UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

KHALED ASADI	§	
Plaintiff	§	
	§	
	§	CIVIL ACTION NO. 4:12-CV-345
G.E. ENERGY (USA), LLC,	§	
Defendant.	§	

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

Plaintiff Khaled Asadi ("Asadi") filed Plaintiff's Original Complaint ("Complaint") on February 3, 2012. *See* Dkt. No. 1. The Complaint alleges that Asadi qualified as a whistleblower under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2011 ("Dodd-Frank") and that he was terminated from his employment by defendant G.E. Energy (USA), LLC ("GE Energy") in violation of Dodd-Frank's anti-retaliation provision. 15 U.S.C. § 78u-6(h). Asadi seeks damages and attorney's fees. Compl. ¶ 27.

GE Energy moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Dodd-Frank defines a whistleblower as an individual "who provides . . . information relating to a violation of the securities laws" to the Securities and Exchange Commission ("SEC"), yet the Complaint lacks any allegation that Asadi has ever provided any information to the SEC, much less that he had done so prior to his termination. Should the Complaint be dismissed for failing to state a claim because it does not allege a material element that is necessary to obtain relief?

2. Dodd-Frank protects a whistleblower from adverse employment action only if the action was in retaliation for engaging in statutorily-defined protected activity. Asadi asserts that his termination was in violation of a Dodd-Frank provision that prohibits retaliation for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information," but Asadi nowhere alleges he has done any of these things, or anything else that qualifies as protected activity under the statute. Should the Complaint be dismissed for failing to state a claim because it does not allege a material element that is necessary to obtain relief?

3. The SEC rules implementing Dodd-Frank provide that an individual qualifies as a whistleblower only if he or she "possess[es] a reasonable belief that the information you are providing relates to a possible securities violation. . . ." 17 C.F.R. § 240.21F-2(b)(1)(i). Should the Complaint be dismissed for failure to state a claim when his sole allegation of a purported securities violation rests on an unsubstantiated rumor he allegedly heard from an anonymous Iraqi government "source" about an individual who was "closely associated" with an Iraqi official being hired by GE Energy "to curry favor" with an Iraqi governmental agency?

4. Unless a statute clearly expresses Congress's intent that the statute should apply to conduct outside the United States, it does not cover such conduct. Here, all of the allegations in the Complaint deal with conduct abroad, and Dodd-Frank's anti-retaliation provision gives no indication that it applies extraterritorially. Should the Complaint be dismissed because the statute does not apply to the conduct that forms the basis of the Complaint?

5. Although Asadi signed an agreement with GE that he would not institute suit without first attempting to resolve any employment dispute through alternative dispute resolution, including non-binding mediation, he did not engage in alternative dispute resolution before filing suit. Should the Complaint be dismissed for failing to comply with his contractual commitment to undertake informal dispute resolution proceedings first?

All of these issues arise under Federal Rule of Civil Procedure 12(b)(6). They are thus governed by the well-known standard for determining whether a plaintiff has stated a claim upon which relief can be granted. In recent years, the Supreme Court has emphasized that this standard has force and should not be passed over lightly. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As the Fifth Circuit has explained:

> The *Twombly* standard replaces the lenient and longstanding rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The new reading raises a hurdle in front of what courts had previously seen as a plaintiff's nigh immediate access to discovery—modest in its demands but wide in scope.

United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 185 (5th Cir. 2009) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Thus, to survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555. Those factual allegations must "raise a right to relief above the speculative level." *Id.* In particular, a complaint must contain "direct allegations or permit properly drawn inferences to support 'every material point necessary to sustain a recovery.'" *Torch Liquidating Trust* ex rel. *Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 384 (5th Cir. 2009) (quoting *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995)). A complaint must be dismissed if it "lacks an allegation regarding a required element necessary to obtain relief." *Id.* Indeed, it has long been the law in the Fifth Circuit that "[a] complaint must contain either direct or inferential allegations respecting all the material elements necessary to

sustain a recovery ***under some viable legal theory***." *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981) (emphasis added).

In addition, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. A complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* A claim is only plausible "when the plaintiffs pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

SUMMARY OF THE ARGUMENT

Asadi's Complaint, which alleges that he was fired in violation of the anti-retaliation protections of Dodd-Frank, suffers from a fundamental, and irremediable, defect: he is not protected by the anti-retaliation provision that he invokes. Dodd-Frank's anti-retaliation provision explicitly covers only those individuals who report securities law violations to the SEC. Furthermore, the subsection of the statute that he contends immunizes him from adverse employment action extends only to individuals who initiate or assist the SEC in an action or investigation. Yet Asadi does not allege that he made a report to the SEC or that he had a role in any SEC proceeding; indeed, he alleges no involvement or interaction with the SEC at all. By his own pleading, Asadi asserts only that he reported his supposed concerns to his supervisor and GE Energy's ombudsperson. As a result, he is not a "whistleblower" as Dodd-Frank defines that term, and he has not engaged in the conduct that he alleges is protected by Dodd-Frank. These defects reveal that the Complaint fails to state a claim on its face, and therefore it should

be dismissed.

Although these are the most glaring defects in the Complaint, they are not the only ones. In addition, dismissal should be granted because: (1) Asadi has failed to plead facts supporting a "reasonable belief" that GE Energy committed a securities violation; (2) the conduct about which Asadi complains occurred in a foreign country, and Dodd-Frank's anti-retaliation provision does not apply abroad; and (3) Asadi filed suit without first complying with the obligation in his employment agreement to exhaust certain informal dispute resolution procedures.

Each of these reasons independently warrants dismissal of Asadi's Complaint.

BACKGROUND

Asadi's Complaint contains only a few sentences purporting to explain the basis for his claims. He alleges that he heard from a third party that GE Energy "had hired a woman closely associated with the Senior Deputy Minister of Electricity (Iraq) to curry favor with the Ministry." Compl. ¶ 11. He asserts that he was "[c]oncerned" that this hiring decision could "potentially violate the Foreign Corrupt Practices Act." *Id.* ¶ 12. Asadi then claims that he reported this concern to his supervisors and to a GE Energy ombudsperson, and that as a result he was ultimately terminated.[1] *Id.* ¶¶ 12-16.

This thinly-pleaded course of conduct, Asadi contends, violated Dodd-Frank's whistleblower anti-retaliation provision. In particular, Asadi asserts that GE Energy's termination of his employment constituted retaliation "because of a lawful act done by

[1] GE Energy treats the allegations as true solely for purposes of this motion to dismiss, and wishes to make clear that it vigorously disputes Asadi's contentions. If, contrary to Fifth Circuit precedent, this case were to proceed beyond the pleadings stage, GE Energy submits that the evidence would refute Asadi's allegations of wrongdoing.

the whistleblower . . . in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." *Id.* ¶ 19 (quoting 15 U.S.C. § 78u-6(h)(1)(A)(ii)).

ARGUMENT AND AUTHORITIES

I. Asadi's Lack of Involvement with the SEC in Connection with his Claim Requires Dismissal of his Claim as a Matter of Law

The complete absence of any allegation that Asadi reported his supposed concerns to the SEC or otherwise assisted or was in any way involved with an SEC investigation of those concerns dooms his Complaint for two reasons. First, it means that he is not a "whistleblower," as that term is defined by Dodd-Frank, and therefore not within the scope of Dodd-Frank's anti-retaliation provision. Second, it means that he has not engaged in the type of activity that he alleges is the basis for his claim. Both reasons require dismissal.

A. Asadi has not Alleged that he Qualifies as a "Whistleblower"

Asadi is not a "whistleblower" under Dodd-Frank, and therefore cannot state a Dodd-Frank retaliation claim. The anti-retaliation provision—which is expressly entitled "Protection of Whistleblowers"—states that "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a ***whistleblower*** in the terms and conditions of employment because of any lawful act done by the ***whistleblower***" in certain specifically identified protected categories. 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). And Dodd-Frank specifically defines a "whistleblower" as "any individual who ***provides . . . information*** relating to a violation of the securities laws ***to the Commission*** [*i.e.*, the SEC]." *Id.* § 78u-6(a)(6).

Congress could not have been more clear; a person must have provided information to the SEC to be able to invoke the anti-retaliation provisions.[2]

The Complaint contains no allegation that Asadi has ever reported any of his supposed concerns to the SEC at any time, and certainly not prior to the termination of his employment. He alleges only that he made a report to his supervisor and a GE ombudsperson. *See* Compl. ¶ 22. Because Asadi has failed to make an allegation about an element necessary to obtain relief, his Complaint must be dismissed. *See Torch*, 561 F.3d at 384.

B. Asadi has not Alleged that he has Engaged in any Activity Protected from Retaliation under Dodd-Frank

The lack of any allegation of interaction between Asadi and the SEC also means that he has failed to plead that he has engaged in the type of activity that the anti-retaliation provision of Dodd-Frank purports to protect. This disconnect between the actual conduct in which Asadi alleges he engaged (as a matter of fact) and the type of conduct that he alleges is entitled to protection under Dodd-Frank (as a matter of law) is apparent from the face of the Complaint. In the Complaint, Asadi expressly relies on

[2] Counsel has identified one unpublished decision that has held that certain types of internal reporting can qualify under the anti-retaliation provisions, even absent a report to the SEC. *See Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 16782066, at *5 (S.D.N.Y. May 4, 2011). That decision cannot be squared with the plain language of the statute, and should be rejected. Furthermore, the court in that case relied upon a different provision of Dodd-Frank than the one Asadi has invoked in this case, and so its expansion of the statutory language would have no application here. The court ultimately dismissed the plaintiff's claim because, among other reasons, he failed to plead that the actions for which the alleged retaliation occurred were protected by the statute. *See id*; *see also Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 4344067, at *3–5 (S.D.N.Y. Sept. 12, 2011) ("*Egan II*") (dismissing amended complaint with prejudice). As explained below, the Complaint suffers from a similar defect. *See infra* Part I.B.

Dodd-Frank's provision prohibiting retaliation against a whistleblower "in initiating, testifying in, or assisting in any investigation or judicial or administrative action ***of the Commission*** based upon or related to such information." *See* Compl. ¶ 19 (quoting 15 U.S.C. § 78u-6(h)(1)(A)(ii)). Yet nowhere does Asadi allege that he actually did any of those things. He does not allege there was any SEC investigation or action going on at the time he was terminated, or that he initiated such an action, testified in such an action, or in any way assisted in any such action. He alleges only that he reported his claim to his supervisor and an internal ombudsman. This conduct plainly is not covered by the statutory provision upon which he relies.[3]

The failure of Asadi's Complaint to allege facts that could satisfy the statutory requirements conclusively establishes that the Complaint should be dismissed. Asadi's limited factual allegations likewise fall short of the two other categories of protected activity that Dodd-Frank sets forth.[4] The first category applies to an actual report of information to the SEC, *see* 15 U.S.C. § 78u-6(h)(1)(A)(i), which he has not alleged as described above. The other category applies to "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, including section 10A(m) of such Act, section 1513(e) of Title 18, and any other law rule, or regulation subject to the jurisdiction of the [SEC]." *Id.* § 78u-6(h)(1)(A)(iii) (citations

[3] Unsurprisingly, Asadi fails to mention any of his own misconduct in the weeks before and at the time of his termination. Asadi unlawfully downloaded thousands of confidential and proprietary GE Energy files several weeks before he was terminated, and again on the date he was terminated. A Jordanian court has convicted Asadi of the crime of breach of trust and sentenced him in absentia to a term of imprisonment of two years.

[4] Asadi has not pleaded that these two additional categories apply to his claim, and, as shown in the text above, he could not do so in any event.

omitted). None of his allegations fit within these provisions either.[5] *See, e.g.*, *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 16782066, at *6 (S.D.N.Y. May 4, 2011) (dismissing Dodd-Frank whistleblower claim for failure to allege that plaintiff had engaged in protected activity).[6]

Because Asadi's alleged conduct does not come within the scope of Dodd-Frank's protection, it is apparent that he could never plead a viable retaliation claim. Therefore, his Complaint should be dismissed with prejudice.

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[5] Notably, the only provision that arguably refers to some type of internal reporting is Sarbanes-Oxley, but it is plainly not available to Asadi. Sarbanes-Oxley only protects internal disclosures dealing with particular types of fraud; it does not extend generally to disclosure of any alleged violation of a securities law. *See* 18 U.S.C. § 1514A(a)(1)(C); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008); *see also Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008) ("[A]n employee must show that his communications to his employer 'definitively and specifically relate[d]' to one of the laws listed in § 1514A."). A report of an alleged FCPA violation does not fall within the types of fraud claims covered by Sarbanes-Oxley. *See Day v. Staples, Inc.*, 555 F.3d 42, 57 n.15 (1st Cir. 2009); *see also In re Gupta*, 2011 WL 121916, at *5, 2010-SOX-00054 (Dep't of Labor Jan. 7, 2011) ("The documents do allege violations [of] the Foreign Corrupt Practices Act . . . . However, a violation of the FCPA is not within the scope of [Sarbanes-Oxley].").

[6] *Egan* appears to be the first decision interpreting the substantive requirements of the Dodd-Frank anti-retaliation statute. The purported whistleblower in that case alleged that he reported information internally, which prompted an internal investigation conducted by outside counsel. *Egan*, 2011 WL 16782066, at *8. Egan argued that his claims were protected by Dodd-Frank on two grounds: (1) that his internal reporting was covered by the provisions of 15 U.S.C. § 78u-6(h)(1)(A)(iii); and (2) that he should be deemed to have reported his allegations to the SEC because he "acted jointly" with outside counsel when he discussed his allegations with them in an interview. *See id.* at *5-9. The court found that he failed to allege protected conduct under Dodd-Frank, even if it extended to purely internal reporting, and therefore dismissed his complaint on the first ground. *See id.* at *5-7. The court additionally found that Egan had not pleaded any factual basis by which to believe that outside counsel had actually reported his allegations to the SEC, so that dismissal was required on the second ground as well. *See id.* at *9. The court granted Egan leave to amend, to attempt to establish a factual basis for his contention that his allegations had been reported to the SEC. Subsequently, the court held the proposed amended complaint failed to cure this deficiency and dismissed Egan's claim with prejudice. *Egan II*, 2011 WL 4344067, at *2-4.

II. Asadi has Failed to Plead Facts Supporting a Reasonable Belief that GE Energy Violated the FCPA

Asadi's Complaint is also deficient because it contains wholly insufficient allegations regarding the underlying securities violation that he supposedly reported to his supervisor, and for which the alleged retaliatory conduct occurred. SEC regulations provide that, to qualify as a whistleblower, a person must have a "***reasonable*** belief" that a securities law has been violated. 17 C.F.R. § 240.21F-2(b)(1)(i) (emphasis added). Yet Asadi pleads no facts whatsoever that would support the inference that he possessed any such reasonable belief.

The core assertion of an underlying securities violation is Asadi's pleading "that he was discharged after advising his supervisors of potential violation of the Foreign Corrupt Practices Act by G.E. in pursuing a lucrative, multi-year contract with the Iraqi government." Compl. ¶ 3. This allegation is nothing more than an "unadorned, the-defendant-unlawfully-harmed-me accusation," of the type that the Supreme Court has expressly rejected as inadequate. *Iqbal*, 129 S. Ct. at 1949. As the Supreme Court has held, a complaint that only "tenders naked assertions devoid of further factual enhancement," is insufficient. *Id.* (internal quotations and citations omitted).

Moreover, there is virtually nothing in the Complaint explaining what conduct could even arguably constitute an FCPA violation and thus provide the "further factual enhancement" that the Supreme Court requires. The FCPA prohibits covered companies from using the mails or the means or instrumentalities of interstate commerce:

> corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give,

> or authorization of the giving of anything of value to any foreign official for purposes of: (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-2(a). The only allegation that Asadi appears to make in this regard is the lone sentence that he "was alerted by a source in the Iraqi government that G.E. had hired a woman closely associated with the Senior Deputy Minister of Electricity (Iraq) to curry favor with the Ministry while in negotiation for a Sole Source Joint Venture Contract with the Ministry." Compl. ¶ 10. Second-hand rumors from undisclosed sources about undescribed conduct that is nowhere alleged to have conveyed anything of value to a foreign official in order to improperly influence him do not come close to alleging a basis by which Asadi could ***reasonably*** have believed that an FCPA violation occurred. Even the most liberal, pre-*Twombly* notice pleading regime would have required more detail than this. Under the additional "hurdle" that the Fifth Circuit has acknowledged now applies, Asadi's conclusory pleading should be dismissed. *Grubbs*, 565 F.3d at 185.

III. Dodd-Frank's Anti-Retaliation Provisions Do Not Apply Extraterritorially

Asadi also cannot state a claim because the conduct of which he complains occurred outside of the United States, and the anti-retaliation provision does not apply extraterritorially. There is "a longstanding principle of American law that legislation of Congress, unless a contrary intent appears otherwise, is meant to apply only within the

territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks and citations omitted); *see also United States v. Villanueva*, 408 F.3d 193, 197 (5th Cir. 2005). Thus, as the Supreme Court has bluntly put it, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 130 S. Ct. at 2878. Invoking this principle, the Supreme Court has held that Title VII, as it was originally drafted, did not apply to American citizens employed by American corporations abroad.[7] *See EEOC v. Arabian American Oil. Co.*, 499 U.S. 244, 248 (1991). And the First Circuit has concluded that the anti-retaliation provision that was enacted as part of Sarbanes-Oxley, 18 U.S.C. § 1514A, also does not apply extraterritorially.[8] *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006). Because Dodd-Frank's anti-retaliation provision gives no indication, much less a clear indication, that it was meant to apply extraterritorially, the rules of statutory interpretation enunciated by the Supreme Court compel the conclusion that it does not apply outside of the United States. *Morrison*, 130 S. Ct. at 2878.

All of the limited allegations in Asadi's Complaint deal with conduct abroad. Although Asadi alleges that he is a dual American and Iraqi citizen, he was employed by GE Energy in Amman, Jordan. Compl. at ¶¶ 1, 3, 9. His contention that venue is proper here reinforces the extraterritorial nature of his claim. *Id.* ¶ 5 ("There is no district where

[7] Congress responded to this decision by amending Title VII to extend explicitly its application extraterritorially. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006).

[8] One court reached a contrary conclusion by distinguishing *Carnero* on its facts. *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008). But that case was decided before *Morrison*, and indeed the principle case on which it relied in determining that Sarbanes-Oxley's whistleblower provision should be applied extraterritorially, *SEC v. Berger*, 322 F.3d 187 (2d Cir. 2003), was abrogated by *Morrison*. 130 S. Ct. at 2879–2881.

suit may otherwise be brought under 28 U.S.C. § 1391(b)(3) since the majority of the events giving rise to the suit occurred in a foreign country."). Because all of the allegations in Asadi's Complaint involve conduct abroad and Dodd-Frank's anti-retaliation provision does not apply to such conduct, Asadi's Complaint fails to state a claim and must be dismissed. *Morrison*, 130 S. Ct. at 2877.

IV. Asadi's Failure to Comply with the Pre-Suit Dispute Resolution Procedures Also Requires Dismissal

The Complaint is also deficient because Asadi failed to comply with the dispute resolution procedures to which he acknowledges that he agreed. There is no basis for Asadi to ignore the preliminary, non-binding dispute resolution procedures that are a condition to his right to pursue this litigation. Because he has failed to comply with these procedures, the Complaint should be dismissed until such time as those procedures have been followed.

Asadi concedes that, "[a]s part of the initial hiring process the Plaintiff signed an agreement to submit any employment dispute to a four-step dispute resolution process including mediation and binding arbitration rather than filing these claims in court." Compl. ¶ 24. He attaches the "Acknowledgement Conditions of Employment," which he signed and which explicitly confirms his:

> review and agreement to the Dispute Resolution Procedure. This procedure requires me to submit unresolved covered employment legal claims to a ***four-step resolution process***, including ***external mediation*** and final and binding arbitration instead of filing such claims in court. My signature below constitutes acknowledgement of my receipt and review of a copy of and agreement to the procedure.

Id. at Ex. A (emphasis added).

GE Energy's existing dispute resolution policy, which is described and referenced in the Complaint as noted above, makes clear that Asadi had contractually agreed to a multi-step pre-suit process to attempt to resolve his claim. *See* Ex. 1, Solutions: An Alternative Dispute Resolution Procedure.[9] Asadi all but concedes, however, that he has refused to comply with his agreement. *See* Compl. ¶¶ 24-26. Asadi's only argument for his failure to adhere to these contractual requirements is that a provision of Dodd-Frank allegedly "provides that no pre-dispute ***arbitration agreement*** shall be valid or enforceable, if the agreement requires ***arbitration*** of a dispute arising under [Dodd-Frank]." Compl. ¶ 25 (emphasis added). But, as Asadi concedes, his agreement is not simply an arbitration agreement; it includes, among other things, a requirement for mediation before any formal dispute resolution. Nothing in Dodd-Frank purports to void contractual agreements requiring parties to undertake non-binding, non-arbitration, dispute resolution efforts before filing suit.

Moreover, Asadi is wrong in characterizing the GE Energy dispute resolution procedure as requiring arbitration in his case. In fact, the policy is carefully crafted so that claims under the anti-retaliation provision of Dodd-Frank are subject only to the non-arbitration portions of the procedure. Thus, the policy states that "[r]etaliation claims for legally protected activity and/or for whistleblowing" are considered "Covered Claims," to which the policy applies. *See* Ex. 1, at 5. But it goes on to state that "claims which, by

[9] The Fifth Circuit has made clear that courts considering a motion to dismiss can take into account documents that are referenced and relied upon in a complaint. *See, e.g., Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) (holding that, in deciding a Rule 12(b)(6) motion, courts may consider documents attached to or incorporated in the complaint). Thus, the GE Energy dispute resolution policy is properly before the Court.

applicable statute, regulation or other legal requirement are precluded from mandatory coverage under a pre-dispute binding arbitration agreement are considered Excluded Claims insofar as they are excluded from Level IV of Solutions [the binding arbitration step], but not excluded from Levels I, II or III of Solutions [the non-binding processes, including mediation]." *Id.* at 6. Moreover, Appendix C to the policy states explicitly that "[c]laims arising under section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act" are not subject to the binding arbitration provision. *See id.* at App'x C.

These contractual, non-arbitration provisions are fully enforceable against Asadi. Indeed, courts have recognized that, where a pre-suit mediation provision requires compliance before litigation can ensue, such a provision should be enforced, and the case should be dismissed. *See, e.g.*, *Rupp v. Ayres (In re Fabbro)*, 411 B.R. 407, 426 & n.59 (Bankr. D. Utah 2009); *Composite Mat Solutions, L.L.C. v. Big Red Events, Inc.*, No. 06-9602, 2007 WL 782191, at *1 (E.D. La. Mar. 12, 2007); *see also USA Flea Market, LLC v. EVMC Real Estate Consultants, Inc.*, 248 F. App'x 108, 110-11 (11th Cir. 2007) (recognizing that failure to comply with pre-suit mediation provision was enforceable, but finding factual dispute concerning whether the provision applied in that case); *cf. Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979) (affirming dismissal of case for failure to comply with statutory requirement for mediation prior to filing suit).[10]

[10] Notably, federal law supports the use of non-binding mediation, even in cases where the parties have not contractually agreed to it. *See* 28 U.S.C. § 651, *et seq.* The Southern District of Texas has adopted a local rule implementing this statute, pursuant to which the Court is authorized to order mediation, even when a party objects to it. *See* S.D. Tex. L.R. 16.4. And

Because Asadi has failed to comply with the pre-suit dispute resolution procedures to which he agreed, the Complaint should be dismissed on this ground as well.

CONCLUSION

Because Asadi has failed to allege the essential elements necessary for him to obtain relief under Dodd-Frank's anti-retaliation provision, GE Energy respectfully requests that the Court dismiss the Complaint. *Torch*, 561 F.3d at 384. GE Energy requests all other relief to which it is justly entitled.

courts have inherent authority even in the absence of a statute or rule to compel mediation of a pending dispute. *See, e.g.*, *In re Atl. Pipe Corp.*, 304 F.3d 135, 145 (1st Cir. 2002).

DATED: February 27, 2012
Houston, Texas.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 27, 2012, I electronically transmitted this document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to plaintiff's counsel of record.

/s/ Eliot F. Turner
Eliot F. Turner