UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand eighteen.

Towaki Komatsu,

Plaintiff - Appellant,

v.

NTT Data, Inc., Credit Suisse AG, AKA Credit Suisse Securities (USA) LLC,

Defendant - Appellee.

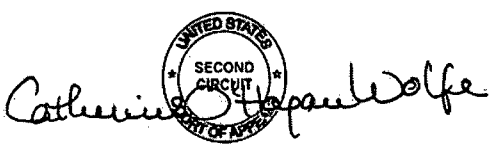
ORDER

Docket No: 16-2977

Appellant, Towaki Komatsu, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



16-2977
Komatsu v. NTT Data, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of July, two thousand eighteen.

Present:

BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
DENNY CHIN,
Circuit Judges.

TOWAKI KOMATSU,

Plaintiff-Appellant,

v. 16-2977

NTT DATA, INC., CREDIT SUISSE AG, a/k/a Credit Suisse Securities (USA) LLC,

Defendants-Appellees.

For Plaintiff-Appellant:	TOWAKI KOMATSU, pro se, Bronx, NY.
For Defendant-Appellee NTT Data, Inc.:	CHRISTOPHER NEFF, Moskowitz, Book & Walsh, LLP, New York, NY.
For Defendant-Appellee Credit Suisse AG, a/k/a Credit Suisse Securities (USA) LLC:	DANIEL SHTERNFELD (Stephen M. Kramarsky, *on the brief*), Dewey Pegno & Kramarsky LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Schofield, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

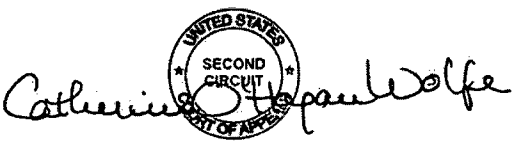
Plaintiff-Appellant Towaki Komatsu ("Komatsu"), pro se, appeals from the district court's dismissal of his claims against Defendants-Appellees NTT Data, Inc. and Credit Suisse AG, a/k/a Credit Suisse Securities (USA) LLC. *See Komatsu v. NTT Data, Inc.*, No. 15-CIV-7007, 2016 WL 2889064 (S.D.N.Y. May 17, 2016). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Under the *Rooker–Feldman* doctrine, "federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments." *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). "*Rooker–Feldman* directs federal courts to abstain from considering claims when four requirements are met: (1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal suit commenced." *McKithen v. Brown*, 626 F.3d 143, 154 (2d Cir. 2010). We review de novo a district court's application of the *Rooker–Feldman* doctrine. *Hoblock*, 422 F.3d at 83. Having conducted an independent and de novo review of the record in light of these principles, we conclude that the *Rooker–Feldman* doctrine applies here: Komatsu lost in New York state court before he filed this federal lawsuit; he complains of an injury caused by the state court's erroneous interpretation of state law, explaining that the state court's decision "induced and misled" him; and he seeks review and reversal of that judgment. Amended Compl. at 4–5, 7, *Komatsu v. NTT Data, Inc.*, No. 15-CIV-7007 (S.D.N.Y. Sept. 10, 2015), ECF No. 3; *see also*

McKithen, 626 F.3d at 155 (observing that "[t]he proper vehicle for [plaintiff] to challenge the state court's interpretation of [state law] was an appeal to the New York Appellate Division" in concluding that *Rooker–Feldman* applies to bar federal court jurisdiction). The *Rooker–Feldman* doctrine thus deprives this Court and the district court of jurisdiction to review Komatsu's claims.

We have considered each of Komatsu's arguments to the contrary and find them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED**. It is hereby **ORDERED** that Komatsu's May 11, 2018 and May 18, 2018 motions to seal are **GRANTED** to the extent necessary to preserve confidentiality. The Clerk of Court is directed to seal the motions consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWAKI KOMATSU,

Plaintiff,

-against-

NTT DATA, INC., et al.,

Defendants.

15 Civ. 7007 (LGS)

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS by Opinion and Order dated May 17, 2016 (the "Opinion"), the motion of Plaintiff Towaki Komatsu to amend his Complaint was denied and this action was dismissed in the absence of any surviving claims.

WHEREAS on June 3, 2016, Plaintiff moved for reconsideration of the Opinion. It is hereby

ORDERED that, for the following reasons, the motion is denied.

The decision to grant or deny a motion for reconsideration rests within "the sound discretion of the district court." *Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61-62 (2d Cir. 1986)). "A motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)) (internal quotation marks omitted). A motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits,

or otherwise taking a second bite at the apple." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)) (internal quotation marks omitted). The standard for granting a motion for reconsideration is "strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Id.* (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)) (internal quotation marks omitted).

Plaintiff's motion attempts to relitigate many of the arguments that were considered and rejected by the Opinion, including that -- despite the terms of the consultancy agreement with NTT Data, Inc. -- he was an employee of Credit Suisse and that his claims against Credit Suisse are not subject to the binding arbitration clause in his consultancy agreement. For the reasons articulated in the Opinion, neither of those assertions is correct. A motion for reconsideration is not a vehicle to relitigate claims resolved by the Opinion.

Plaintiff fails to identify any clear error of material fact in the Opinion. The terms of the consultancy agreement at issue assigns only Plaintiff to Credit Suisse. Plaintiff misunderstands the terms of the consultancy agreement to which his company, Ikam, and NTT Data, Inc.'s predecessor entity, M.I.S.I., were parties; the contract at issue entitles either party to terminate the consultancy of Plaintiff.

Plaintiff also fails to identify any clear error of law misapprehended in the Opinion. Plaintiff provides no legal authority for the assertion that he is entitled to amend the Complaint piecemeal, particularly when the facts as alleged, construed in their most generous light, fail to give rise to an inference of acts necessary to sustain the proposed additional claim.

Because Plaintiff fails to identify any clear error of controlling law or facts in the Opinion, the motion for reconsideration is DENIED. The Clerk of Court is respectfully directed to close the motion at Docket No. 56.

Dated: July 26, 2016
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWAKI KOMATSU,

Plaintiff,

-against-

NTT DATA, INC., et al.,

Defendants.

15 Civ. 7007 (LGS)

OPINION & ORDER

LORNA G. SCHOFIELD, District Judge:

Pro se Plaintiff Towaki Komatsu brings this action against Defendants NTT Data, Inc. ("NTT Data") and Credit Suisse AG ("Credit Suisse"), pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C § 201 et seq., and New York Labor Law § 215. Plaintiff moves for leave to amend the First Amended Complaint ("FAC"). Having reviewed the parties' memoranda of law and other submissions in connection with the motion, Plaintiff's motion to amend is denied. Furthermore, because Plaintiff's claims must be arbitrated rather than litigated in this forum, the FAC is dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. BACKGROUND

A. The Agreement

On January 13, 2012, Plaintiff executed a consultancy agreement (the "Agreement") between Ikam Adeu Corporation ("Ikam") and M.I.S.I. Co., Ltd. ("M.I.S.I."), in his capacity as president of Ikam. Plaintiff owns and operates Ikam. According to the affidavit of Francis J. Convery, an executive at NTT Data who also had served as an executive of M.I.S.I., M.I.S.I. merged with and into NTT Data on or about March 31, 2012.

The Agreement provides that Ikam as a consultant of M.I.S.I. would provide services to

certain of M.I.S.I.'s clients as provided in Exhibit A. Exhibit A states that Ikam's employee, Plaintiff, would provide "production support" services to M.I.S.I.'s client, Credit Suisse, from on or around January 18, 2012, to January 18, 2013. Pursuant to the Agreement, Plaintiff was the only employee of Ikam to be assigned to provide services to Credit Suisse. Credit Suisse is not a party to the Agreement.

The Agreement explicitly states that, under its terms, Ikam is an independent contractor rather than an employee of M.I.S.I. The Agreement establishes five conditions under which it may be terminated: (1) by M.I.S.I., for any reason or for no reason, upon two weeks prior notice to Ikam -- although the Agreement explicitly provides that the services provided to M.I.S.I.'s client may terminate upon shorter notice or without notice if the client so requires; (2) by Ikam, for any reason or for no reason, upon two weeks prior notice to M.I.S.I.; (3) by the filing of a petition in bankruptcy by or against Ikam as debtor; (4) by any breach by Ikam of any of the Agreement's representations or warranties; or (5) by any failure of Ikam to fully and faithfully perform any of its obligations under the Agreement. According to the Convery affidavit, NTT Data exercised its right to terminate the agreement in April 2012.

The Agreement requires that any "controversy, dispute and/or claim" between Ikam and M.I.S.I. -- or any of their respective officers, directors, shareholders or employees -- "which may ever arise between them in relation to this Agreement" be settled solely by binding arbitration to be held in New York City.

B. The State Court Action

Plaintiff previously pursued relief against NTT Data in New York state court, according to the affirmation of M. Todd Parker. On November 21, 2012, Plaintiff filed a complaint for failure to pay wages and for breach of contract against NTT Data relating to NTT Data's

termination of the Agreement and alleged failure to pay Plaintiff. In its order dated April 11, 2014, the Civil Court of the City of New York[1] granted NTT Data's motion to stay the proceeding and compel arbitration pursuant to the arbitration clause of the Agreement.

C. The Federal Court Action

Plaintiff filed this action on September 4, 2015, and named both NTT Data and Credit Suisse as Defendants. The FAC, the operative complaint, alleges that both Defendants violated the FLSA and New York Labor Law by failing to pay Plaintiff overtime wages and by retaliating against him. The FAC further alleges claims against NTT Data of breach of the Agreement, negligence and fraudulent misrepresentation. These claims are substantially identical to the claims raised in Plaintiff's state court action in that they allege that NTT Data failed to pay Plaintiff overtime wages and misclassified him as an independent contractor rather than an employee. The FAC also alleges claims against Credit Suisse of fraudulent misrepresentation, negligence and unjust enrichment. Credit Suisse was not a Defendant in the state court action.

On September 18, 2015, Plaintiff sought a preliminary injunction and temporary restraining order against NTT Data, in substance seeking payment of monies allegedly owed to Plaintiff. At the hearing on the order to show cause for a preliminary injunction and temporary restraining order on September 28, 2015, the Court dismissed Plaintiff's claims against NTT Data for lack of subject matter jurisdiction, as Plaintiff's claims alleged an injury from a prior state court ruling -- the New York state court's order compelling arbitration -- and effectively asked the Court to reverse the decision of the New York state court to compel arbitration.

Plaintiff filed his motion for leave to amend the FAC on October 19, 2015, and both Plaintiff and Defendants extensively briefed the issue of whether Plaintiff's proposed Second

[1] The Civil Court of the City of New York is part of the New York State Unified Court System and accordingly is referred to in this opinion as the "state court." *See* http://www.nycourts.gov/.

Amended Complaint ("SAC") would be futile.

Plaintiff's proposed SAC alleges the following causes of action:

1. Against Credit Suisse for violation of the FLSA for failure to pay regular wages and overtime wages;

2. Against Credit Suisse for violation of the New York Labor Law for failure to pay wages;

3. Against both Defendants for violation of the New York Labor Law for retaliation;

4. Against Credit Suisse for fraudulent misrepresentation;

5. Against Credit Suisse for negligence;

6. Against Credit Suisse for unjust enrichment;

7. Against NTT Data for retaliation in violation of the Sarbanes-Oxley Act (the "SOX Claim");

8. Against NTT Data for fraudulent misrepresentation.

In sum, as to NTT Data, Plaintiff has dropped some claims and reasserted some claims that were dismissed in the FAC, and seeks to add the new SOX Claim. Plaintiff seeks to reassert all of its claims against Credit Suisse, including his FLSA and New York Labor Law claims.

Plaintiff filed a complaint on October 29, 2015, with the Occupational Safety and Health Administration ("OSHA") against both Defendants regarding his termination. OSHA dismissed the complaint as untimely on February 11, 2016.

II. STANDARD

A motion for leave to amend a complaint is entrusted to the discretion of the district court. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 159 (2d Cir. 2015) ("As for leave to amend the complaints, 'we review [the district court's refusal to allow such amendment] only for abuse of discretion which ordinarily we will not identify absent an error of law, a clearly erroneous assessment of the facts, or a decision outside the available range of

permitted choices.'" (quoting *Knife Rights, Inc. v. Vance,* 802 F.3d 377, 389 (2d Cir.2015))). "While '[l]eave to amend should be freely granted, . . . the district court has the discretion to deny leave if there [was] a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *Id.* (quoting *Jin v. Metro Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002)). Futility is assessed under the same standard as a motion to dismiss: "determining whether the proposed complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Indiana Pub. Retirement Sys. v. SAIC, Inc.*, No. 14-4140-cv, 2016 WL 1211858, at *5 (2d Cir. March 29, 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

District Courts have the inherent authority to dismiss meritless claims sua sponte. *Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2d Cir. 2000) (per curiam) (affirming the district court's conclusion that it had the power to dismiss a frivolous action sua sponte); *Wachtler v. Cty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) ("The district court has the power to dismiss a complaint sua sponte for failure to state a claim.") (quoting *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980)); Charles A. Wright & Arthur R. Miller, *5B Fed. Prac. & Proc. Civ.* § 1357 (3d ed.) ("Even if a party does not make a formal motion under Rule 12(b)(6), the district judge on his or her own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim as long as the procedure employed is fair to the parties.").

Where, as here, a party appears pro se, a court must construe "the submissions of a pro se litigant . . . liberally" and interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks omitted); *see Smith v. Fischer*, 803 F.3d 124, 127 (2d Cir. 2015) (confirming *Triestman*'s approach to pro se litigants). However, "failure of subject matter jurisdiction is not

waivable and may be raised at any time by a party or by the court *sua sponte*." *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000); *see also Faucette v. Colvin*, No. 15 Civ. 8495, 2016 WL 866350, at *2 (S.D.N.Y. Mar. 3, 2016) (same).

III. DISCUSSION

A. Claims Against NTT Data

Because the proposed SAC would assert claims against NTT Data that could not survive a motion to dismiss, leave to amend as to NTT Data is futile and is denied. The proposed complaint alleges three claims against NTT Data -- retaliation in violation of New York Labor Law, fraudulent misrepresentation and the SOX Claim.

The first two of these could not survive a motion to dismiss because the Court previously dismissed them from this action on September 28, 2015. Plaintiff's FAC and proposed SAC both allege that NTT Data fraudulently misrepresented the terms of the Agreement to Plaintiff; and both allege the New York Labor Law retaliation claim. These claims were dismissed from the FAC for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, which "directs federal courts to abstain from considering claims when four requirements are met: (1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal suit commenced." *McKithen v. Brown*, 626 F.3d 143, 154 (2d Cir. 2010); *see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (explaining the *Rooker-Feldman* doctrine). The *Rooker-Feldman* doctrine is intended to foreclose a narrow and specific kind of case: "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."

Exxon Mobil, 544 U.S. at 284; *see also Green v. Mattingly*, 585 F.3d 97, 101 (2d Cir. 2009) (same). Because the state court rejected Plaintiff 's objection to arbitration, and Plaintiff seeks relief in federal court as an alternative to that arbitration, Plaintiff's claims meet all four criteria of *Rooker-Feldman*: he lost in state court as he was compelled to arbitrate under the terms of the Agreement; he seeks relief here to avoid that arbitration; the state court judgment was entered before the commencement of the present federal court action; and Plaintiff's claims here necessarily invite the district court to reject the judgment of the state court. *See Yonkers Elec. Contracting Corp. v. Local Union No. 3, Int'l Bhd. Elec. Workers' AFL-CIO*, 220 F. Supp. 2d 254, 259 (S.D.N.Y. 2002) ("A federal court does not have subject matter jurisdiction over a petition to compel arbitration after a state court has already ruled on the merits of that petition."); *Wanderlust Pictures, Inc. v. Empire Entm't Grp.*, No. 01 Civ. 4465, 2001 WL 826095, at *4 (S.D.N.Y. July 19, 2001) ("[S]everal courts have applied the Rooker-Feldman doctrine in cases where a state court has ruled on a party's right to arbitrate prior to the petitioner's filing of the federal suit."). The state law claims against NTT Data were properly dismissed from the FAC and, if reasserted, could not survive a motion to dismiss, rendering leave to amend futile.

Plaintiff also seeks to amend his complaint to add the SOX Claim against NTT Data. Although this claim is new -- albeit alleging essentially the same facts as Plaintiff's previously dismissed retaliation claim under New York Labor Law and the FLSA -- it is dismissed because this Court lacks jurisdiction to hear Plaintiff's claim. An employee seeking relief under the Sarbanes-Oxley Act must first file a complaint with OSHA, the agency with delegated authority to receive such complaints. 29 C.F.R. § 1980.103(c) (2015); *see* 18 U.S.C. § 1514A(b)(1)(A) (2010). Plaintiff filed his OSHA complaint after filing for leave to add the SOX claim in this action. OSHA dismissed Plaintiff's complaint as untimely. Plaintiff was permitted to object to

this determination and request a hearing with an Administrative Law Judge within thirty days of OSHA's determination, *see* 29 C.F.R. §§ 1980.105(c), 1980.107, which was dated February 11, 2016. If Plaintiff failed to object, OSHA's dismissal is final. *See id.* at § 1980.105(c). If Plaintiff did object and the administrative law judge affirmed OSHA's findings, Plaintiff's sole recourse in the federal courts is an appeal to the United States Court of Appeals. *See id.* at § 1980.112; *see generally* Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as amended, 80 Fed. Reg. 11865, 11866 (Mar. 5, 2015). Plaintiff cannot seek relief in this Court, as OSHA acted within 180 days of Plaintiff's filing of the complaint. Only if OSHA had "not issued a final decision within 180 days of the filing of the complaint," could the employee bring "an action at law or equity for *de novo* review in the appropriate district court of the United States." 29 C.F.R. § 1980.114 (2015).

Even if the Court had subject matter jurisdiction to review OSHA's determination, it is evident from the face of the proposed SAC that the SOX Claim is untimely. The Sarbanes-Oxley Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, obligates a complainant to file his complaint within 180 days of discovering the violation. 18 U.S.C. § 1514A(b)(2)(D) (2010). The proposed claim alleges impermissible retaliation on April 27, 2012, in a complaint filed in October 2015. Plaintiff did not file until more than 1,200 days had elapsed. The proposed SAC is therefore untimely and would not survive a motion to dismiss. Leave to amend would be futile.

Plaintiff's request dated April 6, 2016, to further amend his pleading to add a claim for violation of the civil provisions of the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("civil RICO""), is also denied as futile. The proposed SAC does not allege, nor has Plaintiff otherwise suggested specific facts that, construed in the most generous

light, would give rise to an inference of a criminal predicate act necessary to bring a civil RICO claim. *See* 18 U.S.C. § 1962 (establishing conduct constituting RICO predicate); 18 U.S.C. § 1964 (providing for civil remedies to RICO offenses). Plaintiff makes only conclusory statements that he "can substantiate allegations that Ed Epstein and Sharin Newman of NTT Data, Inc. committed multiple acts of wire fraud at [his] expense." Although Plaintiff raised the possibility of amending the FAC to add a civil RICO claim at the September 28, 2016, hearing, his decision not to do so in the proposed SAC does not entitle him to successive bites at the apple by rationing his proposed amendments over multiple iterations of the complaint.

B. Claims Against Credit Suisse

Plaintiff alleges several claims against Credit Suisse. Credit Suisse was not a signatory to the Agreement, and its arbitration clause does not cover disputes with Credit Suisse. However, Plaintiff's services were provided to Credit Suisse pursuant to the Agreement, and Plaintiff cannot avoid the arbitration provision by pressing his claims against Credit Suisse rather than NTT Data, the counterparty to the Agreement. "[A] signatory [is estopped] from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l*, 198 F.3d 88, 98 (2d Cir. 1999) (emphasis omitted).

Plaintiff's claims against Credit Suisse are intertwined with the Agreement as it gave rise to any relationship between Plaintiff and Credit Suisse. The allegations of non-payment and retaliatory firing arise primarily from any rights Plaintiff may or may not have under the Agreement. *See Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 395 (2d Cir. 2015) ("If the allegations underlying the claims touch matters covered by the parties' . . . agreements, then

those claims must be arbitrated." (quoting *Smith/Enron*, 198 F.3d at 99)). It would be anomalous and could lead to inconsistent results to require claims against NTT Data to be arbitrated and the related, if not identical, claims against Credit Suisse to be litigated. Plaintiff is therefore estopped from litigating here claims that should be arbitrated. Allowing Plaintiff leave to amend his complaint to add the proposed claims against Credit Suisse would be futile and is denied.

This estoppel precluding the litigation of claims against Credit Suisse in the proposed SAC applies equally to the existing claims against Credit Suisse in the operative FAC. Both complaints are predicated on identical alleged facts and bear the same relationship to the Agreement. Plaintiff's claims against Credit Suisse are dismissed sua sponte, leaving no further claims for the Court to adjudicate.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to amend the complaint is DENIED. Plaintiff's First Amended Complaint is DISMISSED. The Clerk of Court is respectfully directed to mail a copy of this Order and Opinion to the pro se Plaintiff and to close the case.

Dated: May 17, 2016
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.