

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENJAMIN ASHMORE,

Plaintiff,

v.

CGI GROUP INC. and CGI FEDERAL INC.,

Defendants

11 Civ. 8611 (LBS)

MEMORANDUM
& ORDER

SAND, J.

Defendants, CGI Group Inc. (“CGI”) and CGI Federal Inc. (“CGI Federal”) move to dismiss in its entirety the complaint filed by Plaintiff Benjamin Ashmore (“Ashmore”), alleging that Defendants violated § 806 of the Sarbanes-Oxley Act of 2002 (“the Sarbanes-Oxley Act”), 18 U.S.C. § 1514A, and bringing claims for breach of contract and promissory estoppel pursuant to New York state law. For the reasons provided below, Defendants’ motion is granted in part and denied in part.

I. Background¹

Since 1999, the Department of Housing and Urban Development (“HUD”) has outsourced to public housing authorities (“PHAs”) responsibility for administering the project-based rental subsidy program established by Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f. Under this system, PHAs contract with HUD to provide administrative services to specific Section 8 housing projects. The PHAs then subcontract with private companies such as the Canadian company, CGI Group, and its wholly-owned American subsidiary, CGI Federal (collectively, “CGI”), which actually provide the administrative services required by HUD.

¹ This section is based on facts alleged in the Complaint (“Compl.”), filed November 28, 2011. It also incorporates clarifications of the facts provided in the responsive pleadings.

In 2007, HUD announced that it would, for the first time since the program was established, rebid all of the Section 8 administrative services contracts. In response to HUD's announcement, CGI Federal, which regarded the rebid as a good opportunity to expand its share of the Section 8 subcontracting market, established a strategy team composed of senior managers to coordinate the company's approach to the rebidding process. The group was officially named the Rebid Assessment Team but it was known informally as the RAT Pack.

Ashmore, who was hired by CGI Federal in May 2009 after working for five years as a senior program analyst for HUD, was asked, upon his arrival at the company, to join the RAT Pack, which he did. As a member of the RAT Pack, he participated in regular phone calls with other members of the team to discuss strategy and make plans with respect to CGI's participation in the rebid process. He alleges that during these phone calls he came to learn of a fraudulent scheme, hatched by other members of the team, to evade the 300,000 unit cap that HUD announced that it was considering imposing on the number of Section 8 housing units that any individual PHA or private subcontractor could administer. Because, at the time, CGI Federal already contracted to provide administrative services to 267,000 Section 8 housing units, the cap posed a serious threat to the company's efforts to materially increase its share of the Section 8 subcontracting market as a result of the rebid process. In order to circumvent these limits, Ashmore alleges that a subgroup of the RAT Pack led by Marybeth Carragher, one of Ashmore's supervisors at CGI, developed what Ashmore calls the Director Shell Company Scheme.

Under this scheme, CGI Federal would withdraw from the partnership agreements it had entered into with PHAs in many of the 26 states in which it intended to participate in the rebid process. Four directors would then resign from the company and set up their own formally independent companies. These companies would then enter into partnership agreements with the

PHAs in lieu of CGI Federal and bid for additional Section 8 subcontracts. While formally independent, under the plan they would have full access to CGI Federal's resources, experience and staff, giving them a competitive advantage during the rebid and presumably allowing them to acquire significant additional Section 8 housing contracts. After the rebid was over, the plan was that CGI Federal would then acquire these companies, and with them, their Section 8 subcontracts—thus effectively evading the 300,000 unit limit that HUD planned to impose.

Ashmore alleges that, in his discussions with other members of the RAT Pack, including Carragher, he consistently opposed the Director Shell Company Scheme on the grounds that it was an illegal and fraudulent attempt to evade HUD and federal acquisition regulations, and also likely bad for the company's business prospects. Compl. ¶ 41, 42. In the end, HUD did not impose any limit on the number of units PHAs and their private partners could acquire under the rebid and the alleged scheme never went into effect. Ashmore claims that he was nevertheless first kicked off the RAT Pack and, two days later, fired, because of his opposition to the scheme.

In his complaint, Ashmore alleges that his termination violated § 806 of the Sarbanes-Oxley Act, which prohibits officers and employees of publicly traded companies from firing, or otherwise discriminating against, employees ("whistleblowers") who provide information to their supervisors, or other employees, about conduct that they reasonably believe constitutes mail fraud, wire fraud, bank fraud, securities fraud, or represents a violation of a Securities and Exchange Commission rule or regulation or any federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). Ashmore also brings breach of contract and promissory estoppel claims against Defendants, alleging that Defendants' breached their contractual obligations, and reneged on a verbal promise they made to him when he was hired, by failing to pay him a bonus after his first full year of employment at CGI Federal.

Defendants have moved to dismiss the complaint in its entirety.

II. Standard of Review

On a motion to dismiss, a court reviewing a complaint will consider all material factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Lee v. Bankers Trust Co.*, 166 F.3d 540, 543 (2d Cir. 1999). “To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through ‘factual allegations sufficient to raise a right to relief above the speculative level.’” *ATSI Commc’ns Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 93 (2d Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Rather, the plaintiff’s complaint must include “enough facts to state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1940 (citing *Twombly*, 550 U.S. at 570).

In reviewing a complaint, a court is not limited to the four corners of the complaint; a court may also consider “documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs’ possession or of which plaintiffs had knowledge and relied on in bringing suit.” *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

III. Discussion

A. The Sarbanes-Oxley Whistleblower Claim

Defendants raise a number of objections to Ashmore’s whistleblower claim. They argue that § 806 of the Sarbanes-Oxley Act does not provide protection to Ashmore, as the employee of a non-publicly traded company. They also challenge the claim as untimely. Finally, they challenge its substantive merits.

i. The Reach of the Whistleblower Provision

Defendants argue that Ashmore's whistleblower claim must be dismissed because his allegations stem from his employment at CGI Federal—a non-publicly traded company—and, as of the date of his termination on June 16, 2010, § 806 of the Sarbanes-Oxley Act applied only to employees of publicly traded companies. Defendants acknowledge that, in 2010, Congress amended § 806 to explicitly apply to employees of private subsidiaries of public companies that include the financial information of the subsidiary in their consolidated financial statements. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (2010). They argue, however, that, because Ashmore was terminated before the 2010 amendment came into effect on July 22, 2010, allowing him to bring a claim under § 806 would require giving the 2010 amendment retroactive effect.

Retroactivity is disfavored in the law. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). For that reason, statutory changes will generally “not be construed to have retroactive effect unless their language requires this result.” *Id.* *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (“If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.”). As Defendants point out, the text of the 2010 amendment to § 806 does not express a clear intent that it apply retroactively. *See* Dodd-Frank Act § 929A. As a result, they argue, Ashmore is outside the class of litigants who can properly invoke § 806.

Ashmore argues in reply that even though he was fired before the 2010 amendment came into effect, he can invoke the protections of § 806 without requiring the Court to engage in disfavored retroactivity. This is the case, he argues, because the 2010 amendment clarified, rather than substantively altered, the meaning of § 806. Amendments that merely clarify the

meaning of statutory provisions are not subject to the general presumption against retroactivity but can be applied to all cases pending at the time they come into effect. *Middleton v. City of Chi.*, 578 F.3d 655, 663-664 (7th Cir. 2009). See also *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (“[C]oncerns about retroactive application are not implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law.”); *D’Amico v. United States*, Nos. 94 Civ. 3825 (PKL), 88 Cr. 919 (7S) (PKL), 2000 U.S. Dist. LEXIS 7244, at *18 (S.D.N.Y. May 25, 2000) (“An amendment that merely serves to clarify the original provision may be applied retroactively.”). Ashmore argues that the 2010 amendment to § 806 is of this type and therefore, he can invoke the protection of the statute notwithstanding the fact that he was terminated prior to July 22, 2010.

We agree. When determining whether an amendment to a statute clarifies rather than substantively alters existing law, courts examine several factors, including: “[1] whether the enacting body declared that it was clarifying a prior enactment; [2] whether a conflict or ambiguity existed prior to the amendment; and [3] whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history.” *Middleton*, F.3d 655 at 663-664. In a recent decision in which it examined each of these factors in detail, the Department of Labor’s Administrative Review Board (“ARB”) concluded that, while the evidence with respect to the first of these three factors was mixed, courts were deeply divided on the issue of § 806’s application to subsidiaries prior to the passage of the 2010 amendment, suggesting that the original text of § 806 on this point was ambiguous. *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, 2011 DOL Ad. Rev. Bd. LEXIS 22, at *19 (ARB Mar. 31, 2011). The ARB also found that the interpretation of § 806 provided by the 2010 amendment was a reasonable one, taking into account the broad aims of the Sarbanes-

Oxley Act and the tendency, in federal securities regulation, to treat consolidated subsidiaries and their parents as a single economic entity. 2011 DOL Ad. Rev. Bd. LEXIS 22, at *24-3.

On the basis of its review of the legislative history, pre-amendment case law and statutory purpose, the ARB concluded that the 2010 amendment “is a clarification of Section 806 and does not create retroactive effects [but instead]...merely makes ‘what was intended all along ever more unmistakably clear.’” *Johnson*, 2011 DOL Ad. Rev. Bd. LEXIS 22, at *35 (quoting *United States v. Montgomery Cnty.*, 761 F.2d 998, 1003 (4th Cir. 1985)). We see no reason to depart from the ARB’s well-reasoned and persuasive opinion, particularly given the deference to which ARB decisions are entitled. *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) (ARB interpretations of § 806 of the Sarbanes-Oxley Act are entitled to deference, given Congress’ explicit delegation to the Secretary of Labor of authority to enforce the provision and the Secretary of Labor’s delegation of such authority to the ARB); *Gladitsch v. Neo@ogilvy, Ogilvy, Mather, WPP Group USA, Inc.*, No. 11 Civ. 919 (DAB), 2012 U.S. Dist. LEXIS 41904, at *11–12 (S.D.N.Y. Mar. 21, 2012) (same). As a result, we conclude that, even prior to the clarifying amendments, the whistleblower protection provided by § 806 extended to employees of private subsidiaries whose financial information is included in the consolidated financial statements of their parent companies.

In his complaint, Ashmore alleges that he is among this class of employees because, at the time of his termination on June 16, 2010, he was employed by CGI Federal, a wholly-owned subsidiary of the publicly traded company, CGI Group, whose financial information was included on CGI Group’s consolidated financial statements. Assuming these allegations to be true—as we are required to do at this stage in the proceedings, *Lee*, 166 F.3d at 543—we conclude that Ashmore is entitled to the protections of § 806.

ii. Timeliness

Defendants argue, in the alternative, that Ashmore's claim should be dismissed because he did not file a timely whistleblower complaint with the Secretary of Labor, as the statute requires. 18 U.S.C. § 1514A(b)(2)(D). Ashmore was fired on June 16, 2010. He filed a whistleblower complaint with the Secretary on December 10, 2010—177 days after the alleged violation took place. As of June 16, 2010, the time provided for whistleblowers to file timely their complaints with the Secretary was 90 days. With the passage of the Dodd-Frank Act on July 22, 2010, however, this period was doubled, giving whistleblowers 180 days in which to file their complaints with the Secretary. Dodd-Frank Act, § 922, 124 Stat. at 1848.

Defendants argue that applying the 180- rather than the 90-day limitations period to Ashmore's claim would be an improper retroactive application of the Dodd-Frank Act amendments. We disagree. As the Second Circuit has made clear, "applying a new or amended statute of limitations to bar a cause of action filed after its enactment, but arising out of events that predate its enactment, generally is not a retroactive application of the statute." *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-890 (2d Cir. 1995). Because Ashmore filed both his whistleblower complaint with the Secretary and his civil complaint with this Court after the 2010 amendments went into effect, on July 22, 2010, the 180-day statute of limitations thus applies without raising any retroactivity concerns. Applying the 180-day limitations period set forth in the amended 18 U.S.C. § 1514A(b)(2)(D) we conclude that Ashmore's complaint is timely.

iii. Merits

To assert a whistleblower claim under § 806 of Sarbanes-Oxley, a plaintiff must allege four elements: "(i) [that] she engaged in protected activity; (ii) [that] the employer knew of or

suspected, actually or constructively, the protected activity; (iii) [that] she suffered an unfavorable personnel action; and (iv) [that] circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.” *Sharkey v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45, 53 (S.D.N.Y. 2011). Defendants argue that Ashmore’s complaint fails to adequately allege either of the first two elements of the claim.

1. The Protected Activity Requirement

Section 806 of the Sarbanes-Oxley Act defines protected activity to include the provision of information “regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [prohibiting mail fraud], 1343 [prohibiting wire fraud], 1344 [prohibiting bank fraud], or 1348 [prohibiting 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). To establish that she engaged in activity protected by § 806, a plaintiff is not required, under the terms of the statute, to demonstrate that the conduct about which she blew the whistle *actually* violated federal law. *Mahony v. Keyspan Corp.*, No. 04 Civ. 554, 2007 U.S. Dist. LEXIS 22042, at *5 (E.D.N.Y. Mar. 12, 2007). Instead, what she must show is that her belief that the conduct constituted one of the six kinds of misconduct enumerated in § 806 was both objectively and subjectively reasonable. *Fraser v. Fiduciary Trust Co. Int’l*, No. 04 Civ. 6958 (PAC), 2009 U.S. Dist. LEXIS 75565, at *14–15 (S.D.N.Y. Aug. 25, 2009). She must also show that the information she provided about the conduct was not overly general. *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8, 2004 DOLSOX LEXIS 65, *33-34 (U.S.D.O.L. June 15, 2004) (“[I]n order for the whistleblower to be protected by [SOX], the reported information must have a certain degree of specificity....[A] whistleblower must state

particular concerns which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal.”).

Ashmore alleges that he engaged in protected activity when he complained to Carragher and others at CGI Federal about the Director Shell Company Scheme because, at the time he objected to Carragher and others about the scheme, he reasonably believed that the use of telephone lines and emails in furtherance of the Shell Company Scheme violated, and would continue to violate, 18 U.S.C. §§ 1341 and 1343, the federal mail and wire fraud statutes. Compl. § 69. Defendants challenge this allegation on two grounds. First, they argue that the complaint fails to establish the objective reasonableness of Ashmore’s belief. Defendants also argue that Ashmore’s objections to the Director Shell Company Scheme were insufficiently specific to constitute protected activity under § 806 because, in his communications with Carragher and others in the RAT Pack, Ashmore failed to identify the specific kind of fraud that he believed the Director Shell Company Scheme represented, or how precisely it constituted mail or wire fraud.

Neither argument is persuasive. Defendants claim that Ashmore’s complaint fails to adequately establish the objective reasonableness of his belief because it contains no specific allegations as to how Defendants’ actions actually constituted mail or wire fraud. However, as discussed above, plaintiffs who bring claims under § 806 are not required to demonstrate that defendants *actually* violated one or more of the federal laws and regulations enumerated in the statute. *Mahony*, 2007 U.S. Dist. LEXIS 22042, at *5. Instead, courts assess the objective reasonableness of a whistleblower’s belief by determining whether “a reasonable person in [their] position would have believed” the same. *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2010 U.S. Dist. LEXIS 139761, at *16 (S.D.N.Y. Jan. 14, 2010) (quoting *Welch*, 536 F.3d at 278 n.4). Objective reasonableness is evaluated, in other words, 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). We see no reason to conclude, under this standard, that Ashmore’s belief that the Director Shell Company Scheme, and actions taken in furtherance of it, constituted mail or wire fraud was unreasonable. While Ashmore may or may not have known what is required to prevail on a claim of mail or wire fraud under 18 U.S.C. § 441, it is not unreasonable for someone with his background and experience to believe—perhaps correctly—that the use of the telephone lines and email to further a scheme that, as described in the complaint, was explicitly intended to defraud HUD, constituted mail and/or wire fraud under federal law.

Similarly, the fact that Ashmore did not specifically inform Carragher or anyone else at CGI Federal of his belief that the scheme involved mail or wire fraud, or his reasons for thinking so, does not mean that the information he communicated was insufficiently specific to count as activity protected by § 806 or to alert the defendants to the fact that the company was potentially violating federal law. Whistleblowers do not have to “cite a code section [they] believe[] was violated” in order to satisfy the specificity requirement of § 806. *Welch v. Chao*, 536 F.3d 269, 276-277 (4th Cir. 2008) (citing *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006)). What the specificity requirement instead demands is that “employees’ communications . . . identify the specific conduct that the employee believes to be illegal.” *Id.* Defendants do not dispute that, in his phone conversations with Carragher and other CGI Federal employees, Ashmore specifically identified the conduct that he believed to be illegal—namely, the Director Shell Company Scheme. Nor do they suggest that Carragher, and the other CGI Federal employees to whom Ashmore complained did not understand to what Ashmore was referring when he told them that the Director Shell Company Scheme represented an illegal

attempt to evade federal and HUD acquisition regulations. They merely contest the specificity with which Ashmore described *how* the behavior was illegal. Specificity of this kind is not required for whistleblowers to receive the protection of § 806.

2. The Employer's Knowledge Requirement

Defendants also argue that Ashmore's complaint fails to adequately allege that Defendants knew or should have known about the protected activity. In making this argument, they rely upon the same arguments they made in challenging Ashmore's allegation that he engaged in protected activity. Specifically, they argue that, because Ashmore's allegations fail to demonstrate that he communicated sufficiently specific information to inform Defendants that they were violating federal law, Defendants could not have known that he was engaging in protected activity.

This argument has no merit. As we concluded above, Ashmore's complaint does adequately allege that, when he told Carragher and others that the Director Shell Company Scheme was a fraudulent and illegal attempt to evade federal and HUD acquisition regulations, he engaged in protected activity. Furthermore, in order to satisfy the second element of a whistleblower claim under § 806, a plaintiff does not need to demonstrate that his employer actually believed that what he said about the illegality of the company's conduct was true. He must instead demonstrate only that he did in fact communicate his reasonable belief to that effect to his employer. Courts generally find that plaintiffs meet this standard when they allege, in their complaints, "how, when and to whom" they communicated their concerns. *Sharkey*, 805 F. Supp. 2d at 56. Ashmore specifies all three in his complaint. He alleges that, beginning in early 2010 until his termination on June 16, 2010, he told various members of the RAT Pack, including Carragher, about his objections to the Director Shell Company Scheme. Compl. ¶¶ 40–42. He

also alleges that at least some of these objections were communicated via the telephone. *Id.* ¶¶ 30, 47. This is all that is required to establish a plausible inference that his employer knew or should have known of his communications and objections to the Director Shell Company Scheme.

We therefore conclude that Ashmore had adequately pled the first two elements of the whistleblower claim. Defendants do not challenge the adequacy of his allegations with respect to the third and fourth elements of the claim. Defendants' motion to dismiss Ashmore's claim pursuant to § 806 of the Sarbanes-Oxley Act is accordingly denied.

B. The State Law Claims

In addition to his claim under § 806 of the Sarbanes-Oxley Act, Ashmore alleges that Defendants committed breach of contract when they fired him after 13 months of employment at CGI Federal without paying him the bonus that they were contractually obligated to provide. In the alternative, he also brings a promissory estoppel claim for relief for Defendants' failure to pay the bonus that Ashmore alleges he was verbally promised, at the time of his hire, that he would receive.

Defendants move to dismiss both claims. Their motion to dismiss the promissory estoppel claim is granted. As numerous courts have recognized, New York law does not recognize claims for promissory estoppel in the employment context. *See Rojo v. Deutsche Bank*, No. 06 Civ. 13574 (HB), 2010 U.S. Dist. LEXIS 62796, at *23 (S.D.N.Y. June 23, 2010); *Henry v. Dow Jones*, No. 08 Civ. 5316 (NRB), 2009 U.S. Dist. LEXIS 6508, at *5 n. 8 (Jan. 28, 2009); *Shapira v. Charles Schwab & Co.*, 225 F.Supp. 2d 414, 419 (S.D.N.Y.2002) ("New York does not apply the doctrine of promissory estoppel in the employment context. A prospective employee, in other words, cannot sue an employer who reneges on a job offer or other

employment promise on such a theory.”); *Pancza v. Remco Baby, Inc.*, 761 F. Supp. 1164, 1172 (D.N.J. 1991) (under New York law, “promises surrounding an employment relationship are insufficient to state a cause of action for promissory estoppel”); *Dalton v. Union Bank of Switzerland*, 520 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) (“The fact that defendant promised plaintiff employment at a certain salary with certain other benefits, which induced him to leave his former job and forego the possibility of other employment in order to remain with defendant, does not create a cause of action for promissory estoppel.”). Ashmore cannot therefore invoke the doctrine of promissory estoppel to obtain relief for Defendants’ failure to pay him a bonus after his first year of employment at CGI Federal.

The same is not true of Ashmore’s breach of contract claim. Defendants argue that this claim must also fail because, under the terms of the contract, the decision to award Ashmore a bonus was a purely discretionary one. As Defendants point out, it is well-settled law in New York that “an employee cannot recover a bonus under an employment agreement that provides the employer with absolute discretion in deciding whether to pay the bonus.” *Bravia Capital Partners, Inc. v. Fike*, No. 09 Civ. 6375 (JFK), 2011 U.S. Dist. LEXIS 141013, at *11 (S.D.N.Y. Dec. 6, 2011).

Defendants are correct that, *if* the decision to award Ashmore a bonus was subject to the absolute discretion of his employer, Ashmore could not maintain a breach of contract claim under New York law. We note, however, that courts dismiss breach of contract claims for his reason only when the purely discretionary nature of the bonus decision is stated unambiguously in the contractual documents. *See, e.g., Fishoff v. Coty Inc.*, 634 F.3d 647, 653-54 (2d Cir. 2011) (under New York law, “[d]iscretion to modify or cancel an incentive . . . will not be implied if there exists no explicit contractual provision assigning the employer absolute discretion to pay

such compensation”); *O’Shea v. Bidcom, Inc.*, No. 01 Civ. 3855, 2002 U.S. Dist. LEXIS 13225, at *3 (S.D.N.Y. July 22, 2002) (“When finding that a specific employment contract vested an employer with the absolute discretion whether to award incentives, courts have relied on clauses that ‘unambiguously’ vest such power.”); *Culver v. Merrill Lynch & Co.*, No. 94 Civ. 8124 (LBS), 1995 U.S. Dist. LEXIS 10017, at *9–10 (S.D.N.Y. July 17, 1995) (refusing to dismiss a breach of contract claim when “[n]othing in the language of this compensation plan, we believe, makes it absolutely clear that [the employer] was to have complete discretion in determining whether to award any compensation to Culver for services rendered”).

In this case, while the contractual documents do make clear that CGI Federal enjoyed considerable leeway to determine whether and what size of a bonus it would award, they do not make unambiguously clear that the employer enjoyed absolute discretion over these decisions. The relevant language is contained in the offer letter that Ashmore received from CGI Federal on April 21, 2009 and that Ashmore signed, indicating his acceptance of the job offer, the following day. It states:

“Profit Participation Program: You will be eligible to be a participant in the CGI Profit Participation Program. Through this program, you can earn an annual bonus based on the achievement of certain financial results, client satisfaction, member satisfaction and other measures tied to your performance. This program is dependent upon the success of the company, your business and your own performance.” Carragher Decl. Ex. A.

Defendants argue that the contingent phrasing of the provision (“you can earn an annual bonus” rather than “you will earn an annual bonus”) and the numerous conditions it attaches to the actual receipt of a bonus indicate that CGI Federal retained absolute discretion over the decision whether to award Ashmore a bonus, and to determine the amount.

We disagree. While the contingent nature of the language does make clear, as Defendants argue, that CGI Federal enjoyed considerable discretion to determining whether to pay bonuses,

we do not find that the passage quoted above unambiguously vests CGI Federal with absolute discretion over bonus decisions. To the contrary, by linking the receipt of a bonus to Ashmore's job performance—assessed with respect to a variety of factors, both listed and unlisted—the language quoted above instead suggests that CGI Federal's discretion was constrained by the obligation to base the decision whether to award him a bonus, and how much to award, on his job performance.

Indeed, the bonus provision quoted above contains none of the “magic words” that courts generally require before concluding that the employer's discretion was unambiguous. *Culver*, 1995 U.S. Dist. LEXIS 10017, at *9–10 (refusing to dismiss breach of contract claim when the contractual language failed to state that the payment of bonuses “shall be at the discretion of the management” or that the bonus plan could be “amended, terminated or revoked at any time” and contained no other “magic words” of this kind); *Smith v. Railworks Corp.*, No. 10 Civ. 3980 (NRB), 2011 U.S. Dist. LEXIS 55031, at *15–17 (S.D.N.Y. May 16, 2011) (same). It does not state, in other words, that the decision to award bonuses was entirely discretionary; nor does it indicate that Ashmore's eligibility to participate in the bonus program could be revoked at any time.

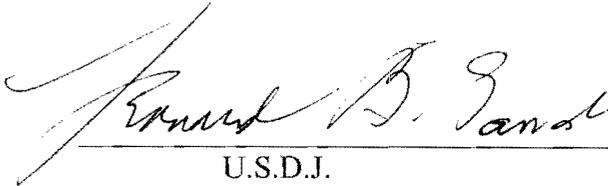
We therefore conclude that the contractual language does not make unambiguously clear CGI Federal's absolute discretion with respect to bonus awards. Ashmore can as a result maintain a claim for breach of contract under New York law. Defendants' motion to dismiss the breach of contract claim is denied.

I. Conclusion

Defendants' motion to dismiss Plaintiff's claim for promissory estoppel is granted. All other motions to dismiss are denied.²

SO ORDERED.

Dated: June 12, 2012
New York, NY


U.S.D.J.

² The Court has considered all of the parties' other arguments and found them to be moot or without merit.