

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
AUDREY GLADITSCH

Plaintiff,

- against -

11 Civ. 919 (DAB)

MEMORANDUM AND ORDER

NEO@OGILVY, OGILVY & MATHER,
WPP GROUP USA, INC., ADDAM
BERGER, and DAVID RITTENHOUSE

Defendants.

-----X
DEBORAH A. BATTS, United States District Judge.

Plaintiff Audrey Gladitsch ("Gladitsch") brings the above-captioned action against defendants Neo@Ogilvy ("Neo"), Ogilvy & Mather ("Ogilvy") (collectively, "the Company"), Addam Berger, and David Rittenhouse (collectively, "Defendants"), alleging retaliation for her engagement in protected activity, pursuant to Section 806 of the Sarbanes-Oxley Act ("SOX") of 2002 (18 U.S.C. § 1514A) ("Section 1514A"). Plaintiff seeks compensatory damages and injunctive relief.

Plaintiff filed her Second Amended Complaint ("SAC") on May 13, 2011. This matter is before the Court on a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), filed July 11, 2011 by Defendants.¹ For the following reasons, Defendants' Motion to Dismiss is DENIED.

¹ Plaintiff concedes that she "does not oppose Defendants' motion to the extent it seeks to dismiss claims against WPP Group USA,

I. FACTUAL BACKGROUND²

A. Defendants Neo and Ogilvy

Defendants Neo and Ogilvy are subsidiaries of WPP plc, a publicly traded media communications services company. (SAC ¶¶ 9-10.) Neo holds itself out to be "the world's leading digital and direct media agency," and is self-described as "a fully integrated division of OgilvyOne Worldwide, and therefore part of Ogilvy & Mather Worldwide." (SAC ¶ 10.) Ogilvy is "one of the world's largest advertising agencies." (SAC ¶ 10.) The financial information of both Neo and Ogilvy is consolidated in WPP plc's financial statements.

B. Plaintiff's Employment with the Defendants

Plaintiff began her employment at the Company in March 1996. From 1999 to 2007, Plaintiff developed substantial experience with IBM, the Company's largest account, working as an Associate Media Director. (SAC ¶ 28.) In April 2009, the Company transferred her to work exclusively on the IBM account. (SAC ¶ 26.) Plaintiff alleges that because IBM was the Company's largest account, this transfer increased her exposure within the Company and

Inc." (Pl.'s Mem. Law at 1.) Accordingly, the Court does not reach Defendants' subject matter jurisdiction argument with regards to WPP Group USA, Inc. and DISMISSES Plaintiff's claims against WPP Group USA, Inc..

² Since this Motion to Dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(6), all Plaintiff's allegations are assumed to be true.

demonstrated the Company's confidence in her. (SAC ¶¶ 27, 29.) On or about September 1, 2009, Plaintiff was transferred to the Information Technology ("IT") Planning Team for the IBM account where she worked under the supervision of Defendant Berger, Group Planning Director at Neo, and Defendant Ritterhouse, Media Director for Neo. (SAC ¶¶ 15-16, 31.)

Two weeks after joining the IT Planning Team, Plaintiff received a proposal from one of the Company's vendors that provided media services to IBM. (SAC ¶ 32.) Upon reviewing this document, Plaintiff allegedly recognized that the proposed figures would substantially overcharge IBM for the purchased services. (SAC ¶ 33.) Plaintiff immediately informed others in the Company, including Oksana Krynsky-Kiefer, the Director of Media Management, that the figures were inaccurate. (SAC ¶ 34.) Subsequently, Plaintiff and Ms. Krynsky-Kiefer conferred with the vendor to discuss the figures. (SAC ¶ 35.) During this meeting, Plaintiff learned that the proposed pricing scheme had been used by the Company for years, and was resulting in a 200% overcharge to IBM. (SAC ¶ 36.) Soon after, Plaintiff brought her findings to the IBM Planning team at Neo, where she learned that the inaccurate pricing scheme had been used since at least 2006, such that the overcharges to IBM amounted to several million dollars. (SAC ¶ 37-38.)

On September 21, 2009, Plaintiff complained directly to Defendant Berger who, along with Defendant Rittenhouse, supervised the IT Planning Team. (SAC ¶¶ 40-41.) Unsatisfied that her complaints did not lead to changes in Defendants' billing practices towards IBM, Plaintiff then met with Defendant Berger, Ms. Krynsky-Kiefer, Margy Gerzema, Neo's Global Managing Director, and Pamela Russo, the Head of Team IBM North America in mid-October 2009. (SAC ¶ 42.) Immediately after this meeting, Plaintiff alleges that Defendant Berger pulled her aside and threatened her, saying, "You need to be careful about how you handle this, because heads could roll over something like this." (SAC ¶ 45.) After the meeting, Plaintiff also overheard a Supervisor on the IBM Team comment on the overcharges to IBM by saying, "we knew it was wrong, but we did it anyway." (SAC ¶ 46.)

C. Actions Following Plaintiff's Reporting of Overcharges

Plaintiff alleges that rather than attempt to remedy the misconduct raised by her complaints, Defendants repeatedly retaliated against her and continued their misconduct. (SAC ¶ 47.) In November 2009, Defendants removed Plaintiff from the IBM account. (SAC ¶ 48.) Plaintiff was told that the reassignment was a "precursor" to a promotion that Defendants had put into motion for her in August 2009. (SAC ¶ 49.)

On January 4, 2010, Plaintiff met with Defendants Berger and Rittenhouse, along with Human Resources Manager Alex Siler, to discuss her 2009 performance review. (SAC ¶ 51.) Prior to this evaluation, Plaintiff allegedly received uniformly positive annual reviews, had never received any write-ups or been put on any performance improvement plans, and received a performance-based bonus in 2008 for her excellent work. (SAC ¶¶ 52-53.) Plaintiff alleges her 2009 performance review did not take into account Plaintiff's work prior to her September 2009 transfer to the IT group (for which she had earned substantial praise from her clients) and repeatedly criticized Plaintiff for performance deficiencies. (SAC ¶¶ 54-56.) Her review also stated it was "not ok to get bogged down" with an individual billing practice, as Plaintiff had with Defendants' overcharging of IBM. (SAC ¶ 57.) In this January 4, 2010 meeting, Plaintiff once again raised Defendants' overcharging on the IBM account. (SAC ¶ 58.)

In mid-January 2010, Plaintiff met with Ms. Gerzema and the Company's Global Chief Executive Officer, Ms. Madhany, to discuss her allegedly unwarranted 2009 performance review. (SAC ¶ 63.) During this meeting, Plaintiff was offered a position working directly for Defendant Berger. However, Plaintiff did not accept this position because it was not a promotion as she had been promised, and because she did not feel comfortable working for Berger, who allegedly had repeatedly expressed his animosity

towards her for continually raising the Company's fraudulent billing practices. (SAC ¶ 64.)

On February 3, 2010, because Plaintiff still had not received a promotion, she told Ms. Gerzema that she would accept the lateral transfer and work under Defendant Berger. (SAC ¶ 65.) Plaintiff was told she would be transferred into the new position shortly, but it was instead given to another employee who Plaintiff claims had significantly less experience than her. (SAC ¶¶ 66-67.) Instead, Defendants offered Plaintiff the position of Associate Planning Director working on contracts for the IBM Team, a demotion to the position Plaintiff had held three years prior. (SAC ¶ 68.) When Plaintiff objected to being demoted, Defendants indicated it was her only option and that she had to accept it if she wanted to continue to work for the Company. (SAC ¶ 69.)

On March 10, 2010, Plaintiff wrote to the Company's head of Human Relations, Jean-Rene Zetrenne, explaining the reasons why she wanted to report the IBM billing improprieties, including her concerns that IBM account could be lost, and that Neo, as part of a public company, was potentially defrauding the stockholders of the parent company by improperly inflating and over-reporting earnings. (SAC ¶¶ 71-72.) In the letter, Plaintiff also objected to criticisms of her reporting the fraudulent overcharges since such statements were "a thinly veiled attempt to express displeasure with me due to my disclosure of [the Company's]

potentially fraudulent practices that exposed us and our parent company to substantial risks." (SAC ¶ 73.)

D. Prior Proceedings

On April 5, 2010, Plaintiff filed a complaint with the United States Department of Labor's Occupational Safety & Health Administration ("OSHA") alleging that Defendants retaliated against her in violation of SOX. (SAC ¶ 22.) When OSHA did not issue a final decision within 180 days and that delay was not due to Plaintiff's bad faith, Plaintiff sent a letter to OSHA, dated December 15, 2010, indicating that she intended to file a lawsuit in federal court. (SAC ¶¶ 23-24.) Accordingly, pursuant to 18 U.S.C. §1514A, Plaintiff commenced this action on February 9, 2011. (SAC ¶ 24.)

II. DISCUSSION

A. Standard for Motion to Dismiss under Rule 12(b)(6)

For a complaint to survive dismissal under Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained,

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility

standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-57). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles,"

a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S.Ct. at 1950.

In ruling on a 12(b)(6) motion, a court may consider the complaint as well as "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." Zdenek Marek v. Old Navy (Apparel) Inc., 348 F. Supp.2d 275, 279 (S.D.N.Y. 2004) (citing Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001)).³

³ Thus, the Court has not considered Plaintiff's supplemental affidavit.

B. Applicability of the Sarbanes-Oxley Act

As an initial matter, the Court addresses Defendants' argument that Plaintiff's Complaint must be dismissed because she worked for subsidiaries of a publicly traded company and not for the publicly traded company itself. Defendants contend that as a result, Neo and Ogilvy are not subject to SOX.

On July 21, 2010, while Plaintiff's OSHA Complaint was pending, the President signed into law the Dodd-Frank Act. Section 929A of the Dodd-Frank Act amended Section 1514A so that the provision currently reads in relevant part:

(a) 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 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, . . . 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 . . . [emphasis added]*

18 U.S.C. § 1514A(a). Because it is a "clarifying" amendment, functioning to correct a misinterpretation rather than effect a substantive change in the law, Section 929A applies to pending cases. Johnson v. Siemens Building Technologies, Inc. ARB Case No. 08-032 at 8-9, ALJ Case No. 2005-SOX-015 (Dept. of Labor ARB Mar.

31, 2011).⁴ Thus, because Neo and Ogilvy are subsidiaries whose financial information is included in publicly traded parent company WPP plc's financial statements (SAC ¶¶ 9-10), they are subject to SOX.⁵

⁴ The Supreme Court has recognized that Chevron [U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)] deference is appropriate when it appears from the "statutory circumstances that Congress would expect the agency to be able to speak with the force of law." United States v. Mead Corp., 533 U.S. 218, 229 (2001). The Court has instructed that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure" such as formal adjudication. Id. at 230 & n. 12. Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication, see 18 U.S.C. § 1514A(b), and the Secretary has delegated her enforcement authority to the ARB, see 67 Fed.Reg. 64,272,64,273 (Oct. 17, 2002).

⁵ In explaining the 2010 Amendment, the Senate Report accompanying what became Section 929A of the Dodd-Frank Act, stated:

[Section 929A] amends Section [1514A] of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

Johnson, ARB No. 08-032, slip op. at 6. (citing Senate Report 111-176 at 114 (Apr. 30, 2010) (S. 3217)).

Accordingly, to the extent Defendants' Motion to Dismiss is based on the grounds that Plaintiff did not work for a publicly traded company, it is DENIED.

C. Defendants as a Single Employer

Defendants argue that the SAC must be dismissed with regard to Ogilvy because Neo and Ogilvy are not a "single employer," and Ogilvy is thus not liable for any alleged violations of SOX.

To be deemed a single or joint employer, two entities must have (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995). This test is "satisfied by a showing that there is an amount of participation that is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions." Id. at 1241.

Here, Plaintiff's Complaint alleges that "WPP exercises control over the board of directors, management and, shares the same Human Resource policies and procedures, and maintains bottom-line financial responsibility for Neo and [Ogilvy]." (SAC ¶ 12.) Neo and Ogilvy share common ownership, premises, directors and/or officers, and financial control. (SAC ¶ 14.) Moreover, Neo's own description of its relationship with Ogilvy explains that "Neo@Ogilvy is a fully integrated division of OgilvyOne Worldwide,

and therefore part of Ogilvy & Mather Worldwide. As part of the Ogilvy network, [Neo@Ogilvy is] uniquely positioned to work in partnership with Ogilvy companies . . . Neo@Ogilvy develops and implements media and search concepts for the entire Ogilvy Group.”

The Complaint, combined with publicly available information and documents integral to the Complaint, sufficiently show that Ogilvy and Neo are a single or joint employer. Accordingly, to the extent that Defendants’ Motion to Dismiss the claims against Ogilvy is based on the ground that Ogilvy and Neo are not a joint employer, Defendants’ Motion is DENIED.

D. Statute of Limitations for Filing an OSHA Complaint

Defendants contend that the Complaint must be dismissed with regard to individual defendants Berger and Rittenhouse because Plaintiff failed to meet the statute of limitations for filing her complaint with OSHA. Section 1514A requires that a whistleblower action “be commenced not later than 90 days⁶ after the date on which the violation occurs.” 18 U.S.C. § 1514A(b)(2)(D).

Plaintiff filed her complaint with OSHA on April 5, 2010, 91 days after Defendants Berger and Rittenhouse conducted her January 4, 2010 performance review. (SAC ¶¶ 22, 51-58.) Defendants thus

⁶ In July 2010, the Dodd Frank Wall Street Reform and Consumer Protection Act amended 18 U.S.C. § 1514A(b)(2)(D) to increase the statute of limitations period from “90” to “180” days. Pub.L. 111-203, § 922(c)(1)(A).

argue that any actions that occurred prior to January 5, 2010 cannot be the basis of a valid Section 1514A whistleblower claim.

However, plaintiffs are allowed "a full span of ninety days in which to file [their] action, and accordingly, when the ninetieth calendar day is a Saturday, Sunday, or holiday, the period does not expire until the end of the next day." Kane v. Douglas, Elliman, Hollyday & Ives, 635 F.2d 141, 142 (2d Cir. 1980). Because the ninetieth calendar day following Plaintiff's performance review was a Sunday, and Plaintiff's complaint with OSHA was filed the next business day (Monday April 5, 2010), Plaintiff's performance review falls within the limitations period.

Defendants also argue that Plaintiff's January 4, 2010 meeting with Berger and Rittenhouse was not part of retaliatory action taken against Gladitsch for her reporting of overcharges. The January 2010 evaluation, however, was not an isolated action. Instead, it could be considered part of a series of actions taken against Plaintiff both before and after January 4, 2010, including Plaintiff's November 2009 removal from the IBM account, February 2010 demotion, and further demotion to the Operations Group in October 2010. See Herschman v. City Univ. of New York, 2011 WL 1210200, at *18 (S.D.N.Y. Feb. 28, 2011), adopted, 2011 WL 1210209 (S.D.N.Y. Mar. 29, 2011) ("negative performance reviews are

generally not considered actionable forms of retaliation, unless the negative review results in demotion or termination. . .").

Accordingly, Plaintiff's claims against Berger and Rittenhouse are not barred by the statute of limitations, and Defendants' Motion to Dismiss on that ground is DENIED.

E. Plaintiff's Retaliation Claim under the Sarbanes-Oxley Act

Section 1514A provides whistleblower protection for employees of publicly traded companies (including their subsidiaries and affiliates). The statute states, in relevant part:

No [publicly traded] company . . . including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company . . . , 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 . . . 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 . . . (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

18 U.S.C. § 1514A. To state a prima facie whistleblower claim, a plaintiff must allege: (1) that she engaged in protected activity, (2) the employer knew of the protected activity, (3) she suffered

an unfavorable personnel action, and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 510 (S.D.N.Y. 2008); Fraser v. Fiduciary Trust Co., Int'l., 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006). Defendants dispute only the first element: whether Gladitsch sufficiently alleged that she engaged in "protected activity" within the meaning of the statute.

i. Protected Activity

Section 1514A defines protected activity to include the provision of information regarding conduct the employee "reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1).

a. Fraud Against Shareholders

Defendants assert that "the law is clear: If Plaintiff did not complain about a fraud affecting shareholders or investors (which she concedes she did not), then she has not engaged in a protected activity and she does not have a SOX whistleblower claim." (Defs.' Reply at 1.)

As an initial matter, contrary to Defendant's assertion, the Court notes that Plaintiff did not concede that she never complained about fraud affecting shareholders or investors. Instead, Plaintiff's Complaint indicates she was concerned that the unlawful conduct (the deliberate overbilling of a client) would lead to reporting "artificially inflated revenues" to shareholders and could "potentially cripple shareholder confidence." (SAC ¶¶ 39,60.) Plaintiff, in a letter to the company's Head of Human Relations, noted "the impact [fraudulent overbilling] could have on our corporate contracts and the agency's overall relationship with IBM, and the stockholders of our parent company." (SAC ¶¶ 71-72.) Thus, it is inaccurate to characterize the Plaintiff's complaints about fraud as not having any relation to or impact on shareholders.

Even assuming Plaintiff never complained specifically about shareholder fraud, an allegation of shareholder fraud is not a necessary component of protected activity under Section 1514A. Instead, courts in this district have found that violations of the statutes enumerated in Section 1514A are not limited by the phrase "relating to fraud against shareholders." O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 518 (S.D.N.Y. 2008) (employee's reporting of employer's fraudulent scheme to evade social security taxes deemed protected activity, regardless of relation to shareholder fraud); Sharkey v. J.P. Morgan Chase & Co., 805 F.Supp.2d 45, 57

(S.D.N.Y. 2011) (SOX prohibits an employer from retaliating against an employee who complains about any of the six enumerated categories of misconduct).

As explained in O'Mahony, "by listing the specific fraud statutes to which Section 1514A applies, and then separately, as indicated by the disjunctive 'or', extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, Section 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud." O'Mahony, 537 F.Supp.2d at 518. Similarly, the Department of Labor Administrative Review Board ("ARB") has interpreted Section 1514A and held that protected activity is not limited to reporting fraud against shareholders. Sylvester v. Parexel, ARB No. 07-123, slip op. at 19, 2011 WL 2517148 (May 25, 2011) ("a complaint of shareholder or investor fraud is not required to establish SOX-protected activity"); Funke v. Federal Express Corp., ARB No. 09-004, slip op. at 8 (July 8, 2011) (complaint of misconduct must not "necessarily relate to fraud against shareholders").

Defendants argue that the O'Mahony decision has been "rendered irrelevant" by the Second Circuit's decision in Vodopia v. Koninklijke Philips Electronics, N.V., 398 Fed.Appx. 659 (2d

Cir. 2010). However, in Vodopia, the plaintiff's allegations regarding fraudulently obtained patents were not sufficiently related to any one of the enumerated statutes under Section 1514A. Vodopia, 398 Fed.Appx. at 664. When the plaintiff in Vodopia alleged a violation of the sixth enumerated category ("federal law relating to shareholder fraud"), the court determined that the plaintiff did not "reasonably [believe] he was reporting potential securities fraud as opposed to patent-related malfeasance." Id.

Accordingly, the Court here assesses the adequacy of Plaintiff's Complaint in accordance with the principle that protected activity under SOX need not relate to fraud against shareholders.

b. A Complainant Need Only Express a "Reasonable Belief" of a Violation to Engage in Protected Activity

To engage in "protected activity," a whistleblower "need not 'cite a code section [she] believes was violated' in [her] communication to [her] employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal." Sharkey, 805 F.Supp.2d at 57 (citing Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2008)); see also Sylvester, ARB No. 07-123, slip op. at 17 (holding that "[t]o be protected under [Section 1514A], an employee's communication to the employer need only identify the conduct with specificity"). Further, protected

activity need not describe an actual violation of the law as long as it is based on a reasonable, even if mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law under Section 1514A of SOX.

Sylvester, ARB No. 07-123, slip op. at 16.

Courts that have interpreted SOX's "reasonable belief" standard have established that, consistent with other anti-retaliation statutes, both subjective and objective components must be satisfied. See, e.g., Harp v. Charter Communications, Inc., 558 F.3d 722 (7th Cir. 2009); Day v. Staples, Inc., 555 F.3d 42 (1st Cir. 2009); Van Asdale v. International Game Tech., 577 F.3d 989 (9th Cir. 2009); Welch v. Chao, 536 F.3d 269 (4th Cir. 2008). The subjective component requires that the complainant or whistleblower made the allegations in good faith and "actually believed the conduct complained of constituted a violation of pertinent law." Day, 555 F.3d at 54, n.10 (citing Welch, 536 F.3d at 277, n.4). Objective reasonableness is evaluated based on "the knowledge available to a reasonable person in the circumstances with the employee's training and experience." Sharkey, 805 F.Supp.2d at 56 (citations omitted).

Here, Plaintiff has alleged sufficiently that she reasonably believed that the pricing scheme, which overcharged IBM, violated an enumerated category of misconduct under SOX. Plaintiff's Complaint alleges sufficiently that she "actually believed" the

overcharging of IBM "constituted a violation of pertinent law." Day, 555 F.3d at 54, n.10 (citing Welch, 536 F.3d at 277, n.4). In her communications with supervisors, Plaintiff identifies specifically the overcharges to IBM through third-party vendor purchases of media services as the conduct she believed to be unlawful. (SAC ¶¶ 36-39.) Plaintiff's allegations implicate sections 1341 [mail fraud] and 1343 [wire fraud]. Plaintiff's allegations of mail fraud and wire fraud were based on her professional training and experience and were reinforced by her employer's reaction to her reports of fraudulent activity. See Harp, 558 F.3d at 723; Ryerson v. American Financial Servs. Inc., ARB No. 08-064 (ARB July 30, 2010) (belief that employer was violating securities laws was reasonable because employer revised form in question in response to concerns). Plaintiff alleges that she heard an IBM Team Supervisor say, in reference to the overcharges, "we knew it was wrong, but we did it anyway." (SAC ¶ 46.) Together with Defendant Berger's warning to Gladitsch that "You need to be careful about how you handle this, because heads could roll over something like this," (SAC ¶¶ 42,45.), Plaintiff's Complaint alleges sufficiently that she reasonably believed an intentional misrepresentation was occurring in violation of SOX.⁷

⁷ Defendants' contention that the overbilling was a mistake or a breach of contract is unavailing. So long as Plaintiff provided information about conduct she reasonably believed violated an

Finally, Defendants argue that the Complaint must be dismissed because Plaintiff failed to allege that she reasonably believed that the vendor engaged in fraud. SOX protects a plaintiff's complaint about misconduct committed by a third-party as well as that by the plaintiff's employer. Sharkey, 805 F.Supp.2d at 57. Here, Plaintiff clearly attributes the illegal conduct to the Company and Defendants Berger and Rittenhouse who "[supervised] the team that was ultimately responsible for the overcharges to IBM." (SAC ¶¶ 41-44.) The extent of the third-party vendor's involvement in the alleged fraud is not relevant with regards to whether or not Plaintiff's complaints were protected activity. See Sharkey, 805 F.Supp.2d 45.

Accordingly, Defendants' Motion to Dismiss on the grounds that Plaintiff failed to adequately allege "protected activity" under SOX is DENIED.

III. CONCLUSION

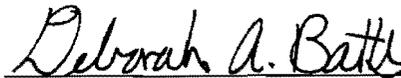
Plaintiff's Complaint, when construed under favorable 12(b)(6) standards, sufficiently alleges facts to state a claim pursuant to Section 806 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A). For the foregoing reasons, Defendants' Motion to Dismiss is DENIED in its entirety.

enumerated category of misconduct, she is deemed to have engaged in protected activity. Sharkey, 805 F.Supp.2d at 57.

Within thirty (30) days from the date of this Order,
Defendants shall file their Answer to Plaintiff's Second Amended
Complaint.

SO ORDERED.

DATED: March 21, 2012
New York, New York



Deborah A. Batts
United States District Judge