IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 4, 2019
Lyle W. Cayce
Clerk

No. 18-20543

LEA S. FRYE,

Plaintiff - Appellant

v.

ANADARKO PETROLEUM CORPORATION,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before CLEMENT, HIGGINSON, and DUNCAN, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Lea Frye seeks review of the district court's dismissal of her claims against her former employer, Anadarko Petroleum Corporation. Frye alleges that Anadarko retaliated against her in violation of the Dodd-Frank Act's whistleblower protections. She also seeks a declaratory judgment stating that her non-disclosure agreement with Anadarko does not cover a letter she wrote to the SEC detailing Anadarko's alleged misconduct. Because Frye failed to present her whistleblower retaliation claim as a continuing violation to the district court, we hold that she has waived this argument. We affirm the district court on the issue as it was presented to that court. However, we reverse the district court's determination that Frye's claim under the

Declaratory Judgment Act is nonjusticiable, and we thus remand for further proceedings on that claim.

I.

A. Frye's Whistleblower Complaints and Retaliation

Frye worked as an engineer for Anadarko Petroleum Corporation (Anadarko) from 2005 to 2016. Her job involved evaluating the size of oil fields and developing economic models related to the viability of drilling and production projects. Frye has alleged that she received consistently positive performance evaluations.

According to Frye, Anadarko fraudulently overstated the economic prospects of its Shenandoah oil field in the Gulf of Mexico and then retaliated against her for objecting to these misrepresentations. Frye was a Senior Reservoir Engineer and team lead for the Shenandoah project. In March 2014, Frye alleges that Anadarko "knowingly published inflated information about its 2013 exploration successes during an investor conference." Further, after drilling began on the Shenandoah 3 (Shen 3) appraisal well, Anadarko allegedly concealed bad reports about this well from the public. In a February 2015 call with investors, an Anadarko executive allegedly "described Shen 3 in glowing terms, claiming there was over 1,500 feet of 'quality sand,'" even though "well data revealed that Shen 3 was actually a dry hole." Finally, in an October 2015 earnings call, Anadarko allegedly exaggerated findings from the Shenandoah 4 appraisal, repeating past optimistic projections without revealing new data indicating that the potential of the well "was vastly overstated." Frye alleges that, although Anadarko "knew the Shenandoah resource was less than half the size Defendant had originally claimed in March 2014," it "made no corrections to its original projections."

Between 2014 and 2015, Frye contends that she made clear she was uncomfortable with Anadarko's "false, misleading statements about Shenandoah and the misleading way faults were being mapped" to "justify resource projections that it knew were flimsy and unscientific." In a February 2014 meeting with Anadarko executives, Frye alleges that she presented an economic analysis stating "that the Shenandoah project value was likely much smaller than Defendant's exploration team had previously claimed." An Anadarko vice president, Ernie Leyendecker, allegedly responded angrily to Frye's conclusions and berated her economic analysis. Frye further alleges that, in August 2014 emails, Leyendecker was "adamant" that she and others conceal maps revealing the existence of faulting and instead use false maps of Shenandoah.

According to Frye, after she "repeatedly vocalized her opposition to the fraudulent acts and omissions she observed during her work on the Shenandoah project, Defendant began to exclude her from the weekly partner drilling update meetings" that were critical to her job. Anadarko also denied Frye access to Anadarko's partners and to the data she needed to do her job. In January 2016, Frye told her supervisor that she would not be a party to overstating the Shenandoah prospects. But she "saw no indication that anything was being done to stop the fraud from continuing."

Around the same time, Frye asked to be included in a planned reduction in force (RIF) that would have allowed her to receive over $300,000 in severance pay and benefits. Anadarko allegedly failed to respond to Frye's request and did not include her in the reduction, despite "a custom and practice of honoring most, if not all, employees' requests to be included in a RIF," including those of other similarly situated engineers. Frye asserts that, by spring 2016, her work environment became intolerable because she was badgered and humiliated by Leyendecker and others, some of her job duties

had been taken away, and she was ordered to continue using false maps. As a result, Frye suffered from depression and anxiety and decided to take leave under the Family and Medical Leave Act (FMLA).

On May 9, 2016, while on FMLA leave, Frye submitted a letter to the SEC detailing alleged violations of federal securities laws by Anadarko. Frye alleges that Anadarko learned of the SEC letter, and that it continued to retaliate against her based on her decision to report this conduct. For example, Frye alleges that Anadarko instructed her coworkers not to speak to her. She also alleges that she suspected Anadarko of outing her as a whistleblower to her coworkers. Frye resigned on May 19, 2016, while still on FMLA leave. Frye alleges that she was constructively discharged because "it was now clear from recent events" that her "work environment was going to be even more intolerable than it had been before she submitted the SEC letter."

After her resignation, Anadarko retroactively shortened Frye's FMLA leave, retroactively cancelled her and her family's health insurance, and delayed her COBRA health insurance coverage. Anadarko also allegedly withheld payment for Frye's accrued but unused vacation time. After Frye retained counsel in June 2016, Anadarko reinstated her health benefits and paid her accrued vacation time. Frye alleges she experienced stress and anxiety because of Anadarko's actions.

B. Non-Disclosure Agreement

In May 2017, about a year after Frye's resignation, Anadarko abandoned the Shenandoah project and wrote off its losses. At this time, Frye decided to reveal to Anadarko shareholders the alleged fraud she had reported to the SEC. As part of her employment with Anadarko, however, Frye had signed a Proprietary Information and Inventions Agreement (PIIA) prohibiting the disclosure of proprietary information. In June 2017, Frye's counsel contacted Anadarko requesting its position on whether the PIIA prohibited Frye from

disclosing the SEC letter. Anadarko responded on June 21, 2017, stating its position that the SEC letter fell within the PIIA and that it reserved its rights if protected information was disclosed in any manner.

On June 22, 2017, Frye sought permission from the district court to reveal the SEC letter to plaintiffs in a securities fraud lawsuit against Anadarko. On July 6, 2017, Anadarko sent Frye's counsel a second letter stating, in relevant part:

> To be clear, the information in the SEC Letter is "Proprietary Information" as defined in the Proprietary Information and Invention Agreement ("PIIA") that your client signed on October 18, 2005. Any disclosure of Anadarko's proprietary information contained in the SEC Letter to third parties (except as may be permitted by any applicable whistleblower or other laws) . . . is prohibited by that agreement. The Company is not waiving any of its rights under the PIIA, and will specifically enforce the protections it bargained for in the PIIA should its confidential information be disclosed in violation of the agreement.
>
> Additionally, Anadarko reserves all of its rights, including but not limited to its rights under both the PIIA and applicable law, to enforce the agreement or seek a remedy for any breach.

Frye did not disclose the SEC letter. She alleges, however, that she would promptly disclose the SEC letter to Anadarko's shareholders if not for her reasonable fear of being sued by Anadarko for breaching the PIIA.

C. Procedural History

Frye filed the instant lawsuit against Anadarko on July 25, 2017. Frye asserted two claims against Anadarko. First, Frye alleged unlawful retaliation under the Dodd-Frank Act and sought back pay, emotional distress damages, and fees and costs. Second, Frye requested a declaratory judgment that the PIIA does not prohibit disclosure of her SEC letter because the information in the letter and its attachments is neither confidential nor proprietary and falls outside the intended scope of the PIIA.

After allowing Frye to amend her complaint twice, the district court dismissed Frye's claims with prejudice on May 15, 2018. The district court held that the Dodd-Frank Act protects only against retaliation that occurs after a report to the SEC. The court thus limited its inquiry to the acts of retaliation that occurred after Frye's May 9, 2016 letter to the SEC, namely Frye's allegations that her coworkers were ordered to stop communicating with her and that Anadarko revealed her whistleblower status to her coworkers. The district court held that these actions are insufficient to give rise to a claim for constructive discharge. Further, the district court held that the Dodd-Frank Act does not allow for recovery of noneconomic damages. Thus, the district court held that Frye could not state a claim under the Dodd-Frank Act because, although she alleged post-resignation retaliatory acts related to her health benefits and accrued vacation pay, these issues were eventually rectified and did not result in economic damages.

The district court also held that it lacked jurisdiction over Frye's declaratory judgment claim because she failed to allege "a sufficiently immediate and substantial controversy." The district court explained that too much uncertainty remained regarding whether Frye would disclose information, what she would disclose, whether Anadarko would consider this a breach of the PIIA, and whether Anadarko would choose to sue her if she disclosed the information.

Frye timely appealed the dismissal of her complaint.

II.

This court reviews a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *See Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *See Lormand v. US Unwired, Inc*., 565 F.3d 228, 232 (5th Cir. 2009).

III.

A. Dodd-Frank Whistleblower Claim

The Dodd-Frank Act defines a whistleblower as: "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). The Act prohibits retaliation against whistleblowers. Specifically,

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the 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 the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of

> Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

Anadarko argues that Frye cannot state a whistleblower claim under the Dodd-Frank Act because she did not experience retaliation sufficient to constitute constructive discharge after she reported to the SEC. Anadarko's position is that the Dodd-Frank Act does not apply to the retaliation that Frye alleges before her SEC report. Frye does not dispute that, as the district court determined, the retaliation that Frye alleges in the short period of time between her SEC report and her decision to resign is insufficient to give rise to a constructive-discharge claim. Instead, Frye argues that the retaliation she suffered, including retaliation that occurred before she reported to the SEC, formed part of the same continuous violation. Thus, because she later reported to the SEC, she argues that this court can consider all retaliation related to her whistleblower activities, even retaliation that occurred before she reported to the SEC, in determining whether she was constructively discharged.

Frye cannot prevail on the theory that Anadarko's retaliation amounted to a continuous violation because she failed to raise this argument below. "An argument not raised before the district court cannot be asserted for the first time on appeal." *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.,* 513 F.3d 146, 153 (5th Cir. 2008). "To preserve an argument, it 'must be raised to such a degree that the trial court may rule on it.'" *Id.* (quoting *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119, 1128 (5th Cir. 1993)). Frye did not argue to the district court that the retaliation she experienced formed the same continuous violation. Instead, she argued that she "and other whistleblowers are entitled to broad protection, without temporal limitation" and that a report to the SEC provides "retroactive protection" for prior internal reports. Under that theory,

once a whistleblower files a report with the SEC, the Dodd-Frank Act provides retroactive protection against any previous retaliation, regardless of whether it could be considered a continuing violation. Importantly, the district court understood Frye to be arguing that Dodd-Frank does not have a temporal requirement, not that the retaliation she faced amounted to a continuing violation. Because Frye failed to argue below that the retaliation she experienced formed the same continuing violation, this argument is forfeited.

As to the theory that Frye raised before the district court, the court correctly held that the Dodd-Frank Act does not apply retroactively once a whistleblower reports her employer's conduct to the SEC. In *Digital Realty Trust, Inc. v. Somers*, the Supreme Court clarified that the statutory definition of a whistleblower in the Dodd-Frank Act limits protection to individuals who provide information to the SEC. 138 S. Ct. 767, 777–78 (2018) (citing § 78u-6(a)(6)). The Court held that the individual must be a statutory whistleblower at the time of the retaliation for the Act to apply. *Id.* at 778 ("The disposition of this case is therefore evident: Somers did not provide information 'to the Commission' *before his termination*, § 78u–6(a)(6), so he did not qualify as a 'whistleblower' *at the time of the alleged retaliation*.") (emphasis added). While the plaintiff in *Digital Realty Trust* did not provide information to the SEC at any point, the Court did not qualify its holding that a whistleblower must "qualify as a 'whistleblower' at the time of the alleged retaliation" to distinguish between those who report after the retaliation and those who never report. *Id.*

Frye argues that this interpretation leaves vulnerable those who report internally before they report to the SEC. Although this is true, the Supreme Court considered and rejected this argument. The Court recognized that some professionals must first report internally but stated that its "reading shields employees in these circumstances, however, *as soon as they also provide*

relevant information to the Commission." *Id.* at 780. "[S]uch employees will remain ineligible for Dodd–Frank's protection until they tell the SEC, but this result is consistent with Congress' aim to encourage SEC disclosures." *Id.* Although the Court acknowledged the possibility "that lawyers and auditors will face retaliation quickly, before they have a chance to report to the SEC," it stated that there is "nothing to show that Congress had this concern in mind when it enacted § 78u-6(h)." *Id.* "Indeed, Congress may well have considered adequate the safeguards already afforded by Sarbanes–Oxley, protections specifically designed to shield lawyers, accountants, and similar professionals." *Id*. This language further clarifies that retaliation experienced before a person reports to the SEC is not covered by the Dodd-Frank Act.

Frye also argues that limiting protection to retaliation that occurs after an SEC report would create the "proof problem" that the Supreme Court stated Dodd-Frank was intended to dispel. It is true that, once an individual reports to the SEC, section 78u-6(h)(1)(A)(iii) protects internal disclosures as well as those made to the SEC because retaliation at that point could be based on either type of disclosure. But there is no "proof problem" if the retaliation occurs before an SEC report, as it could not have been motivated by the SEC report. The only time a potential proof problem exists is when an individual has reported both internally and to the SEC and it is unclear which report sparked the retaliation. *See Digital Realty Trust*, 138 S. Ct. at 779.

In sum, *Digital Realty Trust* holds that a whistleblower may receive protection under the Dodd-Frank Act only for retaliation that occurs after they file a report with the SEC. The retaliation that Frye has alleged in the short time between Frye's SEC report and her decision to resign is insufficient to

state a claim for constructive discharge. We therefore affirm the district court's dismissal of this claim.

B. Declaratory Judgment

i. Subject Matter Jurisdiction

As an initial matter, having dismissed Frye's claim under the Dodd-Frank Act, we must reassure ourselves of our jurisdiction over Frye's claim under the Declaratory Judgment Act standing alone. *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 467 (5th Cir. 2009) (holding that courts must consider jurisdiction *sua sponte* even when neither party has raised the issue). A claim under the Declaratory Judgment Act is insufficient to confer federal question jurisdiction under 28 U.S.C. § 1331. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Frye has asserted in her complaint and in her appellate brief that diversity jurisdiction exists. Frye is a citizen of Colorado. Anadarko is incorporated in Delaware and maintains its principal place of business in Texas. Frye alleges in her complaint that the matter-in-controversy exceeds the jurisdictional requirement, but she has not specified the value of her claims.

"The party seeking to invoke federal diversity jurisdiction bears the burden of establishing both that the parties are diverse and that the amount in controversy exceeds $75,000." *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003) (citing *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998)). When the complaint does not allege a specific amount of damages, this party must prove by a preponderance of the evidence that the amount in controversy is met. *Id.* at 638–39. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Farkas v.*

GMAC Mortg., L.L.C., 737 F.3d 338, 341 (5th Cir. 2013) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977)).

The object of the litigation is the information contained in the SEC letter. Frye has alleged that the potential size of the fraud reported in the SEC letter is "in the billions." She also alleged that Anadarko characterized the Shenandoah basin as a "~$2–4 billion net opportunity." Finally, she alleged that Anadarko's inaccurate projections constituted "a multibillion-dollar exaggeration." Anadarko has not argued that the value of Frye's claim is less than $75,000. Indeed, Anadarko ultimately wrote off hundreds of millions of dollars in losses on the Shenandoah project. Given the high value of the information at issue; Anadarko's potential liability if the letter is released and contains the information that Frye alleges; and, correspondingly, the amount that Anadarko would likely claim in damages in a suit against Frye for breach of contract, the value of the object of the litigation easily exceeds the jurisdictional requirement. Therefore, this claim satisfies the requirements for diversity jurisdiction even after Frye's Dodd-Frank claim has been dismissed.

ii. Actual Controversy

Frye seeks a declaratory judgment that the PIIA does not prohibit disclosure of her SEC letter because the information in the letter is neither confidential nor proprietary and falls outside the intended scope of the PIIA. The district court held that the dispute regarding this disclosure was not sufficiently definite and immediate to be justiciable.

"The Declaratory Judgment Act provides that, '[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (quoting 28 U.S.C § 2201(a)). "When considering a declaratory judgment action, a district court must engage

in a three-step inquiry." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). The court must ask (1) "whether an 'actual controversy' exists between the parties" in the case; (2) whether it has authority to grant declaratory relief; and (3) whether "to exercise its broad discretion to decide or dismiss a declaratory judgment action." *Id.* The statute's requirement of a "case of actual controversy" refers to an Article III case or controversy. *MedImmune*, 549 U.S. at 126. Frye bears the burden of pleading facts demonstrating the existence of a justiciable controversy. *See Orix Credit All.*, 212 F.3d at 897.

The district court dismissed Frye's declaratory judgment claim on the first prong, because it found that the threat of litigation was not imminent and because the existence of multiple contingencies involved in Frye disclosing the letter rendered the dispute too indefinite to constitute an actual controversy. Specifically, the district court noted uncertainty about whether Frye would disclose anything if she was not granted a declaratory judgment, uncertainty about whether Anadarko would choose to sue Frye even if she disclosed the SEC letter, and uncertainty about the audience to whom Frye wanted to disclose the SEC letter. We reverse and hold that Frye has demonstrated an actual controversy under current law.

To show an actual controversy, the dispute at issue "must be definite and concrete, real and substantial, and admit of specific relief through a decree of a conclusive character." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009). Although "[d]eclaratory judgments cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts . . . , declaratory judgment plaintiffs need not actually expose themselves to liability before bringing suit." *Id.* "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Under *MedImmune* and *Vantage Trailers*, Frye has pleaded a justiciable declaratory judgment claim. The subject of the controversy is "definite and concrete"—whether Frye's SEC letter is covered by the non-disclosure agreement. *MedImmune*, 549 U.S. at 127 (quotation omitted). There is also a "real and substantial" disagreement. *Id.* (quotation omitted); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (noting that a dispute was "definite and concrete" where "[p]rior to this suit, the parties had taken adverse positions with respect to their existing obligations"). Further, the legal question of whether the SEC letter is covered by the PIIA is amenable to judicial resolution and "specific relief through a decree of a conclusive character." *MedImmune*, 549 U.S. at 127 (quotation omitted); *see also Orix Credit All.*, 212 F.3d at 895 ("A case is generally ripe if any remaining questions are purely legal ones." (citation omitted)).

The most difficult question, as the district court discerned, is whether the dispute is "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (quotation omitted). Frye has shown that this dispute is of sufficient immediacy to warrant declaratory relief for several reasons. First, the law does not require that Frye actually disclose the letter and test whether Anadarko will sue her for it for her claim to be justiciable. *Vantage Trailers*, 567 F.3d at 748 (explaining that "declaratory judgment plaintiffs need not actually expose themselves to liability before bringing suit"). When a plaintiff faces a "genuine threat of enforcement" and takes actions to avoid that threat, "the threat-eliminating behavior was effectively coerced." *MedImmune*, 549 U.S. at 129. Further, threats of litigation can constitute evidence of a justiciable controversy even if

they are "indirect or implicit or covert." *Vantage Trailers*, 567 F.3d at 750 (quotation omitted).

Anadarko's threat of litigation was more than implicit or covert even if it did not use the terms "sue" or "litigation." It is undisputed that Anadarko informed Frye that disclosing the SEC letter would violate the PIIA. It stated that it was "not waiving any of its rights . . . and [would] specifically enforce the protections it bargained for in the PIIA." It also stated that it "reserve[d] all of its rights, including but not limited to its rights under both the PIIA and applicable law, to enforce the agreement or seek a remedy for any breach." Anadarko's primary mechanism for enforcing its rights and seeking a remedy for breach of the PIIA is via litigation. Although its letter did not use the word litigation, the intent was clear.

Indeed, the threats in *MedImmune* and *Vantage Trailers*, which were both sufficiently immediate to create a justiciable controversy, are analogous to the threats that Anadarko made to Frye. In *MedImmune*, the patent holder "delivered petitioner a letter expressing its belief" that petitioner's product was covered by its patent. *MedImmune*, 549 U.S. at 121. The "petitioner considered the letter to be a clear threat to enforce the . . . patent, terminate the . . . license agreement, and sue for patent infringement if petitioner did not make royalty payments as demanded." *Id*. at 122. Similarly, in *Vantage Trailers*, while this court ultimately determined that the product at issue was not sufficiently developed to create an immediate controversy, we held that "Beall's letter threatening legal action weighs decidedly in Vantage's favor" because an "unfulfilled threat of action by the patent holder is precisely the type of bullying—warning of legal action but never bringing suit—that the Declaratory Judgment Act sought to prevent." *Vantage Trailers*, 567 F.3d at 750–51. The letter to Frye is similarly threatening. The only difference between this letter and the letter in *Vantage Trailers* is that Anadarko avoided

using the words "pursue legal action" and instead used the words "specifically enforce the protections it bargained for" and "rights under . . . applicable law." Anadarko cannot threaten Frye into submission and evade a determination of the PIIA's scope simply by changing wording.

Second, the district court held that the dispute lacked concreteness because of uncertainties about what information Frye will disclose and to whom she will disclose it. But Frye has been clear that the declaratory judgment she requests extends only to the SEC letter. Any speculation by Anadarko that Frye intends to disclose information other than the contents of the letter would be beyond the scope of the requested declaratory judgment. Any uncertainty as to the identity of the recipient does not hurt Frye's case, because this information is not material to the legal question of whether the SEC letter is covered by the PIIA. If the letter is outside the scope of the agreement, Frye is free to disclose it to anyone.

As the situation now stands, Frye's only options are to stay silent or to disclose the SEC letter and risk liability under the PIIA. Under these circumstances, the dispute appears to be "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (quotation omitted). We therefore hold that Frye has presented a justiciable declaratory-judgment claim. Because the district court did not reach the questions of whether it had authority to grant declaratory relief or whether an exercise of its discretion was appropriate, we remand this claim to the district court for it to undertake this analysis in the first instance.

IV.

We AFFIRM the district court's dismissal of Frye's claim under the Dodd-Frank Act. We REVERSE the district court's dismissal of Frye's request

for a declaratory judgment and REMAND this claim to the district court for further proceedings consistent with this opinion.