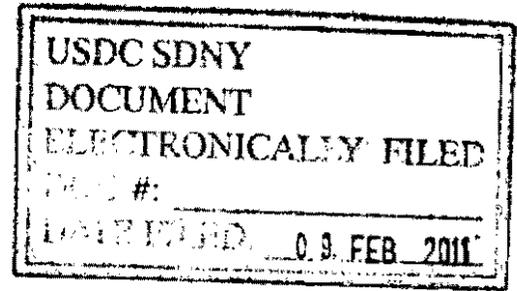


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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CHRISTOPHER CLOKE-BROWNE,

Plaintiff,

-v-

No. 10 Civ. 2249 (LTS)

BANK OF TOKYO-MITSUBISHI UFJ,
LTD., et al.,

Defendants.

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MEMORANDUM ORDER

Plaintiff Christopher Cloke-Browne brings this action against Bank of Tokyo-Mitsubishi UFJ, Ltd. ("BTMU"), Mitsubishi UFJ Financial Group ("MUFG"), Hideyuki Toriumi ("Toriumi"), Timothy S. Tracey ("Tracey"), Randall C. Chafetz ("Chafetz"), and Anthony Moon ("Moon" and, collectively, "Defendants"; Toriumi, Tracey, Chafetz and Moon are also referred to herein as "Individual Defendants") asserting claims for breach of contract, fraudulent inducement, fraudulent concealment, and violations of section 806(a) of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, the Civil Rights Act of 1866, 42 U.S.C. § 1981, the New York State Human Rights Law ("NYSHRL"), the New York City Human Rights Law ("NYCHRL"), Title VII of the Civil Rights Act of 1964, and New York's Labor Law. The Court has subject matter jurisdiction of the action pursuant to 28 U.S.C. §§ 1331 and 1367. Defendants have moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Complaint in its entirety. The Court has reviewed thoroughly the parties' submissions and, for the following reasons, grants Defendants' motion in part and denies it in part.

BACKGROUND

The following facts are taken from the Amended Complaint and documents incorporated by reference therein. Plaintiff Christopher Cloke-Browne was employed by Defendant BTMU from approximately March 2007 until May 1, 2009. (Am. Compl. ¶ 6.) BTMU is a subsidiary of MUFG, and each of the individually-named Defendants occupied supervisory executive positions at BTMU's New York branch office during Plaintiff's employment. (Id. ¶¶ 20-21.)

In late 2006, Plaintiff accepted an offer of employment as Senior Vice President of BTMU's Credit Portfolio Management Division for the Americas. (Id. ¶¶ 6, 66.) Plaintiff's offer letter represented that he would receive certain compensation and bonus payments in connection with his BTMU employment. (Id. ¶ 66.) In particular, the offer letter referenced a "minimum guaranteed bonus payment" for each year and "guaranteed deferred compensation" to replace severance from his previous employer. (Id. ¶¶ 67-68.) For each year of employment, these payments amounted to approximately \$733,000 USD. (Id. ¶ 66.) The offer letter, which was dated November 7, 2006, and countersigned by Plaintiff on November 12, 2006 (the "Offer Letter"), provided that Plaintiff would be eligible to receive a "minimum guaranteed bonus payment" of \$400,000 "to be payable concurrent with the Fiscal Year 2008 bonus payments, payable during the second Quarter of 2009." In the event Plaintiff was "terminated from the Bank for unsatisfactory performance, position elimination, or other reason or employment at will," he was to receive the bonus distribution on the bonus distribution date in 2009 for Fiscal Year 2009, "so long as [he] execute[d] the Bank's standard release of claims; such payments [would] be considered severance." The Offer Letter also provided that Plaintiff would receive a payment "subject to [his] continued active employment with the Bank" of "\$333,000 in May

2009 . . . in compensation for forfeiture of [his] current employer's deferred compensation payments." (Decl. of Peter Walker ("Walker Decl."), Ex. B.)

During hiring negotiations, BTMU's representatives specifically assured Plaintiff that he would have "access" to a \$1.5 billion balance sheet and "the ability to modernize BTMU through the handling of insurance-linked assets." (Am. Compl. ¶¶ 32-34.) Although Plaintiff suggested lucrative investment opportunities and business ideas to his supervisors during his BTMU employment, he was unable to execute any of the deals he had proposed because Defendants stalled, stone-walled, criticized, and/or refused to analyze, provide support for, or execute Plaintiff's proposals. (Id. ¶¶ 36-42.) The Defendants repeatedly criticized Plaintiff's proposals and failed to provide him with the necessary support to close his deals. (Id. ¶¶ 37-41.) BTMU also used Plaintiff's suggestions and business contacts to structure earthquake risk derivative deals in Japan but excluded Plaintiff from participating in negotiations, instead assigning the brokerage of those transactions to individuals in Japan. (Id. ¶ 57.) Furthermore, the company provided valuable work assignments to similarly-situated employees of Japanese ancestry that it denied Plaintiff on account of Plaintiff's race and/or national origin. (Id. ¶¶ 59, 62.)

In April 2008, Plaintiff wrote to Defendants Hosomi¹ and Toriumi to tell them that the company's lack of support infrastructure had rendered him unable to close any deals on BTMU's behalf for over a year. (Id.) That same month, Hosomi and Toriumi conducted a review of Plaintiff's performance. (Id. ¶ 62.) Although Hosomi and Toriumi said his

¹ Plaintiff voluntarily dismissed his claims against Defendants Hosomi and Omori on June 11, 2010. (Docket entry no. 20.)

performance merited the highest rating of “1,” they gave him a rating of “2” on that evaluation. (Id.)

In the fall of 2008, Plaintiff participated in a series of “deal screening” meetings to assess the company’s market exposure and risk. (Id. ¶ 76.) While participating in these meetings, Plaintiff noticed errors in the company’s risk calculations and alerted senior management that such miscalculations could defraud shareholders. (Id. ¶ 76.) He summarized these concerns in a 12-page report circulated to management in approximately September 2008. (Id.) Plaintiff also warned management of BTMU’s exposure to high risk due to investments in AIG and advocated for a review of the firm’s business practices. (Id. ¶ 78.) Defendant Chafetz retaliated against Plaintiff by instructing other employees not to communicate with Plaintiff, and Defendant Tracey took retaliatory steps that included directing a BTMU lawyer to instruct Plaintiff to refrain from sending emails about AIG and excluding Plaintiff from key meetings. (Id. ¶¶ 83-84, 87.) Defendant Moon was also involved in the retaliatory activity by Messrs. Tracey and Chafetz. (Id. ¶ 86.)

In March of 2009, BTMU terminated Plaintiff’s position in a “staff reduction” that eliminated the company’s unprofitable Alternative Credit Investment Business in its entirety and affected only Caucasian employees. (Id. ¶¶ 55, 63.) The “staff reduction” did not include any individuals of Japanese ancestry. For example, one of Plaintiff’s subordinates who had worked on many of the same projects as Plaintiff and had a similar workload was retained because he was of Japanese ancestry. (Id. ¶ 64.)

After his termination, Plaintiff demanded that BTMU pay him the guaranteed minimum bonus and deferred compensation referred to in the Offer Letter for Fiscal Year 2008.

(Id., ¶¶ 67-68, 71.) The company refused to pay these sums unless Plaintiff signed a release waiving all of his discrimination claims. (Id., ¶ 71.)

DISCUSSION

In deciding a motion to dismiss a complaint pursuant to Rule 12(b)(6), the Court must “accept as true all factual statements alleged in the complaint and draw reasonable inferences in favor of the non-moving party.” McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) (internal citations omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 1949. This plausibility standard does not amount to a “probability requirement,” but it calls for more than a “sheer possibility that a defendant has acted unlawfully.” Id. (internal quotation marks and citation omitted).

When deciding a motion to dismiss, the Court “may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.” ATSI Comme’ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007).

Defendants have moved to dismiss the Amended Complaint in its entirety. Each cause of action is addressed below.

Breach of Express Contract (13th Cause of Action)

Plaintiff claims that “Defendants” breached the “minimum guaranteed bonus” and “deferred compensation” provisions of the Offer Letter by refusing to make the specified payments following his termination. The Offer Letter unambiguously provided in relevant part that, in the event of a termination of Plaintiff’s employment prior to the scheduled payout dates “for unsatisfactory performance, position elimination, other reason or employment at will,” Plaintiff would be entitled to receive the guaranteed bonus payments as “severance,” provided that he “execute[d] the Bank’s standard release of claims.” (Walker Decl. Ex. B at 2.) Plaintiff does not, however, allege that he executed any release in favor of the bank. A corporate officer forfeits his right to severance pay by not executing a release required by his employment agreement. Kaul v. Hanover Direct, Inc., 148 F. App’x 7, 9 (2d Cir. 2005). Plaintiff thus fails to state a claim for breach of contract with respect to the guaranteed bonus payments because he has not alleged that he performed the condition precedent that would obligate BTMU to tender the disputed payments to him.

To the extent Plaintiff argues that the release condition is void as against public policy because BTMU’s release form would cover his race and national origin discrimination claims, his position is unavailing. Employees may waive discrimination claims under federal law so long as the waiver is knowing and voluntary. Cordoba v. Beau Deitl & Associates, No. 02 Civ. 4951 (MBM), 2003 WL 22902266, at *6-7 (S.D.N.Y. Dec. 8, 2003); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 n.15 (1974); Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 402 (2d Cir. 1989). Waivers of rights under state anti-discrimination laws are similarly enforceable if knowing and voluntary. Cordoba, 2003 WL 22902266, at *6. The letter

agreement essentially gives Plaintiff a choice – to accept the post-termination bonus payments while waiving claims against the company, or to forgo the payments and preserve whatever claims he may have. No public policy precludes such a contractual condition.

Plaintiff also claims that “Defendants” breached the terms of the Offer Letter that provided for a “deferred compensation” payment of \$333,000 to be paid in May 2009. The Offer Letter provides that the relevant payment would be made “subject to your continued active employment with the Bank, . . . in May 2009.” (Walker Decl. Ex B). There is no reference to a release condition in connection with the deferred compensation payment. In the Amended Complaint, Plaintiff alleges that he was given notice of termination on March 30, 2009, effective May 1, 2009. (Am. Compl. ¶ 88.) Because the Offer Letter’s predicates for payment of the deferred compensation are not unambiguous, Plaintiff’s allegation that his employment was terminated in May 2009 is sufficient to support his claim for breach of the deferred compensation provision of the Offer Letter.

Accordingly, Defendants’ motion to dismiss will be granted as to Plaintiff’s express breach of contract claim (13th Cause of Action) for the guaranteed bonus compensation and denied as to BTMU with respect to Plaintiff’s breach of contract claim regarding the deferred bonus compensation.²

Breach of Implied Contract (14th Cause of Action)

In his Amended Complaint, Plaintiff alleges that he knew of and relied on the ethical reporting and anti-retaliation policies contained in BTMU’s Employee Handbook and

² Because the Offer Letter upon which this cause of action is premised is not signed by any Defendant other than BTMU, the Thirteenth Cause of Action will be dismissed in its entirety as to all defendants other than BTMU.

Code of Ethics and that his termination following his reports and criticisms of BTMU's risk reporting and other financial practices constituted retaliation violative of such policies. (Am. Compl. ¶¶ 156, 80-86.) Under New York law, termination-related provisions in an employer's handbook may become an implied part of the employment contract where the plaintiff can prove that: (1) there was an express written policy limiting the employer's right to discharge; (2) the employer (or its representatives) made the employee aware of this policy; and (3) the employee relied on this policy to his detriment. Baron v. Port Auth., 271 F.3d 81, 85 (2d Cir. 2001); see also Brady v. Calyon Sec., No. 05 Civ. 3470 (GEL), 2007 WL 4440926, at *6 (S.D.N.Y. Dec. 17, 2007). BTMU's Code of Ethics for Employees in North America provides, in relevant part, that:

BTMU has implemented a Compliance Hotline through which employees may disclose, *confidentially and anonymously*, suspected or actual violations of law, policy, or questionable business practices, including, but not limited to, questionable accounting practices or audit matters [T]he Bank prohibits retaliation against an employee who reports or complains about conduct that the employee reasonably believes is in violation of law or policy, including the reporting of financial improprieties.

(Walker Decl., Ex. D at 8.) Plaintiff's allegations that BTMU, through its officials, terminated him in retaliation for his criticisms and reports, when taken as true and read in the light most favorable to Plaintiff, are sufficient to state a claim as against BTMU for violation of the quoted anti-retaliation provision of the Code of Ethics. They are, however, insufficient to state such a claim as against any of the other Defendants, who are not alleged to have entered into any contracts or promulgated any policies relevant to this claim. Accordingly, the breach of implied contract claim (14th Cause of Action) will be dismissed as against all Defendants other than BTMU.

Fraudulent Inducement (11th Cause of Action)

Plaintiff alleges that the Individual Defendants induced him to accept an offer of employment and remain with BTMU by making representations as to opportunities, resources and support that would be provided in the course of his employment, while knowing (or while they should have known) that the representations were false, and that the Individual Defendants did not plan to support his business proposals or deliver on any of the promises they made to him during the hiring process. (Am. Compl. ¶¶ 137-38.) Defendants' motion to dismiss this claim will be granted because the Amended Complaint fails to satisfy the heightened pleading requirements established for fraud claims by Federal Rule of Civil Procedure 9(b).

Rule 9(b) requires that fraud be pleaded with particularity. "The demands of particularity require that, 'the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" Washington v. Kellwood Co., No 05 Civ. 10034(DAB), 2009 WL 855652, at *5 (S.D.N.Y. Mar. 24, 2009). The Amended Complaint identifies only Hosomi and Omori (as against whom the complaint has voluntarily been dismissed) as speakers and proffers no specification of time and place as to any of the alleged statements. The Amended Complaint also fails to allege facts giving rise to a strong inference of fraudulent intent on the part of the Individual Defendants. Plaintiff alleges no specific facts demonstrating that the Individual Defendants had both motive and opportunity to commit fraud. See Washington, 2009 WL 855652, at *5. Accordingly, the Eleventh Cause of Action will be dismissed.

Fraudulent Concealment (12th Cause of Action)

Plaintiff alleges that the Individual Defendants concealed their superior knowledge of the internal business plans of BTMU and MUFG (the “Bank”) from him during the hiring process and thus breached a duty to inform him that BTMU had no intention of supporting Plaintiff’s business proposals or investment platforms during his employment. (Am. Compl. ¶ 145.) This cause of action, which also appears to be asserted only against the Individual Defendants, is pleaded insufficiently to meet the requirements of Rule 9(b) and will be dismissed for substantially the reasons explained in the preceding section of this Memorandum Order.

New York Labor Law (15th Cause of Action)

Plaintiff claims that the “Company”³ owes him bonus payments from 2008 as “earned wages” and that the Company’s withholding of those wages constitutes a violation of N.Y. Lab. L. § 193.⁴ (Pl.’s Mem. in Opp. at 18.) Under New York law, bonuses are governed by the terms of an employer’s bonus plan. See Thomson v. Saatchi & Saatchi Holdings (USA), Inc., 958 F. Supp. 808, 824 (W.D.N.Y. 1997). Such incentive compensation becomes “wages” within the meaning of New York Labor Law only when “vested,” Levy v. Verizon Info. Servs., Inc., 498 F. Supp. 2d 586, 601 (E.D.N.Y. 2007), that is, when payment is not conditioned upon some occurrence or left to the discretion of the employer. Koss v. Wackenhut Corp., 704 F.

³ The opening paragraph of the Amended Complaint defines “Company” as a collective reference to BTMU and MUFG.

⁴ Plaintiff’s Amended Complaint merely cited generally to Article 6 of the New York Labor Law (§ 190 et seq.). In his opposition to Defendants’ motion, he argues that the failure to pay the bonus amounts is an unauthorized wage withholding in violation of Section 193 of the Labor Law.

Supp. 2d 362, 368 (S.D.N.Y. 2010). In the instant case, the Plaintiff's Offer Letter outlines the terms of his "guaranteed bonus" entitlement as follows:

If you are terminated from the bank for unsatisfactory performance, position elimination, or other reason or employment at will, you will nevertheless receive the referred to bonus distributions on the bonus distribution dates in 2007 for Fiscal year 2006, in 2008 for Fiscal Year 2007, and in 2009 for Fiscal Year 2008 . . . so long as you execute the Bank's standard release of claims; such payment will be considered severance.

(Walker Decl., Ex. B at 2.) The Offer Letter also subjects Plaintiff's "deferred compensation" bonus for the year 2008 to his "continued active employment with the Bank" in May 2009. (*Id.*)

Plaintiff's moving papers suggest that the terms of his offer letter are ambiguous as to whether Plaintiff "earned" his deferred compensation and guaranteed bonus payments for 2008. (Pl.'s Mem. in Opp. at 18-19.) Plaintiff argues that the term "continued active employment" applicable to his deferred compensation bonus refers not to the date of payment, but to the period during which the payment was earned, *i.e.*, Fiscal Year 2008. (*Id.* at 19.) Plaintiff thus argues that his guaranteed bonus compensation qualifies as "wages" under New York Labor Law and that, as such, Defendants cannot withhold those payments for work done in 2008. (*Id.* at 18.) Furthermore, insofar as the effective date of Plaintiff's termination was May 1, 2009, Plaintiff has pleaded facts sufficient to state a claim that he was in continued active employment with the bank in May 2009. Accordingly, Defendants' motion to dismiss Plaintiff's Labor Law claims will be denied as to the "deferred compensation" payments.

Plaintiff's "guaranteed bonus" payments, however, are clearly conditioned upon his signing of the firm's standard release. (Walker Decl., Ex. B at 2.) Because Plaintiff's Complaint makes it clear that he has not fulfilled this condition, he fails to state a wage withholding violation claim under New York Labor Law with respect to the bonus payments.

Retaliation (Third, Fifth, Seventh, and Tenth Causes of Action)

Plaintiff asserts claims of race and national origin discrimination and retaliation pursuant to 42 U.S.C. § 1981, NYSHRL, NYCHRL, and Title VII of the Civil Rights Act of 1964. (Am. Compl. ¶¶ 102-03, 110-11, 119-20, 134-35.) The elements of retaliation claims pursuant to these statutes overlap substantially. In order to prevail on each claim of retaliation, Plaintiff must show that he engaged in a protected activity, that his employer was aware of that activity, that he was terminated, and that there is a causal connection between the protected activity and his termination. Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 608 (2d Cir. 2006).

Plaintiff's claims of retaliation in this case fail as a matter of law because he has not alleged facts that would amount to a protected activity under the relevant statutes with which he can demonstrate a relevant causal connection. These statutes define two protected activities: (1) opposing an unlawful act of discrimination; and (2) participating in an investigation of such discrimination. See Sumner v. U.S. Postal Service, 899 F.2d 203, 208 (2d Cir. 1990). In his Amended Complaint, Plaintiff alleges that he filed complaints with the EEOC, OSHA, the New York Commission on Human Rights and the Office of the Corporation Counsel of the City of New York between June and August of 2009. (Am. Compl. ¶¶ 27-28.) While such complaints qualify as protected activity, all post-date the termination of his employment and the last alleged act of discrimination or retaliation. His Complaint thus fails to proffer any basis for an inference of a causal connection between any alleged act of retaliation and the protected activity, and his Third, Fifth, Seventh and Tenth Causes of Action will therefore be dismissed.

Promissory Estoppel (16th Cause of Action)

Plaintiff's moving papers fail to respond to Defendants' motion to dismiss his claim for promissory estoppel. Accordingly, the Court considers Plaintiff to have abandoned this claim. Plaintiff's Sixteenth Cause of Action will therefore be dismissed. See Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786 (RMB)(THK), 2010 WL 1948322, at *12 (S.D.N.Y. May 10, 2010) (citing Frink Am., Inc. v. Champion Road Mach. Ltd., 48 F. Supp. 2d 198, 209 (N.D.N.Y. 1999) ("Plaintiff does not address these claims in its opposition papers, leading the Court to conclude that it has abandoned them.")).

Sarbanes-Oxley (1st Cause of Action)

Plaintiff alleges that Defendants BTMU, MUFG, Tracey, Chafetz and Moon retaliated against Plaintiff for his efforts to report and prevent violations of applicable securities regulations and laws. (Am. Compl. ¶¶ 91-92.) He alleges that Defendants altered various conditions of his employment, terminated that employment and denied his bonus payments and deferred compensation because he engaged in whistleblowing activity protected under the Sarbanes-Oxley Act ("SOX"). (Id.) To prevail on a claim of retaliation pursuant to Section 806(a) of SOX, which is codified at 18 U.S.C. § 1514A, Plaintiff must show that he engaged in a protected activity, that Defendants knew of that activity and that the protected activity was a contributing factor in Defendants' adverse employment action. Fraser v. Fiduciary Trust Co. Int'l, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *4 (S.D.N.Y. Aug. 25, 2009). For the purposes of Section 806, an employee engages in a protected activity when he reports to his employers with some specificity that they are violating applicable laws. See Pardy v. Gray, No.

07 Civ. 6324 (LAP), 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008); O'Mahony v. Accenture, Ltd., 537 F. Supp. 2d 506, 516 (S.D.N.Y. 2003).

Plaintiff's Amended Complaint alleges that he "repeatedly warned Defendants and other senior management of his reasonable belief that serious violations of the securities laws and MUFG's obligations as a publicly-traded company were occurring and/or might occur. (Am. Compl. ¶ 75.) Plaintiff further alleges that he reported to his superiors that he believed the Defendants were not calculating nor publicly reporting accurate risk levels and were thus defrauding shareholders. (Am. Compl. ¶ 76.) Plaintiff claims that he distributed a 12-page report to his superiors to inform them of the erroneous risk calculations and other deficiencies. (Id.) This alleged activity and Plaintiff's alleged expression of concerns about the company's publicly-reported financial health are sufficient to allege plausibly protected activity under Sarbanes-Oxley.

At this stage in the litigation, the Court draws all reasonable factual inferences in favor of Plaintiff. McCarthy v. Dun & Bradstreet Corp., 482 F.3d at 191. Read in this fashion, Plaintiff's allegations, including those that he warned relevant senior management officials of his belief that securities violations were occurring and/or might occur, and that he had reported that "BTMU/MUFG was not properly calculating nor publicly reporting its risk levels, and thus defrauding shareholders," are sufficient to frame SOX-protected activity. (Am. Compl. ¶¶ 75, 76.) The Second Circuit's recent summary order in Vodopia v. Koninklijke Philips Electronics, N.V., No. 09 Civ. 4767, 2010 WL 4186469 (2d Cir. Oct. 25, 2010), which is cited by Defendants, does not point to a contrary conclusion. In Vodopia, the Second Circuit affirmed the dismissal of a complaint in which the plaintiff alleged that he had reported facts concerning

potential fraud on the patent office, but had not alleged that the patent-related information was the subject of shareholder or public disclosure. Thus, the court concluded, “The complaint fail[ed] to allege that Vodopia reasonably believed he was reporting potential securities fraud as opposed to patent-related malfeasance. *Id.* at *3. Here, by contrast, Plaintiff specifically alleges that he warned Defendants of securities law violations relating to the public disclosure of risk levels. As Plaintiff has also pleaded sufficient facts to allege causation, he has stated a prima facie case of retaliation under SOX against Defendants Tracey, Chafetz, Moon, BTMU and MUFG. Defendants’ motion to dismiss Plaintiff’s First Cause of Action is therefore denied.

Discrimination (2nd, 4th, 6th, and 9th Causes of Action)

Plaintiff alleges that Defendants BTMU and MUFG unlawfully terminated his employment because of his race and/or national origin in violation of 42 U.S.C. § 1981, Title VII, NYSHRL, and NYCHRL. (Am. Compl. ¶¶ 96, 106, 114, 129.) Plaintiff also asserts discrimination causes of action under Section 1981, NYSHRL and NYCHRL against defendant Toriumi. Specifically, Plaintiff alleges that Defendants provided opportunities to individuals of Japanese descent that it did not provide to Plaintiff and that Defendants used Plaintiff’s business contacts and ideas to provide business opportunities to less qualified individuals in Japan. (*Id.* ¶¶ 56, 58-59.) Defendants allegedly knew of Plaintiff’s Zimbabwean nationality and passed over Plaintiff in favor of Japanese employees. (*Id.* ¶ 61.)

To state a claim for individual liability under Section 1981, a plaintiff must allege that the individual was personally involved in the discriminatory acts cited in the complaint. *Ifill v. United Parcel Service*, No. 04 Civ. 5963 (LTS), 2005 WL 736151, at *3 (S.D.N.Y. Mar. 29, 2005) (citing *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000)).

“Personal involvement” requires either direct participation in the alleged violations, negligent supervision of those violating Plaintiff’s rights or a failure to take action once the individual Defendant knew that violations were occurring. Patterson v. County of Oneida, 375 F.3d 206, 229 (2d Cir. 2004). Plaintiff makes no such allegations against Defendant Toriumi; while the Amended Complaint alleges that Toriumi gave the Plaintiff a lower performance rating than he deserved in 2008, Plaintiff does not allege further facts to suggest that Toriumi engaged in other discriminatory acts leading to Plaintiff’s termination at BTMU. (Am. Compl. ¶¶ 60-61.) Nor does Plaintiff allege that Toriumi supervised another employee who violated Plaintiff’s rights or that he failed to take action after learning that Plaintiff’s rights were being violated. Plaintiff’s Second Cause of Action, for violations of Section 1981, is therefore dismissed as against Defendant Toriumi. For substantially the same reasons, Plaintiff’s NYSHRL and NYCHRL discrimination claims against Defendant Toriumi (Fourth and Sixth Causes of Action) will also be dismissed.

The remaining discrimination claims against Defendants BTMU and MUFG survive the motion to dismiss. At this stage, Plaintiff needs to provide only a short and plain statement of facts that gives the Defendants “fair notice of what petitioner’s claims are and the grounds upon which they rest.” Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-14 (2002) (holding that petitioner’s complaint survived a motion to dismiss where it detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons); see also Boykin v. KeyCorp, 521 F.3d 202, 215 (2d Cir. 2008). Plaintiff alleges that opportunities within the Defendant company were “provided to less qualified individuals of Japanese descent.” (Am. Compl. ¶ 56.) Plaintiff also alleges that the

Defendants used his client contacts but excluded him from business negotiations by “[allowing] individuals in Japan to broker the sale of the policies without [Plaintiff’s] input.” (*Id.* ¶ 57.) Plaintiff further alleges that Defendants unlawfully terminated a group of Caucasian employees in March 2009 in a “staff reduction” that did not include any Japanese employees. (*Id.* ¶ 63.) To support this allegation, Plaintiff specifically names at least one Japanese individual who was subordinate to Plaintiff and worked on the same projects as the Plaintiff and shared his workload but remained in his job following the “staff reduction.” (*Id.* at 64.) Taking these allegations as true and drawing all reasonable inferences in Plaintiff’s favor, dismissal of the discrimination claims against BTMU and MUFG is inappropriate at this stage, and Defendants’ motion to dismiss Plaintiff’s Second, Fourth, Sixth, and Ninth Causes of Action is denied as to those Defendants. The motion is, however, granted as to Defendant Toriumi.

Aiding and Abetting Discrimination (8th Cause of Action)

As his Eighth Cause of Action, Plaintiff asserts claims against Defendant Toriumi of aiding and abetting violations of NYSHRL and NYCHRL. The Amended Complaint alleges that Toriumi had the ability to hire and fire employees and that he discriminated against Plaintiff when he assigned Plaintiff a lower performance rating than he deserved for 2008. (Am. Compl. ¶¶ 61-62, 123-24.) An individual may be held liable for aiding and abetting violations of NYCHRL and NYSHRL if he participates directly in discriminatory acts alleged by the Plaintiff. See *Ifill v. United Parcel Service*, No. 04 Civ. 5963 (LTS), 2005 WL 736151, at *3 (S.D.N.Y. Mar. 29, 2005); *Emmons v. City University of New York*, No. 09-CV-537 (ENV)(JMA), 2010 WL 2246413, at *19 (E.D.N.Y. June 2, 2010). Aside from the allegation that Toriumi gave Plaintiff a lower performance rating than he deserved, the Plaintiff does not proffer facts to

suggest that Toriumi participated in discriminatory conduct prohibited by the NYSHRL and NYCHRL. Plaintiff alleges that BTMU and MUFG treated workers of Japanese descent more favorably than other employees, but he does not allege that Defendant Toriumi ever discriminated against Plaintiff in favor of a Japanese employee or participated in such discriminatory treatment by BTMU and MUFG. Construing the facts in the light most favorable to Plaintiff, the Amended Complaint fails to state plausibly a claim for aiding and abetting liability against Defendant Toriumi. Plaintiff's Eighth Cause of Action will be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint is granted with respect to Plaintiff's Third, Fifth, Seventh, Tenth, Eleventh, Twelfth and Sixteenth Causes of Action. The motion is also granted with respect to the bonus payment aspect of the Thirteenth Cause of Action but denied with respect to the deferred compensation aspect of that Cause of Action to the extent it is asserted against BTMU. The Thirteenth Cause of Action is dismissed as against all other Defendants. Plaintiff's Second, Fourth, Sixth and Eighth Causes of Action are dismissed as against Defendant Toriumi. Plaintiff's Fourteenth Cause of Action is dismissed as to all Defendants except BTMU. Plaintiff's Fifteenth Cause of Action is dismissed insofar as it relates to payment of bonus compensation. Defendants' motion is denied in all other respects.

SO ORDERED.

Dated: New York, New York
February 9, 2011



LAURA TAYLOR SWAIN
United States District Judge