No. 20-

IN THE

Supreme Court of the United States

JAMES W. ROBERTSON, SR.,

Petitioner,

v.

INTRATEK COMPUTER, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

COLIN WALSH
WILEY WALSH, P.C.
1011 San Jacinto Boulevard,
Suite 401
Austin, TX 78701
(512) 271-5527

ROBERT J. WILEY
Counsel of Record
AUSTIN CAMPBELL
ROB WILEY, P.C.
2613 Thomas Avenue
Dallas, TX 75204
(214) 528-6500
rwiley@robwiley.com

Attorneys for Petitioner

301119

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under 41 U.S.C. § 4712, employees of government subcontractors may not be retaliated against for reporting violations of laws, rules, or regulations related to the competition for or negotiation of a federal contract. 41 U.S.C. § 4712(a)(1).

In section (c), titled "Remedy and Enforcement Authority," the statute provides a very specific scheme of rights and remedies and how to enforce them, including a private cause of action in federal court, district court enforcement of agency orders, and appellate review. *Id.* at § 4712(c). The final subsection of section (c) states: "The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment." *Id.* at § 4712(c)(7).

The Questions Presented are:

1. Does mandatory compelled arbitration of claims under 41 U.S.C. § 4712 disrupt the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712?

2. Did Congress intend to prohibit enforcement of mandatory employment arbitration agreements in 41 U.S.C. § 4712, even if the statute does not expressly refer to arbitration, when it (a) expressly provided for a federal trial in the remedy and enforcement section and (b) expressly prohibited waiver of any rights and remedies provided as a condition of employment?

LIST OF PARTIES

Petitioner, James W. Robertson, Sr. was a plaintiff in the district court and an appellant in the court of appeals.

Robertson Technologies, Inc. was a plaintiff in the district court and appellee in the court of appeals. Robertson Technologies' claims are not before the Court in this petition.

Respondent, Intratek Computer, Inc. was a defendant in the district court and an appellee in the court of appeals.

Allan Fahami was a defendant in the district court and an appellee in the court of appeals. The claims against Allan Fahami are not before the Court in this petition.

Roger Hayes Rininger was a defendant in the district court and an appellee in the court of appeals. The claims against Roger Rininger are not before the Court in this petition.

LIST OF RELATED CASES

- *Robertson, et al v. Intratek Computer, Inc., et al*, No. 19-50792, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Oct. 2, 2020.

- *Robertson, et al v. Intratek Computer, Inc., et al*, No A-18-CV-373-LY, U.S. District Court for the Western District of Texas. Judgment entered on July 30, 2019.

TABLE OF CONTENTS

Table of Contents

Table of Contents

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes and Other Authorities

James W. Robertson, Sr. petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's published opinion affirming in part and reversing in part the district court's order compelling arbitration is reported at 976 F.3d 575 (5th Cir. 2020) and attached as Appendix A at pages 1a – 18a. The district court opinion adopting the magistrate's report and recommendation and compelling arbitration of all claims is unreported but attached as Appendix B at pages 19a – 25a. The report and recommendation of the magistrate recommending that arbitration be compelled on all claims asserted against Intratek Computer, Inc. and Allan Fahami is unreported but attached as Appendix C at pages 26a – 47a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 2, 2020. App. 1a. Under this Court's March 19, 2020 order, deadlines for filing a petition for writ of certiorari were extended to 150 days from the date of the lower court judgment. Therefore, this petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 41, United States Code Section 4712 is reproduced in its entirety in Appendix D at 48a.

STATEMENT OF THE CASE

A. Introduction.

This case presents pure questions of statutory construction and interpretation whose answers will shape how federal agencies enforce orders issued through administrative processes set up by Congress and how Congress drafts legislation.

The facts as related to this petition are not disputed. Petitioner James W. Robertson, Sr. first started working for Intratek Computer, Inc. in the summer of 2011. App. 3a. At the time he was hired, Robertson was required, as a condition of employment to sign a mandatory arbitration agreement. App. 2a. Robertson alleges that he was fired in September 2015 for reporting illegal misconduct, including bribery of Veterans Affairs officials by Intratek's CEO to secure government contracts. App. 3a.

Shortly after his termination, Robertson filed a whistleblower retaliation complaint with the Office of the Inspector General for the Department of Veterans Affairs pursuant to the administrative exhaustion requirements of 41 U.S.C. § 4712. App. 3a.

B. Proceedings below.

Robertson timely filed suit on May 7, 2018. App. 3a. In the Original Complaint, Robertson alleged whistleblower retaliation under § 4712 against Intratek Computer, Inc., among other claims not at issue here. D. Ct. Dkt. 1-1. At the time he filed suit, the OIG investigation into the whistleblower retaliation was still ongoing. App. 3a. In

fact, to date, no final determination has ever been issued by the OIG.

Intratek moved to stay the suit and compel arbitration based on the mandatory arbitration agreement required as a condition of employment that Robertson signed. App. 3a. The motion was referred to a magistrate judge for a report and recommendation. App. 4a. On December 10, 2018, the magistrate judge recommended that Robertson's claim under § 4712 against Intratek be compelled to arbitration. App. 26a. Regarding the § 4712 claim, the magistrate judge reasoned that the nonwaiver provision only prohibited waiver of substantive rights, which did not include the right to a federal trial. App. 33a-40a. The magistrate judge did not address whether or not the federal trial provided in the remedy and enforcement section of the statute was a remedy that could not be waived under the nonwaiver provision. App. 38a. Further, the magistrate did not address how compelling arbitration impacted the other remedies such as district court enforcement of agency orders or appellate review.

Robertson timely filed objections, but on July 30, 2019, the district court adopted in full the recommendation of the magistrate, compelled arbitration and dismissed the entire case. App. 24a-25a. The district court also did not address whether the federal trial provided for in the remedy and enforcement section of the statute was a remedy that could not be waived under the nonwaiver provision. Moreover, the district court did not address how mandatory arbitration would disrupt the administrative scheme set up by Congress.

Robertson timely appealed. App. 5a. On October 2, 2020, the Fifth Circuit affirmed the trial court's order

compelling arbitration of Robertson's § 4712 retaliation claim but reversed concerning the order compelling arbitration of tortious interference claims asserted against an individual defendant, Roger Rininger. App. 2a. The Fifth Circuit did address whether the federal trial expressly provided for in the remedy and enforcement section was a nonwaivable remedy. App. 9a. The Fifth Circuit found that the word "remedies" in the nonwaiver provision only referred to the administrative remedies that must be exhausted before filing suit, but not filing suit itself, which was just a "means to secure" the rights and remedies of § 4712. App. 9a. Further, the Fifth Circuit held that the nonwaiver provision did not apply to the jury trial provided for because the "jury trial is one way to vindicate a whistleblower's *rights* after the whistleblower exhausts administrative *remedies*; the jury trial is not itself a "right" or "remedy" created by § 4712." App. 9a (emphasis in original). The Fifth Circuit did not address the remainder of the statute's comprehensive procedural scheme: how its narrow holding concerning "remedies" affects the rest of the statute, impacts executive agencies' ability to enforce its orders, and disrupts the series of enforcement measures set up by Congress.

Robertson has timely filed this petition. The claims against Roger Rininger are currently stayed in the trial court pending the outcome of this petition. D. Ct. Dkt. 42.

REASONS FOR GRANTING THE PETITION

A. This petition should be granted because the Fifth Circuit's reading of 41 U.S.C. § 4712 disrupts and threatens the administrative scheme created by Congress.

In § 4712, Congress created an administrative apparatus for enforcement of the rights and remedies provided for under the statute. That comprehensive scheme begins with a complainant filing a complaint with the appropriate Inspector General's office of an executive agency. 41 U.S.C. § 4712(b). The executive agency then has up to 210 days to issue a report and order providing or denying relief to the complainant. *Id.* at § 4712(c)(2). Once that order is issued or not issued, administrative remedies are either exhausted or deemed exhausted, respectively. *Id.*

At that point, under the Fifth Circuit's reading of the nonwaiver provision, any further remedies or actions can be waived and/or compelled to arbitration. Under the Fifth Circuit's holding, the nonwaiver provision prohibiting waiver of "the rights and remedies provided for in this section" does not refer to *all* rights and remedies provided for, but only "some" rights and remedies. Specifically, the Fifth Circuit attempts to draw a distinction between the rights and remedies provided for in the statute and "the means [the statute] provides to secure" or "vindicate" them. *See* App. 9a. As discussed in more detail in section B.6, infra, that purported distinction does not exist within the statute and, in any event, conflicts with both the legal definition and common understanding of the term "remedy", which includes "the means of enforcing

a right . . . ." *Black's Law Dictionary*, 608 (3d Pocket Edition 2006); *see also Remedy Definition*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/remedy (last visited February 15, 2021). That alleged distinction, if carried through the rest of the statute, greatly disrupts the specific administrative enforcement scheme set up by Congress.

The scheme is disrupted by the Fifth Circuit's reading because the exhaustion of administrative remedies is not the end of the administrative enforcement apparatus Congress created to enforce whistleblower retaliation under the statute. Indeed, Congress expressly created a way for the any executive agency involved to seek enforcement of the administrative orders issued in federal court and explicitly states that the aggrieved party may join that suit. *See* 41 U.S.C. § 4712(c)(4). The ability of an employer through any agreement, including an arbitration agreement, to prohibit, as a condition of employment, an employee from joining in that enforcement suit throws a wrench into the whole scheme.

Finally, because of the large impact the Fifth Circuit's decision will have on the whole administrative enforcement scheme used by any executive agency, including its ability to enforce orders it issues against private companies, the view of the United States on this issue is essential to determining this case. Therefore, this Court should invite the Solicitor General to submit a brief expressing the views of the United States.

1. Prohibiting an employee from going to court poses an immediate practical threat to the administrative scheme set up by Congress for enforcement of a whistleblower's rights under 41 U.S.C. § 4712.

Reading the statute as a whole, it is clear that prohibiting an employee from going to court compromises the administrative scheme set up by Congress. That is because if the nonwaiver provision stating that "the rights and remedies provided in this section" means only "some" rights and remedies may not be waived, then the statue allows for parallel proceedings. But if the nonwaiver provision prohibiting waiver of "the rights and remedies provided in this section" means "all" rights and remedies provided in this section, then the statutory enforcement scheme is the only scheme that may be followed and parallel proceedings with potentially conflicting rulings would not occur.

For example, under subsection (c)(2), if the agency issues an order denying relief to a complainant, then the complainant may file suit in federal court. 41 U.S.C. § 4712(c)(2). That same subsection also provides that if the agency *fails* to issue an order within 210 days after the complaint was filed, the complainant may go to court. *Id.* Crucially, when a complainant files suit based on the failure of an agency to issue an order within 210 days, nothing in the statute requires that the OIG investigation stop at that point nor does it prohibit the agency from later issuing an order.[1] This is not like the administrative

1. In this case, the investigation is ongoing since no agency order has ever been issued. *See* App. 3a ("At the time Robertson filed suit, [the investigation] remained ongoing.").

process at other agencies, such as the Equal Employment Opportunity Commission ("EEOC"), where the agency investigation stops because a complainant must obtain the right to sue before filing suit. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 29 C.F.R. 1601.28(a)(3).

Under subsection (c)(4), no matter when the agency issues an order, if the agency does issue an order, it has the clear authority and duty to seek enforcement of it through a lawsuit in federal court if the order is not complied with. *Id.* at § 4712(c)(4). This is true even if 210 days have passed and the complainant has already filed suit. Because of that fact, an arbitration agreement or any agreement prohibiting a complainant from going to court disrupts the administrative scheme set up by Congress. This is best illustrated by the following example showing how a private arbitration interferes or even nullifies an executive agency's ability to enforce its orders as contemplated by the statute.

Imagine a whistleblower who signed an arbitration agreement as a condition of employment with his employer files a retaliation complaint with the applicable agency's OIG. The OIG does not complete its investigation within 210 days. So, the whistleblower files suit in federal court under subsection (c)(2). The employer then moves to compel arbitration and the district court grants the motion. One month later, the OIG completes its investigation, and the agency issues an order finding that the whistleblower was retaliated against and grants relief under subsection (c)(1). The employer then refuses to comply with the order, citing the ongoing arbitration. Then, because subsection (c)(4) says the agency "shall file an action for enforcement," the agency files suit in federal court for enforcement of

its order. Under subsection (c)(4), the whistleblower has the right to join that lawsuit. Of course, he is already in arbitration on the same claim, and if he does exercise that right, he will be compelled to arbitration again. But the agency cannot be compelled to arbitration because it is not a signatory to the arbitration agreement. Therefore, there will necessarily be two parallel proceedings regarding the same issues taking place simultaneously: one in arbitration and one in federal court. Such circumstances lead to unnecessary complications and potential conflicts in resolution where an executive agency, a federal district court, and perhaps even a federal appellate court are all ordering a person/company to do something that an arbitrator says the person/company does not have to do. Or vice versa. That cannot be Congress's intent yet would become a common occurrence under the Fifth Circuit's interpretation when claims are compelled to arbitration while the executive agency is still investigating.

This needless complication is eliminated entirely if the word "remedies" in the nonwaiver provision simply means what it says: that all remedies provided for in section (c) are not waivable, including the ability of the complainant to file suit in federal court.

Given the potential disruption to the administrative scheme for enforcement of the rights provided for under § 4712, this case presents important questions of federal law that should be decided by this Court.

2. The administrative scheme set up by Congress for whistleblower retaliation complaints under 41 U.S.C. § 4712 is unique and would be made ineffective by mandatory arbitration.

The administrative scheme Congress set up for § 4712 whistleblower retaliation complaints is unique because it allows a private cause of action if the agency denies relief or fails to act within a certain timeframe, does not require any notice to or permission from the executive agency investigating the complaint before or after filing suit, and not only empowers the executive agency to enforce its orders regardless of whether a private action has been filed, but also explicitly permits the complainant to join an agency lawsuit. As shown below, there are statutes that create administrative schemes with each of those things, but § 4712 is the only one that provides all three and then prohibits waiver of rights and remedies.

a. Unlike the mandatory process in § 4712, mandatory administrative schemes that permit private suits if the agency denies relief or fails to act generally require notice and/or permission from the executive agency before a private suit can be filed.

Congress has set up other administrative schemes that provide for a private cause of action if the agency finds against the complaint or if the agency fails to act.

For example, the EEOC is charged with investigating and enforcing the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, the Pregnancy Discrimination Act, and the Equal Pay Act

against private employers who violate those laws. *See Laws Enforced by EEOC*, EEOC.gov, *available at* https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited February 21, 2021). Each of those statutes provides a private cause of action if the agency does not provide relief or fails to act within a certain amount of time, but for all of them (except the EPA and the ADEA), a charging party must first receive a right to sue from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 29 C.F.R. 1601.28(a)(3). The EPA does not require a right to sue because the EPA dos not have a mandatory exhaustion requirement. *See* 29 U.S.C. § 216(b) (detailing right of action for EPA and FLSA violations). Similarly, under the ADEA, a party can sue 60 days after filing a charge, but once the EEOC finds out about the lawsuit it will stop processing the charge. *See* 29 C.F.R. § 1626.18(d).

Mandatory arbitration does not disrupt that type of administrative scheme. In such a scheme, the executive agency has denied relief and will take no further action, given permission to sue and ceased processing/investigating the complaint, or it ceases processing a complaint once a private suit is filed. *See* 29 C.F.R. 1601.28(a)(3); 29 C.F.R. § 1638.18(d). Accordingly, no situation would arise where the complainant files suit first and gets compelled to arbitration only to have the executive agency file its own enforcement action later. Therefore, no situation would arise where two parallel proceedings are occurring in two different forums over the same claims.

The same is not true of § 4712. Section 4712 provides a private cause of action if the agency denies relief. *See* 41 U.S.C. § 4712(c)(2). In that situation, there would be no danger of parallel proceedings because the agency has

finished with the charge. However, § 4712 also provides for a private cause of action if the agency takes more than 210 days to issue an order. *Id.* In that situation, unlike with the EEOC, a complainant does not need to seek a right to sue, request permission, or even notify the executive agency that they are filing suit. *Id.* Further, unlike the EEOC regulations, nothing in § 4712 or the regulations regarding the previous pilot program at 48 C.F.R. 3.908[2] state that filing suit stops any agency investigation or action. *Id.*; *see also* 48 C.F.R. § 3.908-6(b). Therefore, unlike with the EEOC administrative enforcement scheme, arbitration of the complainant's claim under § 4712 *would* disrupt the administrative enforcement scheme. Perhaps in recognition of this fact, Congress expressly prohibited waiver of any and all rights and remedies provided for through any agreement or condition of employment.

b. Unlike the administrative scheme in § 4712, the administrative schemes that permit a private cause of action if the executive agency fails to take action within a certain number of days do not allow the complainant to join any agency enforcement action.

There is another type of administrative scheme Congress has used to allow for a private cause of action in retaliation complaints. In this type of administrative scheme, Congress states that a complainant may bring a

2. Prior to becoming permanent in 2016, the whistleblower protections in 41 U.S.C. § 4712 were part of a four year "Pilot Program for Enhancement of contractor protection from reprisal for disclosure of certain information."

private cause of action only if the executive agency fails to take action for a certain number of days. However, the complainant must also give the agency notice.

This is not an uncommon scheme with whistleblower complaints investigated by OSHA. For example, this scheme governs whistleblower retaliation under § 211 of the Energy Reorganization Act ("ERA") and under the Surface Transportation Assistance Act ("STAA"). *See* 29 C.F.R. 24.114(a) (stating that a complainant has the right to file suit if the Secretary does not issue an order within one year of the complaint under the ERA); 29 C.F.R. 1978.114(a) (providing private cause of action if no order within 210 days). Under the ERA regulations, a complainant must provide fifteen days' notice to the executive agency before filing suit and then provide the file stamped complaint to the agency after filing suit. *See* 29 C.F.R. § 24.114(b). Under the STAA, if a complainant files suit because of lack of action, the complainant must provide within seven days of filing, a copy of the complaint to a number of different agencies. *Id.* at § 1978.114(b). Again, that is a different statutory scheme than under § 4712, which does not require notice before or after the complaint is filed.

There is yet another important difference between this administrative scheme and the one in § 4712. Unlike under § 4712, a complainant does not have the statutory ability to join any enforcement action brought by the agency under the ERA or STAA. *See* 29 C.F.R. § 24.113(a); 29 C.F.R. § 1978.114(a) (STAA regulations). While under the ERA, a complainant can file their own enforcement action, that is not the same thing as joining the government in a suit. Under § 4712 however, the statute explicitly provides for

a complainant to "join in an action filed by the head of the executive agency." 41 U.S.C. § 4712(c)(4).

This difference is crucial because an arbitration agreement would not disrupt the ERA and STAA administrative schemes since a complainant cannot join the government. However, an arbitration agreement would disrupt the § 4712 administrative scheme. Such an agreement would disrupt that scheme because, while the statute explicitly permits the party to "join in an action," an arbitration agreement would waive that right and remedy and forcibly sever the complainant's claims from the enforcement action causing parallel proceedings in different forums to occur. Perhaps in recognition of that disruption, Congress explicitly prohibited waiver of any rights and remedies by any agreement or condition of employment.

3. Because this case involves a unique administrative apparatus created by Congress and used by executive agencies for enforcement of their orders, this Court should invite the Solicitor General to file a brief expressing the views of the United States.

As indicated above, this case implicates the complex administrative scheme set up by Congress to enforce agency orders regarding whistleblower retaliation under 41 U.S.C. § 4712. It appears to be unique in its administrative enforcement scheme because it not only provides a private cause of action if the agency denies relief or takes too long, but it also does not require the agency to stop investigating *and* allows a complainant to join as a party in a government enforcement action.

Permitting arbitration under this unique administrative scheme results in a high probability for disruption. Therefore, this Court should consider inviting the Solicitor General to provide the views of the United States as to whether arbitration agreements or any conditions of employment that waive the rights and remedies provided for by § 4712 would disrupt the administrative scheme executive agencies must use.

B. On the merits, this case presents an important question of federal law that should be decided by this Court now: Does Congress have to explicitly prohibit arbitration agreements in the text of a statute in order to preclude waiver of judicial remedies? Here, the Fifth Circuit's reading allowing arbitration conflicts with the text, structure, and sequencing of the statute.

"If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent." *New Prime v. Olivieri*, 139 S. Ct. 532, 543 (2019); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("[C]ourts aren't free to rewrite clear statutes under the banner of our own policy concerns."). In *New Prime*, Justice Gorsuch, writing for a unanimous court, held that the text of the FAA prohibited mandatory arbitration of claims by independent contractors of transportation companies. *New Prime*, 139 S. Ct. at 544. The opinion analyzed the plain meaning of the statutory text, including its word choice and sequencing. *Id.* at 537–45 ("Given the statute's terms and sequencing, we agree with the First Circuit . . . .").

Further, this Court has never held that Congress must explicitly use "magic words" to prohibit arbitration in order to evince an intention to preclude waiver of judicial remedies. Justice Sotomayor made this fact clear in her concurrence in the *CompuCredit* case:

> The majority opinion contrasts the liability provision of the Act with other, more recently enacted statutes that expressly disallow arbitration. I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question.

CompuCredit Corp. v. Greenwood, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring).

This case presents the perfect opportunity for the Court to address what Congress must do to "evince[] an intention to preclude waiver of judicial remedies" or to "preclude a waiver of a judicial forum" and whether that includes explicitly prohibiting arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 227 (1987).

1. Contrary to the Fifth Circuit's reading, the text of the nonwaiver provision at 41 U.S.C. § 4712(c)(7) expressly prohibits employers from requiring employees to waive *any and all* rights and remedies provided for in the statute by agreement or as a condition of employment.

The Fifth Circuit's reasoning that the nonwaiver provision only prohibits waiver of some of the rights and remedies provided for in the statute is explicitly belied by the statute's text. Subsection (c)(7) states as follows:

> **Rights and remedies not waivable.** – The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

41 U.S.C. § 4712(c)(7). As plainly seen, the text of this nonwaiver provision does not differentiate or exclude from coverage any specific types or forms of agreements or conditions of employment, such as arbitration agreements. Therefore, under the traditional canons of construction, this nonwaiver provision should be read and applied broadly. *See, e.g., Bostock v. Clayton Cnty., Ga*, 140 S. Ct. 1731, 1747 (2020):

> Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.

Thus, the question then becomes whether or not a federal jury trial is a right or remedy provided for in the statute. If it is a right or remedy provided for in the statute, then it cannot be waived by "any agreement, policy, form, or condition of employment" under the nonwaiver provision of § 4712(c). As shown in the next section of this petition, the ability to request a federal jury trial is a "right or remedy provided for" under the statute.

2. Contrary to the Fifth Circuit's reading, § 4712 provides for the right and remedy of a federal jury trial.

Section (c) of the statute is titled "Remedy and Enforcement Authority." That section creates an administrative scheme that provides a very specific list of rights and remedies. For example, subsection (c)(1) requires the head of the relevant executive agency to decide within 30 days of the Inspector General's report whether a violation has occurred and then lists the types of remedies and relief available, including reinstatement, back pay, other compensatory damages, employment benefits, and attorneys' fees and costs. 41 U.S.C. § 4712(c)(1).

Subsection (c)(2) is titled "Exhaustion of remedies." *Id.* at § 4712(c)(2). That section sets out deadlines for issuing the IG's report, when administrative remedies are deemed exhausted if no report is issued, and then details the rights and remedies available when those administrative remedies are exhausted and relief denied. *Id.* On that account, the statute's remedy is clear, providing explicitly for a federal trial, by jury if requested:

> [T]he complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

41 U.S.C. § 4712(c)(2). In other words, the statue provides for the right and remedy of a federal trial for complainants under § 4712 if the agency denies relief or if the agency fails to act within a certain time.

3. Contrary to the Fifth Circuit's reading, the right and remedy of allowing a complainant to go to federal court is consistent with the rest of the statute's text.

The right and remedy of going to federal court if relief is denied is consistent with the text, structure, and sequencing of the rest of the statute. Indeed, the statute only provides one other remedy for a complainant if the executive agency denies relief. That right and remedy is found in subsection (c)(5), which allows "[a]ny person adversely affected by an order issued under paragraph (1) [to] obtain review" in the applicable federal court of appeals. 41 U.S.C. § 4712(c)(5). In short, if relief is denied, a complainant can go to federal district court or to federal appellate court.

Similarly, the only right and remedy provided for in the statute to an employee who obtains relief from the head

of the executive agency is to file an action in federal court for enforcement of the orders or to hope that the executive agency files such an enforcement action and then join in that action. *Id.* at (c)(4).

Likewise, appellate review is the only right and remedy provided for in the statute to an employer "adversely affected by an order." *Id.* at (c)(5). Finally, the only right and remedy for an employer against a complainant who does not comply with an order issued by the executive agency is to file an enforcement action in federal district court. *Id.* at (c)(4).

In other words, the only rights and remedies provided for in the statute for either a complainant or employer—outside of merely filing a complaint with an Inspector General—expressly involve the right and remedy of going to federal court, whether at the district or appellate level. As explained in the next section of this petition, the Fifth Circuit's reading of the nonwaiver provision would permit waiver of *all* of the above rights and remedies. That cannot be correct when Congress has evinced such a strong preference for judicial remedies and then prohibited waiver of any remedies provided for in the statute.

4. The Fifth Circuit's limitation of the word "remedies" in the nonwaiver provision to only administrative remedies is inconsistent with the text of the statute because it both improperly adds to and replaces the text.

In ruling that the § 4712(c)(7) nonwaiver provision does not apply to arbitration agreements required as conditions of employment, the Fifth Circuit held that the

word "remedies" in the nonwaiver provision only applied to administrative remedies that were "created by" the statute. App. 9a ("[A] jury trial is one way to vindicate a whistleblower's *rights* after the whistleblower exhausts administrative *remedies*; the jury trial is not itself a "right" or "remedy" created by § 4712."). This narrow reading ignores both the text of the statute and its sequencing.

First, here is the nonwaiver provision in its entirety:

> **Rights and remedies not waivable.** – The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

41 U.S.C. § 4712(c)(7). The Fifth Circuit's reading both adds and replaces words that Congress carefully chose and thereby "fail[s] to take account of legislative compromises essential to a law's passage and, in that way, thwart[s] rather than honor[s] the effectuation of congressional intent." *See New Prime*, 139 S. Ct. at 543.

Specifically, the Fifth Circuit adds the word "administrative" as a modifier to the word "remedies" *despite no such limitation existing in the actual text.* App. 9a. Then the Fifth Circuit replaces the expansive phrase "rights and remedies provided for" with the more limiting phrase "rights and remedies created by." App. 9a. The effect of adding that particular phrase—"created by"—was to rewrite the statute in a way that brings it more in line with the phrasing used by this Court in *CompuCredit*, discussed infra, where this Court found that the particular statute with the nonwaiver provision

did not "create" a right to go to federal court, so the nonwaiver provision did not apply. *See CompuCredit*, 565 U.S. at 100-01. As discussed below in section B.8, the *CompuCredit* case is, in actuality, entirely distinguishable. In fact, when read as a whole, *CompuCredit* supports finding that Congress intended to prohibit mandatory arbitration agreements because the drafting of § 4712 appears to take into account the issues the *CompuCredit* Court had with finding a prohibition on waiving judicial remedies. But before that case is analyzed, it is necessary to understand the sequencing of § 4712(c) and why the Fifth Circuit's reading irreconcilably conflicts with it.

5. The Fifth Circuit's limitation of the word "remedies" in the nonwaiver provision to only administrative remedies is belied by the sequencing of the statute.

As described in the section B.3 above, § 4712 provides several remedies to individuals and employers. However, except for filing a complaint with the appropriate Inspector General, all of the remedies provided for in the statute that a complainant or employer may pursue explicitly involve in one way or another federal court. *See generally*, 41 U.S.C. § 4712(c).

Subsection (a) creates the basic statutory right to be free from retaliation for engaging in certain whistleblower activity. 41 U.S.C. § 4712(a); *see also* App. 9a. Subsection (b) then creates the administrative process that a complainant must utilize prior to receiving or being able to pursue any of the remedies provided for in subsection (c). *Id.* at § 4712(b).

Subsection (c) then provides all of the remedies available. It is explicitly titled "Remedy and Enforcement Authority." *Id.* at § 4712(c). Contrary to the Fifth Circuit's restricted reading, this section provides for much more than just the exhaustion of administrative remedies. Subsection (c), among other things, provides for (1) the types of damages and relief that the executive agency can order, (2) when exhaustion of administrative remedies occurs, (3) a de novo private cause of action in federal court (including the ability to request a jury), (4) making IG determinations and agency orders admissible, (5) district court enforcement of agency orders, (6) setting the burden of proof as contributing factor, and (7) appellate court review of agency orders. *Id.* at § 4712(c). After providing for all of those things, only then does the statute, in subsection (c)(7), prohibit waiver of the rights and remedies *just provided for in that section. Id.*

Despite the nonwaiver provision following all of the items listed above, under the Fifth Circuit's reading, that expansive provision counterintuitively only applies to the first two items—agency ordered relief and timeframes for exhaustion—and to the rights and remedies in the two *preceding* sections. Such a reading needlessly and completely ignores the structure and sequencing of the statute. Had Congress intended to only prohibit waiver of administrative remedies or the right to be free from retaliation, it would have placed the nonwaiver provision in subsection (b) where those are the only rights and remedies provided for. But it did not. Therefore, under standard canons of statutory construction, the nonwaiver provision must apply to more than just those two things. Further, as described in the next section, the distinction the Fifth Circuit attempts to draw between remedies and the means of securing relief does not really exist.

6. The Fifth Circuit's reasoning conflates "remedies" with "relief" and is internally inconsistent.

In holding that only administrative remedies are nonwaivable under the nonwaiver provision, the Fifth Circuit conflates the word "remedy" with the word "relief." Twice, the Fifth Circuit attempts to draw a distinction between the nonwaivable administrative remedies provided for in the statute and a waivable federal jury trial, which the Fifth Circuit describes as "the means [the statute] provides to secure" or "vindicate" the rights and remedies provided. *See* App. 9a. But in this statute, the "rights and remedies provided for" include the means to secure them. What the Fifth Circuit is actually doing is using the word "remedies" inconsistently throughout the statute to mean, at some points, "judicial remedies" and at others, to mean "relief" obtained via the remedies provided. But again, the statute only talks of remedies and prohibits waiving any of them. *See* 41 U.S.C. § 4712(c)(7).

By way of illustration, the Fifth Circuit agrees that the administrative remedies provided for in the statute may not be waived by any agreement or condition of employment. App. 9a. The administrative remedies provided for in the statute include requiring a complainant to file a complaint with the appropriate IG within a certain period of time. 41 U.S.C. § 4712(b). The IG then investigates and issues a report to the head of the applicable executive agency. *Id.* at § 4712(c)(1). The head of that agency then issues or does not issue an order providing certain specified types of relief. *Id.* That entire process comprises the "administrative remedies" provided for in the statute. *Id.* at § 4712(c)(3) (describing exhaustion of administrative

remedies as occurring after the executive agency issues or fails to issue an order). That entire process is not waivable as a remedy under the statute. *Id.* at § 4712(c)(7); *see also* App. 9a. And an employer, for example, could not prohibit as a condition of employment, an employee from filing a complaint with the appropriate IG because such a prohibition would necessarily preclude the employee from being able to obtain any nonwaivable relief that the executive agency is expressly allowed to provide. Since the Fifth Circuit acknowledges that a jury trial is one of the means of securing relief under the statute, it is, for the same reasons a remedy under the statute.

As stated above, the distinction the Fifth Circuit was really drawing was between "relief" and the means of securing that relief. If the nonwaiver provision stated that "the rights and *relief* provided for could not be waived" then the Fifth Circuit's interpretation would be correct. But the nonwaiver provision does not talk about prohibiting waiver of "rights and relief"; that provision only prohibits waiver of "rights and remedies." And since the word "remedies" as used in the statute includes the means of securing the rights in the statute, a jury trial is one of the remedies that cannot be waived.

That the word "remedies" is properly understood as including the means used to secure rights or relief is bolstered by both the legal definition of "remedy" and the common definition of remedy. Black's Law Dictionary defines "remedy" as "the means of enforcing a right or preventing or redressing a wrong." *Black's Law Dictionary*, 608 (3d Pocket Edition 2006). The Merriam-Webster Dictionary's third definition of "remedy" is "the legal means to recover a right or to prevent or obtain

redress for a wrong." *Remedy Definition*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/remedy (last visited February 15, 2021). In other words, the legal as well as the common, plain meaning of "remedy" includes the means of securing or vindicating a right. Therefore, under the Fifth Circuit's own logic, the fact that "a jury trial is one way to vindicate a whistleblower's statutory rights" establishes that it is a nonwaivable remedy under § 4712. Therefore, the Fifth Circuit's reasoning is internally inconsistent and contradicted by the text and meaning of the statute.

7. The statute in this case is fundamentally different than the statutes at issue in the cases relied on by the Fifth Circuit because in those statutes, Congress either explicitly encourages arbitration or does not include the same clear nonwaiver language as here.

The Fifth Circuit mainly relied on three Supreme Court cases in rejecting the plain meaning of the statute. First, it discussed *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which is an ADEA case. Second, it analyzed *CompuCredit v. Greenwood*, 565 U.S. 95 (2012), which is a Credit Repair Organization Act case. Finally, it relied on *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). None of these cases change the statutory analysis above for at least three reasons.

First, any cases involving the ADEA, Title VII, the ADA, or Section 1981 are not applicable to this statute because Congress has expressly encouraged the use of arbitration to resolve disputes under those statutes since 1991. Public Law 102-166, title I, § 118 from November 21, 1991 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . *arbitration*, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102–166, title I, § 118, Nov. 21, 1991, 105 Stat. 1081 (emphasis added). The statutes amended include the ADEA, Title VII, the ADA, and 42 U.S.C. § 1981. *Id.*

Second, not a single one of those three main cases or (for that matter) *any* of the cases cited by the Fifth Circuit, the magistrate court, the district court, or Respondent that involve compelling arbitration include a similar nonwaiver provision. For example, in *14 Penn Plaza*, under the ADEA, the nonwaiver provision only prohibited waiver of "any right or claim under this chapter." *See 14 Penn Plaza*, 556 U.S. at 259 (quoting 29 U.S.C. § 626(f)(1)). This Court found that an "agreement to arbitrate is not the waiver of a substantive right as that *term* is employed in the ADEA." *Id.* (emphasis added). Therefore, even if Congress had not already explicitly blessed arbitration agreements, the terms as used in the statute do not prohibit it. *See id.* Crucially, in this case the nonwaiver provision prohibits waiver of "rights *and remedies*" and then specifies in the very same section titled "Remedy and Enforcement Authority" exactly what remedies are available, including the remedy of a federal jury trial. *See* 41 U.S.C. § 4712(c)(7) (emphasis added). Therefore, *14 Penn Plaza* does not compel arbitration in this case. Indeed, applying the same reasoning as Justice Thomas regarding how a particular statute employs the terms it uses, the nonwaiver provision clearly applies to

federal trials because federal trials are a "remedy" as that term is employed in § 4712. Again, this Court's precedent contradicts the Fifth Circuit's reasoning.

The nonwaiver provision in the CROA, which *CompuCredit* examined, likewise, only prohibited waiver of "any right of the consumer under this subchapter." *CompuCredit Corp.*, 565 U.S. at 99. But as this Court explained, the subchapter with the nonwaiver provision did not create or provide the right to sue in court, but only the right to receive a disclosure statement. *Id.* Moreover, even in the civil liability subchapter, the statute did not actually specify the right to sue in any court, but only established a private cause of action and the potential for liability. *Id.* at 100-01. Here, by contrast, § 4712(c) provides for both the specific remedy of going to federal court as well as requesting a jury before, explicitly, in the same section, prohibiting waiver of any remedies provided. *See* 41 U.S.C § 4712(c). Again, applying the same reasoning as Justice Scalia in *CompuCredit* regarding statutory structure and specificity, the nonwaiver provision clearly prohibits waiver of the remedy of going to federal court. Here, both concerns are addressed because the specific section at issue both expressly provides for the remedy of going to federal court and in the same section prohibits waiver of any remedies provided for in that section. *See CompuCredit Corp.*, 565 U.S. at 99-101.

Similarly, in *Epic Systems*, this Court found that the National Labor Relations Act did not preclude enforcement of individual arbitration agreements concerning FLSA violations that prohibited collective actions because "Section 7 [of the NLRA] doesn't speak to class and collective action procedures in the first place" and the

FLSA "does not . . . prohibit individualized arbitration proceedings." *Epic Sys. Corp.,* 138 S. Ct. at 1626. Again, lack of specificity regarding remedies available is not an issue here because the remedy section specifically provides for filing suit in federal court in subsection (c) and then prohibits waiver of any remedies provided for in that very same section. *See* 41 U.S.C. § 4712 (c).

The third reason that these cases are distinguishable is that they all involve quite different statutory schemes and administrative procedures than what is found in § 4712. As discussed above in section A, the administrative scheme Congress created for § 4712 is unique among whistleblower statues because of the rights and remedies it provides for in its text. Therefore, other cases involving other statutory schemes that have a different structure, provide for different remedies that do not include a federal trial, and do not prohibit waiver of any of those remedies are of limited value in discerning Congressional intent in § 4712.

Because this case presents important issues regarding statutory construction and what is required for Congress to preclude waiver of judicial remedies, this petition should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. Further, this Court should invite the Solicitor General at this stage to provide the views of the United States as to whether arbitration agreements or any conditions of employment that waive the rights and remedies provided for by § 4712 would disrupt the administrative scheme executive agencies must use.

Respectfully submitted,

COLIN WALSH
WILEY WALSH, P.C.
1011 San Jacinto Boulevard,
Suite 401
Austin, TX 78701
(512) 271-5527

ROBERT J. WILEY
Counsel of Record
AUSTIN CAMPBELL
ROB WILEY, P.C.
2613 Thomas Avenue
Dallas, TX 75204
(214) 528-6500
rwiley@robwiley.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October 2, 2020, Filed

No. 19-50792

JAMES W. ROBERTSON, SR.,

Plaintiff—Appellant,

ROBERTSON TECHNOLOGIES, INCORPORATED,

Appellant,

versus

INTRATEK COMPUTER, INCORPORATED;
ALLAN FAHAMI; ROGER HAYES RININGER,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-373

Before WIENER, ENGELHARDT, and OLDHAM, *Circuit Judges.*
ANDREW S. OLDHAM, *Circuit Judge*:

Appendix A

The question presented is whether a federal whistleblower statute, 41 U.S.C. § 4712, renders unenforceable an arbitration agreement between James Robertson and his former employer, Intratek. It does not. The district court therefore correctly enforced the arbitration agreement between Robertson and Intratek. But the district court erred in compelling arbitration of claims not covered by that agreement. So we affirm in part, reverse in part, and remand for further proceedings.

I.

Intratek conditioned Robertson's employment on his willingness to sign an arbitration agreement. That agreement said:

> I hereby agree, pursuant to the policy, to submit to binding arbitration any employment related controversy, dispute or claim between me and the Company, its officers, agents or other employees, including but not limited to . . . tort claims . . . and claims for violation of any federal, state, or other government law, statute, regulation, or ordinance, except claims for workers' compensation and unemployment insurance benefits.
>
> I understand that by agreeing to arbitration, I am waiving the right to a trial by jury of the matters covered by the Arbitration policy.

The "Arbitration policy," in turn, covered "[a]ny controversy, dispute or claim between any employee and

the Company, or its officers, agents or other employees related to employment." Robertson signed the agreement on June 17, 2011, and began working on July 11. While at Intratek, Robertson provided various information and technology services to the United States Department of Veterans Affairs ("VA").

Intratek fired Robertson in September 2015. Not long after, Robertson filed a whistleblower complaint with the Office of the Inspector General for the VA. Robertson alleged that Allan Fahami, Intratek's CEO, bribed VA officials to secure lucrative government contracts. According to the whistleblower complaint, a VA employee named Roger Rininger accepted bribes from Fahami and Intratek. An investigation followed. At the time Robertson filed suit, it remained ongoing.

On May 7, 2018, Robertson filed suit in federal district court against Intratek, Fahami, and Rininger. Robertson alleged that Intratek violated 41 U.S.C. § 4712 by firing him for reporting misconduct. Robertson further alleged that the defendants tortiously interfered with Robertson's business relationships.

Intratek and Fahami moved to stay the suit and compel arbitration of the claims against them. Rininger—who worked for the VA—obviously was not a party to the Intratek-Robertson arbitration agreement. So Rininger and Robertson "agreed to effectively stay the case as it pertained to Mr. Rininger" until the court ruled on the motion to compel arbitration.

The district court referred the matter to a magistrate judge. The magistrate judge decided that 41 U.S.C. § 4712 didn't bar arbitration of the whistleblower claim. It also found that all of Robertson's claims (including, apparently, those against Rininger) fell within the scope of the arbitration agreement. Furthermore, the magistrate judge determined that the case should be dismissed instead of stayed, as "each of Plaintiff's claims is subject to arbitration."

Robertson filed objections to the magistrate judge's recommendation on December 20, 2018. Then, on January 29, 2019, Robertson moved to amend his complaint and add his company, Robertson Technologies, Inc. ("Robertsontek"), as a plaintiff. Intratek and Fahami filed their opposition to Robertson's objections and his motion to amend his complaint. Meanwhile, Rininger and Robertson stipulated that Rininger could wait until 21 days after any ruling on the motion to compel arbitration before filing an answer to the original complaint.

The district court adopted the report and recommendation of the magistrate judge and denied Robertson's motion to amend his complaint. On the motion to amend, the district court found that "Robertson's proposal to add his alter ego, Robertson Technologies, Inc., amounts to a tactical maneuver to avert the real possibility that this action will be compelled to arbitration." As for the magistrate judge's recommendation, the court overruled all of Robertson's objections. The court also explained that "all of Robertson's claims are subject to arbitration." Thus the court granted the motion to compel arbitration and

dismissed the case without prejudice. The court entered final judgment. Robertson timely appealed.

We review a grant of a motion to compel arbitration *de novo*, *Dealer Comput. Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009), and a denial of leave to amend pleadings for abuse of discretion, *Filgueira v. U.S. Bank Nat'l Ass'n*, 734 F.3d 420, 422 (5th Cir. 2013).

II.

The principal question on appeal is one of first impression in our Circuit: whether Robertson can use 41 U.S.C. § 4712 to escape the arbitration agreement he signed. Statutory text says no. So does Supreme Court precedent. And the legislative history is irrelevant.

A.

In general, federal law requires federal courts to enforce arbitration agreements. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). Section 2 of the FAA provides that written arbitration agreements are generally "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. Section 2 thus obligates courts to enforce arbitration agreements according to their terms "unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 565 U.S. at 98 (quotation omitted).

To show a "contrary statutory command," the party opposing arbitration must show that "Congress intended to preclude a waiver of a judicial forum" for the claims at issue. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). If "Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum," the Supreme Court has said "that intention will be deducible from text or legislative history." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).[1] Throughout this inquiry, courts should keep "in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quotation omitted).

The Court recently "stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627, 200 L. Ed. 2d 889 (2018). The Court explained:

---

1. The Court has also indicated that a contrary congressional command may be discerned from "an 'inherent conflict' between arbitration and [another statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. It's not clear whether statutory purpose remains a part of the Court's prescribed inquiry on this issue. *See CompuCredit*, 565 U.S. at 95-108 (analyzing issue without considering statutory purpose). *But see id.* at 675 (Sotomayor, J., concurring in the judgment) (stating that purpose remains relevant to this inquiry). In any event, Robertson hasn't advanced any argument on statutory purpose and thus has forfeited the issue. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal." (emphasis omitted)).

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.

Ibid. (collecting cases). Thus, the party opposing arbitration—and urging a congressional command contrary to the FAA—faces a high bar.

Robertson cannot hurdle it with 41 U.S.C. § 4712. We start, as always, with the statutory text. *See Whitlock v. Lowe (In re DeBerry)*, 945 F.3d 943, 947 (5th Cir. 2019). Section 4712 requires a complainant like Robertson to exhaust administrative remedies before filing suit. *See* 41 U.S.C. § 4712(b), (c)(1). And § 4712 further specifies that administrative remedies are exhausted when the agency acts or fails to act for specified time periods:

> **(2) Exhaustion of remedies.**—If the head of an executive agency issues an order denying relief under [(c)](1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)

> (B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

Id. § 4712(c)(2). Robertson wrenches out of context the second sentence of this paragraph—"[s]uch an action shall, at the request of either party to the action, be tried by the court with a jury"—and says it provides him a freestanding "right" or "remedy" to a jury trial. Then he argues that his jury trial "right" or "remedy" cannot be waived in an employment agreement:

> **(7) Rights and remedies not waivable.**—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

Id. § 4712(c)(7). Thus, Robertson concludes, § 4712(c)(2) and (7) preclude Intratek from taking away his "right" or "remedy" of a jury trial by enforcing the arbitration agreement.

Robertson confuses the rights and remedies created by § 4712 with the means it provides to secure them. Section 4712 creates whistleblower rights: "An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for" blowing the whistle on certain government-contracting abuses. *Id.* §4712(a)(1). And § 4712 creates an administrative apparatus to review whistleblowers' complaints and to afford them administrative remedies. *Id.* § 4712(b). Section 4712 further specifies that "[a]n action under this paragraph may not be brought more than two years after the date on which *remedies*"—that is, administrative remedies— "are deemed to have been exhausted." *Id.* § 4712(c)(2) (emphasis added). Thus, the text and structure of § 4712 make clear that a jury trial is one way to vindicate a whistleblower's statutory *rights* after the whistleblower exhausts administrative *remedies*; the jury trial is not itself a "right" or "remedy" created by § 4712.

B.

A long line of Supreme Court precedent confirms our interpretation of § 4712. Start with *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). The question presented was whether the

FAA required enforcement of a "provision in a collective-bargaining agreement that clearly and unmistakably require[ed] union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (ADEA)." *Id.* at 251. The Court held yes. *Id.* at 274.

In so holding, the Court dismantled an argument much like Robertson's. Pyett claimed that the ADEA provided "a '[substantive] right' to proceed in court." *Id.* at 259 (alteration in original; quoting 29 U.S.C. § 626(f)(1)). And ADEA said that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). No matter, the Court said. "[T]he agreement to arbitrate ADEA claims is not the waiver of a substantive right as that term is employed in the ADEA." *14 Penn Plaza*, 556 U.S. at 259 (quotation omitted). For that reason, the Court criticized an earlier decision for "confus[ing] an agreement to arbitrate those statutory claims with a prospective waiver of the substantive right." *Id.* at 265 (discussing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)).

The Court took pains to correct that confusion: "The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." *Id.* at 265-66; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). On that account, the "right" to a judicial forum wasn't a "right" protected by the waiver limitation at all.

14 Penn Plaza, 556 U.S. at 259; *see also McLeod v. Gen. Mills, Inc.*, 856 F.3d 1160, 1164 (8th Cir. 2017) (holding ADEA's antiwaiver provision "refers narrowly to waiver of *substantive* ADEA rights or claims—not, as the former employees argue, the 'right' to a jury trial or the 'right' to proceed in a class action").

CompuCredit teaches the same lesson. There, the issue was whether arbitration could be compelled for claims under the Credit Repair Organizations Act ("CROA"). *CompuCredit*, 565 U.S. at 96 (discussing 15 U.S.C. §§ 1679 *et seq.*). CROA provided a private cause of action to those aggrieved by the conduct of credit repair organizations. *Id.* at 98. The statute also had an antiwaiver provision. It declared that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter" was "void" and could "not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a).

Nonetheless, the Court rejected the notion that CROA "provide[d] consumers with a 'right' to bring an action in court." *CompuCredit*, 565 U.S. at 100. The statute's references to court proceedings didn't change that outcome. The Court observed that "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." *Ibid.* So "[i]f the mere formulation of the cause of action in this standard fashion were sufficient to establish the contrary congressional command overriding the FAA, valid arbitration agreements covering federal causes of action

would be rare indeed." *Id.* at 100-01 (quotation omitted). Of course, they are not rare. *See id.* at 101 (citing *Gilmer*, 500 U.S. at 28; *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 240, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); *Mitsubishi Motors*, 473 U.S. at 637). Relying on those holdings, the *CompuCredit* Court determined that the waiver of "initial judicial enforcement" wasn't a waiver of a right covered by the antiwaiver provision. *Ibid.*

These cases reflect the Supreme Court's dogged insistence that Congress speak with great clarity when overriding the FAA. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1627. That long line of decisions has also given Congress even more reason to use pellucid language in antiwaiver provisions. *Cf. CompuCredit*, 565 U.S. at 104 n.4 (observing that a line of cases dating back decades gave Congress reason to write clear antiwaiver provisions); *id.* at 116 (Ginsburg, J., dissenting) ("Our decisions have increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care."). As the Court observed in *Epic Systems*, Congress has "shown that it knows how to override the Arbitration Act when it wishes." 138 S. Ct. at 1626. It didn't do that with 41 U.S.C. § 4712.

C.

The Supreme Court has also said legislative history is a data point in this inquiry. *See Mitsubishi Motors*, 473 U.S. at 628. *But cf. CompuCredit*, 565 U.S. at 96-105 (not discussing legislative history). Both parties zero in on the same slice of legislative history—a prior Senate draft

version of the antiwaiver provision. It said: "The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, *including by any predispute arbitration agreement, other than an arbitration provision in a collective bargaining agreement*." 158 CONG. REC. S6142 § 844 (Sept. 11, 2012) (Senate Amendments to H.R. 4310) (emphasis added). The House rejected that italicized language.

The Supreme Court has told us that such drafting history "tells us nothing." *Murphy v. Smith*, 138 S. Ct. 784, 790 n.2, 200 L. Ed. 2d 75 (2018). The legislators who voted to drop the italicized "including" clause might've thought it was "flabby duplication." *Ibid.* Or perhaps they dropped it because they substantively disagreed with it. *See ibid.* "There is no way to know, and we will not try to guess." *Ibid.* And whatever that deletion might (or might not) mean, this wee snippet of legislative history can't provide anything like the clarity needed to override the FAA. *Cf. CompuCredit*, 565 U.S. at 103 (noting that if Congress meant to displace arbitration provisions, "it would have done so in a manner less obtuse than what respondents suggest"); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815, 204 L. Ed. 2d 139 (2019) ("So in the end and at most, we are left with exactly the kind of murky legislative history that we all agree can't overcome a statute's clear text and structure."). Therefore, § 4712's history does nothing to change our reading of its plain text.

III.

The next question is whether the arbitration policy covers Robertson's claims against Intratek, Fahami, and

Rininger. It plainly does for the first two. It plainly does not for the third one.

A.

We start with Intratek and its CEO Fahami. Intratek, Fahami, and Robertson are all governed by an arbitration policy that Robertson signed at the beginning of his employment. The relevant text of the arbitration policy says:

> Any controversy, dispute or claim between any employee and the Company, or its officers, agents or other employees related to employment, shall be settled by binding arbitration, at the request of either party. . . .
>
> The Claims which are to be arbitrated under this Policy include, but are not limited to claims for wages and other compensation, claims for breach of contract (express or implied), claims for violation of public policy, tort claims, and claims for discrimination and/or harassment (including, but not limited to, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, pregnancy, sex or sexual orientation) to the extent allowed by law, and claims for violation of any federal, state, or other government law, statute, regulation, or ordinance, except for claims for workers' compensation and unemployment insurance benefits.

Robertson makes two arguments. Both border on frivolous. First, he says the policy applies to "any employee," so it does not apply to Robertson because Intratek fired him. But the policy expressly mentions claims for *unemployment* insurance benefits. If the policy only covered claims by current employees, it wouldn't need to mention unemployment at all. We refuse to read that clause as surplusage. *See Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 893 (5th Cir. 2002) ("A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage."); *Ewing Constr. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 37 (Tex. 2014) (similar).

Second, Robertson argues that the arbitration policy expressly applies to specified claims and makes no mention of the wrongful-termination and tortious-interference claims he brought against Intratek. Robertson's premise is wrong because the policy explicitly covers claims under "any federal . . . law" (like Robertson's claim under § 4712), as well as "state . . . law" and "tort" (like Robertson's claims for wrongful termination and tortious interference). Moreover, the policy applies to claims that "*include, but are not limited to*," the specified examples. The policy also applies to "[a]ny controversy, dispute or claim between any employee and the Company, or its officers, agents or other employees related to employment." And Robertson cannot seriously contest that his claims are "related to [his] employment" at Intratek.[2] The policy plainly applies to

2. Consider, for example, Robertson's tortious-interference claim. Robertson alleges that Intratek and Fahami first fired him and then defamed him to his would-be future business partners.

Robertson's claims against Intratek. *See Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990).

B.

The same is not true of Robertson's claims against Rininger. Rininger is a VA official. He therefore (obviously) never signed any employment contract with Intratek, much less an employment-related arbitration agreement. And although nonsignatories can be compelled to arbitrate under certain conditions, *see Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355-56 (5th Cir. 2003), Robertson never moved to arbitrate his claims against Rininger. Nor did the district court explain any basis (lawful or otherwise) for compelling arbitration of Robertson's claims against Rininger. It's with good reason, then, that neither Rininger nor Intratek even attempt to explain how claims against Rininger could be arbitrable. The district court's decision to compel arbitration of these claims was erroneous.

IV.

Finally, we face the question of whether the district court abused its discretion by denying Robertson's motion to amend his complaint. It did not.

Had Robertson's relationship with his employer not gone awry, Intratek and Fahami would've lacked a motive to defame him. What Robertson calls a "campaign of tortious interference," was, as counsel acknowledged, a "response to [Robertson] opposing illegal activity . . . *while he was employed*" at Intratek. Oral Arg. 12:49 to 13:01. Thus, the content and cause of the "campaign of tortious interference" both relate to Robertson's employment with Intratek.

Rule 15 says courts "should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2). Though that's a generous standard, "leave to amend can be properly denied where there is a valid justification." *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1175 (5th Cir. 2006). Valid justifications include undue delay, bad faith, and dilatory motive. *See Cantu v. Moody*, 933 F.3d 414, 424 (5th Cir. 2019) (quotation omitted). The district court also may consider "whether the facts underlying the amended complaint were known to the party when the original complaint was filed." *Southmark Corp. v. Schulte Roth & Zabel (In re Southmark Corp.)*, 88 F.3d 311, 316 (5th Cir. 1996). We review denial of leave to amend pleadings for abuse of discretion. *Filgueira*, 734 F.3d at 422.

The district court denied Robertson leave to add his company (Robertsontek) as a co-plaintiff. It's not as if Robertson was previously unaware of his own company's existence or potential interest in the case. Nor was Robertson unaware of the risk that a federal court would enforce his arbitration agreement with Intratek. Still he waited nine months—until the magistrate judge recommended compelling arbitration—to move for leave to add a party who could not be compelled to arbitrate. That led the district court to conclude that Robertson's motion was an untimely "tactical maneuver" meant to "challenge the effect of the Report and Recommendation" by preventing arbitration of the claims against Intratek and Fahami. That was not an abuse of discretion. *See Cantu*, 933 F.3d at 424; *Whitaker v. City of Houston*, 963 F.2d 831, 836 (5th Cir. 1992).

Nor can Robertson demand leave to amend under Rule 19. That rule requires the joinder of necessary parties so long as they won't deprive the court of subject-matter jurisdiction. Fed. R. Civ. P. 19(a)(1); *see also Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005) ("Rule 19 provides for the joinder of parties who should or must take part in the litigation to achieve a just adjudication." (quotation omitted)). "Rule 19 is designed to protect the interests of *absent persons* as well as those already before the court from multiple litigation or inconsistent judicial determinations." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1602, at 22 (3d ed. 2001) (emphasis added).

On this record, however, Rule 19 is inapplicable. The district court described Robertsontek as Robertson's "alter ego." Because Robertsontek was merely Robertson's alter ego, it wasn't absent from or necessary to the suit.

The district court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JULY 30, 2019

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-18-CV-373-LY

JAMES W. ROBERTSON SR.,

Plaintiff,

v.

INTRATEK COMPUTER, INC., ALLAN FAHAMI,
AND ROGER RININGER,

Defendant.

July 30, 2019, Decided
July 30, 2019, Filed

ORDER ON REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the court in the above-styled and numbered case is Defendants Intratek Computer, Inc. and Allen Fahami's Motion to Stay and Compel Arbitration filed September 28, 2018 (Dkt. No. 13); Plaintiff's Response in Opposition to Motion filed October 3, 2018 (Dkt. No. 14); and Defendants Reply to Response to Motion filed October

10, 2018 (Dkt. No. 16). The motion, response, and reply were referred to the United States Magistrate Judge for findings and recommendations. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W.D. Tex. Appx. C, R. 1(d).

The magistrate judge filed his Report and Recommendation on December 10, 2018 (Dkt. No. 17). Plaintiff's Objections to the Magistrate Court's Recommendation to Compel Arbitration and Dismiss Plaintiff's Claims Against Intratek Computer, Inc. and Allan Fahami were filed on December 20, 2018 (Dkt. No. 18). Defendant's Response to Plaintiff's Objections to the Magistrate Court's Recommendation to Compel Arbitration and Dismiss Plaintiff's Claims Against Intratek Computer, Inc. and Allen Fahami was filed on December 26, 2018 (Dkt. No. 19). Plaintiff's Reply to Defendant's Response to His Objections to the Magistrate Court's Recommendation was filed on January 3, 2019 (Dkt. No. 22).

On January 29, 2019, Plaintiff James W. Robertson Sr. filed Plaintiff's Motion for Leave to File his First Amended Complaint (Dkt. No. 23). Defendants Intratk Computer, Inc. and Allen Fahami's Response to Plaintiff's Motion for Leave to File Amended Complaint was filed February 5, 2019 (Dkt. No. 24). Plaintiff's Reply to Defendants' Intratek and Fahami's Response was filed February 11, 2019 (Dkt. No. 26). Defendant Roger Rininger's Response in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint was filed February 12, 2019 (Dkt. No. 27). Plaintiff's Reply to Defendant Rininger's Response was filed February 19, 2019 (Dkt. No. 34).

Appendix B

In light of Robertson's objections, the court has undertaken a *de novo* review of the entire case file and finds that the magistrate judge's Report and Recommendation should be approved and accepted by the court for substantially the reasons stated therein. In addition, the court finds that Robertson's motion for leave to amend was clearly filed to avoid dismissal of the case as recommended by the magistrate judge in his Report and Recommendation and therefore shall be denied.

The magistrate judge recommends that the motion to compel arbitration be granted and that the parties be directed to proceed to arbitration according to the terms of the arbitration policy. The magistrate judge further recommends that the motion to stay be denied and that the case be dismissed without prejudice. Robertson objects to the magistrate judge's recommendation, arguing that: (1) wrongful termination claims are not covered by the plain language of the Intratek arbitration policy, (2) Section 4712(c) of Title 41 of the United States Code expressly prohibits employers from requiring employees to waive any rights and remedies under the statute as a condition of employment, (3) the legislative history shows that Congress intended Section 4712(c)(7) to prohibit arbitration policies that are mandatory conditions of employment, (4) the arbitration policies does not cover former employees or their lawsuits regarding independent, non-employment related torts and that the tortious interference alleged to have been committed by Intratek does not relate to employment, and (5) if arbitration is compelled, dismissal is inappropriate because not all claims are subject to arbitration.

Appendix B

Robertson's wrongful termination and tortious interference claims are covered by the arbitration policy signed by the parties. Broad arbitration language is capable of "expansive reach," and "courts have held that it is only necessary that the dispute 'touch' matters covered by the contract to be arbitrable." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5th Cir. 1998). Further, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Safer v. Nelson Fin. Group Inc.*, 422 F.3d 289, 294 (5th Cir. 2005) (internal quotation marks and citation omitted). The magistrate judge determined that the arbitration policy signed by the parties was broad, that the arbitration policy survived post-termination, and that Robertson failed to sustain his burden to show that the arbitration policy does not cover his wrongful discharge or tortious interference claims. The court agrees. Robertson's first and fourth objections are overruled.

To override the Federal Arbitration Act's mandate that federal statutory claims are arbitrable, congressional commands must be done with clarity. Courts must also keep in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (internal citations and quotations omitted). Because Congress did not clearly prohibit arbitration in Section 4712(c)(7), the court overrules Robertson's second objection.

This court agrees with the magistrate judge's interpretation of the legislative history of Section 4712(c)(7). The removal of the language that would have precluded arbitration under the statute shows that Congress did not intend to prohibit arbitration of whistleblower claims under the statute. Robertson's third objection is overruled.

Because all of Robertson's claims are subject to arbitration, the court has the authority to dismiss the case. This court agrees with the magistrate jduge's recommendation that the case should be dismissed without prejudice. Robertson's fifth objection is overruled.

Decisions concerning motions to amend are entrusted to the discretion of the district court. *See Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). Rule 15(a) of the Federal Rules of Civil Procedure instructs that "leave shall be freely given when justice so requires." However, the district court may consider undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. *Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 836 (5th Cir. 1992) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). Additionally, in exercising its discretion to deny leave to amend a complaint, the district court may consider whether the facts or additional parties underlying the amended complaint were known when the original complaint was filed. *See Matter of Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996).

The court finds that Robertson's motion for leave is untimely in light of the procedural posture of this action. *See Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004). The court cannot help but conclude that Robertson's proposal to add his alter ego, Robertson Technologies, Inc., amounts a tactical maneuver to avert the real possibility that this action will be compelled to arbitration. Robertson made the strategic decision to defend his complaint as filed until nearly two months after the Report and Recommendation was filed, even though he had been long apprised of Defendants' argument that his claims were subject to arbitration. Robertson cannot benefit from a "wait and see" approach as to whether he will request leave to amend, *see Goldstein v. MCI Worldcom*, 340 F.3d 238, 255 n. 6 (5th Cir. 2003), where the result, and the apparent intent, is to challenge the effect of the Report and Recommendation.

IT IS THEREFORE ORDERED that Plaintiff's Objections to the Magistrate Court's Recommendation to Compel Arbitration and Dismiss Plaintiff's Claims Against Intratek Computer, Inc. and Allan Fahami filed December 20, 2018 (Dkt. No. 18) are **OVERRULED**.

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge (Dkt. No. 17) is **ACCEPTED AND ADOPTED** by the court.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File his First Amended Complaint filed January 29, 2019 (Dkt. No. 23) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion to Stay and Compel Arbitration is **GRANTED IN PART AND DENIED IN PART**. The motion to compel arbitration is **GRANTED** and the parties are directed to proceed to arbitration according to the terms of the arbitration policy. The motion to stay is **DENIED**, and the case is **DISMISSED WITHOUT PREJUDICE**.

SIGNED this 30th day of July, 2019.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED DECEMBER 10, 2018

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

A-18-CV-373-LY

JAMES W. ROBERTSON SR.,

v.

INTRATEK COMPUTER, INC., ALLAN FAHAMI, AND ROGER RININGER

December 10, 2018, Decided;
December 10, 2018, Filed

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are Defendants' Motion to Stay and Compel Arbitration (Dkt. No. 13); Plaintiff's Response (Dkt. No. 14); and Defendant's Reply (Dkt. No. 16). The District Court referred the above-motion to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. §636(b)(1)(B), FED.

R. Civ. P. 72, and Rule 1(d) of Appendix C of the Local Court Rules.

I. GENERAL BACKGROUND

James W. Robertson Sr. is a former employee of Intratek Computer, Inc., a California based corporation which provides information technology services to various government agencies, including the Department of Veterans' Affairs ("VA"). Robertson worked at Intratek as a SharePoint administrator/developer and InfoPath Developer/SME from July 11, 2011, until he was terminated in September of 2015. Robertson alleges that he witnessed the president and CEO of Intratek, Allan Fahami, bribe VA officials, including Defendant Roger Rininger, with lavish dinners, happy hours and trips in order to obtain lucrative contracts with the VA. Robertson further alleges that Fahami asked Robertson to violate his non-disclosure agreements with his former employers to get a competitive advantage in obtaining valuable contracts with the VA. Robertson contends that he refused to violate such agreements and complained to Fahami that he and other employees were violating the law. Robertson alleges a week later he was fired. On October 7, 2015, Robertson informed the Office of the Inspector General for Veterans Affairs that he had been fired in retaliation for having complained about the company's illegal activities. Robertson further alleges that after he was terminated, Intratek and Fahami sabotaged Robertson's business contracts and potential business contracts.

Appendix C

On May 7, 2018, Robertson filed this lawsuit against Intratek, Fahami and VA employee Roger Rininger, alleging a whistleblower claim under 41 U.S.C. § 4712, tortious interference with prospective contract or business relations, and tortious interference with a contract. Defendants move pursuant to the Federal Arbitration Act ("FAA") to stay the case and compel arbitration, asserting that Robertson's claims are covered by a valid and enforceable arbitration agreement. Robertson concedes that he agreed to the arbitration policy but argues that the policy does not apply to the claims alleged in this lawsuit.

II. STANDARD OF REVIEW

Congress enacted the FAA Act in response to widespread judicial hostility to arbitration. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). As relevant here, the Act provides:

> A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA requires courts to enforce arbitration agreements according to their terms. *CompuCredit Corp.*, 565 U.S. at 98. The FAA establishes "a liberal federal policy favoring arbitration agreements." *Id.* (quoting *Moses H. Cone Memorial Hospital v. Mercury*

Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)).

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). Because of the strong presumption in favor of arbitration, the party opposing arbitration bears the burden of proving that the agreement is invalid or that the claims are outside the scope of the agreement. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004).

When faced with a motion to compel arbitration, courts apply a two-step inquiry. First, the court examines whether the parties agreed to arbitrate the dispute in question. "This determination involves two considerations:

(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). Second, courts analyze "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) . The parties in this case only dispute whether the claims in this lawsuit fall within the scope of the arbitration agreement.

III. ANALYSIS

The arbitration policy contained in the Intratek Employee Handbook provides, in relevant part, the following:

2.1 ARBITRATION

> Any controversy, dispute or claim between any employee and the Company, or its officers, agents or other employees related to employment, shall be settled by binding arbitration, at the request of either party. Arbitration shall be the exclusive method for resolving any dispute; provided, however, that either party may request provisional relief from a court of competent jurisdiction, as provided in California Code of Civil Procedure section 1281.8. The arbitrability of any controversy, dispute or claim under this Policy shall be

> determined by application of the substantive provisions of the Federal Arbitration Act (9 U.S.C. sections 1 and 2) and by application of the procedural provisions of the California Arbitration Act.
>
> The Claims which are to be arbitrated under this Policy include, but are not limited to claims for wages and other compensation, claims for breach of contract (express or implied), claims for violation of public policy, tort claims, and claims for discrimination and/or harassment (including, but not limited to, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, pregnancy, sex or sexual orientation) to the extent allowed by law, and claims for violation of any federal, state, or other government law, statute, regulation, or ordinance, except for claims for workers' compensation and unemployment insurance benefits.
>
> * * *
>
> Both the Company and employees understand that by using arbitration to resolve disputes they are giving up any right that they may have to a judge or jury trial with regard to all issues concerning employment.

Dkt. No. 13-2 at 2-3.

Appendix C

On June 17, 2011, Robertson signed an "Acknowledgment of Receipt of Policy And Agreement to Arbitrate Employment Disputes," acknowledging that he received a copy of the arbitration policy contained in the Employee Handbook. The acknowledgment contained the following language:

> I hereby agree, pursuant to the policy, to submit to binding arbitration any employment related controversy, dispute or claim between me and the Company, its officers, agents or other employees, including but not limited to claims for wages and other compensation, claims for breach of contract (express or implied), claims for violation of public policy, tort claims, and claims for discrimination and/or harassment (...) to the extent allowed by law, and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims for workers' compensation and unemployment insurance benefits.
>
> **I understand that by agreeing to arbitration, I am waiving the right to a trial by jury of the matters covered by the Arbitration policy**.

Dkt. No. 13-1 at 3 (bolding original).

While Robertson acknowledges that he agreed to the arbitration policy, he contends that it does not apply in this case because (1) 41 U.S.C. § 4712 prohibits arbitration of

his whistleblower claim; (2) the arbitration policy does not cover tortious interference with contracts or potential contracts made by Robertson after he was terminated; and (3) the arbitration policy does not apply to former employees.

A. 41 U.S.C. § 4712

Robertson alleges that Defendants retaliated against him by firing him after he complained about reported violations of federal law regarding government contracts in violation of the anti-retaliation provision of the National Defense Authorization Act ("NDAA"), 41 U.S.C. § 4712(a)(1).[1] Robertson argues that the statute provides him with a right to a jury trial which cannot be waived by the arbitration policy. Specifically, Robertson relies on § 4712(c)(2) which provides that:

> [T]he complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. *Such an action shall, at the request of either party to the action, be tried by the court with a jury.*

1. 41 U.S.C. § 4712(a)(1) prohibits a government contractor from discriminating against an employee "as a reprisal for disclosing . . . information that the employee reasonably believes is . . . a violation of law, rule, or regulation related to a Federal contract."

41 U.S.C. § 4712(c)(2) (emphasis added). Robertson argues that this right to a jury trial in federal court cannot be waived because § 4712(c)(7) states that "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment." 41 U.S.C. § 4712(c)(7).

As noted above, federal statutory claims are arbitrable unless the FAA's mandate has been "overridden by a contrary congressional command." *CompuCredit Corp.*, 565 U.S. at 98. In other words, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (internal citations omitted). "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes." *Id.* "[T]he relevant inquiry [remains] whether Congress . . . precluded arbitration or other nonjudicial resolution of claims." *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 360 (5th Cir. 2013) (internal quotations and citations omitted). The Supreme Court has emphasized that "[t]hroughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (internal citations and quotations omitted). The party opposing arbitration bears the burden of showing whether a congressional command exists. *Id.* "Any doubts are resolved in favor of arbitration." *D.R. Horton*, 737 F.3d at 360.

Thus, "if Congress intended the substantive protection afforded [by the statute] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 473 U.S. at 628. Courts have found that when Congress has decided to override the FAA, they have "done so with clarity" and have used explicit language preempting arbitration. As one district court has pointed out, "when Congress restricts the use of arbitration it usually does so with 'clarity,' such as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.§ 1226(a)(2), which provides that '[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.'" *Nelson v. Carl Black Chevrolet of Nashville, LLC*, 2017 U.S. Dist. LEXIS 121714, 2017 WL 3298327, at *7 (M.D. Tenn. Aug. 2, 2017) (quoting *CompuCredit Corp.*, 565 U.S. at 103-04).

Robertson can point to no similarly clear provision in 41 U.S.C. § 4712 which unequivocally prohibits arbitration. As noted, § 4712(c)(7) merely states that the "rights and remedies provided for in this section may not be waived by any agreement . . . ." While the Court is unable to find any case law addressing whether the waiver provision in § 4712(c)(7) precludes arbitration of a claim thereunder, there is a plethora of case law addressing federal statutes containing similar waiver provisions. Thus, in *CompuCredit Corp.*, 565 U.S. at 104, the Supreme Court held that the FAA required the arbitration agreement to be enforced in a case brought under the Credit Repair Organization Act ("CROA") where the statute was silent

on whether claims under the Act can proceed in an arbitrable forum. The plaintiffs had argued that the non-waiver provision in the CROA (which provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter . . . shall be treated as void; and may not be enforced") precluded the case from being sent to arbitration. *Id.* at at 99. As Robertson does in this case, the plaintiffs argued that the statute's references to a "right" to bring an action in court showed that Congress intended the statute to create a right to a judicial forum. The Supreme Court disagreed, reasoning:

> These references cannot do the heavy lifting that respondents assign them. It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish the "contrary congressional command" overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law.
>
> * * *
>
> Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted

the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA. *See, e.g.*, 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of *104 a dispute arising under this section"); 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy"); cf. 12 U.S.C. § 5518(b) (2006 ed., Supp. IV) (granting authority to the newly created Consumer Financial Protection Bureau to regulate predispute arbitration agreements in contracts for consumer financial products or services). That Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the "right to sue" phrase in the disclosure provision, and the references to "action" and "court" in the description of damages recoverable, is unlikely.

Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.

Id. at 100-01, 103-04. *See also, Gilmer*, 500 U.S. at 29 (arbitration not improper in ADEA case because Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims"); *Rodriguez-Depena v. Parts Auth., Inc.*, 877 F.3d 122, 124 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2634, 201 L. Ed. 2d 1045 (2018); *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3rd Cir. 2014); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 880-81 (9th Cir.), *cert. denied*, 506 U.S. 986, 113 S. Ct. 494, 121 L. Ed. 2d 432 (1992) (language in Employee Polygraph Protection Act that "rights and procedures provided by this chapter may not be waived by contract or otherwise" did not preclude arbitration). Thus, "statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA." *D.R. Horton*, 737 F.3d at 360. The legislative history of 41 U.S.C. § 4712 further demonstrates that Congress did not intend to prohibit arbitration of whistleblower claims under the statute. As the Defendants point out, that legislative history shows that during the proceedings leading to its adoption, Congress explicitly removed the very sort of language that would have precluded arbitration under the statute. Dkt. No. 16 at 3-4. Because Robertson can point to no language in the text of 41 U.S.C. § 4712 to show that Congress intended to override the FAA, he has failed to sustain his burden in this case.

Moreover, courts have found that the "right" to a jury trial or the "right" to a judicial forum are not substantive rights but, rather procedural rights which can be validly waived by an arbitration clause. Thus, in *14 Penn Plaza*

LLC v. Pyett, 556 U.S. 247, 265-66, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), the Supreme Court held that a provision in a collective-bargaining agreement that required union members to arbitrate claims under the Age Discrimination in Employment Act was enforceable as a matter of law. The Court explained: "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." *Id.* at 265-66. In other words, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

Similarly, in *McLeod v. General Mills, Inc.*, 856 F.3d 1160 (8th Cir. 2017), the plaintiffs argued that the waiver provision contained in 29 U.S.C. § 626(f)(1) of the ADEA—providing that "an individual may not waive any right or claim under this chapter"—overrode the FAA's mandate to enforce the arbitration agreement. Relying on *14 Penn Plaza*, the Eighth Circuit rejected this argument finding that the "waiver" in § 626(f) "refers narrowly to waiver of substantive ADEA right or claims—not as the former employees argue, the 'right' to a jury trial or the 'right' to proceed in a class action." *Id.* at p. 1164-65. The Court reasoned the following:

> The former employees say that § 626(c)(2) gives them a "right" to a jury trial on ADEA claims. But *14 Penn Plaza* forecloses categorizing

> a jury trial as a § 626(f)(1) "right." Since no "rights or claims" are waived by agreeing to bring claims in arbitration, a jury trial is not a § 626(f)(1) "right."
>
> * * *
>
> Because an individual waives no "rights or claims" under § 626(f)(1)(C) by agreeing to bring ADEA claims in arbitration, an individual similarly waives no "right or claim" under § 626(f)(1) by agreeing to bring ADEA claims in arbitration.

Id. at 1165. The Court concluded that "Section 626(f) is "not a 'contrary congressional command' overriding the FAA's mandate to enforce the agreements to arbitrate ADEA claims." *Id.* at 1166. *See also, Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (rejecting argument that arbitration clause was unenforceable since ADEA provided him a right to a jury trial) Thus, "[t]he provision of a judicial forum for resolution of disputes is not inconsistent with the provisions of the FAA providing for an enforceable right of the parties to contractually agree to resolve those same disputes in an arbitral forum." *Saari*, 968 F.2d at 881.

Based upon the foregoing, the Court finds that Congress did not intend to override the FAA in this case and, therefore, 41 U.S.C. § 4712 does not prohibit enforcement of the Arbitration policy in this case.

B. Tortious Interference Claim

Robertson next argues that the Arbitration policy does not apply to his tortious interference claims because those allegations only refer to Intratek's actions after he was terminated. Robertson argues that any actions that occurred after he was terminated from employment "are not related to employment since they occurred after employment." Dkt. No. 14 at 3.

Whether a dispute is covered by the scope of an arbitration agreement often depends on whether the language of the provisions is broad or narrow: "Broad arbitration language governs disputes 'related to' or 'connected with' a contract, and narrow arbitration language requires arbitration of disputes that directly 'arise out of' a contract." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). The language of the arbitration policy here is broad, as it covers "[a]ny controversy, dispute or claim between any employee and the Company, or its officers, agents or other employees *related to employment* . . . ." Dkt. No. 13-2 at 2 (emphasis added). The policy applies to all claims related to employment including "tort claims" and "claims of breach of contract (express or implied)." *Id.* Both the Supreme Court and the Fifth Circuit have categorized language similar to the language in this case as broad. *Pennzoil*, 139 F.3d at 1067 (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). The Fifth Circuit explained that when parties consent to an arbitration clause that governs all disputes "arising under" or "relating to" their

agreement, they are expressing their intent that the arbitration clause reach all aspects of their relationship. *Pennzoil*, 139 F.3d at 1067. Broad arbitration clauses "are not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Id.* (internal citation omitted). "Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute 'touch' matters covered by the contract to be arbitrable." *Id.* at 1068. When determining whether a dispute comes within the scope of an arbitration agreement, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Safer v. Nelson Fin. Group Inc.*, 422 F.3d 289, 294 (5th Cir. 2005) (internal quotation marks and citation omitted). The Fifth Circuit has thus held that "a valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Personal Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)).

Based upon the foregoing, the Court finds that Robertson's tort claims are within the scope of the broad Arbitration policy in this case. *See e.g., Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609 (5th Cir. 2016) ("[T]ortious interference claims between a signatory to an arbitration agreement and agents or affiliates of the other signatory arise more from the contract than general law,

and thus fall on the arbitration side of the scale."); *P&P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861, 871(10th Cir. 1999) (rejecting plaintiff's argument that tortious interference with contract claim could never fall within the scope of an "arising out of or relation to" arbitration clause); *Colt Unconventional Res., LLC v. Resolute Energy Corp.*, 2013 U.S. Dist. LEXIS 102411, 2013 WL 3789896, at *5 (N.D. Tex. July 19, 2013) (rejecting argument that tort claims were outside scope of arbitration agreement simply because they were intentional torts, because "whether a claim falls within the scope of an arbitration agreement depends on the factual allegations of the complaint instead of the legal causes of action asserted").

C. The Survival of the Arbitration Policy Post-Termination

Robertson also argues that the arbitration policy does not apply to his tortious interference claims or his wrongful discharge claims since those allegations concern actions that occurred after he was employed and therefore the allegations do not involve a claim between "any employee and the Company." In *Litton Financial Printing Division, Litton Business Systems, Inc. v. NLRB*, the Supreme Court recognized a "presumption in favor of post-expiration arbitration of matters unless negated expressly or by clear implication [for] matters and disputes arising out of the relation governed by contract." 501 U.S. 190, 204, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991) (internal quotation marks and citation omitted). *See also, Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255, 97 S. Ct.

1067, 51 L. Ed. 2d 300 (1977). In *Nolde Bros.*, the Supreme Court held that the employees' claim for severance pay arose under the collective bargaining contract and was subject to resolution under the contractor's arbitration terms even though it arose after the contract was terminated, because

> even though the parties could have so provided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination. The contract's silence, of course, does not establish the parties' intent to resolve post-termination grievances by arbitration. But in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract. Any other holding would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations.

Id. at 252-53. Similarly, the Sixth Circuit has observed "that the need for an arbitration provision to have post-expiration effect is intuitive, because if 'the duty to arbitrate automatically terminated upon expiration of the contract, a party could avoid his contractual duty to arbitrate by simply waiting until the day after the contract expired to bring an action regarding a dispute that arose while the contract was in effect.'" *Huffman v.*

Hilltop Companies, LLC, 747 F.3d 391, 395 (6th Cir. 2014) (quoting *Zucker v. After Six, Inc.*, 174 F. App'x 944, 947-48 (6th Cir. 2006)).

Robertson cannot point to any provision in the arbitration policy showing that it excludes the arbitration of claims after Robertson was terminated. *See Duge v. Sears, Roebuck and Co.*, 2016 U.S. Dist. LEXIS 131204, 2016 WL 5376233 at *7 (W.D. Tex. Sept. 26, 2016) (holding that all arbitration agreement covered all employment-related disputes, including those brought post-employment). As the Supreme Court has reasoned, "the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." *Nolde Bros*, 430 U.S. at 255. Because the presumptions favoring arbitrability must be negated "expressly or by clear implication," Robertson has failed to sustain his burden to show that the Arbitration policy does not cover his wrongful discharge or tortious interference claims.

D. Conclusion

Based upon the foregoing, the Court finds that the arbitration policy in this case is valid, binding, and enforceable. As such, the motion to compel arbitration should be granted. With regard to the disposition of the case, the Defendants request that the Court stay the case. The general rule under the FAA is in a case in which arbitration is ordered, the proceedings are stayed pending

arbitration. *See* 9 U.S.C. § 3. The Fifth Circuit, however, has noted that district courts have discretion to dismiss a case in favor of arbitration when all of the issues raised before the district court are arbitrable. *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 676 (5th Cir. 1999); *see also Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("[t]he weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration"). As discussed above, each of Plaintiff's claims is subject to arbitration. Thus, the appropriate disposition here would be to dismiss, not stay, the case.

IV. RECOMMENDATION

The undersigned **RECOMMENDS** that the District Court **GRANT IN PART AND DENY IN PART** Defendants' Intratek Computer, Inc. and Allen Fahami's Motion to Stay and Compel Arbitration (Dkt. No. 13). The Court **RECOMMENDS** that the motion to compel arbitration be **GRANTED** and the parties be directed to proceed to arbitration according to the terms of the arbitration policy. The Court further **RECOMMENDS** that the motion to stay be **DENIED** and that instead the case be **DISMISSED WITHOUT PREJUDICE**.

V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need

not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED this 10th day of December, 2018.

/s/ Andrew W. Austin
ANDREW W. AUSTIN
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D — RELEVANT STATUTORY PROVISIONS

§ 4712. Enhancement of contractor protection from reprisal for disclosure of certain information

(a) Prohibition of Reprisals.—

(1) In general.—
An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) Persons and bodies covered.—
The persons and bodies described in this paragraph are the persons and bodies as follows:

> **(A)** A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

(3) RULES OF CONSTRUCTION.—For the purposes of paragraph (1)—

(A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) INVESTIGATION OF COMPLAINTS.—

(1) SUBMISSION OF COMPLAINT.—

A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

(2) INSPECTOR GENERAL ACTION.—

(A) Determination or submission of report on findings.— Except as

provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) Extension of time.—
If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) PROHIBITION ON DISCLOSURE.—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) Time limitation.—
A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) Remedy and Enforcement Authority.—

(1) In general.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) EXHAUSTION OF REMEDIES.—
If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative

remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) Admissibility of evidence.—
An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Enforcement of orders.—
Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The

person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

(5) JUDICIAL REVIEW.—
Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

(6) BURDENS OF PROOF.—
The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) RIGHTS AND REMEDIES NOT WAIVABLE.—
The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

Appendix D

(d) Notification of Employees.—
The head of each executive agency shall ensure that contractors, subcontractors, and grantees of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) Construction.—
Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(f) Exceptions.—

(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

(g) DEFINITIONS.—In this section:

(1) The term "abuse of authority" means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

(2) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

(h) CONSTRUCTION.—

Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.