JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.:	2:21-CV-05803-AB (Ex)	Date:	January 26, 2022

Title: *Calvin Liu v. Tutor-Perini Corporation, et al.*

Present: The Honorable	**ANDRÉ BIROTTE JR., United States District Judge**
Carla Badirian Deputy Clerk	N/A Court Reporter
Attorney(s) Present for Plaintiff(s): None Appearing	Attorney(s) Present for Defendant(s): None Appearing

Proceedings: [In Chambers] ORDER GRANTING MOTION TO DISMISS

Before the Court is Defendants Tutor Perini Corporation ("Tutor Perini") and Frontier-Kemper Constructors, Inc.'s ("Frontier-Kemper") (collectively referred to as "Defendants") Motion to Dismiss the Complaint. ("Motion," ECF No. 37.) Plaintiff Calvin Liu filed an opposition. ("Opp'n," ECF No. 23.) Defendants filed a Reply. ("Reply," ECF No. 24.) After reading and considering the arguments presented, the Court finds this matter appropriate for resolution without a hearing and **VACATES** the January 28, 2022 hearing. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the reasons stated below, the Court **GRANTS** Defendants' Motion.

I. BACKGROUND

Plaintiff is a "former employee of [Defendants Tutor Perini and Frontier Kemper, who are] the companies () building the Purple Line Extension in Los Angeles, California." ("Compl." ECF No. 1.) Plaintiff was employed by Defendants from March 11, 2019 to August 28, 2020 as an Environmental Lead, and later, as an Office Engineer. (*Id.* at ¶ 6.) Plaintiff asserts that Tutor Perini "communicated false and fraudulent test results [about the levels of soil contamination] via email (i.e., wire

fraud) to numerous government and/or regulatory authorities." (*Id.* at ¶ 8.) During his employment, Plaintiff states he "complained that [Tutor Perini] was engag[ed] in rampant violation[s] of environmental protection statutes and regulations in order to reduce costs . . . at the expense of the health and safety of the surrounding community." (*Id.* at ¶ 9.) As a result of these complaints, Plaintiff was retaliated against and ultimately terminated. (*Id.* ¶¶ 9, 33.)

On October 21, 2020, Plaintiff initiated an administrative action by filing a whistleblower complaint against Defendants with the United States Department of Labor ("DOL") alleging that he was retaliated against for complaining about Tutor Perini's fraudulent reporting regarding soil containing hazardous materials.[1] ("Defs.' RJN," ECF No. 20 at Ex. E, 5-17.)

On November 9, 2020, the Secretary of Labor found that Plaintiff had not met his burden of establishing that he "was retaliated against in violation of [the Sarbanes-Oxley Act ("SOX")]." (*Id.* at Ex. E, 3.) Specifically, the Secretary of Labor found that Plaintiff "did not engage in () protected activity under SOX" because his complaints were "potential violations under several U.S. Environmental Protection Agency Acts." (*Id.*)

On December 9, 2020, Plaintiff appealed the Secretary of Labor's findings with the DOL and requested a hearing before an Administrative Law Judge ("ALJ"). (Defs.' RJN at Ex. F.) Defendants did not receive notice of Plaintiff's appeal until May 2021. (Declaration of Jacqueline Kim ("Kim Decl.") ¶ 5.) After waiting 180 days for a response to his appeal from the ALJ and receiving none, on July 19, 2021, Plaintiff proceed with filing a civil Complaint in this Court against Defendants asserting a cause of action under SOX. (*See generally* Compl.)

However, on September 27, 2021, the DOL sent a Notice of Docketing to the parties informing them that the administrative action had been docketed for hearing before an ALJ since December 10, 2020. ("Pl.'s RJN," ECF No. 23 at Ex. A.) Notably, the delay between the date of docking (*i.e.*, December 10, 2020) and the date the parties received the Notice of Docketing (*i.e.*, September 27, 2021) was "a result of

[1] On March 17, 2020, Plaintiff filed an administrative action with the DOL against Frontier-Kemper alleging he was retaliated against for complaining about multiple violations of the Environment Protection Act. (Defs.' RJN at Ex. B, 2:7-17.) Plaintiff's March 17, 2020 Complaint did not allege violations of SOX. The Secretary of Labor found that Plaintiff had not met his burden of showing retaliation in his March 17, 2020 Complaint. (*Id.*) Plaintiff appealed the finding with the DOL and requested a hearing with an ALJ. (*Id.*) In response, Frontier-Kemper filed a Motion to Compel Arbitration with this Court. (*Id.*) On November 12, 2020, the Court granted Frontier Kemper's Motion to Compel Arbitration and stayed the matter pending the arbitration. (Defs.' RJN at Ex. B.) Similarly, on November 30, 2020, the ALJ stayed the administrative matter based on this Court's November 12, 2020 Order. (*Id.* at Ex. C.)

the miscommunication among [the Office of Administrative Law Judges] staff, and not the fault of the parties." (*Id.*)

On October 19, 2021, Plaintiff served the civil Complaint on Defendants and filed the corresponding proof of service on October 25, 2021. (ECF No. 14.)

On November 9, 2021, Defendants filed this instant motion seeking to dismiss Plaintiff's civil Complaint. (*See generally* Motion.) The only upcoming date in this matter is the Scheduling Conference scheduled for February 18, 2022. (EFC No. 21.)

On November 29, 2021, the DOL sent a Notice of Hearing and Pre-Trial Order to the parties informing them the administrative action had been assigned to ALJ Steven B. Berlin for hearing and decision. (Pl.'s RJN at Ex. B.) The hearing before the ALJ is scheduled to begin on April 11, 2022 in Long Beach, California. (*Id.*)

II. LEGAL STANDARD

Federal Rule of Civil Procedure ("Rule") 8 requires a plaintiff to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, the complaint must allege enough facts to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Labels, conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Id*. The complaint must also be "plausible on its face," that is, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 570). A plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

A complaint may be dismissed under Rule 12(b)(6) for the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). When ruling on a Rule 12(b)(6) motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a

court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (cleaned up).

A court generally may not consider materials other than facts alleged in the complaint and documents that are made a part of the complaint. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged the existence of the materials in the complaint or the complaint "necessarily relies" on the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). The court may also take judicial notice of matters of public record outside of the pleadings and consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Lee*, 250 F.3d at 689-90. In federal court, "[in] alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Rule 9(b) requires a plaintiff averring fraud to plead the 'who, what, when, where, and how' of the alleged misconduct." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

III. REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201, a court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c). Judicial notice permits a court to consider an adjudicative fact "that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2); *see* Fed. R. Evid. 201(b), advisory committee's note ("With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy."). The Ninth Circuit has made clear that "[a] court must also consider—and identify—which fact or facts it is noticing from . . . [a document]. Simply because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 999 (9th Cir. 2018).

Here, Defendants seek judicial notice of five documents they contend are relevant to their Motion. Similarly, Plaintiff seeks judicial notice of three documents, two of which are the same documents Defendants request judicial notice for. (*Compare* Defs.' RJN, Exs. D, E, *with* Pl.'s RJN, Exs. A, B.) Plaintiff does not object to the introduction of Defendants' exhibits, which include filings and orders from

Plaintiff's related civil action and the prior administrative action Plaintiff filed against Frontier-Kemper. (*See* FN. 1.) Defendants only object to the introduction of one of Plaintiff's exhibits based on its "authenticity." (Reply at 3:26-28.) However, the Court overrules Defendants' objection as conclusory.

In sum, the exhibits filed by Plaintiff and Defendants are judicially noticeable as matters of public record. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). Accordingly, these exhibits are accepted for what they represent, but the Court is not bound by any specific fact findings and legal conclusions set forth in them.

IV. DISCUSSION

Congress enacted SOX to "safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014) (internal citation omitted). In seeking to prevent corporate fraud, Congress was concerned with the "abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence,'" which discouraged employees from reporting fraudulent behavior, and those who reported misconduct faced retaliation. *Id.* at 435, (internal citation omitted). In order to address this discouragement and potential retaliation, Section 806 of SOX created a new whistleblower protection provision, 18 U.S.C. § 1514A. *Lawson*, 571 U.S. at 435. This provision, as amended, provides:

> No [publicly-traded] company . . . may discharge . . . or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information ... regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], any rule or regulation of the Securities and Exchange Commission ["SEC"], 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) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee . . . .

18 U.S.C. § 1514A(a). Notably, SOX does not provide whistleblower protection for *any* reported company misconduct, *see id*, but rather the conduct must constitute a specific violation enumerated in the statute (*i.e.*, mail fraud, wire fraud, bank fraud, securities or commodities fraud, SEC rules or regulations, and shareholder fraud). *Id.*

A. Exhaustion of Administrative Remedies

Defendants move to dismiss the Complaint on two grounds. First, Defendants assert Plaintiff failed to satisfy his administrative remedies before filing the civil Complaint. (*See* Motion at 5:21-6:24; *see also* Reply at 2:12-3:4.) Second, Defendants assert Plaintiff fails to state a valid claim under SOX because he did not engage in any activity protected under SOX. The Court finds that the administrative remedies necessary for this Court to have jurisdiction to review the Secretary of Labor's November 9, 2020 findings have not been fully satisfied.

To pursue a SOX whistleblower-retaliation claim in federal court, a plaintiff must first initiate an administrative action by filing a complaint with the Secretary of Labor "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation." *See* 18 U.S.C. § 1514A(b)(1)(A), (b)(2)(D). The law requires "proper exhaustion of administrative remedies, which 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Accordingly, a plaintiff must afford the Secretary of Labor the opportunity to resolve the allegations administratively.

A plaintiff may appeal the Secretary of Labor's findings to an ALJ and ultimately the DOL's Administrative Review Board ("ARB"). *Lawson v. FMR LLC*, 571 U.S. 429, 436–37 (2014) (citing 29 CFR §§ 1980.104 to 1980.110). "[T]he ARB's determination on a [Section] 1514A claim constitutes the agency's final decision and is reviewable in federal court under the standards stated in the Administrative Procedure Act, 5 U.S.C. § 706." *Id.* at 437. However, if a final decision is not issued "within 180 days of the filing of the complaint, and the delay is not due to bad faith on [plaintiff's] part, the [plaintiff] may proceed to federal district court for *de novo* review." *Id.* (citing 18 U.S.C. § 1514A(b)).

Due to the unique factual circumstances presented in this matter, the Court finds the administrative remedies have not been fully exhausted in order for this Court to conduct a *de novo* review of the administrative findings for the following reasons.

Notably, the Court is unaware of any authority addressing an analogous factual situation.

First, the lack of response from the ALJ within 180-days was not an intentional choice to not issue a final decision, but rather a "miscommunication among" administrative staff. Indeed, on December 10, 2020, one day after Plaintiff filed his appeal to the Secretary of Labor's November 9, 2020 findings, the ALJ docketed the matter for hearing. (Pl.'s RJN at Ex. A.) Although the parties were not provided with the Notice of Docketing until September 27, 2021, this delay was caused by a "miscommunications among" the staff of the Office of Administrative Law Judges. (*Id.*) Based on this factual situation, it appears that the ALJ had an intention, which unfortunately was not timely communicated to the parties, to issue a final decision on Plaintiff's administrative appeal within the 180-day deadline.

Second, Plaintiff's administrative appeal is currently pending before ALJ Berlin, which the parties have been aware of since September 27, 2021. (Pl.'s RJN at Ex. B.) Moreover, on November 29, 2021, the DOL sent a Notice of Hearing and Pre-Trial Order to the parties informing them the administrative action had been assigned to ALJ Steven B. Berlin for hearing and decision. (*Id.* at Ex. B.) As such, here, "proper exhaustion of administrative remedies" would require that the ALJ be afforded the opportunity to resolve Plaintiff's appeal on the merits, which the ALJ is scheduled to do so on April 11, 2022. *Woodford*, 548 U.S. at 90 (2006).

Last, considerations of judicial resources and efficiency warrant the ALJ address the issues raised by Plaintiff's appeal on the merits. Indeed, Plaintiff's administrative appeal is further along than the instant civil matter. Specifically, whereas the ALJ has scheduled a hearing for April 11, 2022, no pre-trial or trial dates have been scheduled in the instant civil matter. The only upcoming hearing in this matter is a Scheduling Conference scheduled for February 18, 2022. (EFC No. 21.) As such, in order to preserve judicial resources and time, the ALJ should proceed with hearing and deciding Plaintiff's administrative appeal on April 11, 2022.

Accordingly, the Court finds the administrative remedies have not been fully exhausted here. Because the Court finds the administrative remedies have not been fully satisfied under SOX, the Court will not decide whether Plaintiff states a valid claim under SOX, which is an issue the ALJ will be addressing and deciding.

///

///

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' Motion. Accordingly, the Court **DISMISSES without prejudice** Plaintiff's civil Complaint pending Plaintiff's administrative action before Administrative Law Judge Berlin. All upcoming dates and deadlines are **VACATED**.

IT IS SO ORDERED.