APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56638 D.C. Case No. 3:16-cv-2270-MMA

AMERICAN AIRLINES, INC.,
Plaintiff-Appellee,
v.
ROBERT STEVEN MAWHINNEY,
Defendant-Appellant.

No. 16-56643 D.C. Case No. 3:16-cv-2296-MMA

TRANSPORT WORKERS UNION, LOCAL 591,
Plaintiff-Appellee,
v.
ROBERT STEVEN MAWHINNEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding
Argued and Submitted July 11, 2018
Pasadena, California
Filed September 26, 2018

Before: Marsha S. Berzon and N. Randy Smith,
Circuit Judges, and P. Kevin Castel, District Judge.

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OPINION

BERZON, Circuit Judge:

In these related appeals, we consider whether the district court properly compelled arbitration of Robert Steven Mawhinney's claims for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. With respect to the retaliation claim against Mawhinney's employer, American Airlines ("the Airline"), we affirm. The Airline did not waive its right to arbitrate by waiting to move to compel until after an agency investigation into its conduct was complete, nor is there reason to believe private AIR21 retaliation claims are inherently

nonarbitrable. With respect to the retaliation claim against Mawhinney's union, Transportation Workers Union, Local 591 ("the Union"), we reverse. The Union is not a party to the arbitration provision at issue in these cases and is not otherwise entitled to enforce the provision.

I

Mawhinney is an aircraft maintenance technician formerly employed by American Airlines in San Diego. He was fired by the Airline in 2001 — according to Mawhinney, in retaliation for protected whistleblowing activity. Shortly after his discharge, Mawhinney filed a complaint with the Department of Labor ("DOL"), invoking the whistleblower protections of AIR21.

As here relevant, AIR21 bars air carriers from firing or otherwise penalizing workers for alerting the air carrier or federal agencies to "any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety." 49 U.S.C. § 42121(a)(1). "A person who believes that he or she has been discharged . . . may . . . file . . . a complaint with the [DOL] alleging such discharge . . . ." 49 U.S.C. § 42121(b)(1). AIR21 provides that DOL must then issue, for each retaliation complaint it resolves, "a final order providing . . . relief . . . or denying the complaint." 49 U.S.C. § 42121(b)(3)(A). If the order is later violated, "[a] person on whose behalf" the order was issued may invoke AIR21 in federal district court to "commence a civil action . . . to require compliance with [the] order." 49 U.S.C. § 42121(b)(6)(A).

In December 2002, Mawhinney reached a settlement agreement ("the Agreement") with the Airline on his retaliation complaint. DOL issued an order formally approving the Agreement. The Agreement reinstated Mawhinney to his former position. *See Mawhinney v. Am. Airlines*, No. 15-cv-0259-MMA (BGS), 2015 WL 13604265, at *1 (S.D. Cal. Aug. 13, 2015). It also contained an arbitration provision:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the Released Parties, and any [of] their past, present or future successors, and their past, present or future officers, directors, employees, agents and representatives) involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court. . . . The arbitrator shall have the authority to order any legal and or equitable relief or remedy which would be available in a civil or administrative action on

the claim.
Also included in the Agreement was a California choice-of-law clause.

Between 2010 and 2011, Mawhinney received several disciplinary letters related to his management style. These disciplinary letters culminated in a "career decision advisory" in which Mawhinney was given the choice of (1) signing a letter committing to abide by the Airline's policies, (2) resigning with severance in exchange for a promise not to exercise grievance rights, or (3) being fired without relinquishing grievance rights. Mawhinney refused to accept the career decision advisory, believing it motivated by his renewed whistleblowing activities in 2010 and 2011. Mawhinney was then terminated.

In September and October of 2011, Mawhinney initiated parallel proceedings based on his new allegations of retaliation. One proceeding was an arbitration covering state law claims for retaliation, wrongful termination, breach of contract, fraud, harassment, and intentional infliction of emotional distress. The other was an administrative proceeding before DOL, again invoking the whistleblower protections of AIR21. In his complaint to DOL, Mawhinney named as respondents both the Airline and the Union, as Mawhinney believed the two joined in the alleged retaliation against him.

The arbitration and DOL proceedings unfolded separately, both along bumpy paths. In November 2011, the Airline petitioned for bankruptcy. The arbitration was then stayed, but DOL's independent

investigation of Mawhinney's AIR21 retaliation complaint was not. In mid-2012, DOL concluded that there was "no reasonable cause to believe" the Airline or the Union retaliated against Mawhinney, as the Airline had supplied clear and convincing evidence that Mawhinney's disciplinary action was the result of his "poor judgment and deficient leadership." *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. §§ 1979.104(c), 1979.105(a). DOL advised Mawhinney that he had the right to "appeal" DOL's investigation by making objections and requesting a hearing before an administrative law judge ("ALJ"). *See* 29 C.F.R. § 1979.106(a). However, DOL also noted that, as it had not reached a finding in his favor, it would not conduct any further investigation on its own, and any adversary proceedings against the Airline or Union would be Mawhinney's sole responsibility. *See also* 29 C.F.R. § 1979.108.

Mawhinney pursued adversary proceedings against the Airline and Union by filing objections to DOL's investigation and requesting a hearing before an ALJ. The ALJ then split the retaliation action. As to the Airline, the ALJ stayed the case in view of the pending bankruptcy. As to the Union, the ALJ dismissed Mawhinney's claim, concluding that the Union fell outside the scope of AIR21. As here relevant, AIR21 bars retaliation by an "air carrier or contractor or subcontractor of an air carrier." 49 U.S.C. § 42121(a). A "contractor" is defined as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). According to the ALJ, the Union was not a "company" within the meaning of AIR21.

Mawhinney appealed the ALJ's decision in his now-separate retaliation action against the Union to DOL's Administrative Review Board ("ARB"). The ARB reversed and remanded to the ALJ for reconsideration, reasoning that, at their broadest, the generic terms "contractor" and "company" can include labor unions. In particular, the ARB concluded that a "contractor" is potentially *any* party to a contract, and so a union may be a "contractor" by virtue of being party to a collective bargaining agreement with an employer.

With respect to the Airline, proceedings resumed, both in arbitration and before the ALJ, after the bankruptcy stay was lifted in late 2013. The arbitration of Mawhinney's state law claims was resolved in short order; in November 2014, the Airline prevailed in full. The Southern District of California then confirmed the arbitral award, and a panel of this court affirmed. *Mawhinney v. Am. Airlines, Inc.*, 692 F. App'x 937 (9th Cir. 2017).

The proceedings before DOL, however, turned more complex. In April 2014 — several months after the bankruptcy stay was lifted, and while the arbitration of the state law claims was still pending — the Airline filed a motion to compel arbitration of the action pending before the ALJ. The Airline argued that, like the factually related state law claims, the administrative action fell within the 2002 Agreement approved by DOL. The ALJ granted the motion to compel arbitration the following month. Mawhinney then appealed the order compelling arbitration to the ARB, which in January 2016 reversed.

In reversing, the ARB reasoned that the Airline's demand for arbitration could be viewed equally as a breach of the Agreement or as a breach of the DOL order approving it.[1] With respect to the former, the ARB concluded that the issue was essentially one of contract "construction and enforcement . . . dictated by principles of contract law," such that the proper forum for addressing the Airline's demand was a judicial rather than an administrative proceeding. With respect to the latter, the ARB noted that, under AIR21, the only specified federal forum for enforcing a DOL order disposing of a retaliation complaint is a district court, *see* 49 U.S.C. § 42121(b)(6)(A); the statute makes no mention of enforcement of a DOL order in proceedings before an ALJ. The ARB therefore remanded Mawhinney's AIR21 retaliation action to the ALJ for consideration of the merits, but noted that the Airline retained the option of attempting to compel arbitration in court.

In response, the Airline initiated a *second* arbitration, limited to the claim of retaliation under AIR21. Mawhinney refused to abandon his ongoing administrative action in favor of arbitration, so the

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[1] DOL's order approving the 2002 Agreement does not expressly incorporate the terms the Agreement. DOL regulations currently treat "[a]ny settlement approved" as "the final order of the Secretary." 29 C.F.R. § 1979.111(e); *see also* 29 C.F.R. § 1979.113. Although these regulations came into effect in 2003, after the DOL order approving the 2002 Agreement, DOL's 2016 order treated the 2002 settlement and the DOL order approving it as one, consistent with the later agency regulations. The parties do not dispute the point, and we have no reason to question DOL's 2016 interpretation of its own 2002 order. We therefore treat the 2002 DOL order as incorporating the settlement.

Airline filed suit in the Southern District of California for breach of contract, invoking both the Agreement and the district court's authority, under AIR21, to enforce the DOL order approving the Agreement. The Union, which had also lost at the ARB, brought a similar action.

Soon after filing their complaints, the Airline and the Union moved to compel arbitration.[2] The district court granted both motions. It then dismissed the underlying actions and entered judgment. Mawhinney filed timely appeals.

II

We consider first the pending motions to dismiss. Both the Airline and the Union have moved to dismiss Mawhinney's appeals for lack of appellate jurisdiction, on the theory that the Federal Arbitration Act "generally permits immediate appeal of orders [refusing] arbitration, whether the orders are final or interlocutory, but bars appeal of

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[2] Strictly speaking, neither the Airline nor the Union moved to compel arbitration of the claims brought in district court; they moved to compel arbitration of the underlying AIR21 retaliation action. In a sense, then, the motion to compel was incorrectly styled. It was in fact a motion for judgment on the pleadings, seeking the relief demanded in the complaint — enforcement of the Agreement or of the DOL order approving it. We nonetheless refer to the dispositive motion as one to compel arbitration, as that is the terminology the parties have used. As we explain in the next section, the distinction does not matter; we have jurisdiction even if the motion is viewed as one to compel arbitration of the retaliation claim.

interlocutory orders [enforcing] arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000); *see also* 9 U.S.C. § 16(b)(2).

The motions fail because we are not here presented with interlocutory appeals. As we have repeatedly held, an order compelling arbitration is no longer interlocutory once a district court — like the district court in this case — dismisses the action and enters judgment. *See* 9 U.S.C. § 16(a)(3); 28 U.S.C. § 1291; *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001). That factually related claims may be pending in some other forum, such as at DOL, has no impact on the finality of the district court's decision. Nor does it matter that dismissal is without prejudice. *See Interactive Flight*, 249 F.3d at 1179; *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994). The motions to dismiss are denied.

III

We turn next to Mawhinney's appeal involving the Airline.

Mawhinney does not dispute that, absent some provision of law providing otherwise, his AIR21 retaliation action falls within the scope of the Agreement's arbitration clause. Nor can he, given that he himself invoked the arbitration clause to resolve a parallel claim for retaliation under state law. Mawhinney argues instead that arbitration is unavailable for the AIR21 action, either because a defense to enforcement of the settlement applies or

because the Federal Arbitration Act ("FAA") or AIR21 precludes an arbitration order in this instance.

The district court rejected Mawhinney's arguments for avoiding arbitration. We review the district court's decision de novo, *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008), and affirm.

A

Mawhinney argues first that the Airline waived its right to arbitrate his AIR21 action by participating in the initial investigation of Mawhinney's complaint at DOL. As Mawhinney notes, litigation on the merits is a common basis for finding a waiver of the right to arbitrate on the merits. Litigating in court is inconsistent with asserting one's arbitration right. Litigation may also expose the opposing party to prejudice — for example, prolonged or duplicative proceedings, or a risk of inconsistent rulings — if arbitration is later demanded. *See United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1124–26 (9th Cir. 2008); *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1196 (2003).

In this case, however, there was no "litigation" at DOL from which to infer a waiver.[3] The AIR21

[3] The district court did not make a factual finding regarding waiver. However, as the relevant facts are not in dispute, we address the issue de novo. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1409 (9th Cir. 1990).

complaint Mawhinney filed did not initiate adversarial proceedings before an ALJ. It initiated a DOL investigation, *see* 29 C.F.R. § 1979.104, in which DOL had an independent interest. Had DOL's investigation come out in Mawhinney's favor, DOL would have issued an administrative order providing statutorily and regulatorily defined remedies, *see* 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.105(a)(1), which DOL would have been entitled to enforce in its own name, 49 U.S.C. § 42121(b)(5). The Agreement between Mawhinney and the Airline does not extend to a proceeding of that kind, which concerns not a dispute between the parties to the Agreement, but a potential enforcement action by the government. *Cf. E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). "[A]rbitration agreements will not preclude [the agency] from bringing actions seeking . . . relief." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

As the Airline could not have compelled arbitration of DOL's independent investigation, the Airline cannot be faulted for failing to have sought to do so. The Airline's demand for arbitration, filed with the ALJ shortly after the bankruptcy stay was lifted, reflects a timely and diligent assertion of the right to arbitrate, and so precludes a finding of waiver.

B

Mawhinney next argues that his AIR21 action cannot be arbitrated because AIR21 itself forbids it. In support of this proposition, Mawhinney points to no statutory language so stating, as there is none. Instead, he emphasizes the importance of DOL's role

in hearing and resolving retaliation complaints under AIR21.

Mawhinney misconceives the administrative process provided by the statute. DOL's independent interest in Mawhinney's AIR21 retaliation complaint — grounded in its responsibility for assuring the safety of air travel, *see* H.R. Rep. No. 106-167, pt. 1, at 100 (1999) — ceased once its investigation concluded with a finding of no violation. At that point, DOL's investigatory role was complete, *see* 29 C.F.R. §§ 1979.104, 1979.105(a). An administrative AIR21 action did remain, as Mawhinney elected to pursue his complaint against the Airline in a hearing before an ALJ, as he was entitled to do. *See Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 868 (2010) (observing that the procedure available following DOL's unfavorable investigation was "a full de novo trial-like hearing before an ALJ"). But as DOL emphasized in its letter to Mawhinney regarding his post-investigation "appeal" right, the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in advancing the public interest in airline safety. Once DOL found no violation, that is, the agency provided only the forum, but was not a party to the dispute. The proceeding before the ALJ was therefore squarely controlled by the arbitration provision in the Agreement.

Williams v. United Airlines, Inc., 500 F.3d 1019 (9th Cir. 2007), does not support a contrary conclusion. There, we rejected the argument that an implied private right of action exists in federal

district court for a claim brought under AIR21. We so concluded because AIR21 reflects "a carefully-tailored administrative scheme" for adjudicating retaliation claims, with federal district court actions available only for "suits brought to enforce the [DOL]'s final orders." *Id.* at 1024. It does not follow from the absence of a private right of action in federal district court that other forums for dispute resolution — in this case, arbitration — are foreclosed if agreed upon by the parties. As the Supreme Court has explained, federal claims are generally amenable to arbitration unless there exists a "contrary congressional command." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). Such a command need not be express, *see Gilmer*, 500 U.S. at 29, but it must consist of more than just entrusting the resolution of purely private claims to an executive agency adjudicator in the first instance, *see id.* at 28–29; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

C

Finally, Mawhinney argues that arbitration is barred either by the state statute of limitations, or the FAA. Neither argument survives scrutiny.

1

In California, the limitations period for a breach of contract — including breach of a covenant to arbitrate — is four years. Cal. Civ. Proc. Code § 337(1); *Wagner Constr. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 29 (2007). According to Mawhinney, the

Airline exceeded this limitations period because its action in district court, filed in September 2016, came more than four years after Mawhinney's AIR21 complaint with DOL, filed in October 2011.

Mawhinney mistakes the point at which the limitations period began to run. Under California law, the limitations period on an arbitration demand begins to run when "a party . . . can allege not only the existence of the [arbitration] agreement, but also that the opposing party refuses to arbitrate." *Spear v. Cal. State Auto. Ass'n*, 2 Cal. 4th 1035, 1041 (1992) (emphasis omitted). Mawhinney did not refuse to arbitrate when he filed his AIR21 complaint. He refused to arbitrate in early 2014, when, after the bankruptcy stay was lifted, he refused the Airline's request to fold his AIR21 claim into the then-pending arbitration. At that point the Airline had no option but to move to compel. The Airline's action in district court was filed within four years of that date, and is therefore not time-barred.[4]

2

With respect to the FAA, Mawhinney argues that the Agreement falls within the statutory exemption for "contracts of employment of seamen, railroad

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[4] The district court concluded that Mawhinney did not refuse arbitration until September 2016, after the Airline initiated an arbitration in which Mawhinney refused to participate. That determination was incorrect. California law does not require that an arbitration be initiated before the limitations period starts running; only a refusal to arbitrate is required. *See Spear*, 2 Cal. 4th at 1041.

employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

As an initial matter, it is doubtful the FAA's interstate exemption for contracts of employment in foreign or interstate commerce applies in this case. The Agreement was not the contract under which Mawhinney was hired. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335–36 (1944) (observing that a contract of employment, at its most basic, is an "act of hiring"). Nor was it a contract setting the terms and conditions of employment. *See Am. Postal Workers Union of L.A. v. U.S. Postal Serv.*, 861 F.2d 211, 215 n.2 (9th Cir. 1988) (per curiam) (suggesting that collective bargaining agreements, which do not "hire" workers, but which do set the terms and conditions of employment, also fall within the section 1 exemption); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (so assuming). Instead, the Agreement was a contract settling a dispute between the parties, albeit an employment-related one, by restoring the status quo ante and providing for the resolution of later disputes. *Cf. Gilmer*, 500 U.S. at 25 n.2 (concluding that the section 1 exemption does not extend to an agreement simply because it was reached in furtherance of or in relation to one's employment).

More to the point, though, recourse to the FAA is not a condition of enforcing the arbitration agreement in this case. The FAA governs requests to enforce *contractual* arbitration provisions, *see* 9 U.S.C. § 2, not the enforcement of a governmental order to arbitrate a particular dispute. As discussed, *see supra* note 1, the DOL's order provides an

independent basis for enforcing arbitration. The order incorporates the terms of the Agreement, including the arbitration provision for future disputes, and is *separately* enforceable under 42 U.S.C. § 42121(b)(6)(A).[5]

In sum, Mawhinney's private retaliation claim was a proper subject of arbitration, which the Airline timely requested.

IV

We turn to the appeal involving the Union.

A

The key question in the Union's case is the Union's relationship to the Agreement. If the Union is neither a party to nor a beneficiary of the Agreement, it cannot enforce the arbitration provision within the Agreement by way of a direct action on the contract. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *The H.N. & Frances C. Berger Found. v. Perez*, 218 Cal. App. 4th 37, 43 (2013).[6] Nor can it enforce the Agreement by way of DOL's order approving the Agreement, as AIR21

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[5] We do not address the district court's holding that airline mechanics, unlike "seamen" or "railroad employees," are not "engaged in foreign or interstate commerce." *See* 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

[6] We apply California law because the Agreement included a California choice-of-law provision. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–76 (1989).

only allows private enforcement of DOL orders by "[a] person on whose behalf" the order was issued.[7] 49 U.S.C. § 42121(b)(6)(A). On the other hand, if the Union is in some sense a party to or a beneficiary of the Agreement (and therefore of the DOL order, *see supra* note 1), it may validly compel arbitration of Mawhinney's AIR21 retaliation claim, just as the Airline did.[8]

The Union recognizes that it is not named as a party to the Agreement or to its arbitration provision.[9] It nonetheless contends that it can enforce the arbitration provision because it qualifies, at least for the purposes of Mawhinney's AIR21 action, as an "agent" of the Airline, a category of third parties specifically authorized in the

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[7] The Union could not maintain an action in federal court on the Agreement alone, as the Union and Mawhinney are not diverse, *see Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 n.9 (1980), and the FAA does not create federal question jurisdiction for a request to compel arbitration, *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009). However, the Union has nonfrivolously invoked the provision in AIR21 permitting enforcement of a final DOL order concerning an AIR21 retaliation complaint. *See* 49 U.S.C. § 42121(b)(6)(A). The statute is therefore a basis for federal jurisdiction, even if the Union's claim ultimately fails on the merits. *See Cement Masons Health & Welfare Tr. Fund for N. Cal. v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999).

[8] The Union does not contend that the threshold question of its authority to enforce the arbitration provision is itself arbitrable.

[9] The Agreement defines the "Parties" as Mawhinney and the Airline, defines the "Parties Bound" as Mawhinney and the Airline, and is signed only by Mawhinney, Mawhinney's attorney, and a representative of the Airline.

Agreement to enforce the arbitration provision against signatories.

The Union's theory of agency is convoluted: The Union notes that the ARB reversed and remanded the ALJ's dismissal of the Union from Mawhinney's retaliation claim. The ARB's thesis was that the Union potentially fell within the scope of AIR21 because it could qualify as an Airline "contractor," 49 U.S.C. § 42121(e), and so as a respondent in a retaliation claim. The Union notes also that AIR21 prohibits retaliation by "contractors" only against their "employees." 49 U.S.C. § 42121(a). It follows, according to the Union, that Mawhinney's retaliation action could only proceed if he was deemed an "employee" of the Union. Yet, according to the collective bargaining agreement between the Airline and the Union, the Airline retains "sole" control over "the direction of its working force . . . and the right . . . to hire, discipline and discharge employees." Accordingly, says the Union, it could only have been engaged in an employer-employee relationship with Mawhinney if it functioned as an agent of the Airline, carrying out the Airline's "direction." *See generally* Restatement (Third) of Agency § 1.01 (2006).

The district court did not reach the question whether the Union *could* be treated as an agent of the Airline. Instead, the district court cited the maxim that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). It then compelled arbitration because the Union's legal

argument for agency, and thus for an entitlement to compel arbitration, was at least colorable.

We review the district court's order de novo, *Rogers*, 547 F.3d at 1151, and reverse. Under the established meaning of the term "agent," and the statutory role of the Union under the Railway Labor Act, 45 U.S.C. §§ 151–165, 181–188, the Union simply was not the Airline's agent with regard to its role in Mawhinney's employment dispute, and so was not covered by the arbitration provision in the Agreement. Whether the Union was a "contractor" for purposes of AIR21 is a separate matter, not before us.

B

"Agency is the fiduciary relationship that arises when [a principal] manifests assent to [an agent] that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01; *Edwards v. Freeman*, 34 Cal. 2d 589, 592 (1949); *Secci v. United Indep. Taxi Drivers, Inc.*, 8 Cal. App. 5th 846, 855 (2017). To establish an agency relationship, "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control." *Edwards*, 34 Cal. 2d at 592 (citation omitted); *Secci*, 8 Cal. App. 5th at 855.

Nothing in the Union's pleadings or moving papers suggests that the Airline and the Union had agreed that the Union would act on behalf of the

Airline and under its control with regard to Mawhinney's employment status. That vacuum is not surprising. Generally, a union does not act on behalf of an employer or subject to an employer's control; it acts on behalf of the represented workers, to whom it owes a duty of fair representation vis à vis the employer. *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46–47 & n.8 (1979). In that capacity, the Union's obligation is to *oppose* the employer's interests during collective bargaining and in processing grievances when its role as the workers' representative so requires, not to act on behalf of and under the control of the employer. *See Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 549 (9th Cir. 1987). Indeed, under the Railway Labor Act, which governs Mawhinney's employment with the Airline, it is illegal for the a union to operate under an employer's control. 45 U.S.C. § 152, Fourth; 45 U.S.C. § 182; *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1015–16 (9th Cir. 1990).

The Union does not really engage with the anomaly of contending that it is the agent of the employer with whom it is obligated to bargain on the employer's behalf. Instead, the Union's contention, at bottom, is that it should be treated as an agent on a counterfactual basis — not because it truly *is* an agent, but because the ARB's conclusion that the Union may have "contractor" status under AIR21 can only hold true if an agency relationship exists between the Airline and the Union.[10] We do not

[10] It may well be that the Union is no more a "contractor" under AIR21 than it is an "agent" under the Agreement. The ARB's view, under which any party to a contract is a "contractor," is strangely literal, and seems to confuse contracting *out* or *for*

resolve cases based on how another forum is approaching parallel litigation. The Union's proposition that we should do so here is particularly weak, as the ARB's decision is neither final nor certain — nor even directly about whether the Union is the Airline's "agent."

The district court did not agree with the Union's position concerning its status as the Airline's "agent." Instead, the district court invoked the familiar maxim that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25.

The preference for a broad construction of an ambiguous arbitration agreement has no application here. The federal preference for a broad construction of an arbitration agreement refers to "ambiguities as to the scope of the arbitration clause itself," *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989), not the threshold question whether a person entered into or is covered by an agreement to arbitrate, *see First Options of*

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something with simply being a party to any contract. *Cf. Contractor*, *Webster's Third New International Dictionary* (2002) ("[O]ne that formally undertakes to do something for another . . . ; one that performs work . . . or provides supplies on a large scale . . . according to a contractual agreement . . . ."). In any event, AIR21 itself defines "contractor" narrowly, as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). There is little reason to believe the Union meets that definition — that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, "performs safety-sensitive functions" *for* the Airline.

Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); *Volt*, 489 U.S. at 478. Here, "[t]he question . . . is not whether a particular issue is arbitrable, but whether a particular party is bound by the arbitration agreement. Under these circumstances, the liberal federal policy regarding the scope of arbitrable issues is inapposite." *Comer*, 436 F.3d at 1104 n.11 (emphasis omitted).

V

As the present appeals are not interlocutory, the motions to dismiss are **DENIED**.

In *American Airlines v. Mawhinney*, No. 16-56638, the Airline did not waive arbitration by waiting until after DOL's independent investigation was complete to file a motion to compel. Nor is there any inherent arbitrability problem with a private AIR21 action litigated before an ALJ following an unfavorable DOL investigation. The district court's order compelling arbitration is **AFFIRMED**.

In *Transportation Workers Union, Local 591 v. Mawhinney*, No. 16-56643, applying ordinary principles of agency law, the Union is not in a position to enforce the 2002 settlement agreement or the DOL order approving it. The district court's order compelling arbitration is **REVERSED**.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16-56638 D.C. Case No. 3:16-cv-02270-MMA

AMERICAN AIRLINES, INC.,
Plaintiff-Appellee,
v.
ROBERT STEVEN MAWHINNEY,
Defendant-Appellant.

2018 U.S. App. LEXIS 31288,
November 5, 2018, filed

Judges: Before: BERZON and N.R. SMITH, Circuit Judges, and P. KEVIN CASTEL, District Judge.

Opinion

ORDER

The panel has voted to deny the petition for panel rehearing. Judges Berzon and Smith have voted to deny the petition for rehearing en banc, and Judge Castel so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to hear the matter en banc.

Fed. R. App. P. 35.

The petition for panel rehearing or rehearing en banc is **DENIED**.

APPENDIX C

United States District Court
for the Southern District of California

Case No. 3:15-cv-0259-MMA (BLM)

2016 U.S. Dist. LEXIS 123386

ROBERT STEVEN ***MAWHINNEY***, Petitioner,
vs.
AMERICAN AIRLINES, INC., Respondent.

AMERICAN AIRLINES, INC., Cross-Petitioner,
vs.
ROBERT STEVEN ***MAWHINNEY***,
Cross-Respondent.

August 23, 2016, Decided;
August 23, 2016, Filed

Counsel:
Robert Steven ***Mawhinney***, Plaintiff, Pro se.

For American Airlines, et seq., Defendant:
Robert Jon Hendricks, Morgan Lewis & Bockius;
John D. Hayashi, Morgan, Lewis & Bockius.

Judges: Hon. Michael M. Anello,
United States District Judge.

ORDER DENYING MOTION TO ENFORCE JUDGMENT OR, IN THE ALTERNATIVE, COMPEL ARBITRATION

[Doc. No. 38]

Respondent American Airlines ("American") has filed a motion to enforce judgment or, in the alternative, compel arbitration. Doc. No. 38. Petitioner Robert Steven ***Mawhinney*** ("***Mawhinney***") opposed the motion (*see* Doc. Nos. 40, 42), and American replied (Doc. No. 43). The Court found the matter suitable for determination on the papers and without oral argument pursuant to *Civil Local Rule 7.1(d)(1)*. For the reasons set forth below, the Court **DENIES** American's motion.

BACKGROUND

Robert ***Mawhinney*** began working at American Airlines in 1989 as an Aviation Maintenance Technician. After ***Mawhinney*** was terminated from American in 2001, he filed an administrative whistleblower complaint with the U.S. Department of Labor ("DOL") pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (*"AIR21," codified at 49 U.S.C. § 42121*). The parties subsequently entered into a settlement agreement and American reinstated ***Mawhinney***'s employment. As part of the settlement agreement, the parties agreed to resolve any further disputes through binding arbitration. American terminated ***Mawhinney*** again in September 2011, and ***Mawhinney*** initiated arbitration proceedings shortly thereafter, alleging claims for, among other things, retaliation and wrongful termination. ***Mawhinney*** also filed a second AIR21 complaint

with the DOL, alleging retaliation and wrongful termination.

The DOL investigated ***Mawhinney***'s claims, but dismissed his complaint because it was unable to determine that ***Mawhinney*** had been retaliated against or wrongfully terminated for reporting air safety concerns. ***Mawhinney*** was granted a hearing with an administrative law judge ("ALJ") regarding his AIR21 complaint ("ALJ Action"), but the proceeding was stayed pending American's bankruptcy proceedings.

When the ALJ Action resumed, American moved to dismiss because arbitration proceedings had already been initiated pursuant to the parties' settlement agreement. The ALJ granted the motion, but ***Mawhinney*** appealed the decision to the Administrative Review Board ("ARB").

In November 2014, after six days of arbitration proceedings which included live testimony from nine witnesses, an arbitrator ruled in favor of American on all claims. Among other things, the arbitrator found that ***Mawhinney*** was "unable to establish that he was engaged in a protected activity," that he was "constructively terminated," or that "his reporting of misconduct of other employees was a motivating factor in his termination. Doc. No. 14-4 at 17.

In February 2015, ***Mawhinney*** petitioned this Court to vacate the arbitration award. American opposed vacatur, and cross-petitioned to confirm the arbitration award. The Court denied ***Mawhinney***'s

petition, granted American's cross-petition, and entered judgment in American's favor in August 2015. The Court denied ***Mawhinney***'s motion to alter or amend the judgment on December 9, 2015, and ***Mawhinney*** appealed the judgment on December 31, 2015.

In January 2016, the ARB reversed the ALJ's dismissal of the AIR21 complaint, finding that the ALJ did not have authority to dismiss merely based on the parties' initiation of arbitration proceedings under the settlement agreement, and remanded for further proceedings.

American filed the instant motion to enforce judgment on April 28, 2016. American argues that because the claims in the ALJ Action were already adjudicated in arbitration, and this Court confirmed the arbitration award, ***Mawhinney***'s claims in the ALJ Action are barred by res judicata and collateral estoppel. Accordingly, American urges the Court to enjoin the ALJ Action from proceeding pursuant to the All Writs Act, or, alternatively, to compel the parties to arbitrate the claims in the ALJ Action.

LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), a party may petition of the court for an order confirming, vacating, or modifying an arbitrator's award. *9 U.S.C. §§ 9-11*. If the arbitrator's award is confirmed, "[t]he judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it

had been rendered in an action in the court in which it is entered." *9 U.S.C. § 13.* However, "there are fundamental differences between confirmed arbitration awards and judgments arising from a judicial proceeding." *Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1133 (9th Cir. 2000).* For instance, "[a]bsent an objection on one of the narrow grounds set forth in *sections 10* or *11*, the Act requires the court to enter judgment upon a confirmed arbitration award, without reviewing either the merits of the award or the legal basis upon which it was reached." *Id.* Accordingly, "a judgment upon a confirmed arbitration award is qualitatively different from a judgment in a court proceeding, even though the judgment is recognized under the FAA for enforcement purposes." *Id. at 1133-34*; *see also Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co., 744 F.3d 25, 29 (1st Cir. 2014)* ("[I]f a federal court, in enforcing an arbitration award, held that the arbitration was not fraudulent, and thus was enforceable, a subsequent arbitrator would not be able to decide to the contrary," but "if a federal court has nothing to say about the merits of the arbitration decision that it confirms (which is almost always the case), then a subsequent arbitrator does not infringe on the prerogatives of the federal court by determining the preclusive effect of that arbitration decision.").

DISCUSSION

This Court denied ***Mawhinney***'s petition to vacate the arbitrator's award because he failed to establish any of the narrow grounds for vacutur under *9 U.S.C. 10. See* Doc. No. 17 ("Mr.

Mawhinney's disagreement with Judge Sullivan's conclusions, without more, is not a grounds for vacatur under *9 U.S.C. § 10*. Mr. ***Mawhinney*** provides no evidence that Judge Sullivan acted with prejudice, engaged in misconduct, or acted with manifest disregard for the law."). The Court granted American's cross-petition to confirm the award because a court must enter an order confirming an arbitration award "unless the award is vacated, modified, or corrected" as prescribed in *9 U.S.C. §§ 10-11. 9 U.S.C. § 9*. This Court did not consider the merits underlying ***Mawhinney***'s claims, and therefore enforcement of its judgment is limited to those issues it actually considered. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1133-34*. American's reliance upon *Leon v. IDX Systems Corporation, 464 F.3d 951 (9th Cir. 2006)* is misplaced because *Leon* involved actions taken by a district court to enforce its own judgment rendered after considering the merits of the issues presented, not the more narrow judgment this Court reached when it in summarily confirmed the arbitrator's award. *See Chiron, 207 F.3d at 1134* (noting that "the court issuing the original decision is best equipped to determine what was considered and decided in that decision and thus what is or is not precluded by that decision," and such a policy is not served "when the district court merely confirmed the decision issued by another entity, the arbitrator, and was not uniquely qualified to ascertain its scope and preclusive effect").

Because the arbitration clause in the settlement

agreement[1] appears to broadly encompass all disputes arising between the parties involving ***Mawhinney***'s employment, it is likely the parties will need to seek to arbitrate the issue of whether or not the ALJ Action is precluded by the arbitrator's award. If the parties are unable to agree to arbitrate their dispute concerning the preclusive effect of the arbitrator's award, then either party may seek an order compelling arbitration of the issue by filing a petition to compel arbitration pursuant to *9 U.S.C. § 4*. Although American alternatively requests that this Court compel arbitration of the ALJ Action now, the Court is not in the best position to determine the preclusive effect of the arbitrator's award. *See Chiron, 207 F.3d at 1134*. Furthermore, this case was closed and judgment was entered more than one year ago. The issues now giving rise to American's

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[1] The parties' settlement agreement is very broad, and provides that:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties ... involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court. . . . The arbitrator shall have the authority to order any legal or equitable relief or remedy which would be available in a civil or administrative action on the claim. Doc. No. 38-1 at 3 (emphasis original).

request to compel arbitration are unrelated to the initial petitions to vacate or confirm the arbitration award. Accordingly, to the extent American wishes to file a petition to compel arbitration pursuant to *9 U.S.C. 4*, it must file its petition as a new case, not as an alternative request in a motion to enforce judgment.

CONCLUSION

Because this Court did not consider the merits underlying ***Mawhinney***'s claims in confirming the arbitration award, it is unable to enforce the arbitrator's judgment or determine the preclusive effect of the arbitrator's judgment in the ALJ Action. Accordingly, American's motion to enforce judgment or, in the alternative, compel arbitration, is **DENIED**.

IT IS SO ORDERED.

Dated: August 23, 2016

/s/ Michael M. Anello
Hon. Michael M. Anello
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 3:16-cv-2270-MMA (BLM)

AMERICAN AIRLINES, INC., Plaintiff,
v.
ROBERT STEVEN MAWHINNEY, Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL ARBITRATION;
[Doc. No. 5]
AND DENYING DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, RECUSAL OF JUDGE MICHAEL M. ANELLO
[Doc. No. 14]

Plaintiff American Airlines, Inc. ("Plaintiff"), brings a single cause of action for breach of contract and moves to compel arbitration of Defendant Robert Steven Mawhinney's ("Defendant") underlying employment discrimination claims pursuant to an arbitration clause in a settlement agreement entered into between Plaintiff and Defendant in 2002.[1] Doc. No. 5. Defendant filed an opposition to the motion, to

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[1] In a related case, a different plaintiff (Transport Workers Union, Local 591) seeks to compel the same defendant, Mr. Mawhinney, to arbitrate his claims pursuant to the same settlement agreement. *See* 16cv2296-MMA (BLM).

which Plaintiff replied. Doc. Nos. 16, 19. On September 28, 2016, Defendant filed a motion to dismiss, or, in the alternative, requested the recusal of the undersigned. Doc. No. 14. Plaintiff filed an opposition to the motion, to which Defendant replied. Doc. Nos. 17, 18. For the reasons set forth below, the Court **GRANTS** Plaintiff's motion to compel arbitration. Moreover, the Court **DENIES** Defendant's motion to dismiss, or, in the alternative, request for the undersigned's recusal.

BACKGROUND

Defendant began working at American in 1989 as an Aviation Maintenance Technician. After American terminated Defendant's employment in 2001, Defendant filed an administrative whistleblower complaint with the U.S. Department of Labor ("DOL") challenging his termination pursuant to Section 519 of the Wendell H. Ford Aviation Investment Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. AIR 21 authorizes an "employee" of an "air carrier or contractor or subcontractor" to bring an action where the employer has retaliated against the employee for protected whistleblower activity. 49 U.S.C. § 42121(a).

In December 2002, the parties entered into a Settlement Agreement (the "2002 Agreement"), which required Plaintiff to reinstate Defendant's employment, among other relief. The 2002 Agreement included a broad arbitration clause, requiring that disputes involving compliance with the 2002 Agreement and future disputes arising out of Defendant's employment would be resolved

through binding, private arbitration. The arbitration provisions of the 2002 Agreement provide, in pertinent part:

> In the event of any dispute as to the compliance by either party with the terms of this Agreement, or in the event of any dispute arising at any time in the future between the Parties (including but not limited to the Released Parties, and any [sic] their past, present or future successors, and their past, present, or future officers, directors, employees, agents and representatives) involving Plaintiff's employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, Plaintiff and American Airlines agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means of resolving any such disputes and no other action will be brought in any other forum or court. . . . The arbitrator shall have the authority to order any legal or equitable relief or remedy which would be available in a civil or administrative action on the claim.

Doc. No. 5-2 at 10.[2] The DOL issued an order approving the settlement in January 2003.

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[2] The Court refers to the CM/ECF pagination in Doc. No. 5-2.

Plaintiff terminated Defendant's employment again in September 2011. Defendant initiated arbitration proceedings shortly thereafter, alleging claims for, among other things, retaliation and wrongful termination. In October 2011, Defendant also filed a second AIR 21 complaint with the DOL, alleging retaliation and wrongful termination.

The DOL investigated Defendant's claims in June 2012, but dismissed his complaint because it was unable to determine that Defendant had been retaliated against, or wrongfully terminated for reporting air safety concerns. An administrative law judge ("ALJ") granted Defendant a hearing regarding his AIR 21 complaint ("ALJ Action"), but the proceeding was stayed pending Plaintiff's bankruptcy proceedings.

When the ALJ Action resumed in April 2014, Plaintiff moved to dismiss because arbitration proceedings had already been initiated pursuant to the parties' settlement agreement. On May 14, 2014, the ALJ granted the motion and dismissed the ALJ Action. Defendant appealed the decision to the Administrative Review Board ("ARB").

Defendant then proceeded to arbitrate his claims. In November 2014, after six days of arbitration proceedings which included live testimony from nine witnesses, an arbitrator ruled in favor of Plaintiff. In February 2015, Defendant petitioned this Court to vacate the arbitration award in the related case 15cv259-MMA (BLM). Plaintiff opposed vacatur, and cross-petitioned to confirm the arbitration award. The Court granted Plaintiff's cross-petition and

entered judgment in American's favor in August 2015. *See* 15cv259-MMA (BLM), Doc. No. 17. Defendant appealed the judgment on December 31, 2015.

In January 2016, the ARB reversed the ALJ's dismissal of the AIR 21 complaint, and remanded for further proceedings. The ARB concluded that the ALJ did not have authority to compel the matter to arbitration. The ARB explained that only a district court, and not the ALJ, could enforce Defendant's court-approved settlement and its arbitration provisions. Defendant is currently litigating employment-related claims before the ALJ, and a two-week hearing before the ALJ is scheduled to begin on October 31, 2016.

On April 28, 2016, Plaintiff filed a motion with the Court, seeking to enforce the Court's prior judgment in favor of American, or, in the alternative, to compel arbitration of Defendant's claims. *See* 15cv259-MMA (BLM), Doc. No. 38. The Court denied the motion on August 22, 2016, and instructed Plaintiff to file a new action in order to compel arbitration. On September 2, 2016, Plaintiff commenced arbitration proceedings with Defendant before the American Arbitration Association ("AAA"), and issued to Defendant a demand to compel arbitration. Defendant did not respond. Plaintiff then filed the instant case against Defendant on September 7, 2016, alleging a single cause of action for breach of the arbitration agreement. Doc. No. 1. On September 12, 2016, Plaintiff filed its motion to compel arbitration of matters arising out of Defendant's employment-related claims. Doc. No. 5.

DISCUSSION

I. Plaintiff's Motion to Compel Arbitration

A. Legal Standard

The Federal Arbitration Act ("FAA") permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court . . . for an order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

The Supreme Court has stated that the FAA espouses a general policy favoring arbitration agreements. *AT & T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Federal courts are required to rigorously enforce an agreement to arbitrate. *See id.* Courts are also directed to resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476–77 (1989).

In determining whether to compel a party to arbitration, the Court may not review the merits of the dispute; rather, the Court's role under the FAA is limited "to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114,

1119 (9th Cir. 2008) (internal quotation marks and citation omitted). If the Court finds that the answers to those questions are yes, the Court must compel arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). If there is a genuine dispute of material fact as to any of these queries, a district court should apply a "standard similar to the summary judgment standard of [Federal Rule of Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004).

Agreements to arbitrate are 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. Courts must apply ordinary state law principles in determining whether to invalidate an agreement to arbitrate. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 782 (9th Cir. 2002). As such, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. *Concepcion*, 563 U.S. at 339-41.

B. Analysis

1. Valid Agreement to Arbitrate Exists

In order to determine whether it is appropriate to compel arbitration, the Court must first determine whether a valid agreement to arbitrate exists. *See Cox*, 533 F.3d at 1119. Neither party disputes the existence of a valid agreement to arbitrate. In fact, Defendant initially requested private arbitration in September 2011 pursuant to the terms of the 2002 Agreement. Defendant participated in the

arbitration, called witnesses, submitted briefs, and participated in depositions. Doc. No. 5-1 at 8. At no point did Defendant challenge the enforceability of the 2002 Agreement's arbitration provisions. *Id.* Accordingly, a valid agreement to arbitrate exists.[3]

2. The Scope of the Arbitration Clause Encompasses Defendant's Claims

Because a valid agreement to arbitrate exists, the Court must next consider whether Plaintiff's breach of contract claim, as well as the scope of Defendant's underlying employment discrimination claims are encompassed by the arbitration provisions of the 2002 Agreement. *See Cox*, 533 F.3d at 1119. A claim is subject to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984) (*quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

The 2002 Agreement requires private arbitration "[i]n the event of *any* dispute as to the compliance by either party with the terms of this Agreement." Doc. No. 5-2 at 10 (emphasis added). This broadly worded clause clearly includes a breach of the terms of the

[3] Plaintiff also claims a valid agreement to arbitrate exists pursuant to 49 U.S.C. § 42121(b)(6), because the DOL previously approved the 2002 Agreement. Doc. No. 5-1 at 8. However, because neither party contests the existence of a valid agreement to arbitrate, the Court need not address this argument.

arbitration agreement itself. The arbitration provision provides for two exceptions: (1) disputes that Plaintiff chooses to grieve under the Collective Bargaining Agreement ("CBA"); and (2) disputes that may not be lawfully subject to pre-dispute arbitration agreements. *Id.* Defendant argues these additional provisions "must also be considered to understand the complete intent of the Settlement Agreement." Doc. No. 16-1 at 2 (emphasis in original). Defendant cites a decision of the ARB to support the notion that his AIR 21 claims cannot be subject to private arbitration. *Id.* at 14.

With respect to the first exception, Defendant does not claim that he chose to grieve under the CBA, nor does Defendant offer any evidence to support this notion. Thus, the first exception is inapplicable. With respect to the second exception, Defendant cites an ARB decision, *Lucia v. American Airlines*, ARB Case Nos. 10-014, 10-015, 10- 016, 2011 WL 4690625 (ARB Sept. 16, 2011), as precedent supporting the notion that AIR 21 disputes cannot be subject to a private arbitration agreement. Doc. No. 16-1 at 14. In *Lucia*, the ARB reversed an ALJ's order dismissing AIR 21 claims by airline pilots who were also pursuing arbitration under their CBA. *Lucia*, 2011 WL 4690625, at *7. The ARB found the pilots' claims in arbitration were "wholly independent" from the pilots' AIR 21 claims. *Id.* at *6. The ARB articulated that a union, in a CBA on behalf of a group of employees, could not waive the employees' individual statutory claims, like those under AIR 21. *Id.* at *7. Accordingly, the ARB found the CBA could not be interpreted to require arbitration of the pilots' AIR 21 claims. *Id.*

Here, Defendant initiated arbitration pursuant to a private agreement (the 2002 Agreement), not a CBA. Defendant agreed to submit "any" employment-related dispute to arbitration. Moreover, unlike *Lucia*, where the arbitration claims were substantively different than those in the administrative proceedings, the issues currently before the AAA are identical—claims of retaliation and wrongful termination. Accordingly, neither exception is applicable to the case at bar.

Defendant also contends he is exempt from the FAA as a "transportation worker." Doc. No. 16-1 at 10. Defendant cites 9 U.S.C. § 1 which provides, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engagement in foreign or interstate commerce." 9 U.S.C. § 1. Defendant, as the party opposing arbitration, bears the burden of demonstrating that the Section 1 exemption applies. *Cilluffo v. Cent. Refrigerated Servs., Inc.*, 2012 WL 8523507, at *3 (C.D. Cal. Sept. 24, 2012) (order clarified, 2012 WL 8523474 (C.D. Cal. Nov. 8, 2012) (citing *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008)).

Here, the 2002 Agreement is not a "contract of employment," but rather a settlement agreement designed to resolve legal disputes between the parties. Defendant does not argue that the 2002 Agreement is a contract of employment. Additionally, the Supreme Court has interpreted this exemption narrowly, finding that the exemption is limited to those engaged in the movement of goods in interstate

commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). Aircraft maintenance crew members, or workers engaged in aviation-related services, do not fall within this exemption. *See Jimenez v. Menzies Aviation Inc.*, 2015 WL 4914727, at *5 n.4 (N.D. Cal. Aug. 17, 2015). Because Defendant offers no evidence that the 2002 Agreement is a contract of employment, or that he engaged in interstate commerce necessary to qualify for the exemption, Defendant fails to demonstrate he is exempt from the FAA. Therefore, Defendant's claims fall within the scope of the 2002 Agreement's arbitration provisions and are subject to arbitration.

3. Res Judicata is an Arbitrable Issue

Finally, Plaintiff argues that arbitration is also appropriate because Defendant's claims were previously decided in arbitration. Plaintiff notes that whether a party litigating a claim is barred by res judicata or collateral estoppel is itself an arbitrable issue to be resolved in arbitration. *See* Doc. No. 5-1 at 11. As the Ninth Circuit has indicated, the correct forum to determine the effect of the prior proceeding is in arbitration. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1132-33 (9th Cir. 2000) (holding arbitration as the appropriate forum to determine the res judicata effect of a prior arbitration award). Accordingly, arbitration is also appropriate for the separate determination of whether Defendant's claims are barred by res judicata or collateral estoppel.

C. Conclusion

For the reasons set forth above, the Court finds a valid arbitration agreement exists, and both Plaintiff's breach of contract claim and Defendant's underlying employment discrimination claims are encompassed by the arbitration agreement. Additionally, whether Defendant's claims are barred by res judicata or collateral estoppel is an arbitrable issue for an arbitrator to determine. Accordingly, the Court **GRANTS** Plaintiff's motion to compel arbitration.[4]

II. Defendant's Motion to Dismiss, or, in the Alternative, Request for Recusal

A. Motion to Dismiss

On September 28, 2016, Defendant filed the instant motion to dismiss based on the statute of limitations.[5] *See* Doc. No. 14. The 2002 Agreement

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[4] Defendant raises additional arguments in response to Plaintiff's Motion to Compel that do not bear on the disposition of the motion. For example, Defendant claims American delayed DOL and arbitration proceedings, American's motion to compel is not timely, Defendant describes events that took place more than fifteen years ago, and alleges American participated in arbitration and the AIR 21 claim without raising an objection. *See* Doc. No. 16-1. Although the Court carefully considered all of Defendant's arguments, the Court only addresses the arguments bearing on the disposition of Plaintiff's motion in this section of the Court's opinion.

[5] Defendant also argues in his motion that Plaintiff has "not been forthright with the Court" because its notice of related cases did not list a 2009 action where Plaintiff removed a PAGA

contains a California choice of law provision that neither party contests. Doc. No. 5-2 at 6. California imposes a four-year statute of limitations on suits for a breach of written contract. *Cal. Civ. Proc. Code* § 337. The California Supreme Court has held that in the context of a contract-based action to compel arbitration, "a cause of action to compel arbitration does not accrue until one party has refused to arbitrate the controversy." *Spear v. Calif. State Auto. Ass'n*, 831 P.2d 821, 825 (Cal. 1992); *see also Wagner Constr. Co. v. Pac. Mech. Corp.*, 157 P.3d 1029, 1034 (Cal. 2007) (stating "[a] petition to compel arbitration must be brought within four years after the party to be compelled has refused to arbitrate."). Thus, once the accrual date is determined, the applicable limitations period is the four-year period applied to breach of contract actions. *Spear*, 831 P.2d at 824.

Here, the Court finds Plaintiff timely filed its claim. Defendant asserts the alleged breach occurred in September 2011, when Defendant initiated a claim before the DOL. *See* Doc. No. 14 at 6. Thus, Defendant claims Plaintiff's complaint, filed in September 2016, exceeded the four-year limitations period. *See id.* On September 2, 2016, however Plaintiff commenced arbitration proceedings with Defendant before the AAA and issued to him a

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representative action to federal court involving alleged wage statement violations. Doc. No. 14 at 3-4. This allegation, however, does not advance Defendant's statute of limitations or recusal arguments, and is irrelevant to Defendant's pending motion. Even if the Court were to address this argument, the Court finds the 2009 action is not "related" to the case at bar pursuant to Civil Local Rule 40.1(g).

demand to compel arbitration. Doc. No. 5-1 at 7. Defendant did not respond. *Id.* The accrual date is therefore on or around September 2, 2016. Because Plaintiff filed its Complaint and motion to compel arbitration within two weeks of Defendant's refusal to arbitrate, Plaintiff's claim is timely. Accordingly, the Court **DENIES** Defendant's motion to dismiss for exceeding the statute of limitations.

B. Request for the Undersigned's Recusal

In the alternative, Defendant requests the recusal of the undersigned. *See* Doc. No. 14. The standard for recusal under 28 U.S.C. §§ 144, 455 is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984). Importantly, "the alleged prejudice must result from an extrajudicial source; a judge's prior adverse ruling is not sufficient cause for recusal." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (citing *Mayes*, 729 F.2d at 607).

Defendant claims his status as a *pro se* litigant has been met with prejudice because the Court did not consider the merits underlying Defendant's claims in his motion to vacate the arbitration award in the related, previous case. Doc. No. 14 at 7-8; *see* 15cv259-MMA (BLM), Doc. No. 45 ("This Court did not consider the merits underlying Mawhinney's claims, and therefore enforcement of its judgment is limited to those issues it actually considered."). However, a judge's prior adverse ruling is not a

sufficient cause for recusal. *Studley*, 783 F.2d at 939. Furthermore, the Court has at all times carefully considered Defendant's arguments. When the Court declined to consider the merits of Defendant's petition to vacate the arbitration award in the previous, related case, it was because the Court lacked jurisdiction to do so. Accordingly, because Defendant fails to state an appropriate ground for recusal, the Court **DENIES** Defendant's request for the undersigned's recusal.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Plaintiff's motion to compel arbitration. The Court **DISMISSES THIS ACTION WITHOUT PREJUDICE** and **ORDERS** the parties to proceed to arbitration in accordance with the terms of the arbitration agreement. Furthermore, the Court **DENIES** Defendant's motion to dismiss, or, in the alternative, request for recusal of the undersigned.

The Clerk of Court is instructed to enter judgment accordingly and terminate this case.

IT IS SO ORDERED.

Dated: October 27, 2016

/s/ Michael M. Anello
HON. MICHAEL M. ANELLO
United States District Judge

APPENDIX E

U.S. Department of Labor
Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

ARB CASE NO. 14-060
ALJ CASE NO. 2012-AIR-017
DATE: January 21, 2016

In the Matter of:
ROBERT STEVEN MAWHINNEY,
COMPLAINANT,
v.
AMERICAN AIRLINES, RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BD

Appearances:
For the Complainant:
Robert Steven Mawhinney, *pro se*,
La Jolla, California
For the Respondent:
Robert Jon Hendricks, Esq.;
Larry M. Lawrence, Esq. and
Teri E. Kirkwood, Esq.;
***Morgan, Lewis & Bockius, LLP*;**
Los Angeles, California

Before:
Paul M. Igasaki,
Chief Administrative Appeals Judge;
Joanne Royce,
***Administrative Appeals Judge;* and**
Luis A. Corchado, concurring
Administrative Appeals Judge.

DECISION AND ORDER
VACATING AND REMANDING

Robert Mawhinney filed a complaint against American Airlines (American); the Transportation Workers Union (TWU); and the following named members of the union: Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippell, Aaron Mattox, Frank Krznaric, Larry Costanza, and Ken Mactiernan; and Jose Montes, an American Airlines employee, under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act) and its implementing regulations.[1] He alleged that a "concerted effort" to remove him from employment was "orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564."[2] On July 19, 2012, the Administrative Law Judge (ALJ) issued an order severing this case from Case No. 2012-AIR-014, and this case was placed in abeyance pending American Airlines's bankruptcy proceedings. On April 8, 2014, Respondent filed a Motion to Compel Arbitration and to Dismiss Action. Finding that Complainant agreed to arbitrate all claims arising from his employment relationship with Respondent, the ALJ granted Respondent's motion to compel arbitration and dismissed Mawhinney's AIR 21

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[1] 49 U.S.C.A. § 42121 (Thomson/West 2007); 29 C.F.R. Part 1979 (2015).

[2] Mawhinney Complaint filed October 5, 2011 (2011 Complaint).

claim.[3] Mawhinney appealed the dismissal of his AIR 21 complaint to the Administrative Review Board (ARB).

BACKGROUND

As there has not been a hearing on the merits, the following background is based on the complaint filed in October 2011, the pleadings of the parties, and the decision in a previous AIR 21 action Mawhinney filed. American Airlines first employed Mawhinney in 1989. Respondent terminated his employment in 2001, and he subsequently filed a complaint under the Act, as well as a civil action against Respondent. The complaint and the civil action were resolved, and Mawhinney and Respondent signed a settlement agreement in December 2002. Pursuant to the agreement, Respondent reinstated Mawhinney to his former employment as Aircraft Maintenance Technician. The settlement agreement also contained the following provision:

> In the event of any dispute . . . arising at any time in the future between the Parties . . . involving [Complainant]'s employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, [Complainant and Respondent] agree to submit such dispute to final and binding arbitration

[3] *Mawhinney v. American Airlines,* No. 2012-AIR-017 (May 14, 2014) (O.D.C.).

("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means for resolving any such disputes and no other action will be brought in any other forum or court . . . .

In September 2011, American Airlines again terminated Mawhinney's employment. He filed an AIR 21 complaint with OSHA in October 2011. He alleged that Respondent retaliated against him by terminating his employment because he made safety complaints against Respondent.[4] Given the 2002 settlement agreement's language, the ALJ found that "the only issue meriting discussion is whether [Mawhinney's] complaint under AIR 21 may lawfully be the subject of a pre-dispute arbitration agreement." O.D.C. at 2. The ALJ found that Congress did not invalidate any agreements to arbitrate claims arising under AIR 21. He also found that the agreement to arbitrate is a "condition of employment" that allows for arbitration under

[4] In its decision in *Mawhinney v. Transportation Workers' Union*, ARB No. 12-108, ALJ No. 2012-AIR-014 (Sept. 18, 2014), the Board vacated the ALJ's finding that the TWU is not a "company," and thus it cannot by definition be a contractor or subcontractor subject to liability under the Act. Rather, the Board held that the common legal definition of "contractor" manifestly includes labor unions, and that the proper inquiry is whether the Collective Bargaining Agreement (CBA), or any other contract, between the TWU and American, which was in effect during Mawhinney's employment with American, provides for the performance of safety-sensitive functions by the TWU or its members. Therefore, the Board remanded this issue to the ALJ to determine initially whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.

related Title VII cases.[5] After rejecting Complainant's remaining contentions, and noting that Mawhinney himself invoked the arbitration clause, the ALJ concluded that Mawhinney's AIR 21 claim falls within the scope of the agreement to arbitrate, and that he must pursue his claim in arbitration.[6] The ALJ compelled arbitration of the dispute and dismissed Complainant's AIR 21 complaint.

DISCUSSION

Before the ALJ, Respondent filed a Motion to Compel Arbitration and to Dismiss Action pursuant to the terms of a settlement agreement signed in December 2002. The agreement to arbitrate was a provision of this settlement, and it is this provision that Respondent seeks to enforce. In adjudicating an AIR 21 whistleblower complaint, the ALJ and Board have only the authority expressly or implicitly provided by law.[7] The Act requires the Secretary to (1) investigate an AIR 21 whistleblower complaint and issue findings; (2) permit parties to object to the Secretary's findings and participate in a hearing

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[5] 42 U.S.C.A. § 2000 *et seq.* (Thomson Reuters 2012).

[6] The arbitration was conducted on September 3-5 and 9-11, 2014. The arbitrator issued her decision on November 24, 2014. Details of the proceedings were not provided.

[7] *See, e.g., Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules).

before an ALJ; and (3) issue a final order, including relief for the complainant if the Secretary believes that an AIR 21 violation occurred. See 49 U.S.C.A. § 42121(b)(2), (3). Pursuant to 49 U.S.C.A. § 42121(b)(3)(A), a pending whistleblower "proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation."

Initially we hold that the Secretary's approval of the December 2002 settlement agreement does not mean that Complainant was precluded from pursuing a whistleblower claim with OSHA and DOL against American without clearer indication from the Secretary that this preclusion was intended. Moreover, the parties simultaneously participated in the arbitration process and the AIR 21 whistleblower claim without raising an objection.

Whenever any person has failed to comply with an order issued under the Act, including orders approving settlement agreements, the person on whose behalf the order was issued may commence a civil action to require compliance with such order.[8] The Act provides that the appropriate United States district court shall have jurisdiction to enforce such order.[9] Thus, the issue of whether a settlement agreement has been breached is not a matter for the Board to determine. "A settlement is a contract. Its construction and enforcement are dictated by

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[8] 49 U.S.C.A. §42121(b)(6)(A); *see also* 29 C.F.R. §1979.113.

[9] *Id.*

principles of contract law."[10] As the AIR 21 whistleblower section provides for enforcement of settlement agreements in the appropriate United States district court, the federal district courts, not the ALJ, nor this Board, have jurisdiction to consider actions based on alleged settlement breaches. Therefore, we hold that the ALJ erred in compelling arbitration and dismissing the claim, and remand the claim to the ALJ for further consideration.[11]

Further, our review of the case is impeded by our inability to determine the positions taken by the parties. For example, Respondent appears to have filed a motion to compel arbitration after the date Complainant had invoked arbitration.[12] In addition,

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[10] *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 8 (ARB Nov. 10, 1997).

[11] Moreover, in an intervening case, the Board acknowledged in *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 14-050, ALJ No. 2014-AIR-010 (Mar. 18, 2015), that the Federal Arbitration Act (FAA) manifests a federal policy favoring arbitration agreements. However, the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirements of the FAA. Without explicitly holding that the FAA applies to AIR 21 claims, the Board concluded that this exemption applies to interstate air transportation of passengers and thus the complainant, a flight attendant, was entitled to pursue her AIR 21 retaliation claim before the DOL. The FAA arbitration exclusion for "transportation workers" might similarly apply to Mawhinney who was employed by American Airlines as an Aircraft Maintenance Technician.

[12] We are cognizant of the fact that Mawhinney can, and did, invoke arbitration. The record indicates that arbitration of Mawhinney's claims was conducted last year and was followed by a decision issued on November 24, 2014. This information is

as noted earlier, the parties simultaneously participated in arbitration and the claim under AIR 21. Therefore, on remand, the ALJ is instructed to clarify the positions taken by the parties, consider the contentions raised, and provide a full explanation for resolution of the contested issues. Though his pleadings are unclear, we assume Mawhinney appealed the ALJ's ruling compelling arbitration only to the extent that it disallowed a concurrent determination of his AIR 21 claim before the Department of Labor. In *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 015, 016; ALJ No. 209-AIR-017, 016, 015 (Sept. 16, 2011),[13] the Board held that the contractual arbitration proceeding and the retaliation proceeding then pending before the Secretary can both proceed, as the causes of action are different and wholly independent. The Board further noted that any judicial relief ordered can be equitably structured such that it is offset by any arbitration award ordered for the same relief to avoid duplicate recovery.

Consequently, we hold that the ALJ erred in dismissing Mawhinney's AIR 21 case as he did not have jurisdiction to enforce the terms of the settlement agreement. We vacate the ALJ's order dismissing the complaint and remand for proceedings consistent with this decision.

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provided by Respondent. *See* American Airlines, Inc.'s Status Update for Pending Petition For Review (Jan. 20, 2015).

[13] Mawhinney appears to have cited this case before the ALJ, but the ALJ directed the discussion to another case, *Alexander v. Gardner*, 415 U.S. 36 (1974), which he found was not analogous.

CONCLUSION

The ALJ's Order Dismissing the Complaint is **VACATED,** and the case is **REMANDED** for further consideration consistent with this opinion.

SO ORDERED. **JOANNE ROYCE**
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado, concurring:

I agree with the majority that this matter should be remanded; however, without more analysis and facts, I cannot agree at this time with all of the majority's reasons. To be clear, like the majority, I found no provision in the whistleblower statutes or regulations that expressly authorizes the OALJ or the Board to grant a "motion to compel" to enforce an arbitration clause in a settlement agreement. As the majority opinion indicates, the OALJ and ARB may exercise only the authority they are explicitly or inherently granted. Congress has explicitly authorized the Secretary of Labor to adjudicate whistleblower claims arising in various safety-sensitive industries (planes, trains, trucking, nuclear plants, etc.).

In my view, American Airlines pointed to insufficient legal authority to support its motion to compel and allow the Department of Labor to opt out of fulfilling the Congressional mandate to adjudicate AIR 21 whistleblower claims by subjecting the claim

to exclusive arbitration. Congress wanted to ensure the public learned about safety concerns in industries where many people can die or be seriously injured if a plane or train or 80,000 pound semi-trailer crashes, a nuclear plant threatens to melt down, or the drinking water of a town has toxic poisons. Whistleblower laws also aim to protect us from experiencing another world financial crisis caused by Enron-like scandals. Burying these safety disclosures in the world of arbitration would defeat this Congressional purpose for whistleblower laws. Also, like the majority, I think the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have delegated authority to adjudicate a whistleblower claim.

In the interest of moving this case forward, I will simply list the reasons for my concurrence and wait for another day to address these issues more fully. To begin with, there is no question that the ALJ faced an area of unsettled whistleblower law and confusing conduct by the parties. Recently, in *Willbanks*, the Board discussed the Federal Arbitration Act and arguably suggests that it applies unless the employee is exempt under the Federal Arbitration Act's exemption provisions. The Board needs to clarify whether the Act applies, in the first place, to whistleblower cases and resolve the tension between the Congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act. If the Federal Arbitration Acts applies to the Board, then the Board

must ensure it complies with the mandatory language of that arbitration act and, in my view, more thoroughly analyze the applicability of the arbitration act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C.A. § 1. Neither party in this case provided the ALJ or the Board with sufficient argument on this point.

Because of the ambiguity in Board decisions like *Willbanks*, whistleblowers who disclose nuclear safety and environmental safety concerns might be treated differently from airline and railroad employees. But the Federal Arbitration Act was passed in 1925 without the slightest notion of the devastating power and real threat of nuclear meltdowns like those that occurred at Chernobyl (1986) and Fukushima (2011) and the feared meltdown of Pennsylvania's Three Mile Island (1979). Lastly, American Airlines filed a motion to compel only one month after asking the ALJ to schedule the AIR 21 hearing to occur prior to the arbitration hearing. The significance and impact of this request is unclear to me on the record before us, and I reserve judgment on this point for another day. For the sake of the public and the Administrative Law Judges that must adjudicate the whistleblower claims, I hope the Board soon directly addresses the big question of the Federal Arbitration Act coverage.

LUIS A. CORCHADO
Administrative Appeals Judge

APPENDIX F

U.S. Department of Labor Case Nos.
2012-AIR-00014
2012-AIR-00017

ROBERT STEVEN MAWHINNEY, Complainant
v.
AMERICAN AIRLINES and TRANSPORT WORKERS UNION LOCAL 591, Respondent

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

This case involves Complainant Robert Steven Mawhinney's whistleblower retaliation claims against American Airlines ("AA") and Transport Workers Union Local 591 ("Local 591") (collectively "Respondents"), brought pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. On November 2, 2016, this Court issued an Order for the Briefing requesting the views of the parties and the Assistant Secretary for Occupational Safety and Health ("Assistant Secretary") concerning how to proceed in light of orders compelling arbitration from the U.S. District Court for the Southern District of California (the "District Court"). In response, the Assistant Secretary respectfully submits this brief as *amicus curiae*. For the reasons set forth below, the Assistant Secretary requests this Court stay

administrative proceedings pending resolution of Ninth Circuit appeals of the District Court's orders and arbitration of Complainant's AIR21 retaliation claims.

BACKGROUND

Complainant began working for AA in 1989 as an aircraft mechanic. *See* Order Granting Plaintiff's Motion to Compel Arbitration, *American Airlines v. Mawhinney*, No. 3:16-cv-2270-MMA-(BLM). At 2 (S.D. Cal. Oct. 27, 2016) ("AA Order Compelling Arbitration").[1] While employed by AA, complainant was a member of Local 591.[2] *See* Local 591 Order Compelling Arbitration, at 2. In 2001, AA terminated Complainant's employment and Complainant filed an AIR 21 retaliation complaint with the Occupational Safety and Health Administration ("OSHA"). *See* Order for Briefing 1. In December 2002, AA and Complainant entered into a settlement agreement (the "Settlement Agreement"), pursuant to which AA reinstated Complainant. AA Order

[1] The District Court also issued an order compelling arbitration in the related case *Transport Workers Union, Local 591 v. Mawhinney*, No. 3:16-cv-2296-MMA-(BLM) (S,D, Cal. Oct. 27, 2016); in this brief, that order is referred to as the "Local 591 Order Compelling Arbitration."

[2] Complainant was a member of Transport Workers Union Local 564, which was dissolved in early 2013, *See* Local 591 Order Compelling Arbitration, at 2. The membership of Local 5644 is currently represented by Local 591. *Id.* In this brief, Local 564 and Local 591 are referred to collectively as Local 591.

Compelling Arbitration, at 2. The Settlement Agreement includes the Following clause:

> In the event of any dispute ... arising at any time in the future between [Complainant and AA] (including but not limited to ... their ... officers, directors, employees, agents and representatives) involving [Complainant]'s employment which may lawfully be the subject of pre-dispute arbitration agreements, ... [Complainant and AA] agree to submit such dispute to final and binding arbitration ... for resolution.

Id. In January 2003, OSHA issued a final order approving the Settlement Agreement and terminating the AIR21 proceedings. *See id.* at 3.

In September 2011, AA again terminated Complainant's employment. Id. Complainant alleged, in part, that AA retaliated against him for "raising complaints of violations in the work place by coworkers, e.g., AMT's sleeping on duty; ... and, upholding the statutes which guide the expectations of an AMT which keep AA aircraft safe." See Arbitrator's Award at 3-4.[3] Complainant did not initiate arbitration proceedings with Local 591.

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[3] The arbitrator subsequently issued an award (the "Arbitrator's Award"). *See infra* p. 4. A copy of the Arbitrator's Award was filed with AA's Motion to Enforce Judgment or, in

On October 5, 2011, Complainant also filed an AIR 21 retaliation complaint with OSHA. *See* Order for Briefing 1. Complainant alleged AA and Local 591 engaged in a concerted effort to terminate his employment in retaliation for protected activity. *Id.* In June 2012, OSHA dismissed the AIR 21 retaliation complaint and Complainant requested a hearing with the OALJ. *See* AA Order Compelling Arbitration, at 3.

By order dated July 19, 2012, this Court severed the case against AA ("Action No. 2012-AIR-017") from the case against Local 591 ("Action No. 2012-AIR-014") (collectively, the "ALJ Actions"). *See Mawhinney v. Transp. Workers Union*, ARB. No. 12-108, 2014 WL 4966167, at *2 (ARB Sept. 18, 2014) (:Local 591 ARB Decision"). This Court dismissed Action No. 2012-AIR-014, holding that Local 591 is not a "company," and thus is not a "contractor or subcontractor" for purposes of AIR 21 liability. *See id.* at *3. The, on April 8, 2014,[4] AA filed a Motion to compel Arbitration and to Dismiss Action in Action 2012-AIR-17. *See Mawhinney v. American Airlines*, ARB No. 14-060, 2016 WL 1014038, at *1 (ARB Jan. 21, 2016) ("AA ARB Decision"). On May 14, 2014, this Court held that Complainant's AIR 21 claim was

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the Alternative, to Compel Arbitration in *Mawhinney v. American Airlines*, No. 3:15-cv-259-MMA (BLM) (S.D. Cal.).

[4] Action No. 2012-AIR-17 had been placed in abeyance pending AA's bankruptcy proceedings. AA Order Compelling Arbitration, at 3.

lawfully subject to the Settlement Agreement's arbitration clause; therefore, it dismissed the case and ordered Complainant to pursue his AIR 21 claims in arbitration. Id. Complainant appealed this Court's decisions in both cases to the Administrative Review Board ("ARB").

While awaiting decisions from the ARB, the arbitration initiated by Complainant against AA proceeded. Following six days of hearings, the arbitrator issued an award in favor of AA. See Arbitrator's Award, at 1, 15. In relevant part, the arbitrator found that Complainant did not prove retaliation under California's Fair Employment and Housing Act ("FEHA"). Id. at 7-9. The Arbitrator's Award is silent on the issue of complainant's AIR 21 claims.[5]

In February 2015, Complainant filed a petition to vacate the Arbitrator's Award in the District Court (Case No. 15-259"). *See* Order Denying Motion to Enforce Judgment or, in the Alternative, Compel Arbitration, *Mawhinney v. American Airlines*, No. 3:15-cv-259-MMA (BLM), at 3 (S.D. Cal. Aug. 23, 2016) ("Order Denying Motion to Enforce Judgment"). AA opposed and filed a petition to confirm the Arbitrator's Award. *Id.* In August 2015, the District Court entered judgment in favor of AA,

[5] The arbitrator noted that Complainant had "also filed another claim against AA with the DOL alleging he was wrongfully terminated." Arbitrator's Award, at 3. But, the arbitrator never mentions AIR 21.

confirming the Arbitrator's Award. *Id.* Complainant filed a notice of appeal on December 31, 2015. *Id.* That case is pending before the Ninth Circuit.

Meanwhile, on September 18, 2014, the ARB reversed this Court's decision with respect to Complainant's claims against Local 591. *See* Local 591 ARB Decision. In so doing, the ARB held that "the common legal definition of 'contractor' manifestly includes labor unions." *Id.* at *3. On January 21, 2016, the ARB reversed this Court's decision compelling Complainant to arbitrate his AIR 21 claims against AA. *See* AA ARB Decision. The ARB held that this Court lacked the authority to enforce the Settlement Agreement's arbitration clause and that "the federal district courts, not the ALJ, nor the Board, have the jurisdiction to consider actions based on alleged settlement breaches."[6] *Id.* at *2. The ARB remanded both actions to this Court for further consideration. *Id.* at *3; Local 591 ARB Decision, at *4.

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[6] As authority, the ARB cited 49 U.S.C. § 42121(b)(6)(A):

> A person on whose behalf an order was issued under paragraph (3) may commence a civil action against a person to whom such order was issued to require compliance with such order. *The appropriate United States district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties, *to enforce such order*.

(emphasis added); see also 29 C.F.R. § 1979.113.

On April 28, 2016, AA filed a Motion to Enforce Judgment or, in the Alternative, to Compel Arbitration in Case No. 15-259. *See* Order Denying Motion to Enforce Judgment, at 1, 3. AA argued that the AIR 21 claims against it, in Action No. 2012-AIR-017, were barred by res judicata and/or collateral estoppel based on the Arbitrator's Award. *Id.* at 3. The District Court denied AA's motion to enforce judgment because "it did not consider the merits underlying [Complainant's] claims" in confirming the Arbitrator's Award, and therefore it was "not in the best position to determine the preclusive effect of the [A]rbitrator's [A]ward" on the ALJ Actions. *Id.* at 4-5. The Court noted, however, that because the Settlement Agreement contains a broad arbitration clause "it is likely the parties will need to arbitrate the issue of whether or not the ALJ Action[s are] precluded by the [A]rbitrator's [A]ward." *Id.* at 5. The Court also denied AA's request to compel arbitration, stating that "to the extent [AA] wishes to file a petition to compel arbitration pursuant to 9 U.S.C. 4 [of the Federal Arbitration Act], it must file its petition as a new case, not as an alternative request in a motion to enforce judgment." *Id.*

On September 2, 2016, AA filed a demand for arbitration proceedings. AA Order Compelling Arbitration, at 4. Local 591 filed a parallel arbitration demand on September 7, 2016. *Id.* Complainant did not respond to either arbitration demand. *Id.*

AA and Local 591 filed complaints in the District Court ("Case No. 16-2270" and "Case No. 16-2296," respectfully), each alleging a breach of the Settlement Agreement. *Id.* at 4; Local 591 Order Compelling Arbitration, at 4. Respondents then filed motions to compel arbitration. *Id.* at 4-5; AA Order Compelling Arbitration, at 4. On October 27, 2016, the District Court granted the motions. *Id.* at 11; Local 591 Order Compelling Arbitration, at 10. In both cases, the District Court found that the Settlement Agreement contains a valid agreement to arbitrate, and held that Respondents' breach of contract claims, as well as Complainant's underlying employment-related claims (i.e. his AIR 21 claims), are encompassed by the arbitration agreement. *See* AA Order Compelling Arbitration, at 5-8. The District Court also found that "whether [Complainant's] claims are barred by res judicata and collateral estoppel is an arbitrable issue for an arbitrator to determine. *Id.* at 8. The District Court ordered "the parties to proceed to arbitration." *Id.* at 11. Complainant filed notices of appeal in both of these cases.

On October 26, 2016, this Court postponed a hearing scheduled in the ALJ Actions because Respondents filed motions for summary decision. Order for Briefing 1. Both argued, in part, that this Court should dismiss Complainant's AIR 21 claims on the basis of res judicata and/or collateral estoppel. The, on November 3, 2016, this Court issued an

Order for Briefing. *Id.* In Light of the District Court orders compelling arbitration, the Court asked the parties and the Assistant Secretary to file briefs outlining their positions regarding whether the ALJ Actions should be dismissed for lack of subject matter jurisdiction and, if not, how the ALJ Actions should proceed. *Id.* at 2.

ARGUMENT

This Court should not dismiss the ALJ Actions because the District Court's orders compelling arbitration are on appeal to the Ninth Circuit. If this Court were to dismiss the ALJ Actions, it would place an unnecessary burden on complainant to appeal that decision to the ARB and on the parties and the Department of a Labor to continue active litigation and adjudication of the cases. Otherwise, if Complainant does not appeal this Court's dismissal and the Ninth Circuit subsequently reverses the District Court's orders, holding that Complainant's AIR 21 claims are not subject to the Settlement Agreement's arbitration clause, Complainant would be left without a forum to adjudicate his AIR 21 claims. This Court would no longer have jurisdiction over Complainant's AIR 21 retaliation complaint, and it would be too late for Complainant to appeal this Court's dismissal[7] or to file a new AIR 21

[7] Complainant would have ten business days to file a petition for review of the order dismissing the ALJ Actions with the ARB. *See* 29 C.F.R. § 1979.109(c).

retaliation complaint with OSHA.[8] Therefore, until the issue of whether Complainant's AIR 21 claims are subject to mandatory arbitration has been definitively determined, this Court should not dismiss the ALJ Actions.

This Court also should not dismiss the ALJ Actions on the basis of res judicata and/or collateral estoppel. As an initial matter, we note that the Arbitrator's Award does not explicitly address Complainant's AIR 21 claims. Instead, the arbitrator addressed a state law retaliation claim under California's FEHA.[9] Although that does not preclude the application of res judicata and/or collateral estoppel, the District Court declined to enforce the Arbitrator's Award on that basis in Case No. 15-259 because it "did not consider the merits underlying [Complainant's] claims" in the arbitration. Order Denying Motion to Enforce Judgment, at 4. The District Court noted that "'there are fundamental

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[8] An AIR 21 retaliation complaint must be filed within 90 days of the alleged misconduct. 49 U.S.C. § 42121(b)(1); *see also* 29 C.F.R. § 1979. 103(d).

[9] The standard for causation in an FEHA retaliation claim is different from the standard for causation in an AIR 21 retaliation claim. As the arbitrator explained, to establish a claim of retaliation under FEHA, Complainant needed to prove his protected activity was "a substantial motivating reason" for the adverse employment action. Arbitrator's Award, at 7. In contrast, to establish a claim of retaliation under AIR 21, an employee must prove his protected activity was a "contributing factor in the unfavorable personnel action." 49 U.S.C. § 42121 (b)(2)(B) (emphasis added).

differences between confirmed arbitration awards and judgments arising from a judicial proceeding.'" *Id.* at 3. (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1133 (9th Cir. 2000)). This Court also should not rule on Respondents' res judicata and/or collateral estoppel objections to Complainant's AIR 21 claims. To do so would be contrary to the District Court orders compelling arbitration, which state that "whether [Complainant's AIR 21] claims are barred by res judicata or collateral estoppel is an arbitrable issue for an arbitrator to determine." See AA Order Compelling Arbitration, at 8. The District Court stated that "the Ninth Circuit has indicated[] the correct forum to determine the effect of the prior proceeding is in arbitration." *Id.* (citing *Chiron Corp.*, 207 F.3d at 1132-33); *see also Chiron Corp.*, 207 F.3d at 1132 ("[A] res judicata objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court."). Rather than dismissing the ALJ Actions, this Court should stay proceedings to give the parties an opportunity to arbitrate Complainant's AIR 21 claims, as ordered by the District Court.

This Court also should not rule on the pending motions for summary decision. Those motions involve Complainant's AIR 21 retaliation claims against Respondents. Respondents sought and received orders from the District Court compelling

arbitration of Complainant's AIR 21 claims. Because the District Court has already ruled that the Settlement Agreement contains a valid agreement to arbitrate and that Complainant's AIR 21 claims are encompassed by the arbitration clause, Respondents must arbitrate those claims. At this stage, this Court should not adjudicate Complainant's AIR 21 claims, which includes ruling on the motions for summary decision.

For these reasons, the Assistant Secretary's view is that this Court should stay the ALJ Actions pending resolution of the Ninth Circuit appeals and arbitration of Complainant's AIR 21 claims. In the past, Administrative Law Judges have employed this approach. *See, e.g., Bergman v. Chesapake Energy Corp.*, ALJ No. 2008-SOX-9, 2007 WL 7135716 *2 (ALJ Dec. 19, 2007) (staying proceedings "pending Complainant's pursuit of mandatory arbitration"). To ensure that the Court is kept abreast of developments in the case, it can request status reports from the parties. *See, e.g., Sullivan v. Science Applications Int'l Corp.*, ALJ No. 2007-SOX-60, 2007 WL 7135804, at *5 (ALJ Sept. 21, 2007) (ordering the parties to "file ... joint report[s] ... on the status of the arbitration"). If the parties notify the Court that the issue of arbitrability of Complainant's AIR 21 claims has been definitively determined and there is a final arbitration award addressing Complainant's AIR 21 claims, the Court should dismiss the ALJ Actions.

CONCLUSION

For the foregoing reasons, the Assistant Secretary respectfully requests the Court stay administrative proceedings until the Ninth Circuit appeals are resolved and there is a final arbitration award addressing Complainant's AIR 21 claims.

Respectfully submitted,

M. PATRICIA SMITH, Solicitor of Labor

JENNIFER S. BRAND, Associate Solicitor

WILLIAM C. LESSER, Deputy Associate Solicitor

MEGAN E. GUENTHER,
Counsel for Whistleblower Programs

s/ Joseph M Berndt

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APPENDIX G

Rich v. Shrader
United States District Court
for the Southern District of California
January 18, 2011, Filed
CASE NO. 09 CV 0652 MMA (BGS)
2011 U.S. Dist. LEXIS 4414 *; 2011 WL 181764

Opinion by: Michael M. Anello

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND CLARIFICATION

[Doc. No. 37]

Currently before the Court is Plaintiff Foster Rich's motion for reconsideration and clarification of the Court's order dismissing his First Amended Complaint. [Doc. No. 37.] Defendants opposed Plaintiff's motion, and Plaintiff filed a reply. [Doc. Nos. 41, 42.] The Court in its discretion determined Plaintiff's **[*2]** motion is suitable for a decision on the papers and without oral argument pursuant to Civil *Local Rule 7.1(d)(1)*. For the following reasons, the Court **DENIES** Plaintiff's motion.

BACKGROUND & PROCEDURAL POSTURE

The Court detailed the events giving rise to this action in its previous memorandum order granting Defendants' motion to dismiss Plaintiff's First Amended Complaint ("FAC"). [Doc. No. 36.] That section of the Court's September 17, 2010 Order is incorporated by reference herein.

The Court's September 17 Order ultimately dismissed each of Plaintiff's causes of action for failure to state a claim upon which relief could be granted. The Court explicitly dismissed three claims *with* prejudice, which it determined were governed by the *Nemec* decision:[1] (i) breach of implied covenant of good faith and fair dealing (count 3); (ii) breach of fiduciary duty (count 4); and (iii) unjust enrichment (count 5). The Court dismissed the remainder of Plaintiff's claims *without* prejudice, including: (i) breach of contract (count 8); (ii) tortious interference with contract (count 7); (iii) RICO violations (count 1); (iv) RICO conspiracy (count 2); (v) securities fraud under federal law (count 6); and **[*3]** (vi) securities fraud under California law (count 9).

Plaintiff requests that the Court utilize its inherent authority under *Federal Rule of Civil Procedure 54(b)* to modify and amend its September 17 Order to clarify four aspects of the opinion, and thereby advise Plaintiff which claims and allegations he may assert in his Second Amended Complaint. [Doc. No. 37.] Plaintiff desires clarification and amendment "to avoid any argument by defendants that the Court's September 17 Order has now finalized the four enumerated matters as 'law of the case' on the grounds that a motion for consideration

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[1] The *Nemec* decision as referenced herein refers to a related case filed in the Court of Chancery of Delaware, specifically, the Supreme Court of Delaware's opinion issued April 6, 2010 affirming the Chancery Court's dismissal of the plaintiffs' complaint for failure to state a claim upon which relief could be granted. [C.A. No. 3878, *available at Nemec v. Shrader, 991 A.2d 1120 (Del. 2010).*]

was not filed by Plaintiff." [*Id.* at p.7.] Specifically, Plaintiff requests the Court amend its Order to state the following:

(i) The Court's dismissal of Plaintiff's state-based claims for breach of implied **[*4]** covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment with prejudice, does not foreclose Plaintiff from alleging violations of ERISA under federal common law in his Second Amended Complaint;

(ii) Plaintiff is permitted to plead contractual consequential damages in his Second Amended Complaint;

(iii) The *Nemec* decision does not estop Plaintiff from pleading any facts; and

(iv) Plaintiff may plead that the information as to the reversal of defendants' policies requesting "split up and sale" was material. [Doc. No. 37, p.2-3.]

Defendants oppose any amendment to the existing Order. [Doc. No. 41.]

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) provides:

> When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and **[*5]** may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Under *Rule 54(b)*, a district court has inherent authority to "reconsider and modify an interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law." *Jadwin v. County of Kern, 2010 U.S. Dist. LEXIS 30949 *26 (E.D. Cal.)* (quoting *Abada v. Charles Schwab & Co., Inc., 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2001)*; *City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001))*. "But a court should generally leave a previous decision undisturbed absent a showing that it either represented clear error or would work a manifest injustice." *Jadwin, 2010 U.S. Dist. LEXIS 30949 at *26-27* (quoting *Abada, 127 F. Supp. 2d at 1102*)). Civil *Local Rule 7.1(i)* also allows parties to seek reconsideration of an order.

DISCUSSION

As set forth above, Plaintiff requests the Court modify and amend four aspects of its September 17 Order to clarify which claims and factual allegations Plaintiff may assert in his Second Amended Complaint ("SAC"). Plaintiff's desired relief is **[*6]** problematic for several reasons.

Plaintiff asserts his "sole purpose" for filing the pending motion is to "avoid any argument by defendants that the Court's September 17 Order has now finalized the four enumerated matters as 'law of the case.'" [Doc. No. 37, p.7.] While the Court understands Plaintiff's concern, it will not prospectively limit the arguments Defendants may bring if they choose to challenge Plaintiff's SAC. Further, any amendment or clarification of the September 17 Order is unnecessary, as the Court's discussion clearly and thoroughly identified the scope of Plaintiff's allowable amendments. The plain language of the Order makes clear that the only claims Plaintiff may not reassert in an amended pleading are the three Delaware-based claims, which were dismissed with prejudice. The Court expressly dismissed every other claim without prejudice and with leave to amend. Consistent with *Rule 15(a)*'s liberal amendment standard, the Court placed no restriction on Plaintiff's ability to assert new claims, nor did it limit the relevant allegations Plaintiff may assert in support of each claim.

Beyond that however, it is not appropriate for the Court to prospectively advise Plaintiff **[*7]** which hypothetical claims or allegations he may assert in an amended pleading. The Court's jurisdiction is

strictly limited to the case and controversy before it, as defined by the operative pleading. *See Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990, 1000 (9th Cir. 2010)* ("the court's role is 'neither to issue advisory opinions nor to declare rights in hypothetical cases'"). In its September 17 Order, the Court thoroughly discussed each of Plaintiff's causes of action that he alleged in his FAC, and explained why each of those claims, as pled, was deficient. The Court expressed no opinion regarding possible alternative claims or allegations not pled in the FAC. Although the Court acknowledged numerous new arguments and allegations Plaintiff asserted for the first time in his opposition to Defendants' motion to dismiss, the Court did not analyze nor rule upon the new information that was not contained in the operative pleading.

For example, Plaintiff's FAC asserted state-based claims for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The Court concluded that as pled, these three causes of action arose under **[*8]** Delaware law because of the choice-of-law provision contained in the Officer's Stock Rights Plan. Accordingly, the Court evaluated the sufficiency of these claims under Delaware law, consistent with the *Nemec* decision. [Doc. No. 36, p.13-15.] The Court did not consider potentially related claims arising from federal law that were not asserted in the FAC, as such an exercise would have exceeded the scope of the case and controversy before the Court. The Court declines to amend its Order to provide guidance on claims not alleged in the FAC, as it would amount to nothing more than an improper advisory opinion.

In addition, the Court notes Plaintiff has already filed his SAC, which contains federal causes of action for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. [*See* Doc. No. 38.] While the Court expresses no opinion regarding the sufficiency of these allegations at this stage, the SAC renders Plaintiff's requested relief moot. The Court defers consideration of the sufficiency of Plaintiff's claims until such time as Defendants challenge the pleading, if they choose to do so.[2]

For the same reasons the Court declines to amend its Order to advise Plaintiff whether he can plead contractual consequential damages or information as to the reversal of defendants' policies requesting "split up and sale" in his SAC. Nor will the Court amend its Order to advise Plaintiff which facts he may plead in his SAC. Whether Plaintiff's allegations in his SAC are proper in light of the *Nemec* decision and its application to the present case, is a question not before the Court at this time.

Similarly, reconsideration or clarification of the Court's discussion of materiality in the

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[2] The Court notes both parties spend significant time arguing the **[*9]** propriety and sufficiency of Plaintiff's ERISA claims raised in his pending motion and asserted in his SAC. However, Plaintiff's pending motion for reconsideration and clarification is not the appropriate avenue to determine the propriety of these previously unasserted claims. If Defendants desire to challenge the allegations and claims made in Plaintiff's SAC they are entitled to do so in accordance with the Federal and Local Rules of Civil Procedure, and the Court's October 28, 2010 Order [Doc. No. 40].

September 17 Order is not warranted. Plaintiff challenges the following statement purportedly made **[*10]** by the Court—"An intention to pursue selling a company at some time in the future cannot be material information." [Doc. No. 37, p.17.] As Defendants correctly point out, this quoted language does not appear in the Order. Rather, the Court's Order states, "The 'mere intention' to 'pursue' or an 'unrequited desire' to 'explore' selling the company at some time in the future is not material irrespective of the importance of the restructuring." [Doc. No. 36, p.31-32 (citations omitted).] The two statements are significantly different, the latter being a correct statement of the law. As such, the actual statement made by the Court is necessarily not a finding of fact, which would be inappropriate on a motion to dismiss where Plaintiff's allegations are taken as true. Accordingly, Plaintiff's request for reconsideration of the above misquoted statement is denied.

Finally, the Court notes the judicial system's strong interest in finality and conservation of judicial resources. Consistent with this interest, the Court is disinclined to disturb its earlier decision in the absence of evidence that it committed clear error, or that the decision will work a manifest injustice to Plaintiff. *See* **[*11]** *Jadwin, 2010 U.S. Dist. LEXIS 30949 at *26-27* (citation omitted). The Court concludes its September 17 Order is clear and correct, reflecting an accurate application of the law to the facts alleged. Further, because Plaintiff has been given broad leave to amend all but three of his claims, the Court is not convinced its Order is

manifestly unjust to Plaintiff.[3] Accordingly, the Court declines to invoke its inherent authority under *Rule 54(b)* or *Local Rule 7.1(i)* to amend its September 17 Order.

CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiff's motion for reconsideration and clarification of its September 17, 2010 Order [Doc. No. 36].

IT IS SO ORDERED.

DATED: January 18, 2011

s/ Michael M. Anello
Hon. Michael M. Anello
United States District Judge

[3] Plaintiff does not challenge the Court's dismissal of his three Delaware-based causes of action with prejudice.