

**No. 08-1129**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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W. MICHAEL RZEPIENNIK,

Plaintiff-Appellant,

v.

ARCHSTONE SMITH, INC.,

Defendant-Appellee.

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Appeal from the United States District Court for  
the District of Colorado  
Michael J. Watanabe, United States Magistrate Judge  
No. 1:07-cv-01243-MJW-MEH

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**BRIEF OF DEFENDANT-APPELLEE  
ARCHSTONE SMITH, INC.**

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Oral Argument Not Requested

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Archstone-Smith, Inc. offers the following statement:

Defendant-Appellee Archstone-Smith, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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**STATEMENT OF RELATED CASES**

There are no prior or related appeals.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the district court properly dismissed Appellant's retaliation claim under the Sarbanes-Oxley Act as untimely where he filed his administrative complaint more than 90 days after the allegedly retaliatory act. [See Aplt. App. at 33-39, 154-59.]

2. Alternatively, whether Appellant's retaliation claim under the Sarbanes-Oxley Act should be dismissed for failure to allege an adverse action on the part of Appellee. [See Aplt. App. at 39-41.]

3. Whether the district court properly dismissed Appellant's breach-of-contract claim as untimely where he filed it after the expiration of the applicable three-year statute of limitations. [See Aplt. App. at 41-44, 159-60.]

## STATEMENT OF THE CASE

In late 2003, Plaintiff-Appellant Michael Rzepiennik filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging that his former employer, Defendant-Appellee Archstone Smith, Inc. (“Archstone”), had violated Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, by terminating his employment. Aplt. App. at 27 ¶ 53, 49. In January 2004, OSHA dismissed his claim as untimely. Aplee Supp. App. at 7.<sup>1</sup> Rzepiennik thereafter filed an amended complaint with OSHA, now asserting that it was Archstone’s conditional offer of a bonus payment that violated the Act. See *id.* at 10. A Department of Labor administrative law judge concluded that, under the circumstances, there was no adverse employment action and that in any case Rzepiennik had filed his administrative complaint after the 90-day statutory deadline. Aplt. App. at 73.

On June 13, 2007, Rzepiennik sued Archstone in federal district court, reprising his whistleblower claim and adding a claim for breach of contract. Aplt. App. at 6-29. On March 12, 2008, the district court granted

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<sup>1</sup> Several documents in Appellant’s Appendix have pages missing, apparently due to faulty photocopying. Despite being notified of these omissions, Appellant has not filed a corrected Appendix. Therefore, pursuant to Circuit Rule 30.2(A)(1), Archstone has filed a Supplemental Appendix that contains the documents with the missing pages restored.

Archstone's motion to dismiss both claims as untimely and entered judgment accordingly. Aplt. App. at 151-62.

### **STATEMENT OF FACTS**

The following statement of facts relies on the allegations in the Complaint and indisputably authentic documents referenced in the Complaint that are central to Rzepiennik's claims.

**Archstone's Settlement Offer.** Archstone is a real estate investment trust that develops and operates apartment communities throughout the country. Aplt. App. at 8, 10 ¶¶ 8, 15. On August 28, 2002, Archstone terminated Rzepiennik's employment. *Id.* at 7 ¶ 7. Rzepiennik had been employed at Archstone since May 1998 and was a Vice President of Production at the time he was fired. *Id.*

While employed at Archstone, Rzepiennik disclosed to supervisors and company officers what he alleged to be evidence of financial misconduct and fraud in connection with various Archstone projects. Aplt. App. at 15 ¶ 23. After his discharge, Rzepiennik again reported improper conduct to Archstone, which retained a law firm to investigate the matter. *Id.* at 18-19 ¶¶ 30-31.

On August 20, 2003, Rzepiennik attended a meeting with Archstone and its counsel to discuss the outcome of the investigation. Aplt. App. at 23

¶ 40. That same day, Archstone offered Rzepiennik a written settlement agreement. *Id.* at 24 ¶ 45; Aplt. App. at 89. The proposed agreement stated that, although Rzepiennik was “not eligible” for a Development Incentive Plan Bonus for 2002, Archstone would pay him \$255,589, an amount equivalent to the bonus he could have received if eligible. Aplt. App. at 89. In return, Rzepiennik would agree to, *inter alia*, release all claims against Archstone, not disclose the settlement agreement or the facts leading up to it, and return documents and other company property. Aplt. App. at 24-25 ¶¶ 45-46; Aplt. App. at 89-90.

Archstone’s August 20 letter gave Rzepiennik 21 days to accept the terms of the offer. Aplt. App. at 25 ¶ 46; Aplt. App. at 93. On September 12, 2003—more than 21 days later—Rzepiennik contacted Archstone “to negotiate the terms” and was told that the company would not deviate from the terms and conditions in the August 20 offer. *Id.* Rzepiennik did not accept the offer.

**Rzepiennik’s Administrative Action.** In late 2003, Rzepiennik filed a complaint “by letter” with the Occupational Safety and Health Administration of the United States Department of Labor (“OSHA”), claiming that Archstone discharged him in violation of Section 806 of the

Sarbanes-Oxley Act, which bars retaliation against employees who engage in specified protected activities. Aplt. App. at 27 ¶ 53, 49-54.

In January 2004, OSHA dismissed the complaint as untimely, explaining that the Sarbanes-Oxley Act requires such administrative complaints to be filed within 90 days of an allegedly retaliatory discharge, and Rzepiennik had been fired more than 15 months before complaining to the agency. Aplee. Supp. App. at 7. Rzepiennik then amended his administrative complaint to address a later act—Archstone’s “refusal” to unconditionally pay him a \$255,589 discretionary bonus. See *id.* at 10, 19. As to this claim, a U.S. Department of Labor administrative law judge concluded that Rzepiennik had not suffered an adverse employment action and, in any event, had not filed his claim within 90 days of the conditional bonus offer. Aplt. App. at 73.

**District Court Proceeding.** Rzepiennik then filed a complaint in the United States District Court for the District of Colorado (“Complaint”). He again claimed that Archstone violated Section 806 of the Sarbanes-Oxley Act by conditionally offering to pay him a bonus to which he was allegedly entitled. Aplt. App. at 24, 27 ¶¶ 44, 53. The Complaint alleges that he filed his OSHA claim “[w]ithin 90 days of the expiration of [Archstone’s] offer and conditions” and that OSHA marked his

administrative complaint as received on December 15, 2003. *Id.* at 27 ¶ 53. Rzepiennik also alleged a state-law breach of contract based on Archstone's refusal "to pay him his Development Incentive Plan Bonus for 2002." *Id.* at 28 ¶ 57.

Archstone moved to dismiss the Complaint on the grounds that Rzepiennik had not filed his administrative action within 90 days of the alleged adverse action or suffered an adverse action subject to the Sarbanes-Oxley Act, and that he filed his breach-of-contract claim beyond the applicable statute of limitations. *Aplt. App.* at 30-44.

The district court granted Archstone's motion to dismiss. First, the court held as a matter of law that the 90-day limitations period under the Sarbanes-Oxley Act began to run when Rzepiennik received Archstone's conditional settlement offer on August 20, 2003, not when the 21-day consideration period elapsed. *Aplt. App.* at 156-58. Accepting Rzepiennik's allegation that OSHA received his administrative complaint on December 15, 2003, the court concluded that the complaint was filed 117 days after the allegedly retaliatory act, rendering it untimely. *Id.* at 158-59.

Second, the district court held that Rzepiennik's breach-of-contract claim was untimely. The court reasoned that (1) the Development Incentive Plan, which Rzepiennik "repeatedly referred to in the Complaint," expressly

states that it is governed by Maryland law; (2) Maryland law provides that a breach-of-contract action must be filed within three years of the alleged breach; (3) the alleged breach occurred on either February 15, 2003 (the due date of the bonus) or August 20, 2003 (when Rzepiennik allegedly “discovered” the breach); and (4) Rzepiennik filed his district court Complaint on June 13, 2007—months after the statute of limitations expired. Aplt. App. at 159-160.

Rzepiennik thereafter appealed from the district court’s judgment.

### **SUMMARY OF THE ARGUMENT**

Based on the face of the Complaint and the indisputably authentic documents referenced therein, the district court properly dismissed Rzepiennik’s claims.

#### **I.**

The district court was right to dismiss Rzepiennik’s Section 806 claim as untimely. An administrative claim under Section 806 of the Sarbanes-Oxley Act must be filed within 90 days of the alleged violation. According to Rzepiennik, Archstone violated Section 806 by refusing to pay him a bonus unless he agreed to the specified conditions of the settlement offer. Because that offer was made on August 20, 2003, he had to file his administrative claim by November 18, 2003. He filed that claim at the

earliest on December 15, 2003 and thus failed to meet the statutory deadline.

Rzepiennik argues that the 90-day filing period began to run only when the 21-day deadline for his agreement to Archstone's proposal expired. But an alleged violation of Section 806 of the Sarbanes-Oxley Act occurs when the decision at issue was "made and communicated to the complainant." 29 C.F.R. 1980.103(d). Archstone "made and communicated" its decision to Rzepiennik on August 20, 2003, and, as the Complaint alleges, refused to modify that decision thereafter. In any event, even if the 90-day filing period were deemed triggered by the end of the 21-day consideration period, Rzepiennik still filed his administrative complaint beyond the 90-day deadline.

## II.

Alternatively, Rzepiennik's Section 806 claim should be dismissed for failure to allege an adverse action on the part of Archstone. It is well settled that non-payment of a discretionary bonus is not an adverse action within the meaning of the federal discrimination statutes. Archstone's decision to conditionally offer Rzepiennik the 2002 Development Incentive Plan bonus was discretionary. The Development Incentive Plan expressly states that only individuals employed on the payout date (February 15, 2003) were

eligible for the bonus. Rzepiennik had been terminated well before that date, and Archstone's written offer stated that he was ineligible for the bonus. Thus, Archstone's conditional bonus offer was discretionary and not the type of adverse action that may give rise to a Section 806 claim.

### III.

The district court properly dismissed Rzepiennik's breach-of-contract claim as untimely. That claim again rests on Rzepiennik's allegation that Archstone failed to pay him the 2002 Development Incentive Plan bonus. That Plan states that it is governed by Maryland law, which provides a three-year statute of limitations for breach-of-contract claims. The alleged breach occurred on February 15, 2003, when the 2002 bonus was due. Rzepiennik filed his district court complaint on June 13, 2007—16 months after the statute of limitations expired. Although he now questions the authenticity of the Development Incentive Plan, he waived any argument on that score by telling the district court that he had "no basis upon which to challenge the authenticity of \* \* \* the Development Incentive Plan." Finally, Rzepiennik's failure to plausibly allege that Archstone breached a contractual obligation provides an independent basis for dismissing his breach-of-contract claim.

## ARGUMENT

“Statutes of limitations are not simply technicalities” but rather are “fundamental to a well-ordered judicial system.” *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). They ensure “repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.” *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Strict administrative filing periods embody those same policies by limiting the protection of statutory rights “to those who promptly assert their rights” and protecting employers “from the burden” of defending against stale claims. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

Accordingly, a claim should be dismissed where the face of the complaint makes clear that it is untimely. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). In addressing a motion to dismiss, courts also may consider indisputably authentic documents referenced in the complaint that are central to the plaintiff’s claim. *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1253-54 (10th Cir. 2005). “[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint

and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). As this Court has explained, "[i]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *Id.* at 1385. Rzepiennik failed to attach to his Complaint several such documents, including his administrative complaint, the administrative decisions, Archstone's settlement offer, and the Development Incentive Plan from which he claims entitlement to the \$255,589 bonus. Archstone therefore submitted them with its motion to dismiss papers (see Aplt. App. 47-93; Aplee. Supp. App. at 3-43), and the district court properly considered some of them in resolving Archstone's motion. Aplt. App. at 153-54.

The district court was correct to dismiss Rzepiennik's claims. As his own allegations and the above documents establish, Rzepiennik filed his Sarbanes-Oxley claim with OSHA more than 90 days after receiving Archstone's conditional bonus offer, which he alleges to be the retaliatory action at issue. Because the Sarbanes-Oxley Act requires that such claims be filed within 90 days of the adverse action, the district court properly

dismissed his retaliation claim. Alternatively, that claim should be dismissed because failure to pay a discretionary bonus is not an unfavorable personnel action within the meaning of the Section 806 of the Sarbanes-Oxley Act. Finally, Rzepiennik filed his breach-of-contract claim in the district court well after the expiration of the applicable three-year statute of limitations, requiring dismissal of that claim as well. Therefore, this Court should affirm the judgment of the district court.

**I. THE DISTRICT COURT PROPERLY DISMISSED THE SARBANES-OXLEY CLAIM AS UNTIMELY.**

Section 806 of the Sarbanes-Oxley Act bars an employer from retaliating against an employee for protected activity, including whistleblowing. See 18 U.S.C. § 1514A(a). A Section 806 claim is not actionable unless the claimant files it with OSHA “not later than 90 days after the date on which the violation occurs.” *Id.* at § 1514A(b)(2)(D).

Rzepiennik alleges that Archstone retaliated against him for whistleblowing activity by failing to pay him a 2002 Development Incentive Plan bonus in the amount of \$255,589. *Aplt. App.* at 24-25 ¶¶ 44-46. Because the payment date of that bonus was February 15, 2003 (*Aplt. App.* at 136), the alleged adverse action occurred on that date, which would make Rzepiennik’s December 2003 administrative complaint untimely on its face. Rzepiennik, however, has characterized the allegedly retaliatory act as

Archstone's conditional bonus offer, which he received on August 20, 2003. Giving Rzepiennik the benefit on that point, the district court properly concluded that his administrative complaint was still untimely because he filed it more than 90 days after receiving the conditional bonus offer.

**A. The Statute of Limitations Began to Run When Rzepiennik Received the Settlement Offer on August 20, 2003.**

Rzepiennik argues that Archstone's August 20, 2003 offer was not "final" and therefore that the 90-day filing period did not begin until the 21-day deadline for his agreement to the offer expired. Aplt. Br. 20-26. That argument is meritless.

Under federal discrimination statutes, an administrative statute of limitations "is triggered when a discrete unlawful practice takes place." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-14 (2002). A discrete adverse action "takes place" when a decision is made and communicated to the plaintiff. *Ricks*, 449 U.S. at 258 (adverse act was the communication of tenure decision to plaintiff, not the later loss of his teaching position); *Haynes v. Level 3 Commc'n, Inc.*, 456 F.3d 1215, 1222 (10th Cir. 2006); *Hulsey v. KMart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994). At that point, employees must file any discrimination claims "promptly"

rather than “dredge up old grievances” later on. *Haynes*, 456 F.3d at 1222. The regulation implementing Section 806 of the Sarbanes-Oxley Act incorporates this principle, stating that an alleged violation of the Act occurs “when the discriminatory decision has been both made and communicated to the complainant.” 29 C.F.R. § 1980.103(d). The rationale is that upon such communication, “the employee is aware or reasonably should be aware of the employer’s decision.” *Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002*, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004).

Because Archstone’s alleged failure to pay Rzepiennik an unconditional bonus was a discrete event, the statute of limitations began to run when Archstone communicated its decision to him on August 20, 2003. No later than that date, Rzepiennik was on notice that Archstone would not pay him a bonus (to which it did not believe he was entitled) unless he agreed to the specified terms and conditions. Accordingly, he had 90 days from August 20, 2003 to file a Section 806 claim with OSHA.

Rzepiennik departs from these established principles when he contends that the trigger for the 90-day filing period was not the date of Archstone’s conditional bonus offer but rather the deadline for his

acceptance of the offer 21 days later. Aplt. Br. 20. It is well settled that an administrative filing period is triggered by the initial allegedly discriminatory act, not by a later consequence of that act. See *Ricks*, 449 U.S. at 258; *Brown v. Unified Sch. Dist. 501*, 465 F.3d 1184, 1187 (10th Cir. 2006). On that basis, administrative decisions applying Section 806 confirm that “the date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences.” *Richardson v. JPMorgan Chase & Co.*, 2006 WL 3246871, at \*3 (U.S. Dep’t of Labor SAROX July 7, 2006); *Halpern v. XL Capital, Ltd.*, 2005 WL 4888989, at \*2 (U.S. Dep’t of Labor SAROX Aug. 31, 2005).

In this case, the “expiration” of Archstone’s offer was at most a consequence of Rzepiennik’s decision not to accept its terms. It was not a new and independent act of retaliation by Archstone. In fact, Archstone did nothing at all with respect to Rzepiennik following the August 20, 2003 offer, other than allegedly tell him on September 12 that it would adhere to the terms and conditions of its prior offer. Aplt. App. at 25 ¶ 46. Archstone’s statement on September 12 that it meant what it said on August 20 cannot be deemed a new act of retaliation that would re-trigger the administrative filing period. See *Brown*, 465 F.3d at 1188 (employer’s

“mere reiteration” of its adverse employment decision did not re-trigger Title VII filing period). And the end of the consideration period was not the end of a “settlement process,” as Rzepiennik now alleges (Aplt. Br. 20); his Complaint does not allege that *any* settlement negotiations took place during the 21-day consideration period.

Rzepiennik’s assertion that Archstone’s settlement offer did not state that it was “final” (*id.* at 21) is both incorrect and irrelevant. The settlement letter expressly states that it “constitutes the complete and *final* agreement between you and the Company with regard to this subject matter.” Aplt. App. at 93 (emphasis added). And the Complaint alleges no facts to suggest that the conditions set forth in that letter to payment of the bonus were subject to negotiations. But even if Archstone had been willing to consider a request by Rzepiennik for different terms, the mere possibility of modified terms would not toll the trigger date for the filing of an administrative complaint. See *Ricks*, 449 U.S. at 261 (tenure decision triggered administrative filing period even though grievance procedure might subsequently modify decision).

Rzepiennik cites inapplicable cases where, as the district court put it, “the precise contours and effective date of the adverse action” remained subject to an “on-going settlement process.” Aplt. App. at 157. He relies

principally on *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), a case involving the Energy Reorganization Act of 1974, to support a trigger date later than August 20. The discriminatory act in that inapposite case, however, was not a “discrete decision” by the employer but rather the latter’s coercive “negotiation tactic[s]” during lengthy and contentious settlement negotiations. *Id.* at 96-97. Moreover, in that case, the employer’s settlement offer did not lapse after a short defined period, as in this case; it “remained on the table until revoked” by the employer four months after the negotiations over its terms commenced. *Id.* at 97. In those circumstances, the court unsurprisingly deferred to the Secretary of Labor’s ruling that the filing period was triggered only when those negotiations ended and the employer revoked its offer. *Id.* Here, in contrast, Rzepiennik alleges no negotiations at all after Archstone gave him the conditional bonus offer. Indeed, Rzepiennik’s Complaint alleges that Archstone *refused* his request to negotiate. Aplt. App. at 25 ¶ 46. And unlike in *Connecticut Light*, here the ALJ found that the filing period was triggered when Archstone made its offer, not when its offer expired, making Rzepiennik’s administrative complaint untimely. *Id.* at 72-73.

Also off-point is *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) (Aplt. Br. 23-24). In that case, the court held that the filing period for

the plaintiff's administrative discrimination claim began when she was notified of the challenged lay-off, not when she received prior performance appraisals, because the appraisals did not notify her that she would be laid off. *Id.* at 55. That ruling is fully consistent with the district court's ruling here that the filing period began when Rzepiennik was notified of the conditional bonus offer.

Rzepiennik also contends that Archstone's settlement offer was too "technical and legalistic" to constitute a discrete or final action by Archstone so as to trigger the 90-day filing period. Aplt. Br. 22. But the Complaint nowhere alleges that Rzepiennik was confused or misled by Archstone's offer.

Moreover, that contention is wholly inconsistent with the allegations in the Complaint and thus cannot be considered on a motion to dismiss. See *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) ("a court may not consider allegations or theories that are inconsistent with those pleaded in the complaint"). Far from alleging that Archstone's offer was "inscrutable" (Aplt. Br. 24), the Complaint alleges that Archstone unambiguously "conditioned" payment of the bonus on Rzepiennik's "promise to not disclose to any person or regulatory agency the 'underlying facts' about the financial fraud or Defendant's investigation into it" and on

Rzepiennik’s delivery of specified documents to Archstone. Aplt. App. at 24 ¶ 45. The Complaint further alleges that Archstone gave Rzepiennik 21 days “to accept the non-disclosure and document divestment conditions and to sign a global release of all claims, in order to receive his bonus payment.” *Id.* at 25 ¶ 46. Those allegations do not suggest that Rzepiennik had any difficulty understanding Archstone’s conditions. To the contrary, they show, as the district court put it, that Archstone gave Rzepiennik “clear notice” and that “[t]he employment action and the consequences were easy to identify.” Aplt. App. at 157.

Rzepiennik also argues that it would contravene federal policy to count the 21-day consideration period against the 30-day filing period applicable for *other* types of discrimination claims because that would leave the claimant only nine additional days to file a complaint. Aplt. Br. 26. Whatever the merits of that argument with respect to those other types of discrimination claims, it has no bearing here where the filing period is 90 days and Rzepiennik had ample time to file his claim after the expiration of the consideration period, as the district court properly concluded. See Aplt. App. at 157.

Finally, even if the 90-day filing period began to run only when the 21-day consideration period expired, as Rzepiennik contends, that would

not make his administrative complaint timely. The 21-day consideration period expired on September 10, 2003—21 days after the August 20 offer date. See Aplt. App. at 93. Ninety days after September 10 was December 9, 2003. As explained below, Rzepiennik did not file his administrative complaint with OSHA until December 15, 2003. Hence, even if the filing period began to run only upon expiration of the 21-day consideration period, Rzepiennik’s administrative complaint was still six days late.<sup>2</sup>

**B. Rzepiennik Filed the Administrative Complaint More Than 90 Days After Receiving the Settlement Offer.**

As the Complaint alleges, Rzepiennik’s administrative complaint was marked as received on December 15, 2003. Aplt. App. at 27 ¶ 53; Aplee. Supp. App. at 4. That was 117 days after he learned of the conditional bonus offer on August 20, rendering his administrative complaint untimely by 27 days.<sup>3</sup>

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<sup>2</sup> The Complaint asserts that the 21-day period ended on September 14, which is 25 days after the August 20 offer. Aplt. App. at 25 ¶ 46. The Complaint offers no explanation for the extra four days. But in his district court reply brief, Rzepiennik recognized that his claim had to be filed with OSHA by “Dec. 9, 2003, i.e. 90 days from the Sept. 10, 2003 expiration of Defendant’s Aug. 20, 2003 offer.” *Id.* at 99.

<sup>3</sup> Rzepiennik’s administrative complaint actually bears two reception stamps. One shows that OSHA received it on December 24; the other is marked “Received Dec. 15, 2003” without stating by whom. Aplt. App. at 48. For purposes of this motion to dismiss, we give Rzepiennik the benefit of the doubt and assume it was filed on the earlier date.

Rzepiennik asserts that there are “factual issues” about the date he filed his administrative complaint. Apt. Br. 15, 17. But neither his Complaint nor his brief suggests any filing date earlier than December 15, 2003, and even if they had, the governing Sarbanes-Oxley regulation precludes any such bald assertion. It provides that “[t]he date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery or other means, the complaint is filed upon receipt.” 29 C.F.R. § 1980.103(d). OSHA’s Whistleblower Investigations Manual likewise provides that “[f]or complaints sent by mail, the date filed is the date of the post mark,” and that absent a legible postmark, “the date filed is the date the complaint is received.” Apt. App. at 128. Rzepiennik has not alleged the existence of any postmark or time-stamped fax or e-mail. Thus, the filing date as a matter of law is December 15, 2003, the earliest shown date of receipt.

To be sure, the Complaint asserts that Rzepiennik filed his administrative complaint “by letter” within 90 days of the expiration of the 21-day consideration period. Apt. App. at 27 ¶ 53. But neither the Complaint nor his brief alleges *when* he mailed the letter, much less that there exists the requisite confirmatory postmark. See *Erikson v. Pawnee*

*County Bd. of Comm'rs*, 263 F.3d 1151, 1154-55 (10th Cir. 2001) (“Plaintiff’s conclusory allegation is insufficient to survive defendants’ motions to dismiss”). Just as taxpayers need “evidence beyond their own statement that they mailed the return” to establish timely filing (*Washton v. United States*, 13 F.3d 49, 50 (2d Cir. 1993)), so Rzepiennik needs more than bald assertions about an unspecified mailing (Aplt. Br. 17) to overcome the December 15 receipt date.<sup>4</sup> Rzepiennik’s further contention that he mailed a complaint to a *different* federal agency—the SEC—(*id.*) has no bearing on whether he timely filed his complaint with OSHA.

Rzepiennik’s failure even to allege the required postmark is striking. In the analogous Title VII context, this Court has held that the administrative filing deadline is “a condition precedent rather than an affirmative defense” and thus “integrated into the plaintiffs’ cause of action” and “a burden for plaintiffs to carry.” *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1167-68 (10th Cir. 2007). This burden rests on “practical realities,” namely, plaintiffs’ “superior access to the evidence necessary to prove their compliance with the statutory filing deadline.” *Id.* at 1168. On that basis, courts have held that a Section 806 complaint is subject to dismissal for

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<sup>4</sup> Like OSHA, the Internal Revenue Service deems tax documents filed when mailed only if there is a postmark to prove the mailing date; otherwise, the filing date is the date of receipt. 26 U.S.C. § 7502(a)(1); see *Spencer Med. Assocs. v. Comm’r*, 155 F.3d 268, 271-72 (4th Cir. 1998).

lack of subject matter jurisdiction if the plaintiff cannot prove compliance with the 90-day administrative filing requirement. *E.g., Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 801-02 (N.D. Tex. 2003). But regardless, given the OSHA filing date regulation and the Complaint’s express allegation that OSHA marked the administrative complaint as received on December 15, 2003, Rzepiennik had to at least *allege* an earlier mailing date that can be established by a postmark or similar proof to withstand a motion to dismiss. Rzepiennik’s failure to do so is alone sufficient to affirm the district court’s ruling. See *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (“the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims”).

Finally, Rzepiennik contends that the district court erred by entering judgment without allowing him to amend his Complaint with respect to the timeliness of his administrative filing. Aplt. Br. 15. But Rzepiennik never requested that the district court permit him to amend his Complaint—either in the motion to dismiss proceeding or by a motion for reconsideration—and he therefore has waived that contention. See *Calderon v. Kansas Dep’t of Social & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999) (“normally a court need not grant leave to amend when a

party fails to file a formal motion”). Moreover, his brief offers no reason to think that any amendment to his Complaint can overcome the time bar.

**C. The Retaliation Claim Is Untimely Even Without Reference to the Documents Cited in the Complaint.**

The documents that Archstone attached to its motion to dismiss confirm that Rzepiennik’s Section 806 claim was untimely filed.<sup>5</sup> However, they are not required to conclude that Rzepiennik failed to comply with the 90-day statute of limitations. It is clear from the face of the Complaint that Rzepiennik claims that Archstone violated Section 806 when it “failed and refused to pay Plaintiff his bonus” (Aplt. App. at 27 ¶ 53); Rzepiennik was informed of Archstone’s decision on August 20, 2003 (*id.* at 24 ¶ 45); he filed a complaint with OSHA “by letter” (*id.* at 27 ¶ 53); and OSHA received the complaint on December 15, 2003 (*id.*). Thus, the Complaint alone mandates the conclusion that Rzepiennik filed his administrative action 117 days after he was informed of Archstone’s conditional settlement offer.

Moreover, extending the trigger date to September 10 (21 days after Archstone communicated its decision to Rzepiennik) would not render the administrative complaint timely. Indeed, none of the novel alternative methods that Rzepiennik suggests for calculating the limitations period can

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<sup>5</sup> The settlement offer confirms that Rzepiennik received it on August 20, 2003. Aplt. App. at 93. And the date-stamped administrative complaint confirms a receipt date of December 15, 2003. Aplee. Supp. App. at 4.

overcome the allegations in his Complaint and the statutory deadline. Therefore, dismissal of his retaliation claim was proper.

\* \* \*

At bottom, Rzepiennik is desperately seeking a way to extend the 90-day deadline imposed by Congress. But the statutory deadline is firm, and the legislative history shows that Congress opposed attempts to provide for a longer deadline. The bill that eventually became the Sarbanes-Oxley Act initially provided for a 180-day filing period, which the reporting Committee unanimously voted to reduce to 90 days. S. Rep. No. 107-146, at 22 (2002). Neither Rzepiennik nor the courts are authorized to re-lengthen it.

**II. ALTERNATIVELY, THE SARBANES-OXLEY CLAIM SHOULD BE DISMISSED FOR LACK OF AN ADVERSE ACTION.**

An alternative ground for dismissing the Complaint is that Archstone's alleged failure to pay Rzepiennik the Development Incentive Plan Bonus for 2002 was not an actionable "unfavorable personnel action" under the Sarbanes-Oxley Act. That was the conclusion reached by the ALJ in Rzepiennik's Department of Labor proceeding. She found "no merit to the argument that Respondent's failure to pay Complainant the bonus referenced in the severance package constitutes an adverse action." Aplt.

App. at 69. The district court did not reach this ground, which Archstone raised in its motion to dismiss (*id.* at 39-41), because it deemed the complaint untimely. But this Court may affirm on any basis supported by the record. *E.g., Seegmiller v. LaVerkin City*, 528 F.3d 762, 766 (10th Cir. 2008).

A Section 806 claim under the Sarbanes-Oxley Act requires a showing that “[t]he employee suffered an unfavorable personnel action.” 29 C.F.R. § 1980.104(b)(1). The term “unfavorable personnel action” has the same meaning as the familiar employment-law term “adverse employment action.” *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.2 (5th Cir. 2008). An adverse employment action generally refers to a significant change in employment status such as “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007). An allegedly retaliatory act is adverse if a reasonable employee would have found it materially adverse. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 67-68 (2006); *Piercy*, 480 F.3d at 1203.

Under the Supreme Court’s *Burlington Northern* standard, a failure to receive a discretionary bonus is not an actionable adverse action. *Maclin*

*v. SBC Ameritech*, 520 F.3d 781, 788 (7th Cir. 2008). “The loss of a bonus is not an adverse employment action where the employee is not automatically entitled to the bonus.” *Id.* (internal quotation marks omitted); accord *Kriesch v. Johanns*, 468 F. Supp. 2d 183, 189 (D.D.C. 2007); *Hazelett v. Brownlee*, 2007 WL 2257635, at \*3 (S.D. W. Va. Aug. 3, 2007).

Here, the 2002 “Development Incentive Plan” bonus that Archstone conditionally offered Rzepiennik (Aplt. App. at 6 ¶ 1) was discretionary. The Development Incentive Plan expressly states that only individuals employed on the “Payout Date” are eligible for bonuses:

Payment of Project Bonuses \* \* \* will be distributed in cash to the applicable Participants by February 15 following the calendar year for which they are attributable (the “Payout Date”) \* \* \* . Participants must be employed by the Company or AMERITRON as of the Payout Date to be eligible for a Project Bonus payment.

Aplt. App. at 136. The Complaint alleges that Rzepiennik was terminated on August 28, 2002. Aplt. App. at 7-8 ¶ 7. Thus, he was not employed by Archstone on February 15, 2003, the Payout Date for 2002, and not eligible for the 2002 bonus. Moreover, Archstone’s August 20, 2003 settlement offer to Rzepiennik expressly states that he was “not employed on the date bonuses [were] paid,” he was “not eligible for a bonus,” and the company

was “willing to provide” him with a bonus only if he accepted the specified conditions. Aplt. App. at 89.

In sum, Rzepiennik’s failure to receive such a discretionary bonus is not an “unfavorable personnel action” within the meaning of Sarbanes-Oxley Section 806, an alternative and independent ground for dismissing his claim.

### **III. THE BREACH-OF-CONTRACT CLAIM WAS PROPERLY DISMISSED.**

The district court properly dismissed Rzepiennik’s breach-of-contract claim because it is clear from the face of the contract that the claim is untimely. The governing law provides for a three-year statute of limitations. Any event that Rzepiennik might identify as the breach of the Development Incentive Plan for 2002 occurred more than three years before he filed his claim. Accordingly, the claim is untimely.

Furthermore, Rzepiennik does not plausibly allege that Archstone breached any contractual obligation, providing an independent ground for dismissing his breach-of-contract claim. His bare assertion that he was “entitled to” a bonus under the 2002 Development Incentive Plan is insufficient to overcome the plain language of the Plan itself, which on its face establishes that Rzepiennik was never entitled to a bonus. Lacking a

plausible allegation that Archstone breached an obligation, the Complaint fails to state a claim for breach of contract.

**A. The Breach-of-Contract Claim Was Untimely.**

Rzepiennik’s breach-of-contract claim rests on his allegation that Archstone’s “Development Incentive Plan” entitled him to a bonus for work performed in 2002. Aplt. App. at 28 ¶ 57. That Plan expressly states that it is governed by Maryland law. *Id.* at 137. Colorado enforces such contractual choice-of-law provisions. *Century 21 Real Estate Corp. v. Meraj Int’l Inv. Corp.*, 315 F.3d 1271, 1281 (10th Cir. 2003). Maryland law provides a three-year statute of limitations for breach of contract claims. Md. Code Ann., Cts. & Jud. Proc. § 5-101 (West 2007). Accordingly, the breach-of-contract claim, filed in June 2007, is untimely with respect to any alleged breach that occurred in 2002 or 2003.

The Development Incentive Plan expressly states that bonuses will be paid “by February 15 following the calendar year for which they are attributable.” Aplt. App. at 136. Thus, any breach by Archstone for failure to pay the 2002 bonus occurred on February 15, 2003, and the statute of limitations expired in mid-February 2006. Rzepiennik filed his Complaint on June 13, 2007—16 months after the statute of limitations expired—making his breach of contract claim untimely. See *Webco Indus., Inc. v.*

*Thermatool Corp.*, 278 F.3d 1120, 1126-27 (10th Cir. 2002) (breach-of-contract claim was time-barred). And even if the breach were deemed to be Archstone's August 20, 2003 settlement offer (an argument not raised by Rzepiennik), his breach-of-contract claim would still be untimely by almost 10 months.

Rzepiennik raises three objections to the conclusion that his contract claim is untimely. None has any merit.

First, he contends that he was entitled to discovery as to the authenticity of the Development Incentive Plan so that he could challenge the applicability of its choice-of-law provision. Aplt. Br. 27. But the district court provided Rzepiennik with full opportunity to address the authenticity of that Plan and in particular the affidavit of an Archstone official attesting to its authenticity. Aplt. App. at 141. Rzepiennik did not respond by requesting discovery on that issue. See *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1175 (10th Cir. 2005) (plaintiff "never raised" objection to denial of discovery in district court and thus cannot do so on appeal). Instead, he filed a Surreply stating:

Plaintiff has no basis upon which to challenge the authenticity of Defendant's Exhibit 2, the Development Incentive Plan.

Aplt. App. at 143. Thus, the authenticity of the Plan is not at issue, and Rzepiennik cannot plausibly deny that the Plan is the predicate for his breach-of-contract claim, is expressly referenced for that purpose in his Complaint (¶¶ 44, 55, 57), and by its terms is governed by Maryland law. See *County of Santa Fe v. Public Serv. Co.*, 311 F.3d 1031, 1045 (10th Cir. 2002) (district court properly considered settlement agreement not attached to complaint on motion to dismiss).

Second, Rzepiennik contends that “the Appellee’s invocation of the incentive plan was suspicious on its face, casting doubt on whether it was a valid agreement at all.” Aplt. Br. 28. He offers nothing at all to support that surmise, and certainly not “enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Allegations must meet a minimum threshold of plausibility to survive a motion to dismiss. *Id.* at 1966; *Van Zanen v. Qwest Wireless, LLC*, 522 F.3d 1127, 1129-30 (10th Cir. 2008). Rzepiennik offers no plausible basis for the suggested invalidity of the Development Incentive Plan, and in any event he can have no plausible breach-of-contract claim without a valid contract. Indeed, his claim for a bonus under the Plan should estop him from challenging the validity of the Plan. See *Britton v.*

*Mitchell*, 361 F.2d 922, 926 (10th Cir. 1966) (“one may not accept the benefits of a contract [and] then repudiate the contract”).

Finally, Rzepiennik argues without support that giving effect to the choice-of-Maryland-law provision in the Development Incentive Plan would somehow contravene Colorado public policy. Aplt. App. 28-29. But Colorado as a matter of policy has “adopted the approach of the Restatement (Second) of Conflicts of Laws,” under which “contracting parties may choose a particular body of law to govern their contract.” *Century 21*, 315 F.3d at 1281. Indeed, Colorado courts routinely give effect to such choice-of-law provisions. *E.g.*, *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380, 384 (Colo. Ct. App. 2008). This Court too has recognized that it must give effect to the statute of limitations under the law chosen by contracting parties. *E.g.*, *Halley v. Mutual of Omaha Ins. Co.*, Nos. 97-8019 & 97-8020, 1998 WL 516841, at \*2 n.1 (10th Cir. Aug. 17, 1998) (unpublished) (applying contractual choice of Nebraska law to hold claims barred by Nebraska's statute of limitations). Rzepiennik cannot substitute his policy preferences for these established legal principles.

**B. The Complaint Does Not Plausibly Allege That Archstone Breached the Development Incentive Plan.**

Even if Rzepiennik’s claim for breach of contract were timely, it could not survive a motion to dismiss because the Complaint does not plausibly

allege a breach of the Development Incentive Plan by Archstone. A plaintiff claiming breach of contract must establish, among other elements, that the defendant breached a contractual obligation to the plaintiff. *E.g.*, *Taylor v. NationsBank, N.A.*, 776 A.2d 645 (Md. 2001); *Western Distrib. Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992). Rzepiennik’s Complaint does not plausibly allege such a breach.

As recounted above, the Development Incentive Plan requires that a payee be employed at Archstone on the Payout Date—February 15 of the year following the bonus’s accrual—to be eligible for a bonus. Aplt. App. at 136. Rzepiennik claims entitlement to a bonus for work performed in 2002 (*id.* at 24), which would make February 15, 2003 the applicable Payout Date. According to the Complaint, Rzepiennik was not employed on that date because he had been fired in August 2002. *Id.* at 7-8 ¶ 7. Thus, the plain terms of the Plan that Rzepiennik cites provide that Archstone had no contractual obligation to pay him a bonus. With no such obligation, Archstone’s failure to pay him the referenced bonus cannot constitute a breach of contract.

Rzepiennik’s bald assertion that he was “entitled to receive a Development Incentive Plan Bonus for 2002” (Aplt. App. at 24 ¶ 44), cannot alter this conclusion. “[W]hen the exhibits contradict the general

and conclusory allegations of the pleading, the exhibits govern.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007), cert. denied, 128 S. Ct. 2055 (2008). And applying *Twombly*, allegations in a complaint must show that “the plaintiff plausibly (not just speculatively) has a claim for relief.” *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). Here, the plain contract language shows that Rzepiennik’s breach-of-contract claim is not just implausible but completely foreclosed. His failure to plausibly allege a breach of contract provides an independent ground for affirming the district court’s dismissal.

### **CONCLUSION**

The judgment of the district court should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief is proportionally spaced and contains 7158 words.

I relied on my word processor to obtain the count using Microsoft Word 2002 SP3.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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## **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that a copy of the foregoing Brief of Defendant-Appellee, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Symantec AntiVirus version 10.1.4.4000, updated daily, and, according to the program, is free of viruses.

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## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on August 25, 2008 I caused a copy of the foregoing Brief of the Defendant-Appellee and a copy of the Supplemental Appendix of the Defendant-Appellee to be served on the following by e-mail and by depositing same with United Parcel Service for overnight delivery to:

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