtesy accounts on two occasions, once in January 2004 and again in March 2004;⁵
- “repeatedly postponed or avoided completing assigned work, indicating that the responsibility for such work does not fall in his area”; and
- exhibited disruptive behavior that interrupted office operations and “caused morale problems within and among departments.”

38. Fryer testified Thanedar did not communicate, or refused to communicate with Gray, Controller of Time Warner Cable–Houston Division. According to Fryer, it was extremely important that Thanedar and Gray “work hand in glove.” However, the relationship between Thanedar and Gray was “strained.”

39. For example, Gray emailed Thanedar and Barbara Thomas (“Thomas”), Director of Procurement for Time Warner Cable–Houston Division, the week

⁵As of the date of the reprimand, Fryer still had not received the requested information, and Fryer testified at trial that he never received it.

of July 5, 2004, requesting their input and suggestions on an office re-configuration project. As of July 16, 2004, only Thomas had responded to Gray's request. Thus, Gray asked Thanedar to provide the requested information no later than July 19, 2004.

40. On July 19, 2004, rather than respond to Gray with his input as requested, Thanedar emailed Fryer, informing him that he was "concerned" about the way Gray was handling the re-configuration project.
41. Thanedar also had trouble communicating with subordinate employees.
42. Barnard testified that Su-Lyan McArthur ("McArthur"), a financial analyst for Time Warner Cable-Houston Division, was "distraught," "crying and very upset" over an email Thanedar sent her on July 14, 2004.
43. In this email, Thanedar reprimanded McArthur and copied Fryer on it. Barnard testified that the "public shaming" nature of the email troubled her because it demonstrated Thanedar was not effectively using communication designed to improve an employee's performance.
44. Thanedar continued to have difficulty providing requested information through September 2004. Specifically, Gray testified Thanedar did not provide him with information related to the close process in a timely manner. Likewise, Fryer testified Thanedar did not timely communicate details of budget changes.

45. In October 2004, based upon Thanedar's ongoing and uncorrected performance issues, Fryer decided to terminate Thanedar's employment with Time Warner Cable-Houston Division because he failed to meet performance expectations. TWI had no input on this decision, but Fryer sought Barnard's approval.
46. Barnard testified HR approved the decision to terminate Thanedar's employment after reviewing his performance evaluations, the corrective actions from October 2003 and April 2004, and documentation regarding his interactions with other employees and failure to meet deadlines. She did not consult with anyone at TWI about Thanedar's job performance or his ultimate termination of employment.⁶
47. Barnard testified that in order to receive a bonus, an employee must begin employment with Time Warner Cable-Houston Division by the end of June of the relevant year and remain on the payroll through the end of that year.
48. According to Barnard, Time Warner Cable-Houston Division offered Thanedar a severance package at the time of his termination, and that she had the discretion to offer him some form of compensation while he searched for a new job. Thus, Barnard prorated Thanedar's 2004 bonus and offered him

⁶Barnard testified she consulted with an in-house attorney for TWC about Thanedar's termination because Time Warner Cable-Houston Division had no legal department of its own.

\$14,634.11 not as a bonus, but instead as part of his severance package.

49. Barnard testified Thanedar did not receive the proffered \$14,634.11 because he refused to sign off on a release of liability and the severance package.

50. During his direct examination of himself, Thanedar testified that:

- he was mostly supervised by TWC management,
- Fryer was his direct supervisor after 2001;
- he consistently exceeded expectations as an employee;
- he communicated with Gray and did not know Gray was unhappy;
- Time Warner Cable–Houston Division fired him without any warning and based on no prior disciplinary actions;
- Fryer refused to communicate with him;
- he got a bad reputation at Time Warner Cable–Houston Division because he complained about financial irregularities;
- TWI, the parent company, received all the financial information;
- he received pension benefits and stock options from TWI;⁷
- he is entitled to \$245,000 in back wages, \$156,000 in benefits, \$626,00 in future pay, \$1,000,000 in reputational damages, and \$25,000 for an

⁷On cross-examination, Thanedar testified he will receive pension benefits solely from TWC and TWE-A/N, not TWI. Also, TWC, not TWI, offered Thanedar the stock options.

unpaid bonus.⁸

CONCLUSIONS OF LAW

51. The Court has subject matter jurisdiction over Thanedar's Sarbanes-Oxley claim pursuant to 18 U.S.C. § 1514A *et seq.*
52. The Court has supplemental jurisdiction over Thanedar's state law claims pursuant to 28 U.S.C. § 1367.
53. Venue is proper pursuant to 28 U.S.C. § 1391.

SARBANES-OXLEY WHISTLEBLOWER CLAIM

54. Thanedar first brings a claim under Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.
55. Although Thanedar worked at Time Warner Cable–Houston Division, Thanedar contends TWI, the parent corporation, actually employed him or had the ability to affect the terms and conditions of his employment at Time Warner Cable–Houston Division. Because TWI is a publicly traded entity subject to Sarbanes-Oxley, and because TWI allegedly controlled the terms and conditions of his employment (i.e. his termination of employment) at Time Warner Cable–Houston Division, Thanedar contends Defendants are liable

⁸The Court notes it allotted Thanedar fourteen hours to present his case. When fourteen hours elapsed, the Court granted Thanedar more time for his case and for rebuttal.

under Sarbanes-Oxley.

56. Defendants argue the Court lacks subject matter jurisdiction over Thanedar's Sarbanes-Oxley claim because no publicly traded entity employed him or affected the terms of his employment, and therefore, no cause of action exists under Sarbanes-Oxley. Assuming, *arguendo*, Thanedar establishes Sarbanes-Oxley coverage, Defendants contend Thanedar's Sarbanes-Oxley claim is barred by *res judicata*, Thanedar failed to present evidence establishing a Sarbanes-Oxley "whistleblower" claim, and Thanedar failed to exhaust his administrative remedies as to all Defendants.

A. Coverage Under Sarbanes-Oxley

57. Sarbanes-Oxley protects employees of public companies from retaliation for engaging in certain "whistleblowing activities." *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 317 (S.D.N.Y. 2005).
58. Under Sarbanes-Oxley, a covered entity may not "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." *Id.* (quoting 18 U.S.C. § 1514A(a)).
59. "The Sarbanes-Oxley Act creates 'whistleblower' protection for employees of publicly-traded companies by prohibiting employers from retaliating against

employees because they provided information about potentially unlawful conduct.” *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008).

60. Sarbanes-Oxley, however, applies only to: (1) public companies that are issuers of a class of securities registered under Section 12 of the Securities and Exchange Act of 1934; or (2) public companies that are issuers of securities required to file reports under Section 15(d) of the Securities Exchange Act of 1934 and/or officers, employees, contractors, subcontractors, or agents of such companies. *Brady*, 406 F. Supp. 2d at 317. “A specific requirement, therefore, is that [the] defendant be a publicly traded company.” *Id.*
61. An employee of a subsidiary is a covered employee for Sarbanes-Oxley purposes where the officers of the publicly-traded parent company have the authority to affect the employment of the subsidiaries’ personnel. *Ciavarra v. BMC Software, Inc.*, Civ. A. No. H-07-0413, 2008 WL 352273, at *3 (S.D. Tex. Feb. 7, 2008) (citing *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006)).
62. Thanedar carries the burden of proving, through legally sufficient evidence, that Defendants are publicly-traded companies.⁹ *See id.* (indicating the

⁹Thanedar conceded during the May 23, 2008 final pretrial conference that he carried the burden of proving coverage under Sarbanes-Oxley.

plaintiff carries the burden of proffering sufficient evidence to establish “covered employee” status).

63. Thanedar proffered no legally sufficient evidence at trial that TKCCP, the entity that owned Time Warner Cable–Houston Division, was a public company that issued securities registered under Section 12 of the Securities and Exchange Act of 1934, or that it was an issuer of securities required to file reports under Section 15(d) of the Securities and Exchange Act of 1934. *See Brady*, 406 F. Supp. 2d at 317.
64. Moreover, there is no legally sufficient evidence that TWC, TWE-A/N, TWCH, and TWE were publicly-traded companies and subject to Sarbanes-Oxley coverage at the time of Thanedar’s employment with Time Warner Cable–Houston Division. *See id.*
65. Although TWI is a publicly-traded corporation, Thanedar proffered no legally sufficient evidence to support his conclusory allegations that TWI, the publicly-traded parent corporation, actually employed him or, alternatively, that the officers of TWI had the authority to affect his employment at Time Warner Cable–Houston Division. *See Ciavarra*, 2008 WL 352273, at *3.
66. On the contrary, the evidence demonstrates:
 - Thanedar’s offer of employment letter stated he worked for Texas Cable

Partners, L.P., which later became TKCCP, not TWI;

- Thanedar received stock options from TWC, not TWI;
- Thanedar will not receive pension benefits from TWI;
- Thanedar received no earnings from TWI; and
- TWI had no involvement, oversight, or input regarding employment decisions relating to salary, performance evaluations, and hiring and firing employees at Time Warner Cable–Houston Division.

67. Likewise, there is no legally sufficient evidence that TKCCP, TWC, TWE-A/N, TWCH, and TWE acted as agents of TWI.
68. Moreover, the Court finds there is no legally sufficient evidence to establish that TWI and the other Time Warner Defendants were Thanedar’s joint or integrated employers.
69. Thanedar’s unsubstantiated opinions to the contrary are simply not competent evidence, and to the extent Thanedar’s testimony contradicted that of other witnesses, the Court finds Thanedar’s testimony less credible.
70. In sum, Thanedar did not meet his burden to establish a publicly-traded company, as that term is defined by Sarbanes-Oxley, employed him or affected his employment at Time Warner Cable–Houston Division. *See Brady*, 406 F. Supp. 2d at 317; *Ciavarra*, 2008 WL 352273, at *3. Because Thanedar failed

to establish coverage, the Court finds Thanedar cannot prevail on his Sarbanes-Oxley claim.

B. Res Judicata

71. Assuming, *arguendo*, Sarbanes-Oxley coverage exists, Defendants contend Thanedar's Sarbanes-Oxley claim is nevertheless barred by *res judicata*.¹⁰
72. *Res judicata*, or claim preclusion, bars the litigation of claims that either have been litigated or should have been raised in an earlier lawsuit. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999).
73. For *res judicata* to operate as a bar to a claim, four elements must be satisfied: (1) the parties in both the prior suit and the current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits. *Id.*
74. When all four elements are present, claim preclusion prohibits either litigant from asserting "any claim or defense in the later action that *could have been raised* in support of or in opposition to the cause of action asserted in the prior action." *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994)

¹⁰Defendants also contend Thanedar's breach of contract claims are likewise barred by *res judicata* because they are based on his termination of employment and could have been raised in the First Lawsuit.

(emphasis added).

75. As previously noted, Thanedar's First Lawsuit against Defendants involved alleged violations of Title VII. Defendants in the current lawsuit, or Second Lawsuit, were Defendants in the First Lawsuit. Thus, regarding the first element of *res judicata*, the Court finds the parties in the Second Lawsuit and the parties in the First Lawsuit are identical. *See In re Southmark Corp.*, 163 F.3d at 934.
76. Moreover, the second element of *res judicata* is satisfied because the court in the First Lawsuit, the United States District Court for the Southern District of Texas, is a court of competent jurisdiction. *See id.*
77. Likewise, the third element of *res judicata* is established because the court dismissed the First Lawsuit with prejudice pursuant to Federal Rule of Civil Procedure 41(b). Because "a Rule 41(b) dismissal constitutes a final judgment on the merits," the Court finds the First Lawsuit was a final judgment on the merits. *See Vance v. W.G. Yates & Sons Const. Co.*, 974 F. Supp. 879, 882 (N.D. Miss. 1997) (citing *Colle v. Brazos County, Tex.*, 981 F.2d 237, 242-43 (5th Cir. 1993)). *See also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (noting that "a dismissal with prejudice is a determination on the merits").

78. As for the fourth element of *res judicata*, the Court must determine whether Thanedar raised the same cause of action in the First Lawsuit and the Second Lawsuit. *See In re Southmark Corp.*, 163 F.3d at 934.
79. To determine whether claims alleged in a lawsuit are the “same cause of action,” courts apply the transactional test. *Id.* Under the transactional test, the court focuses on whether the two cases under consideration are based on “the same nucleus of operative facts.” *Id.* (quoting *In re Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993)). The nucleus of operative facts, rather than the relief requested, substantive theories advanced, or types of rights asserted, defines the claim. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994).
80. If the cases are based on the same nucleus of operative facts, the prior judgment’s preclusive effect “extends to all rights the original plaintiff had ‘with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose.’” *Petro-Hunt v. United States*, 365 F.3d 385, 395 (5th Cir. 2004) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(1)).
81. The facts and ultimate issues in both of Thanedar’s lawsuits are virtually identical. In the First Lawsuit, Thanedar claimed Defendants violated Title VII

by discriminating and retaliating against him through various adverse employment actions, including his ultimate termination. In the Second Lawsuit, Thanedar likewise claims Defendants violated Sarbanes-Oxley by retaliating against him through various adverse employment actions, including his ultimate termination.

82. Thus, Thanedar essentially asserts, albeit through different legal theories, that he suffered an adverse employment action and that his employer ultimately terminated his employment because of its illegal and retaliatory motives.
83. The Court finds that both the First Lawsuit and Second Lawsuit's claims focus on one critical issue: whether Thanedar's employer had a legitimate and lawful reason for taking the adverse employment action of which he complains. *See Leon*, 464 F.3d at 962 (finding Sarbanes-Oxley claim, Title VII retaliation claim, and False Claims Act claim arose of out the same nucleus of operative facts); *see also Nelson v. AMX Corp.*, No. Civ. A. 3:04CV1350-H, 2005 WL 2495343, at *6 (N.D. Tex. Sept. 22, 2005) (dismissing lawsuit and explaining that the same nucleus of operative fact existed between an employee's employment contract claim and subsequent discrimination claim as "they [arose] at the same time among the same players at the same events—the termination of [plaintiff's] employment and the interactions leading up to it").

84. Therefore, because the Court finds that the claims asserted in the First and Second Lawsuits are based on the same nucleus of operative facts, *res judicata* bars Thanedar's Sarbanes-Oxley claim.¹¹ *See In re Southmark Corp.*, 163 F.3d at 934.

C. Sarbanes-Oxley Discrimination

85. Assuming, *arguendo*, Sarbanes-Oxley coverage exists and *res judicata* does not preclude Thanedar's claim, Defendants contend Thanedar failed to present legally sufficient evidence establishing a Sarbanes-Oxley "whistleblower" claim.

86. To establish a Sarbanes-Oxley "whistleblower" claim, Thanedar must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

87. Not all complaints about work-related issues are protected by Sarbanes-Oxley.

¹¹The Court also finds the same rationale applies to Thanedar's remaining breach of contract and Texas Payday Law claims because they are based on the same nucleus of operative facts. Because Thanedar could have raised these claims in the First Lawsuit, they are similarly barred by *res judicata*.

An employee's complaint must definitively and specifically relate to one of six enumerated categories found in 18 U.S.C. § 1514A: (1) 18 U.S.C. § 1341 (mail fraud); (2) 18 U.S.C. § 143 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders. *Id.* at 476-77.

88. As previously discussed, Thanedar complained about accounting irregularities, improperly recorded revenues and expenses, and weaknesses of internal controls. Thanedar reported his concerns to DePaoli, the internal auditor. DePaoli conducted an expansive audit to corroborate or refute Thanedar's allegations, and he determined Thanedar's allegations were unfounded.
89. The Court finds there is no legally sufficient evidence to establish that the concerns raised by Thanedar related to or constituted mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, bank fraud under 18 U.S.C. § 1344, securities fraud under 18 U.S.C. § 1348, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. *See id.*
90. Moreover, the Court finds there is no legally sufficient evidence that Thanedar's complaints were objectively reasonable. *See Allen*, 514 F.3d at

477.

91. Even if Thanedar's complaints constituted protected activity and were objectively reasonable, which the Court determines they were not, Thanedar presented no legally sufficient evidence that his complaints about alleged accounting irregularities were a contributing factor in any adverse employment action taken by Defendants. *See id.* at 476.
92. Both Fryer and Barnard testified Time Warner Cable–Houston Division terminated Thanedar's employment because he consistently failed to meet performance expectations despite corrections and suggestions for improvement, not because he complained about financial irregularities. Defendants produced numerous witnesses and exhibits demonstrating Thanedar's persistent inability—or refusal—to cooperate and communicate with his co-workers, follow directions, and accept responsibility for assignments.¹²
93. To the extent Thanedar's testimony contradicts that of another witness, the Court finds Thanedar's testimony less credible.

¹²Likewise, no temporal proximity exists between Thanedar's termination and his complaints of financial irregularities. Thanedar complained about alleged financial irregularities in January 2004, and Time Warner Cable–Houston Division terminated his employment ten months later in October 2004.

94. Because there is no legally sufficient evidence that Thanedar's complaints of alleged accounting irregularities related to any of the six enumerated categories protected by Sarbanes-Oxley, were objectively reasonable, and were a contributing factor in any adverse employment action taken by Defendants, the Court finds Thanedar fails to establish a Sarbanes-Oxley "whistleblower" claim. *See id.*

D. Failure to Exhaust Administrative Remedies

95. Assuming, *arguendo*, Sarbanes-Oxley coverage exists, *res judicata* does not preclude Thanedar's claim, and Thanedar presented legally sufficient evidence establishing a Sarbanes-Oxley "whistleblower" claim, Defendants contend Thanedar failed to exhaust his administrative remedies as to all Defendants.

96. Prior to filing a Sarbanes-Oxley lawsuit, a plaintiff must first file an administrative complaint with the Department of Labor's Occupational Safety and Health Administration Division ("OSHA") and "afford OSHA the opportunity to resolve the allegations administratively." *Hanna v. WCI Cmtys., Inc.*, 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004).

97. A party who is not named in an administrative charge may not later be sued in federal court. *See Mann v. Gannett Co.*, Civ. A. No. 2:06CV888-MHT, 2007 WL 1668835, at *3 (M.D. Ala. June 8, 2007) (dismissing employee's

Sarbanes-Oxley complaint because of her failure to file a complaint with OSHA); *Khan v. United Recovery Sys., Inc.*, Civ. A. No. H-03-2292, 2005 WL 469603, at *6 (S.D. Tex. Feb. 28, 2005) (citing *Way v. Mueller Brass Co.*, 840 F.2d 303, 307 (5th Cir. 1988)).

98. After the close of all the evidence, Defendants stated on the record that Thanedar filed the required administrative complaint with OSHA against Defendants TWI and TWC.
99. Thanedar, however, presented no evidence at trial that he filed the required administrative complaint against Defendants TKCCP, TWE-A/N, TWCH, and TWE.
100. Because Thanedar failed to present any evidence at trial that Defendants TKCCP, TWE-A/N, TWCH, and TWE were named as parties to the OSHA complaint, the Court finds Thanedar failed to exhaust his administrative remedies as to these Defendants. Accordingly, Thanedar cannot prevail on his Sarbanes-Oxley claim against Defendants TKCCP, TWE-A/N, TWCH, and TWE. *See Hanna*, 348 F. Supp. 2d at 1326; *Mann*, 2007 WL 1668835, at *3.

BREACH OF CONTRACT CLAIM

101. Thanedar next asserts a breach of contract claim against Defendants. According to Thanedar, certain policies and standards of business conduct

promulgated by his employer functioned as an express limitation on his at-will employment status and prohibited his termination.

102. Defendants respond that Thanedar was an at-will employee, and he cannot recover for breach of contract because he presented no evidence proving an express agreement to alter his at-will status.
103. Absent an express agreement to the contrary, Texas provides for employment at-will, terminable at any time by either party, with or without cause. *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993); *E. Line & Red River R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888).
104. A discharged employee who asserts that the parties contractually agreed to limit the employer's right to terminate an at-will employee has the burden of proving an express agreement or written representation to that effect. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ).
105. Written representations in employee handbooks do not give rise to contractual obligations under Texas law where the handbook or policy manual contains a disclaimer. *Dutschmann*, 846 S.W.2d at 283. Such a disclaimer negates any implication that a personnel procedures manual places a restriction on the employment at-will relationship. *Id.*; *Shell Oil Co. v. Humphrey*, 880 S.W.2d

170, 176 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

106. At trial, Thanedar admitted his employment status at Time Warner Cable–Houston Division was at-will. Moreover, exhibits introduced at trial reinforced his at-will employment status and confirmed that no other policy, handbook provision, or other document altered his employment status.¹³
107. Thanedar presented no legally sufficient evidence that his employer expressly agreed to or made any written representation that limited its right to terminate Thanedar, an at-will employee.
108. Thus, because Thanedar proffered no evidence of a valid written, oral, or statutory modification of his at-will employment status—other than his own conclusory assertions and testimony—the Court finds Thanedar’s breach of contract claim fails as a matter of law.¹⁴ *See Lee-Wright, Inc.*, 849 S.W.2d at 577.

TEXAS PAYDAY LAW CLAIM

109. Thanedar also asserts a claim against Defendants for an alleged unpaid bonus.

¹³Indeed, one policy provided, “Nothing contained in this policy shall diminish the company’s right to discharge any employee for any reason. The company reserves the right to take disciplinary action whenever appropriate.” *See Dutschmann*, 846 S.W.3d at 283.

¹⁴The Court reiterates Thanedar’s breach of contract claim is also barred by *res judicata*.

According to Thanedar, he is entitled to recover a bonus for the year 2004 in the amount of \$25,000.

110. Defendants respond Thanedar is not entitled to a bonus because he was fired prior to the end of the plan year. Thus, Defendants aver Thanedar was entitled only to severance pay, not a bonus.
111. The Texas Payday Law, codified at TEX. LAB. CODE ANN. § 61.001 *et seq.*, provides that “[w]ages paid on commission and bonuses are due according to the terms of . . . an agreement between the employee and the employer” TEX. LAB. CODE ANN. § 61.015(a).
112. Time Warner Cable–Houston Division’s incentive bonus plan (“Discretionary Houston Incentive Plan” or “HIP”) provided for payment of an incentive bonus, if earned, to employees who remained in the company’s employ at the end of the plan year.
113. The HIP, however, also provided that if the company terminated an employee’s employment, and the company severance policy covered the employee, the severance policy governed with respect to any payments under the HIP.
114. Barnard testified at trial that Thanedar was eligible to participate in the severance pay plan. The severance pay plan, however, contained no provision or requirement for payment of any bonus.

115. Although Barnard offered Thanedar severance pay in accordance with the severance pay plan, Thanedar refused to accept the terms of the severance agreement.
116. Because Time Warner Cable–Houston Division terminated Thanedar’s employment, and the severance pay plan covered Thanedar, the Court finds he was therefore entitled to severance pay benefits, not the HIP bonus.
117. The Court finds Barnard complied with the severance pay plan’s terms and offered Thanedar a severance pay package, which he declined to accept. Thus, the Court finds Thanedar’s Texas Payday Law claim fails.¹⁵

DAMAGES

118. Thanedar seeks \$245,000 in back wages, \$156,000 in benefits, \$626,00 in future pay, and \$1,000,000 in reputational damages.
119. Thanedar alone testified about his alleged damages. He introduced no evidence to support his claims and no expert testimony.¹⁶
120. Because Thanedar presented no evidence or expert testimony to support his

¹⁵The Court reiterates Thanedar’s Texas Payday Law claim is also barred by *res judicata*.

¹⁶Although Thanedar had no expert witness on damages ready to testify, the Court gave Thanedar the opportunity to call his damages expert out of order later in the trial. Despite this accommodation, Thanedar elected to proceed without calling a witness and testify himself as to his alleged damages.

assertion that he is entitled to \$245,000 in back wages, \$156, 000 in benefits, \$626,000 in future pay, and \$1,000,000 in reputational damages, the Court finds his claim for damages fails.¹⁷ See *In re Air Crash Disaster at New Orleans, La.*, 705 F.2d 1230, 1235 (5th Cir. 1986) (“An award for damages cannot stand when the only evidence to support it is speculative or purely conjectural.”).

CONCLUSION

Given the foregoing, the Court hereby

ORDERS that Plaintiff Chandrashekhar B. Thanedar’s claims against Defendants are DISMISSED WITH PREJUDICE. Plaintiff shall take nothing from Defendants. The Court further

ORDERS that until such time as the Court may otherwise order, Thanedar, or any individual acting on his behalf, is hereby ENJOINED from filing any action, complaint, or motion that directly or tangentially raises an issue alleged in cause numbers H-04-4188 or H-06-2139 in this Court without first obtaining leave of Court from the Chief Judge of the United States District Court for the Southern District of Texas. Any new motions, complaints, or action which Thanedar seeks to file in this

¹⁷Moreover, Sarbanes-Oxley does not allow recovery for reputational damages. *Murray*, 2005 WL 1356444, at *3.

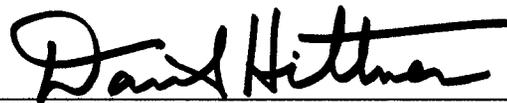
Court will not be docketed until the Chief Judge of the United States District Court for the Southern District of Texas grants Thanedar written leave to file. The Court further

ORDERS that any new motion, complaint, or action which Thanedar, or any individual acting on his behalf, seeks to file in this Court shall be accompanied by a Motion for Leave to File Complaint/Motion. The Clerk of this Court shall forward such action and motion to the Chief Judge of the United States District Court for the Southern District of Texas for submission of the motion. The Court further

ORDERS that failure of Thanedar to comply with this Order, or continuous filing of any vexatious and/or frivolous complaints, motions, or actions raising similar issues addressed in the above referenced cases, may result in the imposition of sanctions and/or a contempt citation. The Court further

ORDERS that a copy of this Order shall be forwarded to the Clerk of the Court.

SIGNED at Houston, Texas, on this 7 day of October, 2008.



DAVID HITTNER
United States District Judge