UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ANTHONY COLESANTI, Plaintiff,	:	
v.	:	C.A. No. 18-491WES
BECTON DICKINSON as successor entity to BARD DAVOL, INC., a division of C.R. BARD, INC., Defendant.	:	

REDACTED REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge.

Patent/trademark attorney Anthony Colesanti has sued his former employer, Becton Dickinson, as successor entity to Bard Davol, Inc., a division of C.R. Bard, Inc., (hereinafter, "Bard"). His Verified Complaint of Retaliation against Whistleblower for Damages ("Complaint") alleges that Bard fired him for reporting an improper royalty overpayment to a French physician patent holder and for disclosing a draft of an independent audit report focused on royalty mismanagement to a compliance officer; he claims that the firing amounts to retaliation for engaging in protected whistleblowing, which is prohibited by 18 U.S.C. § 1514A, the Sarbanes-Oxley Act ("SOX"). Invoking Fed. R. Civ. P. 12(b)(6), Bard challenges the plausibility of Colesanti's pleading. It argues that the Complaint rests on Colesanti's disclosure of his own legal error in repeatedly (and erroneously) advising Bard's Finance Department to continue making a certain royalty payment that was no longer due pursuant to the operative royalty agreement, as well as on Colesanti's communications attempting to deflect blame for his own error and seeking to participate in Bard's development of a solution. Bard asks the Court to dismiss the case because each of the communications that Colesanti claims is a SOX "protected

activity" does not plausibly amount to disclosure of conduct that Colesanti reasonably believed amounted to fraud in violation of one of the enumerated provisions in § 1514A.

Bard's motion has been referred to me for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, I recommend that it be granted.

I. BACKGROUND[1]

In 2004, Colesanti was hired as an in-house patent and trademark attorney to advise Bard regarding intellectual property rights. Compl. ¶ 12, 22. Regarding royalty agreements, he was responsible for determining their impact on patents and "patent schedules," although he did not negotiate, draft or administer the commercial agreements. Id. ¶¶ 24-26.

By 2013, Colesanti's workload had increased, resulting in a "hostile work environment" that was exacerbated when his assistant left on a leave of absence. Id. ¶¶ 28-29. In these tense circumstances, on October 15, 2013, Bard's Finance Department asked Colesanti to advise it on whether Bard must continue to pay a number of royalty payments, including the specific question of whether a royalty stream that Bard had been paying to a French physician, "Dr. Pa,"[2] based on patents he had licensed to Bard eighteen years before, would expire in the spring of 2014. Id. ¶ 40; ECF No. 13-1 at 3. Overwhelmed by his workload (he was "drowning," ECF No. 13-1 at 4) and suffering from a medical issue that in a few months would require a leave of

[1] As with any Fed. R. Civ. P. 12(b)(6) motion, except as otherwise indicated, this background is derived from the well-pled facts in the Complaint, together with the pro-plaintiff inferences that flow from them, all of which have been accepted as true for purposes of this analysis. Katz v. Pershing, LLC, 672 F.3d 64, 70-71 (1st Cir. 2012). It is important to note that the facts are drawn not just from the Complaint itself, but also from what the Complaint repeatedly references as "Exhibit A." Plaintiff's counsel explained that Exhibit A was not attached due to confusion about whether it should be filed under seal; however, Bard attached the same documents to its legal memorandum, labelled them as Exhibit B and docketed them at ECF No. 13-1. At the hearing, Colesanti confirmed that Bard's Exhibit B is precisely what he refers to in the Complaint as Exhibit A and that the Court may consider Bard's Exhibit B as incorporated into the Complaint as Exhibit A in connection with this Fed. R. Civ. P. 12(b)(6) motion. Jorge v. Rumsfeld, 404 F.3d 556, 559 (1st Cir. 2005). Based on the foregoing, I have considered ECF No. 13-1 as part of the Complaint.

[2] The Complaint uses the sobriquet "Dr. Pa" to refer to the French physician who received the royalty payments in issue in this case. It is not his full name. Compl. ¶ 31.

absence, Colesanti begged his supervisor for assistance and advised him that he (Colesanti) had "put [the inquiry] at the bottom of the priority list." Compl. ¶¶ 30-32, 39; ECF No. 13-1 at 3. Other than a reference months later that the matter had been "discussed," ECF No. 13-1 at 17, the record does not reflect Colesanti's response to this first Dr. Pa inquiry.

Six months later, on April 16, 2014, the Finance Department again asked Colesanti the same question as to the Dr. Pa royalty: "I know we discussed some of these a couple of months ago, but I need to make sure that I have the correct answer on these before we pay out royalties for Q1, and to make sure our BVR is correct for the rest of the year. Can you please confirm." Id. Colesanti's response appears[3] to advise: "Pa royalty expired 3/1/14 worldwide, on all products . . . . US 6,723,133 provides protection for the Large . . . products until it **expires in 2019**." Id. at 14-16 (emphasis in original). The Complaint explains the response: "Colesanti only confirmed that the patents covering the products were still in force[, but] [i]n responding Colesanti was careful not to comment about whether the [Dr. Pa] royalty agreement was ending because he had insufficient time to review the contract's commercial terms," as well as because the copy he had was in French. Compl. ¶ 40. Soon after, in May 2014, Colesanti went out on a medical leave that continued until August 2014; according to the Complaint, he attributes the medical condition to "severe, chronic stress at work." Id. ¶¶ 39, 41. Bard continued to pay royalties to Dr. Pa based on the "large product" patent; the first payment beyond the term of the royalty agreement was made while Colesanti was on leave. Id. ¶ 41. The Complaint alleges that the Finance Department misconstrued Colesanti's carefully cabined response, which provided the patent expiration dates, but not the royalty expiration date; Bard also did not consult any other attorney. Id. ¶¶ 41-42.

[3] Colesanti's response was typed into the inquiry email, which was sent back to the Finance Department. ECF No. 13-1 at 17. It is not entirely clear what was in the inquiry and what was Colesanti's response.

A little over a year later, on July 14, 2015, the Finance Department again was deciding what royalty payments Bard was contractually obliged to pay; for the third time, it addressed the question to Colesanti. Regarding the Dr. Pa royalty, it framed the inquiry as follows: "Based on my notes it looks like the Pa royalty agreement expired on 3/1/2014 but we are still paying royalties on this. My guess is because we still have patents for this agreement that expire in 2019. Can we please confirm that this is the case." Id. ¶ 43. On July 16, 2015, Colesanti advised that a portion of the Dr. Pa royalty payments needed to continue: "There are two Pa patents . . . . One of those patents has expired. The remaining patent does not cover the medium size or light . . . , only the large. You will need to figure out which product codes cover the large . . . and only pay royalties on those." ECF No. 13-1 at 6.

In early 2016, the Finance Department asked the same question for the fourth time; in this instance, the inquiry was triggered by Dr. Pa's complaint about the reduction of his royalty stream. Compl. ¶¶ 46, 49. On February 17, 2016, the Finance Department asked Colesanti if Bard "should be paying until 2019 per the attached Pa Memo," and clarified that this would be more than just the large product patent: "this could cause us to pay out a significant royalty to him, that we haven't been paying since Q2 2014." ECF No. 13-1 at 7-8. Colesanti responded on February 18, 2016: "I reviewed this. Yes, you are correct." Id. at 8.

"[T]wo days later," Colesanti reviewed the commercial terms of the Dr. Pa agreement and asked to have a "Commercial Attorney" review it also, which was done. Compl. ¶ 49. This review revealed that the legal duty to pay any royalties to Dr. Pa ended with the expiry of the royalty agreement in 2014, even though some of the patents continued until 2019. Id. ¶ 47. The discovery compelled the conclusion that royalty payments made after the 2014 termination of the

Dr. Pa agreement – totaling between $800,000 and $1 million – were overpayments. Id. ¶¶ 47, 50.

In what he alleges to be his first act of SOX whistleblowing, on February 25, 2016, Colesanti transmitted this conclusion to his superiors, the assistant general counsel and the vice presidents of intellectual property and research and development. ECF No. 13-1 at 9; Compl. ¶ 49. In the same communication, Colesanti began his analysis of blame for the error – "[a]s to why this was missed – tougher question to answer." ECF No. 13-1 at 9. He suggested, "This might support the ongoing need for a proper company-wide contract management system that can generate reminders." Id. When Bard blamed Colesanti for the Dr. Pa overpayment, Colesanti responded by asking for an outside, independent audit; Bard agreed. Compl. ¶¶ 51, 65. After some hesitation, at the suggestion of "the legal department," Bard's Finance Department, acting through a representative identified in the Complaint as Mehdi Syed or "Mehdi," engaged PriceWaterhouse Coopers ("PWC") to perform the audit. Id.; ECF No. 13-1 at 18, 22. The Complaint alleges that Bard's decision to terminate him nine to ten months later was in retaliation for the February 25, 2016, communication and related follow-up: "for reporting the issues related to improper royalty payments because the entire system for royalty payments was incorrectly administered." Compl. ¶ 53.

Shortly after Colesanti revealed the Dr. Pa overpayment to his superiors, with the assistance of outside counsel and its French legal advisers, Bard promptly notified Dr. Pa that his royalty payments should have stopped in 2014. ECF No. 13-1 at 12. [redacted]

[redacted] The Complaint does not reveal what happened during the telephonic meeting with Dr. Pa or how that meeting affected Bard's ultimate decision whether to press further for recoupment from Dr. Pa or not. It alleges only that, "[Bard] allowed the licensor to retain the overpayment; potentially to avoid having to restate its earnings." Compl. ¶ 8.

During the spring and into the summer of 2016, discussion of the Dr. Pa overpayment continued. On July 26, 2018, Colesanti told a colleague that Mehdi of the Finance Department had "informed the Board that he has lost confidence in [Colesanti's] ability to do [his] job." ECF No. 13-1 at 18. The next day (July 27, 2016), Colesanti sent lengthy emails to Bard's senior management, including the general counsel and vice president of research and development, with copies to others, seeking to point out "salient facts" to address "your negative perception of my performance related to the recent royalty payment issues." Id. at 20-23. In these emails, Colesanti claimed that "the data [he] provided was accurate," that the overpayments began while he was on medical leave and that Bard had "misconstrued the termination date of the royalty payments." Compl. ¶ 60. These communications permit the inference that the Finance Department was really at fault, not Colesanti. See id. ¶¶ 68-69; ECF No. 13-1 at 20. In one of the emails, Colesanti reported to senior employees that the vice president of research and development ("Dave") (who was the recipient of one of the emails) had told Colesanti that "our contract management system (or lack thereof) has become a significant risk to the business";

Colesanti also advised that he (Colesanti) was working with the Finance Department to implement a solution. ECF No. 13-1 at 20. In these emails, Colesanti laid out his proposal for ways to improve the contract management process and expressed his desire to work "with the team to find and implement a complete solution." Id. at 23. The Complaint alleges that these July 2016 emails are the second set of SOX whistleblowing communications, in that they "effectively blew the whistle on [Bard's] overpayment of significant royalties." Compl. ¶ 60.

Meanwhile the PWC independent audit ordered by Bard's Finance Department was continuing. Colesanti was one of the last persons interviewed in connection with the audit; the Complaint alleges that auditors had not yet learned of the Dr. Pa overpayment until he told them about it. Compl. ¶ 74. Based on Colesanti's revelation, they reviewed it. Id. On November 22, 2016, PWC published a draft of its report. Colesanti was given a copy of the draft. Id. ¶ 71. The Complaint alleges that the draft "indicated a number of issues including non-compliance with contract terms, exchange rates, definitions, etc.," as well as "that [Bard] neither followed the explicit terms of its royalty agreements nor did [Bard] properly administer and pay for these royalty agreements." Id. ¶¶ 65-66. Specifically, "[a]s an example of commercial contract mismanagement, PWC confirmed that improper payments were likely made to hospitals associated with physician licensors and that there was no system in place for tracking such improper payments in violation of anti-kickback statutes." Id. ¶ 6.

At about the same time that Colesanti saw the draft PWC audit report, he also observed Bard's compliance officer meet with Mehdi, the same representative of the Finance Department who had made the decision to engage PWC. Id. ¶ 65; see ECF No. 13-1 at 22. "Approximately 2-3 days [later], Colesanti inquired about whether [the compliance officer] was aware of [the PWC draft]." Compl. ¶ 65. When the compliance officer "stated that he was not aware of any of

the problems related to royalty overpayments, problems related to contract administration or that there had even been an audit," Colesanti forwarded the PWC draft to him. Id. "Almost immediately thereafter BD terminated Colesanti."[4] Id. The disclosure of the PWC draft to the compliance officer is the third communication that Colesanti alleges constitutes SOX whistleblowing.

To link these facts to SOX, the Complaint concludes that Bard's "failure to accurately and properly keep track of or pay royalties that were due and owing resulted in a material misrepresentation of such royalties to Bard's shareholders and in any Securities and Exchange Commission filings." Id. ¶ 95; see id. ¶ 32 ("royalty payments . . . impact shareholder revenues, are reportable under Securities and Exchange Commission (SEC) Rules and implicate SOX reporting requirements"). Colesanti claims that Bard retaliated against him "for reporting the issues related to improper royalty payments because the entire system for royalty payments was incorrectly administered." Id. ¶ 53. To permit the inference that Bard knew it was perpetuating a fraud on its shareholders, Colesanti points to Bard's failure to inform the PWC audit team about the Dr. Pa overpayment, "at least until the investigators met with Colesanti who provided the information that Bard failed to provide." Id. ¶ 96. Nowhere does the Complaint expressly state that Colesanti formed the subjective belief that the Bard conduct that he exposed in each of his three SOX whistleblower communications actually amounted to or implicated fraud. However, the Complaint does allege that Colesanti engaged in SOX "protected conduct" and/or that he is a "whistleblower," id. ¶¶ 72, 81, 87, 88, as well as that Bard knew it was perpetuating

[4] The Complaint is ambiguous regarding when Colesanti was actually fired. Paragraph 71 states that "Colesanti was terminated on November 29," which is immediately after the alleged whistleblowing disclosure of the draft PWC audit to the compliance officer. By contrast, paragraphs 77 and 91(l) state that Bard terminated Colesanti almost a month later, on December 21, 2016. For Fed. R. Civ. P. 12(b)(6) purposes, the ambiguity is not material.

fraud by failing to tell PWC about the Dr. Pa overpayment, but allowing Colesanti to disclose it to them, id. ¶ 96.

In connection with whether the Complaint plausibly alleges a theory of "fraud [that] approximate[s] the basic elements of a claim of securities fraud[,]" Bard asks the Court to consider the "material[ity]" of the conduct that was disclosed by the alleged whistleblowing. ECF No. 10-1 at 14. Specifically, it asks the Court to take notice of its contemporaneous public Securities and Exchange Commission EDGAR filing,[5] which establishes that its total income for each of the two or three years when Dr. Pa was overpaid exceeded $3.3 billion. ECF No. 10-4. Factually, Bard contends that this establishes that the Dr. Pa royalty overpayment (a total of approximately $900,000 paid in 2014, 2015 and possibly in 2016) represents a scintilla (less than 0.00025%) of Bard's total revenues.

II. STANDARD OF REVIEW

To avoid foundering in the face of motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege a plausible entitlement to relief that gives the defendant fair notice of the claim and the grounds on which it rests. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007).[6] The plausibility inquiry requires the court to

[5] EDGAR is the Electronic Data Gathering, Analysis, and Retrieval system that the Securities and Exchange Commission uses to collect an array of financial information on companies. The Court may take judicial notice of Bard's publicly reported revenues without converting this motion to one for summary judgment. Andersen v. Lasalle Bank Nat'l Ass'n, No. 15-30107-MGM, 2016 WL 3093375, at *1 (D. Mass. June 1, 2016), appeal dismissed (Oct. 4, 2016). At the hearing, Colesanti assented to this proposition. ECF No. 20 at 15.

[6] Colesanti's Complaint (but not his legal argument in opposition to the motion to dismiss) cites a decision of the Department of Labor's Administrative Review Board ("ARB") holding that the pleading standard articulated in Twombly/Iqbal does not apply to a SOX whistleblower claim. Compl. ¶ 79. This is not correct. Because Congress anointed the ARB as the *nisi prius* decider of SOX whistleblower claims, its decisions pertaining to the interpretation of §1514A may well be entitled to Chevron deference. However, the ARB's view of the appropriate standard of review is not. Courts routinely deploy Twombly/Iqbal in considering the plausibility of a SOX whistleblower's pleading. See, e.g., Nielsen v. AECOM Tech. Co., 762 F.3d 214, 218 (2d Cir. 2014) (motion to dismiss SOX whistleblower complaint should be granted if "well-pled facts do not permit the court to infer more than the mere possibility of misconduct.") (citing Twombly/Iqbal); Wood v. Dow Chem. Co., 72 F. Supp. 3d 777, 783 (E.D. Mich. 2014) (standard of review for SOX whistleblower Fed. R. Civ. P. 12(b)(6) motion is

distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012). This two-pronged approach begins by identifying and disregarding statements in the complaint that merely offer "'legal conclusion[s] couched as . . . fact[ ]'" or "[t]hreadbare recitals of the elements of a cause of action." Iqbal, 556 U.S. at 1949-50 (quoting Twombly, 550 U.S. at 555). "A plaintiff is not entitled to 'proceed perforce' by virtue of allegations that merely parrot the elements of the cause of action." Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011). Factual allegations that appear to be internally inconsistent with other well-pled factual allegations must also be set aside. Hinton v. Trans Union, LLC, 654 F. Supp. 2d 440, 449 (E.D. Va. 2009), aff'd, 382 F. App'x 256 (4th Cir. 2010). The Court must then determine whether the well-pled facts, taken as true, are sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 678). In doing so, the complaint should be read holistically with a heavy dose of common sense. Rodriguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283-84 (1st Cir. 2014).

In the SOX whistleblower context, the Twombly/Iqbal standard may be applied forgivingly: "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Wood v. Dow Chem. Co., 72 F. Supp. 3d 777, 783 (E.D. Mich. 2014) (citing Iqbal, 556 U.S. at 596). And because SOX whistleblower claims can be fact-intensive, courts have expressed reluctance to dispose of them at the motion to dismiss stage. E.g., Rhinehimer v. U.S. Bancorp Inv., Inc., 787 F.3d 797, 811-12 (6th Cir. 2015) ("[T]he inquiry into whether an employee had a reasonable

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Twombly/Iqbal); cf. Smith v. Berryhill, 139 S. Ct. 176, 1778 (2019) (Chevron deference does not extend to Social Security Administration's interpretation of the scope of judicial review).

belief [for purposes of a SOX retaliation claim] is necessarily fact-dependent, varying with the circumstances of the case."); Thomas v. Tyco Int'l Mgmt. Co., LLC, 262 F. Supp. 3d 1328, 1336 (S.D. Fla. 2017) ("The inquiry into whether Plaintiff had a reasonable belief for purposes of her SOX retaliation claim is a fact-dependent one inappropriate for resolution at the motion to dismiss stage."). Nevertheless, if a complaint fails to lay out facts plausibly permitting the inference that the plaintiff blew the whistle on fraud that he reasonably believed at least approximates the basic elements of a claim of securities fraud, the claim should be dismissed. See, e.g., Kantin v. Metro. Life Ins. Co., 696 F. App'x 527, 529 (2d Cir. 2017) (affirming grant of motion to dismiss SOX whistleblower complaint where plaintiff "failed to make an adequate showing [that] he had an objectively reasonable belief that [the defendant] engaged in some type of fraudulent activity"); Nielsen v. AECOM Tech. Co., 762 F.3d 214, 218 (2d Cir. 2014) (affirming dismissal of SOX whistleblower complaint because "well-pled facts do not permit the court to infer more than the mere possibility of misconduct"); Diaz v. Transatlantic Reinsurance Co., 16 Civ. 1355, 2016 WL 3568071, at *5 (S.D.N.Y. June 21, 2016) (motion to dismiss SOX whistleblower complaint granted because it failed plausibly to allege either reported conduct involving false or fraudulent information provided to shareholders or reported conduct engaged in with intent to deceive shareholders).

Although a SOX whistleblower claim must derive from the claimant's belief that she has reported conduct amounting to fraud, it remains unclear whether the heightened pleading standard of Fed. R. Civ. P. 9(b) must be applied to the fraud allegations. As of this writing, no court within the First Circuit has addressed the issue. Only the Fifth Circuit and courts within the Second and Eleventh Circuits have crisply held that a SOX whistleblower is not required to plead with particularity in accordance with Fed. R. Civ. P. 9(b). Wallace v. Tesoro Corp., 796

F.3d 468, 480 (5th Cir. 2015) ("Nothing in SOX or Rule 9(b) suggests that a reasonable belief of fraud must be pleaded with particularity."); Hendrick v. ITT Engineered Valves, LLC, No. 1:16-CV-204-SA-DAS, 2018 WL 837600, at *3 (N.D. Miss. Feb. 12, 2018) (SOX whistleblower "is not required to plead with particularity in accordance with Rule 9(b)"); Burns v. Medtronic, Inc., No. 8:15-cv-2330-T17-TBM, 2016 WL 3769369, at *3 (M.D. Fla. July 12, 2016) (adopting Wallace's holding that fraud allegations in SOX claims "do not have to be pled with the particularity required by 9(b)"); Wiggins v. ING U.S., Inc., No. 3:14-CV-01089 (JCH), 2015 WL 8779559, at *3 (D. Conn. Dec. 15, 2015) (§ 1514A's language "protects an employee who 'reasonably believes' that conduct violates an enumerated statute"; Fed. R. Civ. P. 9(b) heightened pleading standard does not apply). The opposing view is not persuasively stated in the few decisions found that adopted it. See Wiest v. Lynch, 710 F.3d 121, 143 n.10 (3d Cir. 2013) (Jordan, J., dissenting) (arguing that court should apply 9(b)); Fuqua v. SVOX AG & SVOX USA, Inc., No. 14 C 216, 2014 WL 3811047, at *7 (N.D. Ill. Aug. 1, 2014) (without analysis of why, finding SOX whistleblower complaint insufficient based in part on Fed. R. Civ. P. 9(b)).

I find compelling the analysis deployed in the Second, Fifth and Eleventh Circuits. Because § 1514A protects the employee's reasonable subjective belief of fraud, and does not require proof of actual fraud, I have not applied the Fed. R. Civ. P. 9(b) particularity requirement to determine the sufficiency of the Complaint.

III. APPLICABLE LAW

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted Sarbanes-Oxley in 2002."

Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 773 (2018). Under § 1514A, SOX provides whistleblower protection to:

> [A]ny lawful act done by [an] employee 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 . . . a person with supervisory authority over the employee.

18 U.S.C. § 1514A. The goal of § 1514A is to "encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies." S. Rep. No. 107-146, at 19 (2002). The requirements for a *prima facie* SOX whistleblower case are articulated in the Department of Labor regulations. Day v. Staples, Inc., 555 F.3d 42, 53 (1st Cir. 2009). They provide that the employee's complaint must allege the existence of facts and evidence showing that: "(i) the employee engaged in a protected activity or conduct; (ii) the [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) the employee suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1); see Stewart v. Doral Fin. Corp., 997 F. Supp. 2d 129, 134-35 (D.P.R. 2014).

The first prong – whether the employee engaged in protected activity – is at the center of this case. This aspect of § 1514A was interpreted by the ARB in Sylvester v. Parexel Int'l LLC, ARB No. 07-123, 2011 WL 2517148 (U.S. Dept. of Labor May 25, 2011),[7] which held that the

[7] The ARB originally endorsed a stricter interpretation in Platone v. FLYi, Inc., ARB No. 04-154, 2006 WL 3193772 (U.S. Dept. of Labor Sept. 29, 2006), which held that the employee's "communications must definitively and specifically relate to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1)." Id. at *9. In Sylvester, the ARB concluded that Platone was "often applied too strictly" and adjusted the focus to "whether the employee reported conduct that he or she reasonably believe[d] constituted a violation of federal law." Sylvester, 2011 WL 2517148, at *17. In Day, decided before Sylvester, the First Circuit deferred to the ARB's interpretation. Day, 555 F.3d at 55. Since Sylvester, every court to consider the matter has rejected Platone and adopted the Sylvester interpretation that the employee must demonstrate an objectively reasonable

employee must show (1) she had a subjective belief that the complained-of conduct constitutes a violation of relevant law, and (2) that the belief was objectively reasonable. Id. at *17. The "relevant law" is mail fraud; wire fraud; bank fraud; securities fraud; any rule or regulation of the Securities and Exchange Commission; and any provision of federal law relating to fraud against shareholders. Day, 555 F.3d at 54-55. As the First Circuit summarized in Day:

> The elements of a cause of action for securities fraud resembl[e] . . . common-law tort actions for deceit and misrepresentation. Those elements typically include a material misrepresentation or omission, scienter, loss, and a causal connection between the misrepresentation or omission and the loss. Securities fraud under section 10(b) and Rule 10b-5 requires: (1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.

Id. at 55-56 (internal citations and quotation marks omitted).

To plausibly plead an objectively reasonable subjective belief that the employer has engaged in fraud as defined in SOX, the claimant need not identify the specific law believed to have been violated, nor must she prove that there was actual fraud. Id. at 55; Fraser v. Fiduciary Tr. Co. Int'l, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) (employee need not "cite a code section he believes was violated"). Nevertheless, the cases are clear that the plaintiff's belief must at least approximate the basic elements of a listed law in § 1514A in order to be objectively reasonable. Rocheleau v. Microsemi Corp., Inc., 680 F. App'x 533, 535 (9th Cir. 2017); Nielsen, 762 F.3d at 221 n.6; see Day, 555 F.3d. 56 (employee's theory must rest on fraud that "meet[s] the basic components of fraud or of securities fraud"). As the court in Lamb v. Rockwell Automation, Inc., 249 F. Supp. 3d 904 (E.D. Wis. 2017), put it, "some amount of

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subjective belief. See, e.g., Genberg v. Porter, 882 F.3d 1249, 1255-56 (10th Cir. 2018) (adopting Sylvester); Beacon v. Oracle Am., Inc., 825 F.3d 376, 380 (8th Cir. 2016) ("This court, joining the Second, Third, and Sixth Circuits, adopts the Sylvester standard."); Stewart, 997 F. Supp. 2d at 136 (District of Puerto Rico adopts Sylvester, placing "particular emphasis on the fact that the First Circuit granted Chevron deference to the ARB in Day and that the two Circuit Courts who have decided this identical issue have applied the framework set forth in Sylvester."). For the reasons articulated in these decisions, I apply Sylvester in this report and recommendation.

'tethering,' however minimal, must be required to connect the plaintiff's beliefs about wrongdoing to the fraud-prevention purposes of SOX." Id. at 912 (listing cases).

"Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Shea v. Kohl's Dep't Stores, Inc., No. 7:16-cv-01155-TMP, 2018 WL 2676164, at *5 (N.D. Ala. Feb. 18, 2008). "That is to say, a plaintiff 'must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation." Wood, 72 F. Supp. 3d at 785 (quoting Livingston v. Wyeth, Inc., 520 F.3d 344, 352 (4th Cir. 2008)). A "plaintiff's particular educational background and sophistication [is] relevant to the subjective component." Day, 555 F.3d at 54 n.10. In determining the sufficiency of an employee's claim of an objectively reasonable belief that disclosed conduct amounts to fraud, the court also may be informed by the employer's after-the-fact reaction. Id. at 58 ("A company's explanations given to the employee for the challenged practices are also relevant to the objective reasonableness of an employee's belief in shareholder fraud.").

Because SOX was enacted to protect shareholders, courts have consistently held that an activity is not SOX-protected where it involves disclosure of conduct that is innocuous or trivial, or where it bears only a tenuous relationship to shareholder interests, even if the plaintiff reasonably believed the activity to be a violation of federal law dealing with fraud. Nielsen, 762 F.3d at 222 (citing Sylvester, 2011 WL 2165854, at *14-15). Relatedly, courts have rejected SOX whistleblower claims grounded in securities fraud because the alleged fraud does not rise to the level that would be material to the shareholders. Westawski v. Merck & Co., 215 F. Supp. 3d 412, 429 (E.D. Pa. 2016) ("study cost Merck just over $200,000, or 0.000004% of its sales

revenue in 2010 . . . it cannot be said that such a small amount meets the materiality requirement for an objectively reasonable belief in shareholder fraud") (collecting cases), aff'd, Westawski v. Merck & Co., 739 F. App'x 150 (3d Cir. 2018); Nazif v. Comput. Scis. Corp., No. C-13-5498 EMC, 2015 WL 3776892, at *6 (N.D. Cal. June 17, 2015) ("[E]ven if this Court assumes that the entire value of the Abbott Contracts was improperly booked as revenue . . . , a $1-2 million overstatement of revenue would be a 'minor or technical violation' that is not material."). Nevertheless, conduct that may not involve a substantial amount of money might still implicate fraud against shareholders; for example, repeated improper use by a chief executive officer of corporate funds for personal expenses (resulting in reimbursement and public disclosure when it was exposed) was found to be more than sufficient to lead a reasonably objective individual to believe the reported activity was fraud. Wood, 72 F. Supp. 3d at 788-89. Such a misstatement is material as a qualitative matter. Nazif, 2015 WL 3776892, at *6 n.7 (citing Nathanson v. Polycom, Inc., 84 F. Supp. 3d 966, 974 (N.D. Cal. 2015)) (chief executive officer stealing from company is material without regard to amount stolen).

IV. ANALYSIS

In a nutshell, Colesanti's memorandum of law argues to this Court that he reported "fraudulent activity to his supervisor and was subsequently terminated after an independent audit confirmed his report." ECF No. 15 at 2. The problem with this proposition is that his Complaint falls fatally short of alleging that what Colesanti reasonably subjectively believed[8] he had

[8] For purposes of this analysis, the Court presumes that the Complaint contains a factually grounded assertion of Colesanti's subjective belief that he was disclosing fraud. However, nowhere does the Complaint state that Colesanti "reasonably believe[d]" that what he was disclosing amounted to SOX-level fraud, which is an essential element of a SOX whistleblower claim. 18 U.S.C. § 1514A. Rather, the Complaint is replete with the conclusory allegations that Colesanti engaged in SOX "protected conduct" and/or that he is a "whistleblower." Compl. ¶¶ 72, 81, 87, 88. These are the precise sort of "allegations that merely parrot the elements of the cause of action," which Twombly/Iqbal require be set aside in performing the Fed. R. Civ. P. 12(b)(6) analysis. See Ocasio-Hernandez, 640 F.3d at 12. This report and recommendation steps over this deficit; it examines whether, assuming such a belief, it would be objectively reasonable. If the Court rejects my recommendation that the Complaint should be dismissed

uncovered and was disclosing approximates "fraudulent activity." Id. Put differently, the pleading cannot clear the Twombly/Iqbal bar because it does not contain facts (as opposed to conclusory allegations) that establish or permit the inference that a person with Colesanti's legal training and experience could reasonably believe that the conduct he disclosed to his superiors at Bard involved "deceit [or] misrepresentation" that approximates or implicates fraud or that the conduct is otherwise tethered to wrongdoing connected to "the fraud-prevention purposes of SOX." Lamb, 249 F. Supp. 3d at 912; see Day, 555 F.3d at 55-56.

When Colesanti's first act of whistleblowing is examined with all inferences drawn in his favor, what he exposed was the Finance Department's mistaken reliance on an overworked attorney who was trying to provide competent legal advice regarding what royalties to pay without having ready access to the resources and documents that he needed to do the job effectively. The Court should also accept that this first act of whistleblowing exposed that such reliance on an overworked attorney like Colesanti amounted to a flawed system for determining what royalties were legally required to be paid and that Bard did not have an effective royalty management system. And after Colesanti disclosed the Dr. Pa overpayment, the Complaint makes clear that Bard adopted Colesanti's suggestion that PWC should be engaged to do an independent audit of Bard's royalty management system. Compl. ¶¶ 50, 65. There is not a whiff of fraud, deceit or misrepresentation buried in these allegations. While they certainly are plausible in alleging that Colesanti exposed a serious mistake, and perhaps incompetence, understaffing and under-resourcing, they simply do not describe anything that Colesanti objectively could have believed to be fraud or SOX-implicating wrongdoing.

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for failure to allege conduct that a reasonable person in Colesanti's circumstances could subjectively believe amounted to fraud, I alternatively recommend dismissal with leave to amend to cure (if it can be cured) this deficiency.

In an effort to rehabilitate this claim, Colesanti argues that the Court should look to events subsequent to the disclosure. He contends that these facts permit the inference that Bard viewed the Dr. Pa overpayment as information that it needed to cover up. See Day, 555 F.3d at 58.

First, Colesanti alleges that it is reasonable to posit that exposing the Dr. Pa overpayment is SOX whistleblowing because Bard covered up the overpayment by "allow[ing] the licensor [Dr. Pa] to retain the overpayment; potentially to avoid having to restate its earnings." Compl. ¶ 8. The problem with this contention is that the Complaint also includes the documents in Plaintiff's Exhibit A (Defense Exhibit B), which make clear that Bard promptly revealed the overpayment to Dr. Pa and sought and obtained legal advice about trying to go after Dr. Pa, that its French counsel advised that there was a risk that it would lose if it tried to litigate the issue, that Bard considered and concluded that there was no compliance-based reason to sue Dr. Pa for recoupment, and that Bard's legal team was planning a telephonic meeting with Dr. Pa regarding its demand for recoupment. [redacted] These well-pled facts render utterly implausible the inconsistent allegation that Bard "allowed" Dr. Pa to retain the overpayment as part of a fraud to cover up that it had been made. See Leroy v. Medtronic, Inc., No. 3:14CV284/MCR/CJK, 2015 WL 4600880, at *4 (N.D. Fla. July 29, 2015) (exception to rule that facts are taken as true for purposes of motion to dismiss arises when "facts alleged are internally inconsistent"). Nor does the Complaint contain a single plausible fact permitting the inference that recovery of the Pa overpayment might require a restatement of earnings or that such a consideration played any role in Bard's strategizing over seeking recoupment from Dr. Pa. When a "plaintiff's allegations appear internally inconsistent," and complaint otherwise lacks

"sufficient factual matter . . . to 'state a claim to relief that is plausible on its face," the pleading must be dismissed. See Hinton, 654 F. Supp. 2d at 449 (citing Twombly/Iqbal).

Also, in support of his contention that the Complaint plausibly alleges that Bard covered up his disclosure of the Dr. Pa overpayment, Colesanti points to the fact that he was one of the last persons at Bard to be interviewed by the PWC independent audit team, and that, until he told them, no one had advised the PWC auditors about the Dr. Pa overpayment error. Compl. ¶ 74. This allegation simply does not plausibly permit the inference that Bard was trying to cover up the Dr. Pa overpayment.[9] To the contrary, it establishes that PWC's independent audit team included Colesanti in the fact-gathering and that the PWC report reflected his disclosure.

To summarize, read in favor of Colesanti, the Complaint alleges that Colesanti's February 2016 disclosure – that the Finance Department wrongly and misguidedly relied on his legal advice and continued to pay Dr. Pa, and that the Dr. Pa overpayment should trigger an independent audit of royalty payments – is a SOX "protected activity" temporally linked to his termination. These allegations fail to state a claim because there are no plausible facts that would permit an objectively reasonable individual with Colesanti's legal training and experience to believe that the overpayment to Dr. Pa or the resulting need to examine the royalty management system might somehow implicate fraud. The Complaint's post-disclosure facts – that Bard accepted Colesanti's suggestion for an independent audit; engaged PWC; included Colesanti on the list of employees to be interviewed by the PWC audit team; and explored whether to pursue Dr. Pa for recoupment – hammer home the absence of fraud or cover-up. See

[9] As taught by Twombly/Iqbal, the Court must disregard the conclusory aspect of Colesanti's allegation that "Bard knew it was perpetuating this fraud on its shareholders because Bard failed to inform the PWC investigators which specific contracts and royalty payments were at issue; at least until these investigators met with Colesanti who provided the information that Bard failed to provide." Compl. ¶ 96. That is, the Court must accept as true that no one told the PWC investigators about the Dr. Pa overpayment until they met with Colesanti, who told them. However, these facts do not permit the inference that Bard therefore knew it was perpetuating fraud.

Day, 555 F.3d at 58 (company's reaction to employee's report of challenged practices relevant to objective reasonableness of employee's belief in fraud).

The second alleged "protected activity" is the July 2016 set of emails sent by Colesanti to various senior officials in the Bard legal department and other business units. The thrust of these emails is Colesanti's effort to deflect blame for the Dr. Pa overpayment from himself to others. In them, he disclosed to various senior managers what at least one of them (per his email) already knew[10] – that the "contract management system (or lack thereof) has become a significant risk to the business." ECF No. 13-1 at 20. Again there is not a hint of fraud or deceit: it is simply not plausible to posit that Colesanti reasonably believed that these emails were exposing conduct at Bard that amounted to fraud.

The third "protected activity" is the providing of a copy of the draft PWC report to Bard's compliance officer. Tipping all inferences Colesanti's way, this disclosure caused the compliance officer to become aware of a draft that revealed that Bard was not properly administering or paying for royalty agreements, and that, with no effective system in place for tracking, it was possible, indeed "likely," that improper "kickback" payments had been made to hospitals and physician licensors. Compl. ¶¶ 4, 6, 65-66. Further, before Colesanti gave him the draft, the compliance officer was not aware of problems with royalty payments or contract administration, or that an independent audit of those areas of Bard's business was in progress. Id. ¶ 65. Colesanti alleges that he was fired within days/weeks of taking this action. Id. ¶¶ 71, 77, 91(l).

[10] The emails are addressed to an array of senior officials at Bard; they include the vice president of research and development. This vice president is the same individual who is quoted by Colesanti as having concluded that Bard's contract management system was seriously deficient. ECF No. 13-1 at 20-22. Put differently, this is not Colesanti's disclosure; rather, he was parroting back what at least one of the recipients had already concluded.

The issue for the Court is whether this modest set of facts is enough to permit the inference that Colesanti gave the draft to the compliance officer in the objectively reasonable subjective belief that the draft revealed conduct amounting to fraud that was being intentionally withheld from the compliance officer. Apart from the threshold deficiency that the Complaint does not allege that Colesanti ever formed such a belief,[11] the problem is that, at most, the Complaint alleges that Colesanti disclosed to the compliance officer a draft report identifying a systemic failure of the royalty payment management system that not only resulted in the Dr. Pa overpayment payment error and adversely impacted revenues,[12] but that also created the risk that actual fraud involving "improper payments in violation of anti-kickback statutes," id. ¶ 6, might not have been detected. Because neither meets the threshold of conduct approximating the basic elements of securities fraud, the requisite subjective belief, if actually held by Colesanti, fails to clear the bar that it must also be objectively reasonable.

As to the former (an inadequate system causing adverse impact on revenues), Colesanti's claim is analogous to what the First Circuit found insufficient to support an objectively reasonable belief in Day, where the plaintiff claimed he had disclosed that Staples was using an inadequate internal tracking system resulting in "a 'needless loss of revenue [that] detrimentally affected Staples' shareholders.'" 555 F.3d at 56. The First Circuit held that "Day's belief that the process of canceling and reissuing return orders constituted fraud on shareholders because it permitted courier overbilling lacks objective reasonableness." Id. "A claim of 'needless loss of revenue' is not a claim of fraud." Id.

[11] See n.8, *supra*.

[12] The Complaint does not suggest that the overpayment to Dr. Pa conceivably amounted to a payment to induce referrals or the generation of business in violation of the anti-kickback laws.

As to the latter (an inadequate system causing risk of undetected kickbacks), Plaintiff's third disclosure lacks plausibility as SOX protected conduct because the Complaint is devoid of any suggestion that Colesanti's education, training and job experience at Bard placed him in a position to identify actual fraud in the form of payments to induce referrals or the generation of business in violation of the antikickback laws. Nor does the Complaint allege that Colesanti ever uncovered conduct involving kickbacks that amounted to actual improprieties related "to the fraud-prevention purposes of SOX." Lamb, 249 F. Supp. 3d at 912. What remains is the disclosure of PWC's speculation that fraud involving kickbacks might have occurred. However, the cases found that have considered such a claim in the SOX context uniformly hold that the disclosure of a system inadequacy or weakness that creates the risk of undetected fraud does not rise to the level required to sustain a claim of SOX whistleblowing. See Nielsen, 762 F.3d at 218 (SOX whistleblower complaint fails because "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct"); Lamb, 249 F. Supp. 3d at 915 (SOX requirement for "whistleblower to reasonably believe 'that the violation is likely to happen' . . . is not a place for open speculation; instead, the violation must be 'taking shape,' 'in motion,' or 'likely to occur' to suffice"); Nazif, 2015 WL 3776892, at *8 (no evidence that failure to maintain global contracts database actually did result in misleading financial statements; plaintiff's speculation that it could does not amount to objectively reasonable belief of fraud).

Before closing, a brief comment on materiality. Bard argues – correctly – that the disclosure of the Dr. Pa. payment, viewed in isolation, fails as a SOX "protected activity" because it is not plausible that Colesanti reasonably believed that $900,000 in lost revenue spread over two or three fiscal years would be material to an entity of Bard's size. Westawski, 215 F. Supp. 3d at 429 (loss of just over $200,000, or 0.000004% of its sales revenue in 2010

cannot "meet[] the materiality requirement for an objectively reasonable belief in shareholder fraud") (listing cases); Nazif, 2015 WL 3776892, at *8 ("Nazif presented no evidence that would indicate that CSC's apparent failure to maintain a 'global contracts database' could (and actually did) result in the publication or dissemination of materially misleading or inaccurate financial statements."). However, the Complaint alleges that Colesanti was disclosing not just the Dr. Pa overpayment, but also a failure of the overall royalty management system that the Complaint plausibly describes as "a significant risk to the business."[13] ECF No. 13-1 20. At the Fed. R. Civ. P. 12(b)(6) phase, this is enough; the materiality of what Colesanti disclosed is more appropriately tested at the summary judgment phase. See Westawski, 215 F. Supp. 3d at 429-30 (granting summary judgment based on lack of materiality); Nazif, 2015 WL 3776892, *8 (granting summary judgment based on lack of materiality).

Based on the foregoing, I find that the Complaint fails to state a plausible claim that Colesanti, in light of his sophistication as an experienced attorney, held the objectively reasonable subjective belief that any of the Bard conduct that he disclosed even approximated fraud or implicated the basic elements of a listed law in § 1514A. Rocheleau, 680 F. App'x at 535; Day, 555 F.3d at 56. Accordingly, I recommend that the Complaint be dismissed.

V. CONCLUSION

In reliance on Fed. R. Civ. P. 12(b)(6), I recommend that the Court GRANT Defendant's motion to dismiss (ECF No. 10) Plaintiff's Verified Complaint of Retaliation against Whistleblower for Damages because it fails to state a claim.

[13] For the same reason, at the Fed. R. Civ. P. 12(b)(6) phase, I do not find that the Complaint lacks plausibility because the conduct allegedly disclosed is trivial or innocuous. See Nielsen, 762 F.3d at 222 (disclosure of conduct that is innocuous or trivial does not trigger SOX remedies). Rather, I find that Colesanti's Complaint fails because it does not plausibly allege anything approximating fraud.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
July 19, 2019[14]

[14] Pursuant to the Court's Order regarding the redactions included in this report and recommendation, the effective date of this report and recommendation is the date of the issuance of the original report and recommendation, which remains under seal.