No. 20-395

In The

Supreme Court of the United States

TIMOHY C. ROTE,

Petitioner,

v.

MAX ZWEIZIG,

Respondent.

ORIGINAL

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit's and district court's decisions to not compel arbitration in this case signals a clear intention to ignore the Federal Arbitration Act (FAA), Oregon Uniform Arbitration Act (OUAA) and applicable state law to bypass decisions reserved for the arbitrator. App.2a-10a.

The question of whether respondent's claims were subject to mandatory arbitration was resolved during the first lawsuit respondent filed against petitioner in New Jersey State Court in 2004. App.159a. Respondent referenced the same employment agreement with NDT in his complaint in this case as he did in 2004. The parties are the same. In 2006, petitioner prevailed (App.166a) on a Motion to Compel arbitration (App.143a-158a) on respondent's wrongful termination and post-employment retaliation claims against NDT and non-signatory Timothy Rote. Zweizig subsequently prevailed on a post-employment retaliation claim in the 2011 arbitration that followed. App.172a-173a. The U.S. District Court of Oregon confirmed the award and ruling of the New Jersey Court in 2011 finding that the post-employment retaliation claims were subject to arbitration, referencing both the FAA and OUAA. App.186a-187a.

Petitioner filed his Answer and Affirmative Defenses which timely raised issue and claim preclusion implicating these prior rulings that mandate arbitration. App.49a-58a. Petitioner filed timely Motions to Dismiss and Compel.App.70a.The lower courts refused to compel arbitration in this case as demanded by Petitioner, on a finding of inapplicability to non-signatory petitioner, questioning the

application to post-employment retaliation and on the basis of waiver because petitioner responded to an anti-SLAPP Motion to Strike brought by Respondent. Under Oregon Law, non-signatory, estoppel and waiver are issues for the arbitrator to decide. The Ninth's and district court's ignoring an adjudicated and confirmed decision on the construction and meaning of the employment agreement, in its application to post-employment retaliation and to non-signatories, represents a return to the old judicial hostility to arbitration and a significant departure from this Court's repeated guidance that arbitration agreements are to be enforced as any other contracts and that any doubts regarding arbitrability must be resolved in favor of arbitration. *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S.1, 24–25 (1983).* See also the Court confirming that a non-signatory may compel arbitration in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

Petitioner wrote a blog critical of the tangible and intangible costs of litigation, an arbitrator and arbitration involving then respondent Zweizig, which by the time of trial was 96 Chapters and approximately 96,000 words in length. Only 1% of the content involved the outline of evidence and criminal conduct of the respondent. The first chapter of that blog was published in 2015. Petitioner also wrote a blog in 2014 on his litigation between NDT and Silicon Valley Bank, which grew to 60 Chapters and 60,000 words.

In response to some of the 2015 blog content on arbitration, respondent filed suit under ORS 659A.030 (1) (f) alleging retaliation against dissolved corporate former employer Northwest Direct (NDT) and under ORS 659A.030 (1) (g) against

Petitioner for aiding and abetting. The content of the blog to which the respondent ascribes retaliation was published by petitioner after NDT administratively dissolved. The respondent's claims are against a fictional retaliator and therefore both structurally flawed and unconstitutional as applied. Petitioner has a Right of Free Speech that the district court seeks to abridge, again as applied.

Respondent waived offers of anonymity and redaction of his identity. Petitioner carried out redaction anyway. During trial respondent voluntarily testified that he took issue with the totality of the blog for violating what he perceived to be a confidential arbitration, that issue disputed. Respondent offered no written proof, but testified as to his belief. Petitioner testified in opposite. Respondent asked the jury for noneconomic damage and to punish petitioner for the stress of litigation. Respondent's admissions, or alternatively his refusal to accept anonymity and redaction, vitiate his claims as the "but-for" causation standard on retaliation cannot be met.

Respondent five times solicited of the court due process violations against Petitioner. On appearance and belief, the court responded in support of respondent effecting pre and post-trial decisions and denying petitioner a right to arbitration, discovery, to put on evidence challenging causation and damages and ultimately denying petitioner a fair trial. Petitioner was not for example permitted to take depositions of Zweizig and Ware or to engage in discovery a full twelve months before trial.

The Questions presented are:

1. Whether the district court erred and exceeded its authority under the FAA and OUAA by refusing to compel arbitration (finding waiver and non-signatory) as mandated under the employment contract (previously adjudicated by the New Jersey State Court which compelled arbitration of post-employment retaliation claims against non-signatory petitioner)?

2. Recognizing that the non-signatory question had already been decided in 2006 in favor of petitioner, whether the district court exceeded its limited authority in finding that petitioner responding to an anti-SLAPP Motion to Strike Petitioner's counterclaims constitutes waiver of his right to arbitrate claims, where under Oregon Law waiver and estoppel are reserved for the arbitrator?

3. Whether the "but-for" causation standard for respondent's retaliation claim fails as a matter of law given the facts in this case including respondent's waiver, admissions, testimony and arguments?

4. Whether the ORS 659A.030 (1) (f) and (g) claims in this case that were alleged to have arisen after administrative dissolution and against dissolved former employer NDT as retaliator is so fictional and flawed (with which *McLaughlin v. Wilson*, 365 Or 535 (Or. Sup. Ct. September 2019) affirms) that it resulted in an unconstitutional abridgement of Petitioner's First Amendment Right of Free Speech and an unconstitutional taking of property?

5. Whether there is adequate evidence of due process violations and a resulting unfair trial given the facts, repeated solicitations by respondent, arguments, testimony and rulings in this case requiring the judgment to be vacated?

PARTIES TO THE PROCEEDING

Petitioner Timothy C. Rote was a defendant in the district court proceedings. Controlled and dissolved corporation Northwest Direct (and related corporate entities) were also defendants in the district court proceeding. Timothy Rote was the appellant in the court of appeals proceedings. Respondent Max Zweizig was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

- *Max Zweizig v. Northwest Direct, et.al.*, 3:15-cv-2401, U.S. District Court for the District of Oregon. Judgment entered December 18, 2018.
- *Max Zweizig v. Northwest Direct, et. al.*, No. 18-35991, U.S. Court of Appeals for the 9th Circuit. En Banc Denied. Judgment entered July 23, 2020.
- *Max Zweizig v. Northwest Direct, et. al.*, No. 18-36060, U.S. Court of Appeals for the 9th Circuit. Referred to the Supreme Court for the State of Oregon. Referral accepted July 30, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Timothy C. Rote respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reproduced at App. 1a–9a. The opinion of the district court on post-trial Motions and Judgment is reproduced at App. 10a–20a. The opinion of the district court denying petitioner's Motion to Dismiss and Compel is reproduced at App. 31a-48a.

JURISDICTION

The court of appeals affirmed the district court's order denying the motions to compel arbitration and upheld the Judgment on June 18, 2020. App.2a-9a. Petitioners timely filed a petition for rehearing / rehearing en banc on Jun 30, 2020, which the court of appeals denied on July 23, 2020. App.1a. Petitioner timely filed this petition within 150 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press [.]"

U.S. Const. amend. First.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [.]"

U.S. Const. amend. Fourteen, section 1.

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., provides in § 2 and § 3:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The Oregon Uniform Arbitration Act, ORS § 36.600 et seq., provides:

ORS 36.620 Validity of Agreement to Arbitrate:

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(2) Subject to ORS 36.625 (Petition to compel or stay arbitration) (8), the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent [Waiver] to arbitrability has been fulfilled [.]

The Oregon Employment Discrimination Statutes, ORS §659A.030 (1) (f) and (g) et seq., provides:

(1)It is an unlawful employment practice:

(f) For any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

Ore. Rev. Stat. § 659A.030 (1) (f) and (g).

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Rote owned and operated multiply companies that over 20 years welcomed and protected the civil rights of all who worked there. Outside of Zweizig there was not a single legal action for harassment, discrimination or retaliation because of race, color, sex, religion, sexual orientation, national origin, marital status, age, etc. Not a single complaint on more than 3,750,000 of payroll hours over that same period of time. It would take a ten-person law firm more than 170 years of unblemished civil rights protection to match the petitioner's accomplishment as a business owner.

Petitioner's public critique of litigation, the arbitrator and proceeding involving the respondent was in the form of a blog, first entitled "Sitting Duck Portland", but rebranded with redactions of respondent's identity to "When Justice Fails", subtitled as "A Portland Story of Fraud, Collusion and Cybercrime." Petitioner Rote has now published more than 172 chapters (150,000 words) and a book on this case. Chapter 1 of the blog was published on February 27, 2015. App.256a.This was not the first blog on litigation published by Petitioner. The first

blog was entitled "Sitting Duck Denver," the first chapter published on February 17, 2014 (almost two years before the complaint in this case) and detailed the litigation between petitioner's controlled company NDT and Silicon Valley Bank. App.261a.

A. Procedural History of this Case Material to Arbitration

Respondent filed this lawsuit on December 24, 2015 alleging retaliation under ORS 659A.030 (1) (f) against NDT (and other corporate defendants as successors) and aiding and abetting under (1) (g) against Petitioner Rote. Respondent Zweizig sought $150,000 in damages and referenced the employment agreement between himself and NDT. App.203a. The District Court opined that the claims brought by Zweizig were employment claims. App.31a. NDT was out of business and administratively dissolved at the time the blog posts (chapters), those posts with which the respondent took issue, were published. App.254a. Petitioner was not employed by NDT at the time the blog was started and this remains un-refuted.

Petitioner answered the respondent's complaint in this case on January 28, 2016, and raised affirmative defenses including the contract mandate to arbitrate, issue preclusion (arbitration and application to post-employment retaliation and non-signatory) and claim preclusion (retaliation for publishing of the computer forensic reports). Petitioner also raised counterclaims. App.49a-62a. NDT filed its answer on January 28, 2016 and preserved the same affirmative defenses App. 63a-69a.

Petitioner filed his first Motion to Dismiss and Compel Arbitration on March 1, 2016. App.70a-92a. The Motion was substandard and withdrawn to coordinate

with NDT counsel. Much to Petitioner's surprise, Counsel for NDT (Andrew Brandsness) was resistant to filing a Motion to Dismiss and Compel on behalf of the corporate defendants in spite of being ordered to do so. Petitioner would later learn that Brandsness believed the corporate defendants named in this lawsuit as potential successors to NDT could not compel arbitration. Petitioner would also later learn that adding additional defendants is a taught tactic by plaintiff counsel to try to avoid arbitration. As this was being considered, respondent filed an anti-SLAPP Motion to Strike Petitioner's counterclaims. Plaintiff was ordered to not file any other Motions or to amend any Motions until after the anti-SLAPP was decided. Counsel for the corporate entities, Andrew Brandsness, ultimately refused to file a Motion to Dismiss and Compel after admitting to malpractice in this case.

Petitioner filed his revised Motion to Dismiss and Compel after the anti-SLAPP once he was permitted to do so. App.93a-107a. Respondent ultimately argued in his Response that arbitration should not be granted because (1) post-employment retaliation claims were not contemplated under the contract; (2) Petitioner Rote was not a signatory to the contract; and (3) Petitioner waived arbitration by responding to the anti-SLAPP Motion to Strike. App.112a-123a. Respondent did not admit that the issues had already been adjudicated. Judge Hernandez sided with respondent and refused to compel arbitration based on a finding that Petitioner (1) was not a signatory and (2) waived arbitration by engaging in litigation thus far, interpreting that to mean responding to the anti-SLAPP. App.31a-48a.

Respondent first sued petitioner Rote and his controlled corporation NDT (former employer of Zweizig) on March 18, 2004 in New Jersey State Court alleging wrongful termination and post-employment retaliation. App.159a. Respondent, then plaintiff Zweizig, argued the contract unconscionable and challenged the enforcement of his employment agreement mandate to mediate and arbitrate his employment claims in that New Jersey action. Petitioner's Motion and Brief to Compel in that case referenced the New Jersey Arbitration Act, Oregon Uniform Arbitration Act and the Federal Arbitration Act and was filed on December 1, 2005 more than 18 months after Zweizig initiated litigation in New Jersey. App.143a-159a.

The New Jersey State Court found that Zweizig had the benefit of counsel (his girlfriend and attorney Sandra Ware made changes to the contract), the employment contract conscionable, binding and applicable to the employment claims brought and granted petitioner Rote's Motion to Compel arbitration in 2006. Zweizig filed a Motion for reconsideration and to add defamation. The New Jersey Court denied reconsideration. App.166a. [1]

Zweizig thereafter pursued his claims against NDT and Rote in arbitration, without appeal, and prevailed on a post-employment retaliation claim on a letter allegedly written by Rote five years after Zweizig's termination, a letter not in evidence. The arbitrator, however, denied Zweizig's Million dollar damage claim for Rote publishing a letter and one of the computer forensic reports showing Zweizig

[1] The Ninth Circuit was fully briefed on the New Jersey State Court's decision and Oregon Law governing non-signatory and waiver questions.

was engaged in a host of criminal conduct including downloading and disseminating child pornography. App.172a. That forensic report is republished here. App.270a.

In spite of the clear mandate to arbitrate, the Ninth Circuit affirmed the judgment, rejecting Petitioner's arguments that the judgment must be vacated. Both lower courts chose to re-litigate the meaning of the contract arbitration provision including its application to post-employment retaliation, and made decisions on non-signatory and waiver. The courts were fully briefed on these errors.App.297a.

B. History of this Case Material to "But-For" Causation

Respondent affirmed that the blog topics were published in a public forum and were on topics of public interest. Respondent made that affirmation in his anti-SLAPP Motion to Strike Petitioner's counterclaims. The evidence ignored by the arbitrator and which ascribes criminal conduct to the respondent represents only 1% of the content of the blog. Petitioner maintains that he cannot critique the evidence ignored by the arbitrator without actually describing and publishing the evidence, has repeatedly critiqued the unchecked errors of litigation and the "but-for" standard of causation cannot be met.

Respondent rejected all offers by petitioner of anonymity, redaction of respondent's identity, offer to edit or footnote anything the respondent felt was untrue, corrections, etc. This is un-refuted. App. 387. Petitioner carried redaction of respondent's name anyway during the pendency of the lawsuit up to the time of trial. The redaction was academic after that point. Arguably redaction was academic at the early stage of the case. Respondent testified that the totality of the

blog, caused him difficulty leaving for the world to determine if the content was disgusting. App.409a. Respondent would not answer questions about the forensic reports. What is not missing is that respondent believed the totality of the arbitration was confidential and presented no proof of that statement. App.393a-394a. It was not.

In spite of the blog being the central theme of the respondent complaint, the primary response to questions regarding items written in the blog, like the forensic reports, the respondent answered with "I don't remember." Twelve times on topics with which he should have had intimate detail and that were supposed to cause him emotional distress. App. 384a-430a.

C. Material Content of the Blog

Respondent acknowledged in his anti-SLAPP Motion that the blog was on topics of public interest and in a public forum. Thus Petitioner and Respondent agree that there is tension between Respondent's claims and First Amendment speech. Petitioner does not deny he disdains Respondent. After all, respondent threatened to shut down NDT, did shut down NDT, did dis-employ 150 employees, stole programming, falsely accused NDT of billing fraud and threatened to rape Petitioner's wife. Petitioner's Amended Statement of Claims in the arbitration are provided herein. App.374a.

In 2003 Respondent Zweizig was given notice of termination and subsequently terminated for withholding critical software programs and owned by his employer and processed data files owned by a client of his employer (NDT). That client is a well known household name Insurance company and the files he withheld

were up to five months late in being returned to that client resulting in a notice of probable termination to NDT if the files were not transmitted immediately. Zweizig used the circumstance of potential contract termination to attempt to extort a raise. He was rebuffed, completed the transmission files timely and was immediately given notice of termination (October 2, 2003). The evidence of his extortion attempt as well as the notice of termination were captured and recorded via email and corroborated by multiple parties.

Six months earlier Zweizig had been involved with a group of young executives of NDT that had decided to spin out and start their own company. That was stopped. Respondent Zweizig pleaded for leniency and was permitted stay.

Within that six months that followed, from April 2003 through October 2003, Zweizig recruited his assistant manager (Chris Cox) and jointly they removed all key programming from six servers owned by NDT. Three weeks after his notice of termination (on October 2, 2003), Zweizig alleged he was terminated for bringing to Rote's attention a claim that his employer (NDT) was overbilling their clients. The alleged overbilling was approximately $400. Zweizig produced a spreadsheet, which he claimed he received via an email. He never produced the email and refused to turn over his digital email (outlook) file. The spreadsheet was never corroborated, did not identify clients and no such invoices had been issued. Moreover the nightly reports to clients were automated and published by midnight of the day the work was performed, making the allegation of billing fraud all the more preposterous. Zweizig testified that he did not remember if he turned over the email. App.386a.

Ultimately the arbitrator opined there was no over-billing. Moreover the claim was objectively unreasonable under Oregon law and should have been dismissed.

The arbitrator, who billed more than $50,000 during that engagement, refused to dismiss Zweizig's complaint against NDT even when presented with email evidence of Zweizig's notice of termination preceding his complaint about over-billing, supporting testimony of three NDT witnesses and the reports and testimony of two computer forensic experts confirming their opinion that said termination email was sent to Zweizig three weeks before his complaint of overbilling.

Upon giving notice to Zweizig, Rote attempted to confirm that the programming owned by NDT was in place. Petitioner determined at that time there was none of the programming necessary to engage in and report on NDT's daily business. Rote ordered Zweizig to turn over the programming. Zweizig refused to do so. Chris Cox (co-conspirator) refused to identify where the programming was saved. This exchange of mandates to Zweizig and his refusal to comply was captured in emails, corroborated, un-refuted and presented during the arbitration. The arbitrator refused to dismiss Zweizig's claims.

After Zweizig's last day, respondent having refused to provide the employer owned programming, and as a result NDT shut down for ten days. An outside programmer from Chicago came to Oregon, looked again for the programming on all servers and back-up tapes and could not find the programming. That programmer,

Jayme Gedye, generated superior programming in about five days after his arrival. Gedye, Rote, three other employees and a client of NDT testified that NDT shutdown for 10 days immediately after Zweizig's last day of employment because the programming was stolen and daily production reports could not be produced for clients. The arbitrator refused to dismiss Zweizig's claims.

Gedye and Rote testified in the arbitration that the programming could not be found on any of the company servers. Gedye and Rote also testified that the programming could not be found on the 60 gig hard drive Zweizig returned on his last day of employment. Three computer forensic experts (one of whom was Justin McAnn, Zweizig's expert) produced reports and testified that here was no programming on the 60 gig hard drive returned by Zweizig. The record by Zweizig shows that he denied the existence of any programming in an email sent to Rote prior to the shutdown, refusing to provide what he claimed did not exist. Zweizig subsequently testified that there were some programs, but not apps, and confirmed that he had refused to provide them when Rote ordered him to do so. Zweizig did not refute the shutdown. The arbitrator ignored this evidence.

The evidence shows Chris Cox refused to identify where or if he had programming that would have forestalled the shutdown. Cox, who worked remotely, left NDT right after the shut down and reformatted his hard drive before returning it to NDT.

Zweizig returned a 120 gig hard drive on his last day of employment, November 13, 2003. He had reformatted that hard drive just before returning it.

Three computer forensic experts (one of whom was Justin McAnn) testified that more than 1900 programs and data files were found on that 120 gig hard drive. The programming Zweizig claimed did not exist did in fact exist, which was to be expected. NDT compiled approximately 100,000 bits of data daily to produce twelve unique nightly reports for each of its clients. That cannot be done without tested programming. All three experts agreed the programming found on the 120 gig hard drive was dated to the time Zweizig had possession of the hard drive. The arbitrator ignored this evidence.

The three computer experts also opined that contrary to Zweizig's testimony, that 120 gig hard drive had not failed, was not reformatted in May 2003 as Zweizig testified but rather was reformatted the day before it was returned to NDT, on November 12, 2003. The arbitrator ignored this evidence.

The three experts also testified that there was no activity of use of the 120 gig hard drive at any time other than when Zweizig had possession of the hard drive. The experts also opined in report and testimony that in addition to the programming, the hard drive contained an email outlook account through the first part of May 2003, movies and music downloaded in violation of copyright laws, personal identity records stolen from NDT clients, video files of pornography and child pornography downloaded from and uploaded to other viewers using a peer to peer program registered to Zweizig. The arbitrator ignored this evidence.

NDT incurred more than $25,000 in computer forensic expert fees for examination, preservation of the hard drives, forensic images of the hard drives,

reports and testimony. The arbitrator solicited this evidence but then summarily dismissed it when it was unfavorable to Zweizig.

NDT incurred more than $150,000 in legal fees in the arbitration, in addition to the $100,000 in fees incurred in New Jersey to preserve the contract mandate to arbitrate. Rote published no critiques during the pendency of the arbitration.

Upon finding out that the arbitrator and Zweizig counsel Linda Marshall were partners for 14 years at Miller Nash LLP, Petitioner Rote raised the issue. Arbitrator Crow recused himself. Neither Crow nor Marshall disclosed this. Marshall told him he could not recuse himself and the Arbitration Service of Portland found that Crow could return as arbitrator. Upon returning Crow summarily ignored all of NDT's evidence (1,000 pages of documents, the testimony of eight witnesses, the reports and testimony of three forensic experts).

Arbitrator Crow awarded Zweizig nine months of pay, including vacation time. He also awarded Zweizig $5,000 for post-employment retaliation on a letter Zweizig claimed was critical of his child porn, a letter not in evidence and not corroborated. Crow refused to award NDT legal fees for the New Jersey action and refused to award legal fees to Zweizig as prevailing party, since the contract provides for the award of no legal fees and costs. Crow did award NDT $4,200 in court reporter fees billed to NDT for Zweizig's copies of the transcripts. Zweizig had defaulted on those court reporter bills.[2]App.167a.

[2] Zweizig defaulted on the court reporter's fees and NDT was forced to cover those costs since the court reported contract was in NDT's name. The court reporter firm was a client of the arbitrator.

In spite of the abuses of the arbitrator and what should have resulted in vacatur, Federal Magistrate Paul Papak confirmed the award in a hotly contested confirmation proceeding. NDT obviously took the position that the arbitrator's refusal to disclose his conflict, the arbitrator's self-recusal upon the conflict issue being raised, the arbitrator's subsequent rejoining over the objection of NDT and the arbitrator's summarily ignoring NDT's entire body of evidence, supported vacatur. Magistrate Papak confirmed the award and more specifically for our purpose also opined that the wrongful termination and post-employment retaliation claims were claims subject to arbitration. He did not disturb any finding of the New Jersey Court that Rote as non-signatory could compel arbitration. Zweizig did not appeal the New Jersey decision compelling the parties or claims to arbitration. App.176a-202a.

The above is captured in the blog, with references and links to the material evidence. That evidence was suppressed by the Court.

D. The Evidence of Due Process Violations

First and foremost the respondent filed what has been referred to in the record as the Jones Transcript and Kugler Show Cause. The Jones document is a transcript of a hearing in which the Hon. Robert Jones recused himself after Rote communicated by letter questioning Judge Jones adjudicating a case where the plaintiff was an extended member of the Judges family. The Kugler show cause document is an order to show cause by the Hon. Robert Kugler in response to Rote sending a letter informing the Judge that his law clerk met ex-parte with Sandra

Ware (Zweizig girlfriend). The law clerk and Ware both graduated from Rutgers Law as did Judge Kugler. Judge Kugler sent NDT's transfer to Fed Court back down to State Court just after Judge Kugler received the Jones document from Sandra Ware via the law clerk. The header on the Jones document shows Sandra Ware received it on February 2, 2004 at 9:14 am. App. 263a.

The solicitations of the court by respondent are replete and invade every quarter of the case history. Respondent filed the Jones and Kugler documents three times beginning with the anti-SLAPP and requested that arbitration not be imposed by reference to the blog critique of the arbitrator and arbitration. That argument was also made to the 9th Circuit.

Second, the complaint is so structurally flawed the fact that the court permitting this claim raises questions of bias. Petitioner argues that he cannot aid and abet a dissolved corporation wherein he is ascribed an agent action on behalf of deceased NDT as retaliator and then also aid and abet (as an employer or employee of deceased NDT). The Court did not conclude that NDT was the exclusive employer to Zweizig until after trial testimony was closed, as the jury instructions so indicate.

Petitioner ascribes the Court's pre-trial and trial rulings to bias implicating the court's refusal to provide petitioner substantive and procedural due process. Petitioner references at a minimum decisions to not permit discovery, to not admit corroborated arbitration evidence, to not permit the petitioner to lay a foundation for computer forensic evidence, to permit structural flaws in the respondent's claims, to permit the soiling of deliberation by allowing respondent counsel to make

more than 15 unsubstantiated and highly prejudicial arguments to the jury, to allow knowingly inaccurate jury instructions and to errors permitted in the trial court transcript. Respondent solicited Court and jury bias more than 20 times in this case alone and without admonition by the Court. App.213a-253a.

REASONS TO GRANT CERTIORARI

Certiorari is warranted to restrain the U.S. District Court of Oregon and the 9th Circuit Court of Appeals from ignoring the Federal Arbitration Act, Oregon's Uniform Arbitration Act and Oregon's body of law, to which the contract is subject. The courts limited jurisdiction was to determine (1) whether there was a contract and (2) whether the claims are contemplated under the contract. The arbitrator opinion was in evidence showing that Zweizig had prevailed on post-employment retaliation claims in the past. Respondent further referenced the contract in his complaint to argue his claim was an employment claim. Waiver is for the arbitrator under Oregon law. This is a direct attack on arbitration.

Certiorari is also warranted because Petitioner has a right of free speech that the courts in Oregon want to punish by endorsing meritless litigation. Speaking to power is a right we have as Americans. The Respondent's refusing anonymity and his position that he need not have been named in the blog for the petitioner's public critiques to actionable by necessity means that the "but-for" causation standard on retaliation cannot be met. The respondent's structural flaw of his complaint created a fictional retaliator that in a hybrid type of claim must not be favored over free speech. The court should have ruled on both issues before allowing the claim to go to

a jury. Because that happened to an untrained *pro se* litigant, the solicitations by the respondent implicate court bias, which sadly was confirmed by the creative content of the 9th Circuit opinion issued by Judge Paez.

Finally, Certiorari should be granted because the totality of the record shows that respondent successfully solicited specific quid pro quo due process abuses of the Court and jury, without being sanctioned or warned. The Court put up many road blocks to the petitioner's defense from which the petitioner could not recover, again at the request of the plaintiff. The record is peppered with rulings that endorse the abuses of plaintiff counsel, not the least of which is the court's ruling to disregard the employment agreement in its totality, including severable terms that do not permit the award of fees and costs. Respondent must accept responsibility for engaging the court to act with bias.

I. The 9th Circuit and District Court Ruling Vitiates the FAA and OUAA

While it is hard to imagine that the district court did not know the litigation history between the parties revealing that the questions of arbitration on post-employment retaliation claims and non-signatory opportunity to compel were well settled favoring arbitration, certainly the court was not ignorant that Oregon Law governs these questions and that these questions are reserved for the arbitrator. It is impossible for the petitioner to fathom that this was an innocent mistake and certainly the 9th Circuit reviewed this issue de novo, fully briefed, and now signals their intent to not abide by the Federal Arbitration Act (FAA), the Oregon Uniform

Arbitration Act (OUAA) and Oregon Law on these topics. The arbitrator's and Magistrate Papak's opinions were in the record.

The employment agreement (App.203a) between Zweizig and NDT provides that Oregon Law governs and reads as follows:

> Section 6.5 of the employment agreement provides that "The Laws of the State of Oregon shall govern all questions relative to interpretation and construction of this Agreement and its enforcement regardless of the jurisdiction or venue of any proceeding brought hereunder."

Under Oregon law the court is to determine (1) if a contract exists and (2) if the claims are claims subject to the contract. Oregon, like the federal courts, recognizes a presumption in favor of arbitrability. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) (courts should resolve any doubts in favor of arbitration and should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); *Snow Mountain Pine, Ltd. v. Tecton Laminates Corp.*, 126 Or.App. 523, 869 P.2d 369, rev. den., 319 Or. 36, 876 P.2d 782 (1994) (same); see also *Black v. Arizala*, 182 Or.App. 16, 48 P.3d 843 (2002), aff'd, 337 Or. 250, 95 P.3d 1109 (2004).

The question of whether post-employment retaliation claims are subject to arbitration was decided by the New Jersey State Court in 2006. The party's litigation history also settles this question. The 2011 Opinion of the arbitrator clearly shows an award for post-employment retaliation claims in favor of Zweizig. App.167a. That award was confirmed by Magistrate

Papak. The district court confirmed the New Jersey Court compelled Zweizig to arbitration, wherein Rote was a non-signatory. App.180a. One year later Petitioner was dismissed from the arbitration action.

The Court in *Livingston* also rejected the thought that an arbitration agreement does not apply to claims arising after termination of employment. *Livingston v. Metropolitan Pediatrics*, 227 P.3d at 804, "In light of the strong policy favoring the enforceability of arbitration clauses, we conclude that the text of the clause plausibly encompasses controversies or disputes that are pursued after the termination of employment..."

Petitioner's appeal argument was not an invitation for the court to re-litigate this settled issue or to usurp those decisions reserved for the arbitrator, but rather to show that Oregon law permits non-signatory to compel arbitration.

Under Oregon Law, a non-signatory to an employment contract has a right to compel arbitration. See *Livingston v. Metropolitan Pediatrics*, 227 P.3d at 802-03 (Or. Ct. Appeals, March 2010). Again quoting the court that... "Generally, a third party's right to enforce a contractual promise in its favor depends on the intentions of the parties to the contract. *Sisters of St. Joseph v. Russell*, 318 Or. 370, 374, 867 P.2d 1377 (1994). Courts have relied on a number of rationales for permitting nonsignatory defendants to invoke arbitration clauses in claims against them by signatories to a contract. Once again, the terms of the arbitration clause are at the center of the inquiry,

because it is the text of the arbitration clause that will determine whether the parties to the agreement intended that third parties could enforce its provisions." Again this issue was decided by the New Jersey State Court, issue preclusion was raised in the petitioner's Answer and Affirmative Defenses, again in his Motion to Dismiss and Compel, Summary Judgment and in the post-trial Motions.

This Court has also opined that "a litigant who was not a party to the arbitration agreement may invoke §3 if the relevant state contract law allows him to enforce the agreement. Neither FAA §2—the substantive mandate making written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract"—nor §3 purports to alter state contract law regarding the scope of agreements. Accordingly, whenever the relevant state law would make a contract to arbitrate a particular dispute enforceable by a non-signatory, that signatory is entitled to request and obtain a stay under §3 because that dispute is "referable to arbitration under an agreement in writing." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

This Court's review is necessary to once again reaffirm that under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." See *Henry Schein*, 139 S. Ct. at 529.

II. The Federal Court Does Not Decide Waiver or Estoppel

Again, the decision by the 9th Circuit and district court usurp the authority of the arbitrator and vitiates the mandates of the OUAA and FAA. This is an incredibly important issue, as the 9th must be constrained from extending its authority beyond the limits of Title III jurisdiction.

Under Oregon law, the arbitrator decides conditions precedent including notice, time limits, estoppel and waiver. See ORS 36.620 (3), *Livingston v. Metropolitan Pediatrics*, 227 P.3d at 802-03. Quoting the Livingston Court, "...However, in Oregon, waiver likewise has been treated as a condition precedent to arbitrability. In *Industra/Matrix Joint Venture v. Pope & Talbot*, 200 Or.App. 248, 260-61, 113 P.3d 961 (2005), aff'd, 341 Or. 321, 142 P.3d 1044 (2006), we held that the defendant's waiver defense to arbitrability was a precondition to arbitrability that the arbitrator should decide. Although that case was decided under the FAA and not the UAA, our reasoning there — that a waiver of arbitrability, like estoppel, presents a condition precedent to arbitrability that grows out of the dispute and bears on its final disposition, 200 Or.App. at 261, 113 P.3d 961 (citing *Howsam v. Dean WitterReynolds, Inc.*, 537 U.S. 79, 83-85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)) — is persuasive. Plaintiff's waiver argument, like estoppel, is a procedural rather than a substantive defense to arbitrability that grows out of the controversy itself, see RUAA § 6 comment 2, and we conclude for that reason that, under ORS 36.620(3), the issue of waiver of arbitrability involves a condition precedent to be decided by the arbitrator, rather than the court."

Petitioner is perplexed not only by the Court's decision here, but also on the endorsement of the represented arguments made by respondent counsel (Sandra Ware, Joel Christiansen and Shenoa Payne) knowing that these arguments are deceptive. Intentionally deceiving the court is a professional ethics violation in Oregon.

The precedent of the 9th Circuit also strongly supports arbitration on questions of waiver. Most cases on this point of waiver rule in favor of arbitration even when a Motion to Dismiss and Compel are filed two or more years after the litigant first answered a complaint. The 9th Circuit acknowledges that "waiver of a contractual right to arbitration is not favored," and therefore, "any party arguing waiver of arbitration bears a heavy burden of proof." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Specifically, "[a] party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.* Respondent cannot prove prejudice.

Plaintiff argued and the court agreed that the element of time was the key issue on prejudice; however, the 9th Circuit has found that argument to be unavailing when the plaintiff also knew of the obligation to arbitrate. In *Richards V. Ernst & Young, LLP*, 744 F.3d 1072, 1074 (9th Cir. 2013) a case involving a former employee Richards and former employer Ernst and Young (E&Y), the parties litigated for several years and even engaged in some discovery before the E&Y filed

its Motion to Compel Arbitration. That court found that Richards was not prejudiced because she knew her claims were subject to arbitration. The court noted in *Fisher*, "we rejected the notion that "self-inflicted" expenses could be evidence of prejudice."791 F.2d at 698.

Recognizing that both Oregon and Federal Law do not favor waiver, petitioner is again perplexed as to why responding to an anti-SLAPP Motion to Strike his claims is sufficient in any respect to constitute waiver. Petitioner had already filed his Motion to Dismiss and was ordered to not even amend that filing before the anti-SLAPP was decided. In Oregon, anti-SLAPP Motions are required to be heard within 30 days of filing. See ORS 31.152.

There is no body of law that supports the court's decision that responding to an anti-SLAPP constitutes waiver. There is a great deal of effort by the 9th Circuit to erode the application of the FAA and similar state statutes. Using an anti-SLAPP Response as support to not compel represents dangerous precedent and a strategy that plaintiff counsel will no doubt deploy ad nauseum, increasing the burden on the Courts and creating opportunities for noncomplying circuits to play a game of chance with a writ.

III. The Ninth Circuit Again Refuses to Endorse the "But-For" Causation Standard

The 9th Circuit Model Jury Instructions properly frame the "but-for" standard on employment related retaliation claims. The district court did not follow

those instructions, Oregon law or Federal Law on the causation standard for employment retaliation claims.

Oregon law follows the "but-for" standard outlined in this Court's rent case as espoused in the *University of Texas v Nassar Sw. Med. Ctr.*, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013)

In *Siring v. Oregon State Board of Higher Education*, 977 F. Supp. 2d 1058 (D. Or. 2013) the District Court of Oregon specifically affirmed the "but-for" standard for ORS 659A.030 retaliation claims, affirming by reference to the *University of Texas, Id.*. Respondent's retaliation and aiding and abetting claims form under ORS 659A.030.

On information and belief, the Judicial Council will continue to ignore Supreme Ct. decisions like the *University of Texas* unless constrained and will continue to encourage compliance of the district courts within its circuit until those judicial actors are reversed repeatedly in kind.

Respondent's admission that he took issue with the totality of the blog, endorsed by his refusal to accept offers of redaction and anonymity, show that respondent cannot prevail on the "but-for" causation standard on why the blog was published. Moreover, petitioner's long standing blogging activity invalidates the thought that petitioner all of sudden decided to target respondent, notwithstanding the fact that transparency of litigation is also favored by the courts.

The blog was not published to retaliate against respondent, as the 1% content referencing his conduct shows. Dishonest litigants are a dime a dozen. The blog

holds the arbitrator, the attorneys involved on both sides of the isle and magistrate Papak responsible for refusing to follow the law on vacatur.

There is no body of law that the petitioner can find that challenges a First Amendment right to critique a court, arbitrator or attorney against a back drop of an admission by plaintiff (on refusal to mitigate) that he rejected anonymity and need not be named. That makes the question of whether he's named academic. There is no body of precedent that addresses the application of the "but-for" causation standard for retaliation with such a ridiculous set of facts. Petitioner presumes that this abuse is somehow related to the fact that petitioner is *pro se*.

Even a hybrid case gives more weight to favor free speech. In *Masterpiece Cakeshop*, 138 S. Ct. 1736 (Thomas, J., concurring in part and concurring in the judgment) Justice Thomas noted that "States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " (quoting Johnson, 491 U.S. at 414)). The respondent's state law claim given these facts implicates the 14th Amendment of the United State Constitution.

In fact respondent asked the jury to punish petitioner, even though respondent was not seeking punitive damages, as an interim opportunity to punish San Francisco, such as Facebook and other free public forums of free speech. The inferences that can be drawn from respondent's attorneys is that they want to be

free to engage in dishonest compromises to due process without it being published and in the event it is published to treat it as retaliation under ORS 659A.030 (1) (f). In this particular case it is the 1% anonymous tail wagging the 99% dog. Even the fear of having to defend such a lawsuit erodes Free Speech.

Respondent further asked that he be compensated to make his litigation exposure worth it, a cost of litigation that is not actionable. It is hard to explain the unsanctioned abuses opposing counsel took in closing argument in the absence of either confirmation or assumption that the court would not intervene.

IV. The Structural Flaw of the Complaint Is Both an Unconstitutional Attack on Free Speech and Taking of Petitioner's Property

Respondent's complaint for retaliation forms as reverse retaliation by former employer NDT. Respondent argues the petitioner acting as agent of deceased corporate employer NDT engaged in retaliation. But NDT did not write the blog. Petitioner did. Petitioner was not an employee of dissolved NDT at the time the blog posts disagreeable to the respondent were published. Petitioner could not in fact act as agent for a dissolved corporation except in a very narrow, uncompensated and limited capacity. Any action by agent outside that limited definition of duties does not enjoy corporate liability protection and would have been deemed the personal action of the agent.

Oregon law has wrestled with this role of retaliator for some time. Plaintiff counsel has with some degree of consistency tried reverse retaliation tactics which have been repeated rebuffed. Just recently the Petitioner's interpretation of ORS 659A.030 (1) (g) was upheld when the Oregon Supreme Court issued its Opinion in

McLaughlin v. Wilson, 365 Or 535 (2019). The Supreme Court opined that "employer or employee" of ORS 659A.030 (1) (g) was by legislative design intentionally different than "person" under ORS 659A.030 (1) (f). The qualifying clause is absent from paragraph (f) and "use of a term in one section and not in another section of the same statute indicates a purposeful omission * * *." PGE, 317 Or at 611. *McLaughlin* makes it clear now that this convoluted reverse discrimination action is a theoretical and unsupported construction of the statute.

McLaughlin was decided after the Judgment in this case. Petitioner was not sued under ORS 659A.030 (1) f) but rather (1) (g). *McLaughlin* also established that a person in (1) (g) must be an employee or employer and arguably little guidance to broaden those terms to be former employee or former employer.

When a discrimination claim against the employer fails, then the aiding and abetting claim must be simultaneously defeated. See *Grosz v. Farmers Ins. Exchange*, 2010 WL 5812667, *9 (D Or 2010); *Young v. Yellow Book Sales and Distrib. Co., Inc.*, 2008 WL 2889398, *6 (D. Or. July 21, 2008) (not reported). This body of law further supports the necessity of an employee and employer relationship between NDT and Rote at the time of retaliation.

The court found that only NDT was the employer of Zweizig and the only party that could have retaliated under ORS 659A.030 (1) (f). NDT could not retaliate.

Respondent's fabrication of an employer to attack petitioner was if allowed to stand an erosion of Free Speech and an Unconstitutional taking of property, implicating a violation of the 14th Amendment.

V. The Evidence of Due Process Violations Supports Vacating the Judgment

A. The Jones and Kugler Documents

Opposing attorneys have submitted the Jones and Kugler documents more than ten times in five Federal and State cases adjudicated in three states, even in cases where Zweizig was not a party. In two of those cases, the Oregon State Bar Professional Liability Fund, through counsel hired to represent Joel Christiansen, also filed the Jones and Kugler documents, each time requesting abuses of due process that ultimately had the effect of denying petitioner a fair trial or a remedy.

In this case the petitioner was denied a right to arbitration, discovery, the benefit of legal precedent, the opportunity to put on evidence, the opportunity to even lay a foundation for evidence, key witnesses and even denied an accurate record. Respondent counsel believes that the filing of the Jones and Kugler documents had a material impact on the introduction of evidence, the forming of the jury instructions and the abuses of closing argument.

B. Suppression of Computer Forensic Reports

Federal Rule 804 (b) (1) would not preclude the forensic reports from coming in. Those reports were referenced and linked in the blog as support for the body of evidence the arbitrator ignored. The arbitration testimony of those forensic experts was also in the blog.

Respondent moved the court to suppress this body of evidence in order to not re-litigate the arbitration, which is precisely what the respondent was doing anyway.

The body of evidence is also in the public domain as exhibits in the confirmation litigation adjudicated by Magistrate Papak. The evidence is therefore self-authenticating under Rule 902.

It was not until the forensic reports were suppressed and the court signaled it would not allow the reports in that the respondent increased his damage claim from $150,000 to $2,000,000. In Multnomah County juries find in favor of the employee more than 85% of the time. Opposing counsel argued that the average noneconomic damage award on employment claims in Portland is $2 Million. App.247a. In fact the average award is approximately $75,000.

C. The Transcript

Petitioner has also argued that the trial transcript was materially inaccurate and offers further support of this allegation by the court clerk and court reporters destruction of their respective trial digital recordings, both while under subpoena and litigation holds. This allegation of trial recording destruction is in the record and un-refuted. The court's decision to quash the subpoena of the court and court reporter's recordings is an indication of the spoliation of critical evidence that could have been used in this appeal.

D. Respondent's Closing Argument

Petitioner leaves this Court with a portion of the closing arguments of respondent's attorney Joel Christiansen (with referenced Excerpt), who engaged in unfettered misconduct by falsely claiming that the (1) arbitrator made definitive rulings refuting the accuracy of the forensic reports (ER 1584, 9-18); (2) district court looked at the arbitration on its merits and confirmed the award (ER 1584, p19); (3) defendant makes $4 million dollars a year in net income and should be punished (pending transcript challenge); (4) plaintiff had no duty to mitigate, contrary to the instructions (ER 1822); (5) punishing Rote will force San Francisco to pay attention (ER 1812, p9); (6) critiques of attorneys is an act against Zweizig (ER 1811, p10); (7) 96 chapters were written about Zweizig (ER 1806, p10); (8) defendant is ready and willing to make 17,500 calls a day about Zweizig (ER 1806, p7); (9) defendant does not need to work, wealthy (ER 1806, p14); (10) defendant spent $350,000 to defend Zweizig's claims just to make everyone suffer (ER 1806, p17); (11) attorneys remained unpaid in a fraudulent transfer prior lawsuit brought by Zweizig and this is actionable retaliation (ER 1806, p19); ...; (14) plaintiff's public presence showing pronounced litigation by him was Rote's fault and constituted something the jury should punish (ER 1813, p1); ...and (17) NDT currently makes $100,000 a week. (ER 1583). App.246a.

In *USA v. Sanchez*, No. 10-50192 USCA (9th Circuit, 2011), Defendant asked for a new trial because the prosecutor asked the jury to "send a memo" to other drug dealers and convict. Sanchez counsel did not object. Defendant offers this case and similar facts as to an egregious error standard.

Petitioner filed a Motion to Set Aside the Judgment on multiple grounds, those raised here including mandatory arbitration, First and Fourteenth Amendment argument2. App.213a-253a. The Motion was denied by the District Court. App.11a-30a.

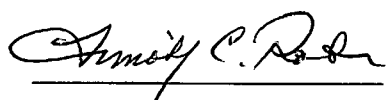
Because petitioner was not permitted discovery prior to trial, respondent's testimony refusing to acknowledge material content of the blog, that he need not have been named in the blog, that the trial exposure was a basis for his most of his damages and more could not otherwise be determined any sooner. Petitioner could not recover from being denied discovery.

In December 2018, a year before his death, the arbitrator executed a declaration admitting his failures in the arbitration and naming those who attempted to influence him.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,



Timothy C. Rote
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September 17, 2020