UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN NIELSEN,

Plaintiff,

-v-

AECOM TECHNOLOGY CORP., and AECOM MIDDLE EAST, LTD.,

Defendants.

12 Civ. 5163 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiff Christian Nielsen commenced this action against his former employer--defendant AECOM Middle East, Ltd. ("AME")--and its parent--defendant AECOM Technology Corp. ("AECOME" and with AME, "defendants"), alleging that defendants retaliated against him for certain whistleblowing activities in violation of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), codified at 18 U.S.C. § 1514A. (Compl. ¶¶ 51-56, ECF No. 1.)

Defendants have moved to dismiss plaintiff's complaint on the grounds that the Court lacks personal and subject matter jurisdiction over AME pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure; and that plaintiff fails to state a claim under 18 U.S.C. § 1514A pursuant to Rule 12(b)(6).

For the reasons set forth below, defendants' motion is GRANTED.

## I. BACKGROUND

### A. Factual Background[1]

AECOM is a publicly-traded company located in the United States. AME, an entity incorporated in the Bailiwick of Jersey and headquartered in Abu Dhabi, United Arab Emirates ("UAE"), is a wholly-owned subsidiary of AECOM International Consultants Limited ("AIC"), an entity incorporated also incorporated in Jersey. In turn, AIC is a wholly-owned subsidiary of AECOM Global, Inc., which is a wholly-owned subsidiary AECOM. AME is not publicly-traded and does not have operations, offices, or employees in the United States. AECOM is not involved in AME's daily operations--and the two entities do not share any personnel.

In 2010, AME hired plaintiff as a Fire Engineering Manager. AME management in the UAE made all decisions relating to hiring plaintiff. AECOM was not involved in those decisions in any way. For the entirety of his employment with AME, plaintiff worked exclusively in the UAE, Saudi Arabia, Bahrain, Qatar, and Oman. Plaintiff's job responsibilities included ensuring that all engineering plans satisfied applicable safety standards, among other things.

Plaintiff supervised another AME employee, Naung Hann, who was employed as a Fire Protection Engineer. During the time period relevant to this action, Hann worked exclusively in the UAE.

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[1] The Court accepts as true all well-pleaded allegations in the Complaint and draws all reasonable inferences in plaintiff's favor. See Levy v. Southbrook Int'l Invs., Ltd., 263 F.3d 10, 14 (2d Cir. 2001). Because there is a question of this Court's subject matter jurisdiction pending before the Court, the Court consider declarations and other documents outside the pleadings in connection with the jurisdictional issue. See Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005).

Plaintiff alleges that Hann allowed more than twenty fire safety designs to be approved even though none had undergone the requisite review process. On March 1, 2011, plaintiff warned Hann in writing that such action constituted a performance lapse.

Plaintiff alleges that he participated in a series of meetings in March 2011 regarding the issue with Hann. On March 20, 2011, plaintiff allegedly "advised AECOM management" about his concerns with Hann's performance, "including the fire safety design approval issue." Then, on March 24, 2011, plaintiff purportedly met with Andrew Bannister, AME's Regional Director for Dubai and the Northern Emirates, to discuss his concerns about Hann. Four days later, plaintiff allegedly met with Andrew Schofield, AME's then-Vice President of Building Engineering, regarding Hann. All of the alleged meetings occurred in the UAE. AECOM was not made aware of the meetings at the time they occurred nor did any AECOM personnel participate in the meetings.

After a June 7, 2011, incident in which Hann again allegedly approved fire safety drawings without the proper review, plaintiff advised Steve Royston, the Buildings Business Unit Manager for AME's Dubai office, of the issue. Throughout June 2011, plaintiff purportedly participated in another series of meetings in the UAE with AME management regarding the issue with Hann.

Plaintiff alleges that he informed Bannister and two other members of AME management--Donna Watson and Anthony McCarter--that if AME did not rectify the fire safety issue with Hann, he would have resign from AME. However, on June

23, 2011, Bannister informed plaintiff that his employment with AME was being terminated. The decision to terminate plaintiff's employment was made solely in AME's UAE office by AME personnel. AECOM was not made aware of the decision to terminate plaintiff at the time it was made--and no one from AECOM participated in making the decision. On June 27, 2011, Gehan El Fetoury, AME's Human Resources Senior Advisor (also located abroad), sent plaintiff an email confirming termination of plaintiff's employment.[2]

On July 7, 2011, plaintiff contacted Susan Frank, Vice President and Assistant General Counsel for AECOM's Global Compliance who is located in the United States, requesting that AECOM conduct an independent investigation into his dismissal. AECOM commenced the investigation and concluded that AEM justifiably terminated plaintiff's employment, with no wrongdoing having occurred.

B. Procedural Background

On December 13, 2011, plaintiff filed a complaint against AECOM with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"). In his OSHA complaint, plaintiff alleged--as he does here--that his termination violated the employee protection provisions of section 806 of SOX, 18 U.S.C. § 1514A. OSHA dismissed the complaint on the grounds that, among other things, the alleged violations were extraterritorial.

[2] Between plaintiff's June 23 meeting with Bannister and the June 27 email, plaintiff alleges that he sent an email to David Barwell, AME's Middle East CEO (located outside of the United States), on June 26, 2011, stating that he had been "unjustifiably dismissed." Barwell responded that he would investigate the matter.

Plaintiff filed objections to that dismissal and requested a hearing with one of the Department of Labor's Administrate Law Judges ("ALJ"). AECOM moved to dismiss plaintiff's claim before the ALJ, which plaintiff opposed. On May 24, 2012, ALJ granted AECOM's motion, finding that hearing plaintiff's claims would allow an improper extraterritorial application of SOX.

On July 2, 2012, plaintiff filed a complaint in this Court (the "Complaint") against AME and AECOM, alleging that defendants' termination of plaintiff violated SOX's whistleblower provision, 18 U.S.C. § 1514A.

Defendants moved to dismiss the Complaint on October 12, 2012, and the motion was fully submitted as of November 21, 2012.

## II. DISCUSSION

As discussed above, defendants seek dismissal of the Complaint on a number of grounds. The Court addresses only those dispositive to this action.

Defendants seek dismissal of the Complaint against AME under Rule 12(b)(2), on the basis that the Court does have personal jurisdiction over AME. Defendants seek dismissal of the Complaint under Rule 12(b)(6), based upon plaintiff's failure to state a claim under 18 U.S.C. § 1514A. The Court addresses each argument in turn.

### A. Personal Jurisdiction over AME

Resolving jurisdictional questions requires a "two-part analysis": first, to "determine whether, under the laws of the forum state . . ., there is jurisdiction over the defendant," and second, if so, whether exercising jurisdiction comports with

federal due process. Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005). The burden rests with the plaintiff to make a prima facie showing of jurisdiction. Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59 (2d Cir. 2012). Such a showing may be made through affidavits and other supporting materials and "must include averments of fact that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." Id. (quotation marks omitted).

To establish personal jurisdiction, a plaintiff must show (1) that plaintiff's service of process upon the defendant was procedurally proper; (2) that there is a statutory basis for personal jurisdiction; and (3) that the exercise of jurisdiction comports with procedural due process. Licci, 673 F.3d at 59-61. The court addresses the statutory basis for personal jurisdiction with reference to the laws of the forum state--here, New York. See id. at 59-60; D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006). New York law provides for personal jurisdiction over nonresident individuals or corporations in two instances, set forth in Civil Practice Law and Rules ("CPLR") §§ 301 and 302(a)(1).

CPLR § 301 submits a nonresident party to personal jurisdiction if it is "doing business" in the state. See N.Y. C.P.L.R. § 301; Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000). The "doing business" standard that confers "presence" in New York for jurisdictional purposes (irrespective of whether the defendant has any New York contacts) is met if the defendant "does business in

New York not occasionally or casually, but with a fair measure of permanence and continuity." Wiwa, 226 F.3d at 95.

CPLR § 302(a)(1), New York's "long arm statute," provides an alternate basis for the exercise of personal jurisdiction over a nonresident individual or corporation. Under the statute, a nonresident party may be subject to jurisdiction if (i) it "transacts any business within the state"; and (ii) the cause of action arose out of that transaction of business. CPLR § 302(a)(1); see also D.H. Blair, 462 F.3d at 104. "Physical presence" is not the hallmark of "transacting business": "[A]s long as [a defendant] engages in purposeful activities or volitional acts through which he avails himself of the privilege of conducting activities within the State," a defendant has "invok[ed] the benefits and protections of its laws" to subject itself to jurisdiction. Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 169 (2d Cir. 2010) (internal quotation marks, citations, and alterations omitted). The statute is clear, however, that jurisdiction may lie only where there is a "'substantial nexus' between the transaction of business and the claim." D.H. Blair, 462 F.3d at 104.

Neither the Complaint nor plaintiff's affidavit submitted in opposition to defendants' motion contains allegations or averments that would allow this Court to exercise jurisdiction over AME pursuant to either CPLR §§ 301 or 302. Indeed, the Complaint contains only the conclusory allegation that "defendants engage[ ] in business" in "this District." (Compl. ¶ 5, ECF No 1.) That is far less than the standard demands. See Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 185 (2d Cir.

1998) ("[C]onclusory non-fact-specific jurisdictional allegations" are insufficient "to establish a prima facie case of jurisdiction.").

Despite the opportunity to put in factual materials regarding the Court's jurisdiction over AME, plaintiff submitted on his own declaration in opposition to defendants' motion. (See generally Decl. of Christian Nielsen ("Nielsen Decl."), ECF No. 23-1.) In his declaration, plaintiff himself avers only that "[t]he personnel functions of [AME] offices and the central headquarters of AECOM located in New York are very much intertwined." (Nielsen Decl. ¶ 6.) Plaintiff, however, has not provided anything to support the truth of that statement. Further, plaintiff's declaration is devoid of any basis for plaintiff's own personal knowledge of AME's and AECOM's corporate structure for personnel decisions--as discussed above, plaintiff was employed at AME in a non-managerial capacity. Thus, the Court has no plausible basis to credit plaintiff's statement that AME's and AECOM's personnel decisions are intertwined.

In the absence of any allegations or factual basis for finding either that AME continuously "does business" or "transacts business" sufficient to confer personal jurisdiction here, the Court finds that it does not have personal jurisdiction over AME. Accordingly, plaintiff's claim against AME is dismissed.

B. Failure to State a Claim with Respect to AECOM

To survive a Rule 12(b)(6) motion to dismiss, "the plaintiff must provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund,

Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Alt. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (quoting Twombly, 550 U.S. at 570); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (same). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. In applying that standard, the court accepts as true all well-plead factual allegations, but does not credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." Id. If the court can infer no more than "the mere possibility of misconduct" from the factual averments, dismissal is appropriate. Starr, 592 F.3d at 321 (quoting Iqbal, 556 U.S. at 679).

18 U.S.C. § 1514A makes it illegal for any publicly traded company--or any subsidiary thereof--to, inter alia,

> discharge, demote, suspend, threaten, harass, or in any other manner discriminate against employee in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [a number of federal laws].

18 U.S.C. § 1514A(a)(1). To state a claim under the statute, a plaintiff must plausibly allege: (1) that he engaged in a protected activity; (2) the employer knew of the protected activity; (3) that the plaintiff suffered an unfavorable personnel action; and (4) that such action was taken on account of (at least in part) the plaintiff's exercising of his protected activity. Vodopia v. Koninklijke Phillips Elecs.,

N.V., 398 F. App'x 659, 662 (2d Cir. Oct. 25, 2010) (citing Fraser v. Fiduciary Trust Co. Int'l, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2007)).

Under the terms of the statute, a "protected activity" is conduct that the employee "reasonably believes constitutes" a violation of: (1) 18 U.S.C. §§ 1341, 1343, 1344, or 1348; (2) "any rule or regulation of the Securities and Exchange Commission"; or (3) "any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). The Second Circuit has found that to constitute "protected activity," "'the employee's communications must definitively and specifically relate to one of the listed categories of fraud or securities violations in 18 U.S.C. § 1514(a)(1).'" Vodopia, 298 F. App'x at 662-63 (quoting Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996-97 (9th Cir. 2009)) (alterations omitted) (emphasis in original). In addition, "the employee must have 'a subjective belief that the conduct being reported violated a listed law' and 'this belief must be objectively reasonable.'" Nance v. Time Warner Cable, Inc., 433 F. App'x 502, 503 (9th Cir. 2011) (quoting Van Asdale, 577 F.3d at 1000); see also Fraser v. Fiduciary Trust Co. Int'l, 396 F. App'x 734, 735 (2d Cir. 2010) (affirming the district court's dismissal of a SOX whistleblower claim because "the record evidence would not permit a factfinder to conclude that [the plaintiff] held both a subjectively and objectively reasonable belief that he was reporting conduct covered by the law.").[3]

Here, the Complaint fails to plausibly plead a "protected activity" sufficient to sustain plaintiff's claim here. Plaintiff asserts that he engaged in a "protected activity" in that he "reasonably believed" that reporting Hann's procedurally-

[3] Accord Gale v. U.S. Dep't of Labor, 384 F. App'x 926, 929-30 (11th Cir. 2010) (collecting cases).

improper approvals of fire safety designs amounted to both shareholder fraud by defendants and "violati[ons of] the United States mail and wire fraud statutes." (Compl. ¶ 52.) Neither of those theories supports the proposition that plaintiff's reporting of Hann's "rubber stamping" of fire safety drawings constitutes a "protected activity."

First, plaintiff fails to plausibly allege that he reasonably believed that his reporting of Hann's approvals constituted a protected activity. "'To have an objectively reasonable belief that there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud.'" Riddle v. First Tenn. Bank, Nat'l Ass'n, No. 11-6277, 2012 WL 3799231, at *8 (6th Cir. Aug. 31, 2012) (quoting Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009)). "Thus, the employee must have an objectively reasonable believe that the company intentionally misrepresented or omitted certain facts to investors, which were material and risked loss." Id. There is no allegation (or indication) that AME--or AECOM--represented anything at all about its approval procedures for fire safety drawings to its shareholders. Without any allegations about defendants' statements to shareholders regarding the subject of plaintiff's reporting to AME management, there is no basis to find that defendants misrepresented anything--or omitted material facts--to its shareholders. See id.

Second, the allegation that plaintiff "reasonably believed" that his reporting of improperly approved (or unapproved) fire safety drawings constituted a violation of the mail and wire fraud statutes is not plausible. Indeed, an "objectively

reasonable" employee could not believe that plaintiff's communications "directly and specifically" related to any of the enumerated federal laws in 18 U.S.C. § 1514A(a)(1). See Vodopia, 398 F. App'x at 663.[4]

Without plausibly alleging a "protected activity," plaintiff fails to state a claim under 18 U.S.C. § 1514A. Accordingly, the Complaint is dismissed against AECOM (and would be against AME if this Court had personal jurisdiction over AME).

## III. CONCLUSION

For the aforementioned reasons, defendants' motion to dismiss is GRANTED.

Given that the Court finds that no set of facts could sustain an action under 18 U.S.C. § 1514A against either defendant--and that this Court does not have subject matter jurisdiction over defendant AECOM Middle East, Ltd., this action is DISMISSED with prejudice.

The Clerk of the Court is directed to terminate the motion at ECF No. 12, and to terminate this action.

SO ORDERED:

Dated: New York, New York
December 11, 2012

KATHERINE B. FORREST
United States District Judge

[4] Even if such a claim was plausible, plaintiff failed to oppose defendants' motion to dismiss with respect to the "mail and wire fraud" theory and thus, is deemed to have abandoned this part of the claim. See Brandon v. City of New York, 705 F. Supp. 2d 261, 268 (S.D.N.Y. 2010) (Preska, C.J.) (collecting cases).