

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 14-23017-CIV-KING

SPENCER DUKE,

Plaintiff,

vs.

PRESTIGE CRUISE HOLDINGS, INC.,
PRESTIGE CRUISE SERVICES, LLC, and
SEVEN SEAS CRUISES S. DE R.L.,

Defendants.

FINAL ORDER OF DISMISSAL

THIS MATTER comes before the Court upon Defendants PRESTIGE CRUISE HOLDINGS, INC., PRESTIGE CRUISE SERVICES, LLC, and SEVEN SEAS CRUISES S. DE R.L.'s Motion to Dismiss Plaintiff's Third Amended Complaint with Prejudice and Incorporated Memorandum of Law (DE 54), filed November 2, 2015.¹ Defendants seek the dismissal of Plaintiff's Third Amended Complaint (DE 52) on the basis that it: 1) fails to comply with Rule 11(a) of the Federal Rules of Civil Procedure and Rule 5.1(a)(6) of the Local Rules of the Southern District of Florida;² 2) purports to reinsert defendants that were

¹ The Court has additionally considered Plaintiff's Response in Opposition to the Motion (DE 58), filed November 27, 2015, and Defendants' Reply in Support of the Motion (DE 61), filed December 21, 2015.

² While the Court agrees that Plaintiff's Third Amended Complaint violated the cited rules, Plaintiff cured this defect through the filing of a corrected Third Amended Complaint (DE 57) which included counsel's signature, and the Court declines to dismiss this matter over a technical defect that is no longer an issue.

previously released from this suit;³ and 3) otherwise fails to state a claim upon which relief may be granted as to the named Defendants.

BACKGROUND

Plaintiff SPENCER DUKE brings this action based on his alleged retaliatory termination in violation of section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. § 1514A against Defendant PRESTIGE CRUISE HOLDINGS, INC. (“PCH”) (Count I) and Defendant SEVEN SEAS CRUISES S. DE R.L. (“Seven Seas”) (Count II) and the Florida Whistleblower Act (“FWA”) against PCH (Count III) and Defendant PRESTIGE CRUISE SERVICES, LLC (“PCS”) (Count IV).

The following facts are alleged in the Amended Complaint, which the Court accepts as true for the purposes of the instant Motion:

Plaintiff was hired by PCH as its Senior Director of Compliance and Security in January of 2012. PCH, Seven Seas, and PCS are subsidiaries of Prestige Cruises International, Inc. (“PCI”). Plaintiff’s responsibilities included assessing PCI and its subsidiaries’ compliance with legislation and applicable regulations, “and reporting deficient internal controls over financial reporting and/or data security controls to the management of [PCI] and its subsidiaries.”

During 2012, Plaintiff identified internal controls relating to SOX compliance which were not operating effectively. At some point after making this discovery, Plaintiff reported

³ Again, while the Court agrees that the Second Amended Complaint (DE 45) did not include two defendants named in the Third Amended Complaint, the Court accepts Plaintiff’s assertion that the failure to include Defendants Prestige Cruise Holdings, Inc. and Prestige Cruise Services, Inc. in the Second Amended Complaint was simply a scrivener’s error, which was subsequently corrected by the filing of the Third Amended Complaint shortly thereafter, and declines to dismiss Plaintiff’s claims on this basis.

his findings to his then-direct supervisor, Alfred Alfonso, and to the Senior Director of Internal Audit, Steve Roth.

On March 1, 2013, an unnamed information technology engineer (the “engineer”) came to Plaintiff and “made a significant number of serious allegations related to violations of GAAP, misappropriations, deficient internal controls over financial reporting, deficient security controls, backups not being performed regularly, a lack of documented procedures, and lies/misrepresentations made to [PCH]’s auditors from early in 2010 to March 1, 2013.”⁴ Plaintiff notified Mr. Roth and the Company’s Vice President of Information Technology, Benigno Lago, about the engineer’s allegations, and then Plaintiff began investigating the allegations.

“On March 2, 2013, [Plaintiff] issued an ‘Ethics and Compliance’ Report that described the substance of the [engineer]’s various complaints.” The report included a number of allegations against Mr. Alonso relating to “highly questionable practices.” On March 5, 2013, at the direction of Mr. Lago, Plaintiff provided information to PCH’s external auditors, PricewaterhouseCoopers, related to his investigation. That same day, PCH’s Senior Vice President of Finance and Chief Information Officer, Harry Sommer, directed Plaintiff to investigate the allegations raised in his Ethics and Compliance Report. On March 11, 2013, Plaintiff provided a summary of his findings to Mr. Sommer and Mr. Lago via email.

On April 7, 2013 or May 20, 2013, Mr. Alonso was terminated without notice from PCH by its management and/or board of directors. “[PCH]’s stated reason for terminating [Plaintiff] was that [PCH] had undergone restructuring and that [Plaintiff]’s position had been eliminated as part of that restructuring.” Sometime after his termination, Plaintiff filed a

⁴ The acronym “GAAP” stands for “Generally Accepted Accounting Principles.”

complaint against PCH and Seven Seas, with the Occupational Safety and Health Administration (“OSHA”), in which he alleged that his termination was in retaliation for activities protected by SOX.

LEGAL STANDARD ON MOTION TO DISMISS

Defendant’s Motion to Dismiss alleges that the Complaint fails federal pleading standards and should be dismissed, under Rule 12 of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12. Rule 8 requires that a complaint include a “short and plain statement” demonstrating that the claimant is entitled to relief. Fed R. Civ. P. 8. To survive a Rule 12(b)(6) motion, a complaint must include “enough facts to state a claim to relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). As a corollary, allegations absent supporting facts are not entitled to this presumption of veracity. *Id.* at 681.

When evaluating a motion to dismiss, the Court must take all of the well-pled factual allegations as true. *Id.* at 664. However, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 663. And, the Court’s duty to accept the factual allegations in the complaint as true does not require it to ignore specific factual details “in favor of general or conclusory allegations.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007). The Court must dismiss a complaint that does not present a plausible claim demonstrating entitlement to relief.

DISCUSSION

In their motion, Defendants assert the Third Amended Complaint (the “Complaint”) should be dismissed in its entirety. With respect to Counts I and II, which are the only claims that raise a federal question, Defendants argue that Plaintiff’s SOX retaliatory termination claims should be dismissed with prejudice because Plaintiff has failed to properly state his claims after multiple attempts to do so. Defendants further argue that, upon dismissal of Counts I and II, the Court should decline to exercise jurisdiction over Plaintiff’s remaining state law claims under the FWA (Counts III and IV) and dismiss those claims as well.

Defendants argue that Counts I and II must be dismissed because PCH and Seven Seas are not entities covered by SOX. For his part, Plaintiff argues that Defendants are covered by SOX by virtue of their status as “subsidiaries, affiliates, officers, employees, contractors, subcontractors, and/or agents of Apollo Global Management, LLC, a company that has a class of securities registered under section 12 of the Securities Exchange Act of 1934” An entity with a class of securities registered under section 12 of the Securities Exchange Act is covered by SOX. 18 U.S.C. § 1514A.

For purposes of SOX, a “[c]overed person means any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, . . . or any officer, employee, contractor, subcontractor, or agent of such company” *Id.* To determine whether SOX applies to a given entity, the Court may take judicial notice of Apollo Global Management, LLC’s (“Apollo”) form 10-K filings for the purposes of determining which, if any, companies’ financial information is included in Apollo’s consolidated financial statements. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (taking judicial notice of SEC filings, stating, “we hold that a court, when considering a

motion to dismiss in a securities fraud case, may take judicial notice (for the purpose of determining what statements the documents contain and not to prove the truth of the documents' contents) of relevant public documents required to be filed with the SEC, and actually filed . . . SEC filings are generally recognized as the most accurate and authoritative source of public information about a company.”). Upon review of Apollo’s filings with the SEC, is it plain that neither PCH nor Seven Seas’ financial information is included in Apollo’s consolidated financial statements and, therefore, PCH and Seven Seas are not covered by SOX.

Taking all of the well-pled factual allegations as true, the Complaint does not state a *prima facie* case for violations of SOX because it does not allege *facts* which would establish that PCH and Seven Seas are entities subject to SOX. Plaintiff’s conclusory assertions that PCH and Seven Seas are subsidiaries of Apollo notwithstanding, the Court finds the Complaint has failed present a plausible claim demonstrating entitlement to relief. Moreover, as this is his fourth bite at the apple,⁵ and Plaintiff has still failed to make out a *prima facie* case for violations of SOX, Counts I and II shall be dismissed with prejudice.

Upon the dismissal of Counts I and II, the only remaining claims (Counts III and IV) will be pure state law claims under the FWA against Defendants PCH and PCS. The Court declines to exercise jurisdiction over the state law claims, and Counts III and IV shall be dismissed without prejudice.

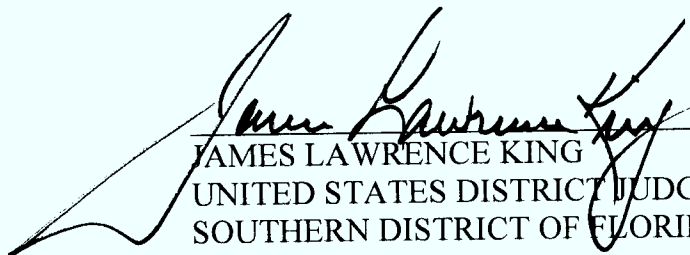
CONCLUSION

Accordingly, it is **ORDERED, ADJUDGED** and **DECREED** that Defendants’ Motion to Dismiss the Third Amended Complaint (**DE 54**) be, and the same is, hereby

⁵ This is the fourth iteration of the Complaint. *See generally* DE 1; DE 7; DE 45; DE 52; DE 57.

GRANTED. Counts I and II are **DISMISSED WITH PREJUDICE** and Counts III and IV are **DISMISSED WITHOUT PREJUDICE.** Should he so choose, Plaintiff may initiate a new action in an appropriate state court to pursue his state law claims. All pending motions are **DENIED AS MOOT** and the Clerk shall **CLOSE** this case.

DONE and **ORDERED** in Chambers at the James Lawrence King Federal Justice Building and United States District Courthouse, Miami, Florida this 13th day of July, 2016.


JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

Cc: All Counsel of Record