No._____

IN THE

Supreme Court of the United States

ERIN DALY

Petitioner,

– v. –

CITIGROUP INC., CITIGROUP GLOBAL MARKETS, INC., and CITIBANK, N.A.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI APPENDIX

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December 16, 2019

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-665

ERIN DALY, *Plaintiff-Appellant*,

v.

CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC., CITIBANK, N.A., *Defendants-Appellees*.

Filed: September 19, 2019

Before: SACK, HALL, AND DRONEY, *Circuit Judges*.

OPINION

SACK, Circuit Judge.

The plaintiff-appellant, Erin Daly, is a former employee of Citigroup Inc., Citigroup Global Markets, Inc., and Citibank, N.A., the defendants-appellees. She brought suit against them in the United States District Court for the Southern District of New York alleging gender discrimination and whistleblower retaliation claims under several local, state, and federal

statutes, including the Dodd-Frank and Sarbanes-Oxley Acts. In response, the defendants filed a motion to compel arbitration and to dismiss the plaintiff's claims, arguing that each of the plaintiff's claims, with the exception of her Sarbanes-Oxley claim, was subject to mandatory arbitration under her employment arbitration agreement, and that her Sarbanes-Oxley claim should be dismissed for lack of subject matter jurisdiction. The district court (Richard J. Sullivan, *Judge*) issued an opinion and order granting the defendants' motion in its entirety. On appeal, the plaintiff argues that the district court erred in dismissing her Sarbanes-Oxley claim and compelling arbitration of the remainder of her claims. We disagree. The district court appropriately compelled arbitration of all but the plaintiff's Sarbanes-Oxley claim, including her Dodd-Frank whistleblower retaliation claim, because her claims fall within the scope of her employment arbitration agreement and because she failed to establish that they are precluded by law from arbitration. The plaintiff's Sarbanes-Oxley claim was also properly dismissed because the district court lacked subject matter jurisdiction over it inasmuch as the plaintiff failed to exhaust her administrative remedies under the statute. Accordingly, the district court's order is:

AFFIRMED.

The plaintiff-appellant Erin Daly was employed by the defendants- appellees, Citigroup Inc., Citigroup Global Markets, Inc., and Citibank, N.A. She brought suit in the United States District Court for the Southern District of New York alleging gender discrimination and whistleblower retaliation claims under several local, state, and federal laws, including the Dodd-Frank Act and the Sarbanes-Oxley Act. In response, the defendants filed a motion to compel arbitration and to dismiss the plaintiff's claims. They argued that all of the plaintiff's claims, with the exception of her Sarbanes-Oxley claim, were subject to mandatory arbitration under her employment arbitration agreement. The defendants further contended that the plaintiff's Sarbanes-Oxley claim, which is nonarbitrable by statute, required dismissal for lack of subject matter jurisdiction because the plaintiff had failed to exhaust her administrative remedies.

The district court (Richard J. Sullivan, *Judge*) issued an opinion and order granting the defendants' motion to compel arbitration and to dismiss in its entirety. The court concluded that the plaintiff's claims fell within the scope of her employment arbitration agreement. It further concluded that the plaintiff had failed to establish that her claims were precluded by law from arbitration, with the exception of her Sarbanes-Oxley claim, which is nonarbitrable by statute. As relevant here, the court decided that because Congress had not demonstrated its intent to preclude claims arising under Dodd-Frank's whistleblower retaliation provision from arbitration, the plaintiff's Dodd-Frank

whistleblower claim was arbitrable.

The court further concluded that the plaintiff's Sarbanes-Oxley claim should be dismissed because she had failed to exhaust her administrative remedies before filing her claim in federal court. While the district court noted its uncertainty as to whether failure to exhaust under Sarbanes-Oxley is a jurisdictional prerequisite to suit evaluated under Federal Rule of Civil Procedure 12(b)(1), or a claim-processing requirement to be assessed under Rule 12(b)(6), it concluded that the defendants' motion must in either event be granted. The district court therefore dismissed the plaintiff's Sarbanes-Oxley claim and ordered arbitration of the remainder of her claims.

On appeal, the plaintiff maintains that the district court erred in compelling arbitration of the majority of her claims because they involve the same whistleblower activity that is the subject of her nonarbitrable Sarbanes- Oxley claim. She also argues that the district court erred in dismissing her Sarbanes-Oxley claim because even if administrative exhaustion is a jurisdictional prerequisite to suit, she has satisfied the statute's requirements.

These arguments are meritless. The district court correctly compelled arbitration of the plaintiff's claims, with the exception of her Sarbanes-Oxley claim, because they fall within the scope of her employment arbitration agreement and because she failed to satisfy her burden of establishing that such claims are precluded by

statute from compelled arbitration. The plaintiff's Sarbanes-Oxley claim was also properly dismissed because the district court lacked subject matter jurisdiction inasmuch as the plaintiff failed to exhaust her administrative remedies under the statute, which constitutes a jurisdictional bar to suit in federal court. The district court therefore properly dismissed the plaintiff's Sarbanes-Oxley claim and granted the defendants' motion to compel arbitration as to the remainder of her claims.

BACKGROUND

Factual Background

From 2007 through 2014, the plaintiff-appellant Erin Daly was employed by the defendants-appellees, Citigroup Inc., Citigroup Global Markets, Inc., and Citibank, N.A. (collectively the "defendants" or "Citi"). On three separate occasions while she was so employed, she entered into an arbitration agreement with the defendants, in the form of an Employment Arbitration Policy (the "Policy"). The Policy required that all employment-related disputes be arbitrated.[1]

In 2010, Daly was promoted to Assistant Vice President of the Citi Private Bank Division.

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[1] These agreements were included in an appendix to Citi's employee handbook, and the plaintiff electronically accepted each of their terms.

The position carried with it the highly coveted authority to allocate shares of stock for purchase among the defendants' customers.[2] Amended Complaint ("AC") ¶ 72; J. App. 103. On June 29, 2012, however, Daly was stripped of her authority to make such allocations. Despite her complaints to her supervisors, Citi did not restore her privileges. Other professional responsibilities of hers were also diminished. The plaintiff asserts that these actions on the part of her superiors were intended to make it clear that "[t]he boys were in charge." *Id*. ¶ 93; J. App. 106 (emphasis omitted).

The plaintiff further alleges that her supervisor, James Messina, "constantly demanded that [she] disclose material non-public information of which he knew she was in possession" so that "he could pass the information along to his favored clients." *Id.* ¶¶ 121-22; J. App. 110. On November 19, 2014, Daly conveyed those accusations to Citi attorneys and human resources employees.

On December 1, 2014, less than two weeks later, Daly was notified that she was being terminated. The defendants later filed a Uniform Termination Notice for Securities Industry Registration Form ("Form U-5") with the Financial

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[2] In her complaint, Daly describes the securities vaguely as "subjective stock," AC 70, J. App. 103, and "stock of certain 'hot' IPOs," *id.* ¶ 72, J. App. 103, without alleging what her or the defendants' role was in its underwriting, sale, or distribution.

Industry Regulatory Authority ("FINRA"), as required when a registered representative of a firm departs therefrom for any reason.[3] It contained assertions that, among other things, the plaintiff had been late to work and had mishandled confidential information. The plaintiff asserts that these statements are "false, malicious, and defamatory." *Id.* ¶¶ 36-38; J. App. 17-18. Because the plaintiff's Form U-5 is available in the FINRA database, which allows FINRA members to search for information about individual financial professionals, the plaintiff alleges that the defendants' statements continue to have an adverse impact on her employment opportunities.

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[3] "The National Association of Securities Dealers ('NASD') require[d] its members to file a termination form ('Form U-5') whenever they terminate[d] a registered employee. The form contain[ed] the employer's statement of the reasons for the termination, and the NASD provide[d] the form to any member firm upon request." *Rosenberg v. MetLife, Inc.*, 493 F.3d 290, 290 (2d Cir. 2007) (*per curiam*). In "2007, the NASD merged with parts of the New York Stock [E]xchange to form FINRA and the NASD code was replaced by the FINRA Code." *Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184, 188 (2d Cir. 2019). The Form U-5 filing requirement continued under FINRA. *See* Financial Industry Regulatory Authority, "Terminate an Individual's Registration,"https://www.finra.org/industry/terminate-individuals-registration (last visited September 3, 2019).

Procedural History

On November 28, 2016, Daly filed a complaint in the United States District Court for the Southern District of New York. She alleged several gender discrimination and whistleblower retaliation claims, including claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002(e); the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Sarbanes-Oxley Act ("SOX"), 15 U.S.C. § 1514A; the Dodd-Frank Act ("Dodd-Frank"), 15 U.S.C. § 78u-6; and the Human Rights Laws of New York State and City.

On March 3, 2017, the defendants filed a motion to compel arbitration and to dismiss the plaintiff's claims. They argued that, with the exception of her SOX claim, the plaintiff's claims were employment-related and therefore subject to her employment arbitration agreement. They further contended that the plaintiff's SOX claim should be dismissed for lack of subject matter jurisdiction because she had failed to exhaust her administrative remedies.

On March 24, 2017, Daly responded, arguing that her claims were not subject to arbitration because there was clear congressional intent to preclude such claims from the waiver of judicial remedies. She also filed an amended complaint, the operative pleading in this case. On October 6, 2017, the defendants filed a letter supplementing their motion to dismiss, in light of the amended complaint, to which the plaintiff responded on October 20, 2017.

On February 6, 2018, the district court

issued an opinion and order granting the defendants′ motion in its entirety.[4] The district court found that the plaintiff had entered into three successive employment arbitration agreements. It concluded that the plaintiff′s claims fell within the scope of her arbitration agreements. The court further determined that the plaintiff had failed to establish that her claims were nonetheless precluded from arbitration by law, with the exception of her SOX claim, which is nonarbitrable by statute. By contrast, because Congress had not demonstrated its intent to preclude Dodd- Frank whistleblower claims from arbitration, the plaintiff′s Dodd-Frank claim was arbitrable. The court therefore concluded that each of the plaintiff′s claims, with the exception of her SOX claim, was subject to mandatory arbitration.

The district court also dismissed the plaintiff′s SOX whistleblower claim, concluding that the plaintiff had failed to file an administrative complaint within 180 days of the alleged violation, and, thus, had not exhausted her administrative remedies under the statute. *See* 18 U.S.C. § 1514A(b)(2)(D). The court noted its uncertainty as to whether failure to exhaust under SOX is a jurisdictional bar to suit, evaluated on a motion to dismiss under Federal Rule of Civil Procedure

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[4] The opinion and order is equivalent to a final judgment against Daly from which she can and does appeal. *See* Fed. R. Civ. P. 54(a) (noting that "′Judgment′ as used in these rules includes a decree and any order from which an appeal lies″).

12(b)(1) for lack of subject matter jurisdiction, or a claim-processing requirement to be assessed under Rule 12(b)(6) for failure to state a claim. But it determined that the plaintiff's claim was in either event dismissible: If exhaustion is jurisdictional, the plaintiff's claim fails for lack of subject matter jurisdiction because she did not timely file her administrative complaint; and if it is an element of a claim, the plaintiff fails to assert equitable defenses that would excuse her belated filing. The court therefore dismissed the plaintiff's SOX claim and referred each of her other claims to arbitration.

DISCUSSION

On appeal, the plaintiff argues that the district court erred in dismissing her SOX claim for lack of subject matter jurisdiction and compelling arbitration of her other claims. She insists that her Title VII, EPA, and Dodd-Frank claims involve the same whistleblower activity that is the subject of her nonarbitrable SOX claim and should therefore, like her SOX claim, be precluded from arbitration.[5]

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[5] On appeal, the plaintiff does not separately address her claims under the Equal Pay Act or Title VII. She does, however, speak generally about the claims asserted under federal law. *See, e.g.*, Pl. Br. 25 ("The claims asserted here are exactly the federal statutory claims . . . [which] . . . Congress intended . . . to be non arbitrable." (internal quotation marks omitted)). We therefore understand the plaintiff to be contesting the arbitrability of each of her federal claims, including those under the EPA and Title VII.

She further maintains that the district court erred in dismissing her SOX claim for failure to exhaust her administrative remedies because she continues to suffer an ongoing violation on the part of her former employer, thus rendering her administrative filing timely.

I. Motion to Compel Arbitration

We review a district court's decision to compel arbitration *de novo*. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 49 (2d Cir. 2004).

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "reflects a legislative recognition of 'the desirability of arbitration as an alternative to the complications of litigation.'" *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (quoting *Wilko v. Swan*, 346 U.S. 427, 431 (1953)). The FAA, "reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts." *Id.*(internal quotation marks omitted). To achieve these goals, it provides that arbitration clauses in commercial contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, "[b]y its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

In reviewing a motion to compel arbitration, we must therefore determine: (1) "whether the parties agreed to arbitrate"; (2) "the scope of that agreement"; and, (3) "if federal statutory claims are asserted, . . . whether Congress intended those

claims to be nonarbitrable." *Genesco*, 815 F.2d at 844. In accordance with the "strong federal policy favoring arbitration as an alternative means of dispute resolution," we resolve any doubts concerning the scope of arbitrable issues "in favor of arbitrability." *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir. 1996). In so doing, we "will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* (internal quotation marks omitted).

The plaintiff does not dispute that she entered into three valid arbitration agreements with the defendants during the course of her employment, in the form of an Employment Arbitration Policy. They provide:

> This Policy applies to both you and to Citi, and makes arbitration the required and exclusive forum for the resolution of all employment-related disputes (other than disputes which by statute are not subject to arbitration) which are based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) and arise between you and Citi . . . . These disputes include, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, . . . the Equal Pay Act of 1963, . . . and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment

> discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, or retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

J. App. 75. The plain terms of the plaintiff's arbitration agreements thus establish that the parties agreed to arbitrate "all employment-related disputes." *Id.* And, as the district court correctly concluded, each of the plaintiff's claims fall within that broad category. The only question that remains then is whether Congress intended for any of the plaintiff's federal statutory claims to be nonarbitrable as a matter of law.

We conclude that the plaintiff's claims arising under Title VII and the Equal Pay Act ("EPA") are arbitrable. We have previously decided that there is insufficient evidence "that with respect to claims under Title VII, Congress intended to preclude the waiver of judicial remedies." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *see also Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 148 (2d Cir. 2004) (noting that we have "conclude[d], along with the majority of other circuits, that Title VII claims could be subject to compulsory arbitration"). Similarly, the plaintiff has failed to present any "evidence that Congress intended claims arising under the EPA to be nonarbitrable." *Crawley v. Macy's Retail Holdings, Inc.*, No. 15 Civ. 2228 (KPF), 2017 WL 2297018, at *5, 2017 U.S. Dist. LEXIS 80541, at

*13 (S.D.N.Y. May 25, 2017) (internal quotation marks omitted). The plaintiff has therefore failed to meet her burden of showing with respect to either her Title VII or EPA claim that Congress intended to preclude her claims from arbitration. *See Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 78 (2d Cir. 1998) ("Congress . . . may override the presumption in favor of arbitration by manifesting its intention to do so[, which] will be discoverable in the text of the [statute], its legislative history, or an inherent conflict between arbitration and the [statute's] underlying purposes." (internal quotation marks omitted)), *abrogated on other grounds by Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015). The parties also expressly agreed that the scope of their arbitration agreements covers "claims . . . under Title VII . . . [and] . . . the Equal Pay Act of 1963." J. App. 75. The district court therefore correctly compelled arbitration of both claims.

Whether the plaintiff's Dodd-Frank claim is arbitrable, however, is less certain. To determine whether it is, we must first look to its statutory framework.

In 2002, Congress passed the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002), which established a private right of action for employees of certain companies who are discharged for, among other things, "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of [specified securities laws] . . . to . . . a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a)(1)(C). Following

the financial crisis of 2007-08, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which, *inter alia*, amended a variety of federal statutory provisions that had been designed to regulate the financial industry. As relevant here, Dodd- Frank amended the Securities Exchange Act of 1934 to create a private right of action against an employer who retaliates against a whistleblower for engaging in one or more of three categories of protected activity including "making disclosures that are required or protected under [SOX]." 15 U.S.C. § 78u- 6(h)(1)(A)(iii). Separately, Dodd-Frank amended the SOX whistleblower retaliation provision, 18 U.S.C. § 1514A, to include an anti-arbitration provision, which reads:

> (1) Waiver of rights and remedies.--The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> (2) Predispute arbitration agreements.--No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

18 U.S.C. § 1514A(e)(1)-(2). Importantly for present purposes, Dodd-Frank did not include a comparable anti-arbitration provision in its own whistleblower provision, § 78u-6(h).

The parties agree that Congress's amendment to SOX's whistleblower-retaliation provision to include an anti-arbitration clause evidences clear congressional intent that claims arising under that provision are to be precluded from arbitration. We have yet to determine, however, whether claims arising under Dodd-Frank's whistleblower provision are also precluded from arbitration.[6] The Third Circuit, the only federal circuit to have ruled on this issue, has found such claims to be arbitrable.[7] *See Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d

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[6] District courts in this Circuit have diverged on the issue. *Compare Murray v. UBS Securities, LLC*, No. 12 Civ. 5914 (KPF), 2014 WL 285093, at *8-11, 2014 U.S. Dist. LEXIS 9696, at *22-33 (S.D.N.Y Jan. 27, 2014) (Dodd-Frank claims are arbitrable), *with Wiggins v. ING U.S., Inc.*, No. 14 Civ. 1089 (JCH), 2015 WL 3771646, at *7, 2015 U.S. Dist. LEXIS 78129, at *19 (D. Conn. June 17, 2015) (Dodd-Frank claims are nonarbitrable).

[7] This also appears to be the consensus position of district courts outside this Circuit. *See, e.g.*, *Sayre v. JP Morgan Chase & Co.*, No. 17-cv-449 (JLS) (MDD), 2018 WL 1109032, at *6, 2018 U.S. Dist. LEXIS 30776, at *14-15 (S.D. Cal. Feb. 26, 2018); *Wussow v. Bruker Corp.*, No. 16-cv-444 (WMC), 2017 WL 2805016, at *6-7, 2017 U.S. Dist. LEXIS 99904, at *15-18 (W.D. Wis. June 28, 2017); *Ruhe v. Masimo Corp.*, No. SACV 11–00734 (CJC), 2011 WL 4442790, at *4-5, 2011 U.S. Dist. LEXIS 104811, at *11-14 (C.D. Cal. Sept. 16, 2011).

488, 492-95 (3rd Cir. 2014). For the reasons that follow, we now join the Third Circuit in concluding that Congress did not intend to preclude arbitration of Dodd-Frank whistleblower claims:

> First, nothing in Dodd-Frank's text suggests that claims arising thereunder are nonarbitrable. Dodd-Frank amended several statutory provisions to include anti-arbitration provisions but did not do so with respect to its own whistleblower provision, § 78u-6(h). As discussed above, Dodd-Frank amended SOX's whistleblower provision to include an anti-arbitration provision. *See* 18 U.S.C. § 1514A(e)(2). It also inserted an identical anti-arbitration provision into the whistleblower protections of the Commodity Exchange Act, *see* 7 U.S.C. § 26(n)(2), and a nearly identical provision into the whistleblower protections of the Consumer Financial Protection Act, *see* 12 U.S.C. § 5567(d)(2) ("[subject to one limited exception,] no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.").
>
> Congress's failure to attach an anti-arbitration provision to the Dodd-Frank whistleblower provision, § 78u-6(h), while simultaneously amending similar statutory regimes to include the same, is a strong indication of its intent not to preclude Dodd-Frank whistleblower claims from arbitration.[8] *See Gross v. FBL Fin.*

[8] The statute's legislative history also supports our understanding that this omission was not

Servs., Inc., 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally [in doing so]."); *see also Khazin*, 773 F.3d at 493 ("The fact that Congress did not append an anti-arbitration provision to the Dodd-Frank cause of action while contemporaneously adding such provisions elsewhere suggests . . . that the omission was deliberate.").

Second, the language of the SOX anti-arbitration provision restricts its applicability to its own statutory scheme. As discussed above, the SOX anti- arbitration provision states that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under *this section*." 18 U.S.C. § 1514A(e)(2) (emphasis added). The "section" referred to is the SOX whistleblower provision. The

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accidental. *See, e.g.*, *Ruhe*, 2011 WL 4442790, at *4, 2011 U.S. Dist. LEXIS 104811, at *13-14 (concluding based on review of relevant legislative history that omission of anti-arbitration provision in Dodd-Frank's whistleblower provision was not a "drafting error"); *Wussow*, 2017 WL 2805016, at *7, 2017 U.S. Dist. LEXIS 99904, at *17-18 (noting that "Congress's apparent inconsistent treatment with the whistleblower provisions under SOX and Dodd-Frank has been the subject of substantial discussion and a fair amount of criticism. Yet Congress has done nothing to expressly expand the SOX [a]nti-[a]rbitration [p]rovision to Dodd-Frank whistleblower claims" (internal citations omitted)).

SOX anti-arbitration provision thus applies only to agreements requiring arbitration of SOX whistleblower claims. The Dodd-Frank cause of action, by contrast, is not located in the same section, or even the same title, of the federal code. *See* 15 U.S.C. § 78u-6(h).[9] The language of the SOX anti-arbitration provision thus further reflects congressional intent to limit its terms to the claims arising under its particular statutory scheme.

Moreover, even if the SOX anti-arbitration provision were ambiguous, we still could not infer that Congress intended to extend its application to Dodd Frank. Despite some surface similarities,[10]

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[9] Nor could the phrase "this section" refer to the location of these two provisions in Dodd-Frank itself. While both the SOX anti-arbitration provision and the Dodd-Frank whistleblower provision appear in the same section of Dodd-Frank, "Sec. 922. Whistleblower Protection," *see* 124 Stat. 1376, 1841-49 (2010), the text of the statute clearly indicates that each provision is to be incorporated at other points in the federal code. *Compare* § 922(c)(2), 124 Stat. at 1848 (amending the whistleblower provision of SOX "by adding [that anti-arbitration provision] at the end"), *with* § 922(a), 124 Stat. at 1841 (Dodd-Frank whistleblower provision to be inserted into "[t]he Securities Exchange Act of 1934 (15 U.S.C. 78[a et seq.]))."

[10] The SOX whistleblower provision, 18 U.S.C. § 1514A(a), states, in relevant part, as follows:

> No company [covered under relevant

> provisions of the Securities Exchange Act] . . . may discharge, demote, suspend, threaten, harass, 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 . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ; or
>
> (2) to file . . . or otherwise assist in a proceeding filed . . . relating to an alleged violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The Dodd-Frank whistleblower provision, 15 U.S.C. § 78u-6(h)(1)(A), states, in relevant part, as follows:

> 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

the whistleblower retaliation provisions of Sarbanes-Oxley and Dodd-Frank diverge significantly in their "prohibited conduct, statute of limitations, and remedies." *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 497 (S.D.N.Y. 2014). For example, a whistleblower seeking to assert a claim under SOX must first file an administrative complaint with the Secretary of Labor through the Occupational Safety and Health Administration ("OSHA"), *see* 18 U.S.C. § 1514A(b)(1)(A), 29 C.F.R. § 1980.103(c), while that same whistleblower asserting a claim under the Dodd-Frank whistleblower provision may bring suit directly in federal district court, *see* 15 U.S.C. § 78u-6(h)(1)(B)(i). And a whistleblower asserting a claim under SOX may obtain "back pay, with interest," 18 U.S.C. § 1514A(c)(2)(B), while under Dodd-Frank he or she is entitled to double that amount, 15 U.S.C. § 78u- 6(h)(1)(C)(ii). These differences in the statutes'

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because of any lawful act done by the whistleblower—

(i) in providing information to the [Securities and Exchange] Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under [SOX}, this chapter . . . , and any other law, rule, or regulation subject to the jurisdiction of the Commission.

whistleblower provisions support our conclusion that Congress did not intend for SOX's anti-arbitration provision to extend to whistleblower claims arising under Dodd-Frank.

Notwithstanding the absence of evidence that Congress intended to preclude from arbitration the Title VII, EPA, and Dodd-Frank claims, the plaintiff asserts that we cannot separate these claims from her SOX claims for purposes of determining their arbitrability because they arise out of the same act of whistleblowing. Pl. Br. 23. She therefore argues that each of her federal claims, like her SOX claim, should be precluded from arbitration. We disagree. We cannot simply lump all of the plaintiff's claims together for purposes of determining their arbitrability, even if they pertain to the same conduct. We are instead charged with "examin[ing] with care the complaints seeking to invoke [our] jurisdiction in order to separate arbitrable from nonarbitrable claims." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam). Here, for the reasons discussed, we conclude that Congress did not intend for claims arising under Dodd-Frank's whistleblower provision to be precluded from arbitration. The plaintiff's SOX whistleblower claim cannot save her otherwise arbitrable claims from their fate. The district court therefore correctly compelled arbitration of all of the plaintiff's claims, with the exception of her SOX claim, which it properly determined to be nonarbitrable.

II. Motion to Dismiss

"We review *de novo* a district court's grant of a motion to dismiss, including legal conclusions

concerning the court's interpretation and application of a statute of limitations." *Castagna v. Luceno*, 744 F.3d 254, 256 (2d Cir. 2014) (internal quotation marks omitted). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "The burden of proving jurisdiction is on the party asserting it." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).

The district court dismissed the plaintiff's SOX whistleblower claim on the ground that she failed to exhaust the statute's administrative exhaustion requirements, which require a claimant who wishes to raise a claim of whistleblower retaliation to first file a complaint with OSHA within 180 days of the date of the alleged violation, or when the claimant first became aware of it.[11] The plaintiff in this case did not file her complaint with OSHA until at least two years after she became aware of the alleged violation. The district court concluded that Daly's claim required dismissal because she had failed to

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[11] As of July 22, 2010, the statute allows 180 days for the filing of a complaint, rather than the previously mandated statutory period of 90-days. 18 U.S.C. § 1514A(b)(2)(D) (2010). Since the plaintiff filed her claim with OSHA no earlier than 2016, the 180-day filing period applies to her claim.

exhaust her administrative remedies, even though it was not certain whether the proper vehicle for that dismissal was for lack of jurisdiction, under Rule 12(b)(1), or for failure to state a claim, under Rule 12(b)(6).

In evaluating whether the plaintiff's SOX claim was correctly dismissed by the district court, we first assess whether the statute's administrative exhaustion requirements are a jurisdictional prerequisite to suit. We consider the Rule 12(b)(1) challenge first since "if [we] must dismiss the complaint for lack of subject matter jurisdiction, the [defendants'] defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990) (internal quotation marks omitted).

This Court has yet to address whether SOX's administrative exhaustion requirements are a jurisdictional prerequisite to suit, nor have we found clear guidance among our sister circuits. The Fourth Circuit assumed without deciding that a claimant's failure to exhaust the statute's administrative remedies would deprive a district court of jurisdiction, citing as support several district court cases and an administrative decision of the Department of Labor. *See Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 345 n.7 (4th Cir. 2014). And the Fifth Circuit similarly implied that the SOX exhaustion requirements are a jurisdictional prerequisite to suit. *See Heaney v. Prudential Real Estate Affiliates, Inc.*, 328 F. App'x 314, 314 n.1 (5th Cir. 2009) (per curiam) (noting that the court was "satisfied that the plaintiff

exhausted his administrative remedies under the Sarbanes Oxley Act and thus that the district court had jurisdiction over the matter").[12] However, the First Circuit appears to have departed from this position. *See Newman v. Lehman Bros. Holdings Inc.*, 901 F.3d 19, 25 (1st Cir. 2018) (dismissing the plaintiff's SOX whistleblower claim for failure to exhaust under 12(b)(6) after noting that "administrative exhaustion requirements in similar statutes . . . are mandatory, though not jurisdictional, and akin to a statute of limitations" (internal quotation marks omitted)).

To determine whether the administrative exhaustion requirements of SOX are jurisdictional or not, we look to the text of the statute to assess

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[12] Most district courts to have considered the issue have similarly concluded that a claimant's satisfying the statute's administrative exhaustion requirements is a jurisdictional prerequisite to suit. *See, e.g.*, *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 649-50 (E.D. Tenn. 2015) (collecting cases), *aff'd on other grounds*, 676 F. App'x 421 (6th Cir. 2017); *Mart v. Forest River, Inc.*, 854 F. Supp. 2d 577, 599 (N.D. Ind. 2012) (same); *Trusz v. UBS Realty Inv'rs*, No. 9 Civ. 268 (JBA), 2010 WL 1287148, at *4 n.2, 2010 U.S. Dist. LEXIS 30374, *11-13 n.2 (D. Conn. Mar. 30, 2010); *Nieman v. Nationwide Mut. Ins. Co.*, 706 F. Supp. 2d 897, 907 (C.D. Ill. 2010); *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 710 (E.D. Va. 2007); *Willis v. Vie Fin. Grp., Inc.*, No. CIV.A. 04-435, 2004 WL 1774575, at *2 n.3, 2004 U.S. Dist. LEXIS 15753, *5 (E.D. Pa. Aug. 6, 2004).

the congressional intent behind it. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982) ("[T]he initial question whether exhaustion is required should be answered by reference to congressional intent."); *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 996 (8th Cir. 2006) ("The Supreme Court has indicated that a statute requiring plaintiffs to exhaust administrative remedies before coming into federal court may be either jurisdictional in nature or nonjurisdictional, depending on the intent of Congress as evinced by the language used."(citing *Weinberger v. Salfi*, 422 U.S. 749 (1975))).

We conclude that the text of SOX makes clear that Congress intended for its administrative exhaustion requirements to be a jurisdictional prerequisite to suit in federal court. The statute's exhaustion requirements are included in the same provision—indeed, in the same sentence—as its jurisdictional provision. And that provision expressly grants federal jurisdiction only when specific administrative remedies have been exhausted:

> (1) In general.--A person who alleges discharge or other discrimination by any person in violation of [the whistleblower protection provision] may seek relief under [this section], by--
>
> (A) filing a complaint with the Secretary of Labor; or
>
> (B) if the Secretary has not issued a final

> decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

18 U.S.C. § 1514A(b)(1)(A)-(B).

The statute goes on to state that an employee asserting a SOX whistleblower claim must file her 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." 18 U.S.C. § 1514A(b)(2)(D). And the Secretary of Labor has, in turn, delegated the responsibility for adjudicating such a claim to OSHA. *See* 29 C.F.R. § 1980.103(b)- (d).

By the terms of the statute and its attendant regulations, then, a party may seek review of a SOX whistleblower claim in federal court under two circumstances:

First, when OSHA fails to issue a final decision within 180 days of the filing of an administrative complaint, and "there is no showing that such delay is due to the bad faith of the claimant," 18 U.S.C. § 1514A(b)(1)(B),[13] a party may

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[13] A final order in an OSHA administrative

seek relief by "bringing an action at law or equity for de novo review in the appropriate district court of the United States." *Id*. Second, review in federal court is possible if the party seeks review of a final order from OSHA within 60 days in "the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation," in which case the federal court's review on appeal is limited to the administrative record. *See Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 450 (2d Cir. 2013) (explaining on review of agency order dismissing SOX whistleblower claim that our review is limited to the administrative record).

In either instance, however, for the federal court to have jurisdiction over the claim, the claimant must first commence an action with an adjudicating administrative agency.[14] And the

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proceeding is issued by an Administrative Law Judge, unless a petition for review is filed and accepted by the Administrative Review Board, who would then issue the final order. *See* 29 C.F.R. §§ 1980.109-110.

[14] In this regard, the administrative scheme of SOX differs significantly from that of Title VII, which we have previously concluded does not create a jurisdictional prerequisite to suit. *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015). While SOX is "judicial in nature and is designed to resolve the controversy on its merits," the procedures of Title VII are "geared toward fostering settlement." *Roganti v. Metro. Life Ins. Co.*, No. 12 Civ. 161 (PAE), 2012 WL 2324476, at

nature of a federal court's subsequent review, if any, is expressly set forth by statute and agency regulation, including the standard of review (*de novo*) and the substantive content that may be reviewed (the administrative record). This procedural structure reflects Congress's clear intent for federal courts to exercise jurisdiction over a SOX claim only after the claimant has first exhausted the statute's administrative remedies. We therefore conclude that the administrative exhaustion requirements under SOX are jurisdictional and a prerequisite to suit in federal court.

We also conclude that the plaintiff has failed to exhaust her administrative remedies, which, for the foregoing reasons, deprives federal courts of subject matter jurisdiction over her claim. Daly contends that she filed an administrative complaint on November 28, 2016, which is approximately two years after her alleged wrongful termination, although she concedes that OSHA did not actually receive her complaint until March 24, 2017. *See Daly v. Citigroup Inc.*, No. 16-cv- 9183 (RJS), 2018

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*6, 2012 U.S. Dist. LEXIS 84939, at *18 (S.D.N.Y. June 18, 2012) (quoting *Willis*, 2004 WL 1774575 at *5, 2004 U.S. Dist. LEXIS 15753, at *15). And while, as discussed, the federal jurisdictional provision of SOX is coupled with its administrative exhaustion requirements, the jurisdictional provision in Title VII, by contrast, is entirely separate from the "provision specifying the time for filing charges with the EEOC" and "does not limit jurisdiction to those cases in which there has been a timely filing." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982).

WL 741414, at *6 n.5, 2018 U.S. Dist. LEXIS 19413, *15 n.5 (S.D.N.Y. Feb. 6, 2018). In either event, though, her administrative complaint was untimely: It was submitted long after the 180-day statutory filing period had run. *See* 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). Because the plaintiff did not exhaust her administrative remedies, the district court correctly dismissed her claim for lack of subject matter jurisdiction.

The plaintiff argues that even if filing a complaint with OSHA is a jurisdictional prerequisite to suit, it is a requirement that she has satisfied under the "continuing violation" doctrine. *See* Pl. Br. 13-14, 18-20. Under that doctrine, a court may review a claim involving a mix of timely and time-barred conduct as part of one violative pattern of activity. *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015). The plaintiff argues that because the defendants' filing of a false and defamatory Form U-5 about her on the FINRA database continues to prevent her from obtaining employment in the financial sector, their violation is ongoing and, therefore, her 180-day filing deadline has not yet elapsed. *See* Pl. Br. 13-14, 18-20.

We disagree. The Supreme Court has rejected the continuing violation doctrine in the employment discrimination context when the alleged violation involves discrete acts, rather than an ongoing discriminatory policy. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (explaining that "acts such as termination, failure to promote, denial of transfer, or refusal to hire" are clearly discrete adverse actions); *see also*

Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir. 1997) ("Discrete incidents of discrimination . . . will not ordinarily amount to a continuing violation, unless such incidents are specifically related and are allowed to continue unremedied for so long as to amount to a discriminatory policy or practice." (internal quotation marks omitted)). The defendants' misconduct, as alleged, consists of discrete, discriminatory acts, including her exclusion from workplace meetings, ultimate termination, and the filing of a disparaging Form U-5. They do not amount to an overarching policy of discrimination and are, therefore, insufficient to establish a continuing violation for purposes of deferring her administrative filing deadline. *See Gonzalez,* 802 F.3d at 220 (explaining that the continuing violation doctrine does not apply "to discrete unlawful acts, even where those discrete acts are part of a serial violation" (internal quotation marks and brackets omitted)). Indeed, "[t]o hold otherwise would render meaningless the time limitations imposed on discrimination actions." *Lightfoot*, 110 F.3d at 907-08.

We conclude, then, that Congress intended for federal courts to be able to assert jurisdiction over a SOX whistleblower claim only after the claimant has first exhausted the statute's administrative remedies. Here, Daly failed to satisfy her administrative exhaustion requirements because she did not file a timely complaint with OSHA. She is therefore precluded from filing her claim in federal district court. Because the district court lacked subject matter jurisdiction over her claim, the court properly

dismissed it under Rule 12(b)(1).[15]

Conclusion

We have considered the plaintiff's remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, we AFFIRM the order of the district court.

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[15] Because we conclude that the plaintiff's failure to exhaust is a jurisdictional bar to suit, we need not reach the plaintiff's SOX claim on the merits.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 16-cv-9183 (RJS)

ERIN DALY, *Plaintiff,*

v.

CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC., AND CITIBANK, N.A.,

Defendants.

Signed: February 14, 2019

ORDER

SULLIVAN, United States District Judge.

On February 6, 2018, the Court issued an order dismissing Plaintiff's Sarbanes-Oxley whistleblower claim and referred all other claims to arbitration. (Doc. No. 40.) When an entire dispute is referred to arbitration *and the parties request a stay,* the Federal Arbitration Act requires district courts to stay the federal case while the arbitration proceeds. *See Katz*

v. Cellco P'ship, 794 F.3d 341, 343 (2d Cir. 2015); *see also* 9 U.S.C. § 3. However, where, as here, neither party requests a stay, district courts have discretion to stay or dismiss the case. *See Benzemann v. Citibank N A.,* 622 F. App'x 16, 18 (2d Cir. 2015) (summary order); *Zambrano v. Strategic Delivery Sols., LLC,* No. I 5-c v-8410 (ER) , 2016 WL 5339552 , at *10 (S.D.N.Y. Sept. 22, 2016).

Accordingly, in an abundance of caution, the Court gave the parties until February 13, 2018 to inform the Court if they wished this case to be stayed for the pendency of the arbitration. (Doc. No. 40, at 12.) The Court received no such notification. As a result, the Clerk of Court is respectfully directed to close this case.

SO ORDERED.

Dated: February 14, 2019
New York, New York

/s/ Richard J. Sullivan
RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 16-cv-9183 (RJS)

ERIN DALY, *Plaintiff,*

v.

CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC., AND CITIBANK, N.A.,

Defendants.

Signed: February 6, 2018

OPINION AND ORDER

SULLIVAN, United States District Judge.

Plaintiff Erin Daly brings this action against her former employers, Defendants Citigroup Inc., Citigroup Global Markets, Inc., and Citibank, N.A. ("Defendants" or "Citi"), alleging that Defendants discriminated against her on the basis of her gender and retaliated against her after she complained about that discrimination and unrelated securities-law

violations perpetrated by Defendants. Now before the Court are Defendants' motions to (1) compel arbitration and (2) dismiss Plaintiff's Sarbanes-Oxley whistleblower claim for lack of jurisdiction and/or failure to state a claim pursuant to Federal Rule of Civil Procedure 12. (Doc. No. 20.) For the reasons set forth below, the Court grants Defendants' motions in their entirety.

I. BACKGROUND[16]

[16] The following facts are drawn from Plaintiff's first amended complaint (Doc. No. 27 (" FAC")) and her employment agreement (Doc. No. 22). On March 24, 2017, Plaintiff filed a letter motion seeking leave to file an amended complaint and the amended complaint itself. (Doc. Nos. 24, 25.) At the time, the Court deferred consideration of Plaintiff's request to amend her complaint until the resolution of Defendants motion to dismiss. (Doc. No. 28.) However, because Plaintiff's amended complaint was filed exactly twenty-one days after Defendants made their motion to dismiss and to compel arbitration, Plaintiff was entitled to amend her pleadings as of right pursuant to Federal Rule of Civil Procedure 15(a)(1)(B). Accordingly, the amended complaint is the operative pleading in this action and will be considered by the Court in connection with Defendants' motions. Nevertheless, because the amended complaint has no effect on the arguments raised by Defendants, the Court will deem Defendants' motions to apply to the amended complaint. In addition, the Court has also relied on Defendants' memorandum of law (Doc. No. 20), Plaintiff's opposition (Doc. No. 23), Defendants' reply (Doc. No. 29), Defendants' supplemental letter motion

A. Facts

Plaintiff was employed by Defendants from 2007 to 2014 (Doc. No. 27 ("FAC") ¶¶ 53, 133), eventually rising to the position of Assistant Vice President in the "Citi Private Bank" division (*id.* ¶ 57). While she was employed by Defendants, Plaintiff entered into three successive arbitration agreements with Defendants in which she agreed to the mandatory arbitration of employment-related disputes. (*See* Doc. No. 22, Exs. 1–6.) In 2009, employees in Plaintiff's division (the "Desk") were given authority to allocate stock among the Bank's clients. (*Id.* ¶¶ 70– 71.) The ability to exercise allocation discretion was particularly desirable – and made Desk employees valuable to clients – when a major "hot" initial public offering took place. (*Id.* ¶¶ 70– 72.) In those situations, the demand for stock subscriptions often outpaced supply and the allocation power could be used to reward some clients over others. (*Id.*) On June 29, 2012, Plaintiff was allegedly, and inexplicably, stripped of her ability to allocate stock. (*Id.* ¶ 73.) Despite Plaintiff's complaints to her supervisors and her efforts to regain her stock-allocation clearance, Plaintiff's ability to allocate stock was never restored. (*Id.* ¶¶ 75–88.) At around the same time, Plaintiff started to be excluded from regular meetings and her opinions and role on the Desk were increasingly devalued. (*Id.* ¶¶ 90–92.) Plaintiff claims that these employment decisions communicated to others that "the boys were in

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(Doc. No. 34), Plaintiff's supplemental letter response (Doc. No. 37) and the exhibits and declarations attached thereto.

charge." (*Id.* ¶ 93 (emphasis omitted).) Plaintiff further alleges that Citi employee James Messina, who served as Plaintiff's supervisor, repeatedly demanded that Plaintiff disclose material, nonpublic information that she obtained as a result of her role as the "go-to person" for legally sensitive trading plans and stocks that were subject to U.S. Securities and Exchange Commission ("SEC") rules governing insider trading and restricted stock. (*Id.* ¶¶ 102–22.) On November 19, 2014, Plaintiff alerted Citi attorneys and human resources employees of Messina's behavior, and on December 1, 2014, Plaintiff was terminated. (*Id.* ¶¶ 124, 133.) After Plaintiff was terminated, Defendants filed a Financial Industry Regulatory Authority ("FINRA") U5 Form that included allegedly false and negative descriptions of her performance as an employee.[17] (*Id.* ¶ 38.)

B. Procedural History

Plaintiff filed her initial complaint on November 28, 2016, bringing claims for (1) unlawful gender discrimination and (2) subsequent retaliation in violation of federal, state, and local antidiscrimination statutes[18] and of the whistleblower

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[17] FINRA maintains a database where members can search for information concerning specific financial professionals. Financial firms submit and maintain U5 Forms to document a financial professional's period of employment, employment performance, and other details for the benefit of future employers, regulators, and interested parties. (*See* FAC ¶¶ 28, 30.)

[18] Specifically, Plaintiff asserts violations of Title

protections set forth in the Sarbanes-Oxley Act, 15 U.S.C. § 1514A, and the Dodd-Frank Act, 15 U.S.C. § 78u-6. (Doc. No. 1.) On January 31, 2017, Defendants filed a premotion letter seeking leave to file the present motions to compel arbitration and to dismiss the complaint. (Doc. No. 14.) Plaintiff responded to the letter the following day (Doc. No. 16), and the Court held a premotion conference on February 10, at which the parties discussed the issues of exhaustion, timeliness, and arbitrability (*see* Hr'g Tr. 3:14–17, 7:11–11:9). On March 3, 2017, Defendants filed the present motions, to which Plaintiff filed an opposition and Defendants filed a further reply brief in support. (Doc. Nos. 20, 23, 29.) On March 24, 2017 – the same day Plaintiff filed her opposition – she also filed an amended complaint along with a letter motion seeking leave to file the amended complaint. (Doc. Nos. 24, 25.) As discussed above, because Plaintiff filed her amended complaint within twenty-one days of Defendants' motion, she had the right to amend her pleading without permission from the Court. Consequently, the amended complaint is the operative pleading here. (*See supra* n.1.) With leave of the Court, Defendants filed a letter supplementing their motion to dismiss on October 6, 2017, and Plaintiff responded on October 20, 2017. (Doc. Nos. 34, 37.) On October 2, 2017, Plaintiff filed a letter stating that she had exhausted her complaint in administrative proceedings and seeking leave to file a "motion to remove her Sarbanes-Oxley claim [to federal court] for de novo review." (Doc. No. 32.) The

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VII, the Equal Pay Act ("EPA"), the New York State Human Rights Law, New York State's workplace retaliation statute, and the New York City Human Rights Law.

Court denied this request, concluding that such motion was unnecessary and duplicative. (Doc. No. 33.) Despite this order, however, Plaintiff did file such a "removal" motion, to which Defendants submitted a response. (Doc. Nos. 35, 36, 38, 39.) Because Plaintiff's "motion to remove" was filed in contravention of a Court order, the Court will neither consider it nor Defendants' response, and that motion is denied.

As for the remaining motions, Defendants argue, first, that the vast majority of Plaintiff's claims are subject to mandatory arbitration per her employment agreement with Defendants. Second, Defendants argue that Plaintiff's sole non-arbitrable claim, the alleged violation of Sarbanes-Oxley's whistleblower protections, must be dismissed. The Court will address each in turn.

II. MOTION TO COMPEL ARBITRATION

Under the Federal Arbitration Act, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "A district court has no discretion regarding the arbitrability of a dispute when the parties have agreed in writing to arbitration." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) (citing 9 U.S.C. §§ 3, 4). Federal policy favors arbitration "as an alternative means of dispute resolution." *Hartford Accident & Indemnity Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001). Indeed, the Second Circuit has stated that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we 'have often and emphatically applied.'" *Arciniaga v. Gen. Motors*

Corp., 460 F.3d 231, 234 (2d Cir. 2006) (quoting *Leadertex*, 67 F.3d at 25). Accordingly, "where . . . the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability." *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir. 2002); *see also Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) ("'[F]ederal policy requires us to construe arbitration clauses as broadly as possible.' . . . We will compel arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" (quoting *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991))). "In the context of motions to compel arbitration . . . the court applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003).

To determine whether a dispute is arbitrable, a court must decide two questions: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Accident*, 246 F. 3d at 226 (citation omitted). In addition, where federal statutory claims are asserted, a court must also consider a third issue – that is, "whether Congress intended those claims to be nonarbitrable." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 382 (2d Cir. 2008) (quoting *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 75–76 (2d Cir. 1998)). "[S]tatutory claims may be the subject of an arbitration

agreement, enforceable pursuant to the [Federal Arbitration Act] . . . 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Here, Plaintiff entered into an agreement with Defendants making arbitration the required and exclusive forum for the resolution of all employment-related disputes.[19] (*See* Doc. No. 22, Ex. 5 (the "Arbitration Agreement").) In relevant part, the language of the Agreement provides:

> This Policy applies to both you and to Citi, and makes arbitration the required and exclusive forum for the resolution of all employment-related disputes (other than disputes which by statute are not subject to arbitration) which are based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) and arise between you and Citi, its predecessors, successors and assigns, its current and former

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[19] Plaintiff actually entered into three successive, substantially identical, arbitration agreements with Defendants. (*See* Doc. No. 22, Exs. 1, 3, 5.) Each agreement was included as an appendix to the employee handbook, and Plaintiff submitted electronic acknowledgements that she accepted the terms of each agreement. (*See id.*, Exs. 2, 4, 6.)

> parents, subsidiaries, and affiliates . . . . These disputes include, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, . . . the Equal Pay Act of 1963, . . . and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, or retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

(Doc. No. 22, Ex. 5 at 3.) Plaintiff does not deny the existence or the validity of the Agreement. And it is also clear that all of Plaintiff's claims in this lawsuit are undeniably employment-related. Accordingly, Plaintiff's state law claims must be arbitrated. *See Preston v. Ferrer*, 552 U.S. 346, 352–53 (2008). The only sticking point in the analysis is whether there is any discernable congressional intent to make Plaintiff's federal statutory claims –Title VII, the EPA, Sarbanes- Oxley, and Dodd-Frank – non-arbitrable.

The Second Circuit has expressly held that Title VII claims are arbitrable. *See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.,* 191 F.3d 198, 206 (2d Cir. 1999); *see also, e.g.*, *Johnson v. Tishman Speyer Props., L.P.*, No. 09-cv-1959 (WHP), 2009 WL 3364038, at *3 (S.D.N.Y. Oct. 16, 2009) (compelling arbitration for Title VII claims specifically named in the arbitration agreement). Here, the Arbitration

Agreement states that the scope of the agreement "includes, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964." (Doc. No. 22, Ex. 5 at 3.) Accordingly, Plaintiff's Title VII claim is subject to arbitration.

As for Plaintiff's EPA claim, Plaintiff neither contests the arbitrability of that claim, nor carries her burden in demonstrating that Congress "intended to preclude a waiver of a judicial forum" with respect to EPA claims. *Gilmer*, 500 U.S. at 26. In the absence of any discernable congressional intent to the contrary, the Court finds that Plaintiff's EPA claim is obviously subject to arbitration. *Accord Steele v. L.F. Rothschild & Co., Inc.*, 701 F. Supp. 407, 408 (S.D.N.Y. 1988) (concluding that EPA claims are arbitrable).

Plaintiff's Sarbanes-Oxley whistleblower anti-retaliation claim stands on different footing. When Congress enacted Dodd-Frank, it amended Sarbanes-Oxley's whistleblower anti-retaliation provision to make it non-arbitrable. *See* 18 U.S.C. § 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). This constitutes a clear congressional statement of intent that Sarbanes- Oxley whistleblower claims be exempted from arbitration. Accordingly, this claim is not arbitrable.

A closer question is whether Dodd-Frank's separate whistleblower anti-retaliation provision is non-arbitrable. As discussed above, when Congress enacted Dodd-Frank it amended Sarbanes-Oxley's whistleblower provision to exempt such claims from

predispute arbitration agreements; however, Congress did not include the same language in Dodd-Frank's own analogous whistleblower-protection provision. *Compare* 18 U.S.C. § 1514A(e)(2) (Sarbanes- Oxley), *with* 15 U.S.C. § 78u-6(h)(1) (Dodd-Frank). At first glance, it might appear odd that a single piece of legislation – Dodd-Frank – would simultaneously amend an earlier-enacted whistleblower provision to limit its arbitrability while enacting a new whistleblower protection with no restrictions as to arbitrability. But on closer inspection, and as Judge Failla noted in a thoughtful opinion on the subject, it is apparent that the two whistleblower provisions are distinct, differing in procedure, remedies, and their statutes of limitations such that the conditions of one cannot simply be grafted upon the other. *See Murray v. UBS Sec., LLC*, No. 12-cv-5914 (KPF), 2014 WL 285093, at *8–9 (S.D.N.Y. Jan. 27, 2014); *see also Ahmad v. Morgan Stanley & Co., Inc.*, 2 F. Supp. 3d 491, 497 (S.D.N.Y. 2014) (concluding that Dodd-Frank is not "merely a fraternal twin of the Sarbanes–Oxley whistleblower provision, it is a distinct cause of action that 'increases a party's liability for past conduct'" (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994))). Needless to say, "when Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs.,* Inc., 557 U.S. 167, 174–75 (2009). The Court thus finds that Congress's choice not to include a mirror provision in the anti-retaliation provisions of Dodd-Frank is suggestive of its intent that the Dodd-Frank claim be subject to arbitration. In light of this ascertainable congressional intent, the Court concludes, like Judge Failla, that Dodd-Frank's whistleblower provision is not subject to the bar on

arbitrability imposed by Sarbanes-Oxley's similar provision. *See Murray*, 2014 WL 285093, at *11. Accordingly, all of Plaintiff's claims, with the exception of her Sarbanes-Oxley claim, are arbitrable.

III. MOTION TO DISMISS

Defendants seek to dismiss Plaintiff's Sarbanes-Oxley claim for lack of jurisdiction due to Plaintiff's failure to properly exhaust her claim. Most courts to consider the question have concluded that failure to properly comply with the statute's administrative exhaustion regime divests district courts of jurisdiction. *See, e.g.*, *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 345–346 (4th Cir. 2014) (assuming, without deciding, "that the requirement to exhaust one's administrative remedies . . . is jurisdictional"); *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 417 (S.D.N.Y. 2012); *Mart v. Forest River, Inc.*, 854 F. Supp. 2d 577, 588–89 (N.D. Ind. 2012) (compiling cases). But whether Plaintiff's failure to exhaust is jurisdictional or goes to an element of her claim, the Court has little difficulty concluding that Plaintiff's Sarbanes-Oxley claim must be dismissed.

On a Rule 12(b)(1) motion to dismiss, the party seeking to invoke the Court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must "provide the grounds upon which [the] claim rests." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *see also* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief "). To meet this standard, plaintiffs must allege "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, 678 (2009). In reviewing a Rule 12(b)(6) motion to dismiss, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *ATSI Commc'ns*, 493 F.3d at 98. However, that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Thus, a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. If the plaintiff "ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Id.* at 570

Sarbanes-Oxley's whistleblower provision "prohibits a publicly traded company from retaliating against an employee who provides information concerning securities law violations to, among other[s], a federal regulatory or law enforcement

agency, a member of Congress, or 'a person with supervisory authority over the employee.'" *Berman v. Neo@Ogilvy LLC,* 801 F. 3d 145, 147 (2d Cir. 2015) (citing 18 U.S.C. § 1514A(a)(1)). Nevertheless, Sarbanes-Oxley and its implementing regulations establish requirements for administrative exhaustion. Thus, an employee seeking relief under the whistleblower provisions of Sarbanes-Oxley must first file a complaint with the Occupational Safety and Health Administration ("OSHA"). *See* 18 U.S.C. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103(d). This filing "shall be commenced 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." 18 U.S.C. § 1514A(b)(2)(D). If the Secretary of Labor has not issued a final decision within 180 days of the complaint's filing, the employee may bring "an action at law or equity for de novo review in the appropriate district court of the United States." 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114. Because Section 1514A provides that "OSHA has exclusive jurisdiction over Sarbanes-Oxley whistleblower claims for 180 days," a "federal court may not hear a Sarbanes–Oxley claim that is not first submitted to OSHA." *Wong*, 890 F. Supp. 2d at 417.

Here, the parties agree that 180 days have elapsed since Plaintiff filed her administrative complaint with OSHA.[20] (*See* FAC ¶ 49, Doc. Nos. 34,

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[20] The amended complaint alleges that Plaintiff filed a complaint "with the Department of Labor . . . alleging whistleblower retaliation in violation of Sarbanes Oxley" on November 28, 2016. (FAC ¶ 49.) However, in subsequent submissions, Defendants claim – and

37.) However, even if the claim has been pending for more than 180 days, it was not timely filed and thus was not properly exhausted, since Plaintiff was fired in December 2014, but did not file her complaint for retaliation for two years, well after the 180-day filing window that followed the alleged retaliation.

Plaintiff responds that because she continues to experience harm as a result of Defendants' filing of a negative U5 – which is accessible to potential employers via the FINRA database – she is suffering from a continuing violation for which the 180-day limit has not yet run. But while the continuing violation doctrine may function in narrow circumstances to allow courts to consider a mix of timely and time-barred conduct as part of one violative pattern of activity, *see Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015), that doctrine does not apply to the discrete acts at issue in retaliation cases – in this case, Plaintiff's alleged exclusion from certain meetings, ultimate termination, and the filing of a retaliatory U5. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997) ("Discrete incidents of discrimination that are unrelated to an identifiable policy or practice . . . 'will not ordinarily amount to a continuing violation' . . . ." (quoting *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996)). Indeed, the Fifth Circuit

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Plaintiff concedes – that OSHA did not receive the complaint until March 24, 2017. (*See* Doc. No. 34 at 2, Doc. No. 37 at 3.) Because either date is well beyond the 180-day limit prescribed by statute, the Court need not resolve this factual discrepancy.

confronted a strikingly similar fact pattern and concluded that the "'continuing violation' theory has no application to th[e] discrete act" of the filing of an allegedly retaliatory U5 form. *Judy Chou Chiung-Yu Wang v. Prudential Ins. Co. of Am.*, 439 F. App'x 359, 366 & n.6 (5th Cir. 2011). Plaintiff's corollary argument – that she continues to suffer ongoing consequences of the allegedly false and retaliatory U5 – is equally unavailing. *See Lightfoot*, 110 F. 3d at 907–08 ("A continuing violation is not established merely because an employee continues to feel the effects of a discriminatory act on the part of the employer. To hold otherwise would render meaningless the time limitations imposed on discrimination actions."); *see also Birch v. City of New York*, 675 F. App'x 43, 44 & n.1 (2d Cir. 2017) (same).

In sum, Plaintiff's Sarbanes-Oxley claim was not properly exhausted under Section 1514A(b)(2)(D). Accordingly, if the exhaustion requirement is jurisdictional, Plaintiff's Sarbanes- Oxley claim fails for lack of subject-matter jurisdiction; if proper exhaustion is simply an element of the claim, Plaintiff fails to state a claim. Either way, Defendants' motion to dismiss must be granted.

IV. NEXT STEPS

Because all of Plaintiff's remaining claims are arbitrable and subject to a valid arbitration agreement, they must be arbitrated. By submitting her claims to arbitration, Plaintiff "does not forgo the substantive rights afforded by the statute" but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S.

at 628. Where an entire dispute is arbitrable, the Federal Arbitration Act "requires a stay of proceedings when all claims are referred to arbitration *and a stay requested*." *Katz v. Cellco P'ship*, 794 F.3d 341, 343 (2d Cir. 2015) (emphasis added); *see also* 9 U.S.C. § 3. But where "[d]efendants seek dismissal rather than a stay . . . th[e] Court has discretion whether to stay or dismiss Plaintiffs' action." *Zambrano v. Strategic Delivery Sols., LLC*, No. 15-cv-8410 (ER), 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016). Here, neither party has requested a stay. Accordingly, out of an abundance of caution, if either party wishes for this case to be stayed pending arbitration, that party must inform the Court of that fact no later than February 13, 2018.

V. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED THAT Plaintiff's Sarbanes-Oxley claim is DISMISSED and that Defendants' motion to compel arbitration is GRANTED. IT IS FURTHER ORDERED THAT if either party wishes for this action to be stayed rather than dismissed, that party shall inform the Court no later than February 13, 2018. The Clerk of the Court is respectfully directed to terminate the motions located at document number 20 and 38.

SO ORDERED.

Dated: February 6, 2018
New York, New York

/s/ Richard J. Sullivan
RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE