APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2021

(Argued: April 1, 2022 Decided: August 5, 2022)

Docket Nos. 20-4202 (Lead), 21-56 (Con)

TREVOR MURRAY,

Plaintiff-Appellee-Cross-Appellant,

v.

UBS SECURITIES, LLC, UBS AG,

Defendants-Appellants-Cross-Appellees.

Before:

PARK, MENASHI, and PÉREZ, *Circuit Judges*.

Plaintiff Trevor Murray claims that UBS Securities, LLC and UBS AG (together, "UBS") fired him in retaliation for reporting alleged fraud on shareholders to his supervisor. Murray sued UBS under the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, and he ultimately prevailed at trial. The district court (Failla, *J.*), however, did not instruct the jury that a SOX antiretaliation claim requires a showing of the employer's retaliatory intent. Section 1514A prohibits publicly traded companies from taking adverse employment actions to "discriminate against an employee … because of" any lawful whistleblowing

act. 18 U.S.C. § 1514A(a). We hold that this provision requires a whistleblower-employee like Murray to prove by a preponderance of the evidence that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent—i.e., an intent to "discriminate against an employee … because of" lawful whistleblowing activity. The district court's legal error was not harmless. We thus vacate the jury's verdict and remand to the district court for a new trial.

THOMAS G. HUNGAR (Christopher Smith, Anna Casey, Gibson, Dunn & Crutcher LLP, Washington, D.C.; Gabrielle Levin, Gibson, Dunn & Crutcher LLP, New York, NY, *on the brief*), Gibson, Dunn & Crutcher LLP, Washington, D.C., *for Defendants-Appellants-Cross-Appellees.*

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PARK, *Circuit Judge*:

I. BACKGROUND

A. Factual Background

In 2011, UBS hired Murray as a strategist in its commercial mortgage-backed securities ("CMBS")

business. Murray was "responsible for performing research and creating reports that were distributed to [UBS's] current and potential clients about CMBS products, services and transactions." Am. Compl. ¶ 2. As a CMBS strategist, Murray was required by Securities and Exchange Commission ("SEC") regulations to certify that his reports were produced independently and that they accurately reflected his own views.[1]

According to Murray, two leaders of UBS's trading desk—Ken Cohen, the head of the CMBS trading desk, and Dave McNamara, the head CMBS trader—improperly pressured him to skew his research and to publish reports to support their business strategies. For example, Murray testified that in September 2011, Cohen told him "if we're going to accomplish what we want to accomplish as a business, it's important that we maintain consistency of message between originations, trading desk, and research," and that "it would be best if you clear your research articles with the [trading] desk going forward," and McNamara agreed. App'x at 254. This made Murray "very concerned" because he "was faced with the dilemma of how to maintain a relationship

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[1] Specifically, Murray was required to "include in [his] research report[s] a clear and prominent certification . . . containing . . . [a] statement attesting that all of the views expressed in the research report accurately reflect the research analyst's personal views about any and all of the subject securities or issuers; and . . . [a] statement attesting that no part of the research analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report." 17 C.F.R. § 242.501(a).

with [his] client while maintaining integrity as a researcher." *Id.* at 255.

Murray reported this conduct to his direct supervisor, Michael Schumacher, in December 2011 and again in January 2012. In December, Murray met privately with Schumacher and told him:

> [M]y relationship with my client had become untenable, that [Cohen and McNamara] had told me to preclear my articles, which I had been doing; that they wanted me … to be nothing more than a shill for the market. The only feedback I had gotten [about the articles] for the most part was just negative. … [I] [t]old [Schumacher] about the reaction I got from both [Cohen] and [McNamara] about [one of my research] article[s] and that I was like I don't know how [Cohen] got away with this.… But this type of relationship was completely foreign to me; and that it wasn't just unethical, it was illegal, and I wanted it to stop.

Id. at 283. According to Murray, Schumacher responded: "I sympathize with your situation. It is a tough position to be in when you have a dour view of the market that is in conflict [with] … your internal client but it is very important that you do not alienate your internal client." *Id.*

The following month, Murray met with Schumacher to go over his performance review. Afterwards, Murray "told [Schumacher] once again that the situation with [his] client," referring to the UBS trading desk, "was bad and getting worse." *Id.* at 294. Murray explained that he had been left out of

meetings that "would normally be a normal part of [his] job function" and outlined Cohen and McNamara's "constant efforts to skew [his] research dating back to the beginning." *Id.* at 294–95. Schumacher responded that "these were the confines under which [you] should expect [your] job to be, … [you're] going to have to operate, and … just … write what the business line wanted." *Id.* at 295.

Shortly after this, Schumacher emailed his supervisor, Larry Hatheway, recommending that UBS "remove [Murray] from our head count." *Id.* at 539, 1,544. Alternatively, he suggested that "[i]f Ken Cohen and the CMBS team want to keep a presence in analysis, they can move [Murray] onto the desk" as a desk analyst, unregulated by the SEC. *Id.* at 539–40, 1,544. Schumacher continued that "[o]therwise, we will make the tough call," which Schumacher later explained meant that "[Murray] would be a candidate for termination." *Id.* at 540, 1,544. The CMBS trading desk declined to take Murray on as a desk analyst, and UBS terminated him in February 2012.

Murray contends that his termination was retaliation for whistleblowing. UBS asserts that it terminated Murray due to a shift in strategy prompted by financial difficulties. Indeed, UBS had implemented a series of reductions in force, including one in February 2012 which resulted in the elimination of Murray's position.

B. Procedural History

Murray sued UBS in 2014.[2] He alleged that he was terminated by UBS in response to his complaints about fraud on shareholders in violation of the Sarbanes-Oxley Act's antiretaliation provision, 18 U.S.C. § 1514A.[3] The case went to trial before a jury. UBS moved for judgment as a matter of law, which the district court denied. The district court then instructed the jury on the elements of a section 1514A claim:

> First, that plaintiff engaged in activity protected by Sarbanes-Oxley;
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> Second, that UBS knew that plaintiff engaged in the protected activity;
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> Third, that plaintiff suffered an adverse employment action – here, the termination of his employment at UBS; and
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> Fourth, that plaintiff's protected activity was a contributing factor in the termination of his employment.
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> * * *
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> For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment. Plaintiff is not

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[2] Murray first sued UBS in 2012 for violating the Dodd-Frank Act's antiretaliation provision, 15 U.S.C. § 78u-6(h), but the district court granted UBS's motion to compel arbitration.

[3] Murray also sued for violation of 12 U.S.C. § 5567(b), but that cause of action is not at issue in this appeal.

> required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reasons for his termination … was a pretext, in order to satisfy this element.

App'x at 1,389–90, 1,393. UBS objected to these jury instructions, arguing that they lacked a key element of a section 1514A claim: proof of UBS's retaliatory intent in taking the adverse employment action. The district court overruled UBS's objection and the case went to the jury, which found UBS liable. The jury also returned an advisory damages verdict, determining that Murray should be awarded $653,300 in back pay, no front pay, and $250,000 in non-economic damages.

In post-trial briefing, UBS renewed its motion for judgment as a matter of law or, in the alternative, for a new trial, and moved to limit Murray's back-pay award. The district court denied UBS's motions. The district court reasoned that "there is evidence to support the jury's finding as to each of the elements of the Section 1514A offense, principally derived from Mr. Murray's testimony." Sp. App'x at 10. In reaching this conclusion, the district court again did not view retaliatory intent as an element of a section 1514A claim. The district court also adopted the jury's advisory verdict on damages.

Murray then moved for statutory attorney's fees and costs. The district court entered judgment, awarding Murray $1,769,387.52 in attorney's fees and costs, as well as $653,300 in back pay, no front pay, and $250,000 in non-economic damages—identical to the jury's advisory verdict on damages.

UBS appealed the district court's denial of its motion for judgment as a matter of law or, in the alternative, a new trial, while Murray cross-appealed the damages and attorney's fees awards.

II. DISCUSSION

This appeal presents the question whether the Sarbanes-Oxley Act's antiretaliation provision requires a whistleblower-employee to prove retaliatory intent. We review this legal question *de novo*. *See United States v. Williams*, 733 F.3d 448, 452 (2d Cir. 2013).

UBS argues that the district court erred by failing to instruct the jury that Murray had to prove UBS's retaliatory intent to prevail on his section 1514A claim. Murray responds that there was no such error because retaliatory intent is not an element of a section 1514A claim. We conclude based on the plain meaning of the statutory language and our interpretation of a nearly identical statute that retaliatory intent is an element of a section 1514A claim. The district court committed a non-harmless error by failing to instruct the jury accordingly. We thus vacate the judgment and remand for a new trial on liability and do not reach the cross-appeal.

A. The Plain Meaning of the Sarbanes-Oxley Act's Antiretaliation Provision

First, the plain meaning of the statutory language makes clear that retaliatory intent is an element of a section 1514A claim. To interpret statutory language, "we begin with the statute's text because 'we assume that the ordinary meaning of the statutory language accurately expresses the

legislative purpose.'" *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 147 (2d Cir. 2016) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013)). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (citation omitted). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent … the inquiry ceases." *Friends of the E. Hampton Airport*, 841 F.3d at 147–48 (citation omitted).

The unambiguous, ordinary meaning of section 1514A's statutory language requires retaliatory intent. Section 1514A directs that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner *discriminate* against an employee … *because of*" whistleblowing. 18 U.S.C. § 1514A(a) (emphasis added). To "discriminate" means "[t]o act on the basis of prejudice," which requires a conscious decision to act based on a protected characteristic or action. *Discriminate*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994); *see Discriminate*, THE NEW OXFORD AMERICAN DICTIONARY (2001) (to "make an unjust or prejudicial distinction in the treatment of different categories of people"). And "because of" means "by reason of" or "on account of," connoting a causal relationship between the parts of the sentence the phrase connects. *See Because of*, THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000); *Because of*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

The statute thus prohibits discriminatory actions caused by—or "because of"—whistleblowing, and actions are "discriminat[ory]" when they are based on the employer's conscious disfavor of an employee for whistleblowing. *Cf. Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (explaining that, in the Title VII context, "an action is 'because of' a plaintiff's [protected characteristic] where it was a 'substantial' or 'motivating' factor contributing to the employer's decision to take the action"). A discriminatory action "because of" whistleblowing therefore necessarily requires retaliatory intent—*i.e.*, that the employer's adverse action was motivated by the employee's whistleblowing. The plain meaning of section 1514A's statutory language thus compels our conclusion that retaliatory intent is required to sustain a SOX antiretaliation claim.

We have previously articulated the elements of a SOX antiretaliation claim in *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443 (2d Cir. 2013). There, we explained that "an employee must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Id.* at 447 (citation omitted). The district court instructed the jury that "[f]or a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment." App'x at 1,393. But this explanation of the contributing factor element fails to account for the statute's explicit

requirement that the employer's conduct be "discriminat[ory]."[4] We therefore hold that to prevail on the "contributing factor" element of a SOX antiretaliation claim, a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent—*i.e.*, an intent to "discriminate against an employee … because of" lawful whistleblowing activity.

B. Consistency with Our Interpretation of a Nearly Identical Provision in the Federal Railroad Safety Act

This reading of the SOX antiretaliation provision is consistent with our interpretation of nearly identical language in the Federal Railroad Safety Act, 49 U.S.C. § 20109(a) ("FRSA"). *See Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74 (2d Cir. 2020).[5] We generally interpret identical language in different statutes to have the same meaning. *See,*

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[4] The inadequacy of the "contributing factor" standard utilized by the district court is illuminated by the fact that "tended to affect in any way UBS's decision to terminate plaintiff's employment" could include a scenario in which Murray's whistleblowing resulted in termination, but also a scenario in which, by virtue of his whistleblowing activity, Murray was *insulated* from a termination to which he would otherwise have been subjected sooner. In addition, "tended to affect" increases the level of abstraction such that a jury might look beyond whether the whistleblowing activity *actually* caused the termination to whether it was *the sort of behavior* that would *tend to affect* a termination decision.

[5] We note that the district court did not have the benefit of our decision in *Tompkins* during the pendency of Murray's trial; *Tompkins* was decided one day after the district court entered final judgment in this case.

e.g., Northcross v. Bd. of Educ., 412 U.S. 427, 428 (1973) ("The similarity of language in § 718 and § 204(b) is, of course, a strong indication that the two statutes should be interpreted pari passu."); *Wasser v. N.Y. State Off. of Vocational & Educ. Servs. for Individuals with Disabilities*, 602 F.3d 476, 479 (2d Cir. 2010) ("Given the similarity between, and in fact the nearly identical wording of, 29 U.S.C. § 722(c)(5)(J)(ii) and 20 U.S.C. § 1415(i)(2)(C), we see no basis for interpreting the standard of review required by these provisions differently.").

The relevant statutory language of the SOX and the FRSA is nearly identical. *Compare* 18 U.S.C. § 1514A(a) (No covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee … to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [federal law]."), *with* 49 U.S.C. § 20109(a) (A covered railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done … to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any [federal law]."). Accordingly, our

articulations of the elements of these claims must likewise be consistent.[6]

In *Tompkins*, we interpreted the whistleblower antiretaliation provision of the FRSA and held that "some evidence of retaliatory intent is a necessary component of an FRSA claim." 983 F.3d at 82; *see also Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) ("The [FRSA] prohibits intentional discrimination in response to an employee's performance of a protected activity. That is to say, an employer violates the statute only if the adverse employment action is, at some level, *motivated* by discriminatory animus." (citation omitted) (emphasis in original)). We pointed to the language specifically referencing discrimination— *i.e.*, "that a rail carrier may not discharge 'or in any other way *discriminate* against' an employee for engaging in protected activity"—as requiring evidence of retaliatory intent for an FRSA claim. *Tompkins*, 983 F.3d at 82 (citations omitted) (emphasis in original). We also explained that "the essence of such a tort is

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[6] *Compare Bechtel*, 710 F.3d at 447 (To prevail on a SOX antiretaliation claim, "an employee must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." (citation omitted)), *with Tompkins*, 983 F.3d at 80 (To prevail on an FRSA antiretaliation claim, "a plaintiff must show by a preponderance of the evidence that (1) the plaintiff engaged in protected activity; (2) the employer knew that the plaintiff engaged in the protected activity; (3) the plaintiff suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." (cleaned up)).

discriminatory animus, which in turn requires the employee to prove that she was the victim of intentional retaliation prompted by her protected activity." *Id.* (cleaned up).

The unambiguous, ordinary meaning of section 1514A's statutory language, along with our identical interpretation of the FRSA antiretaliation provision, thus compel the conclusion that a SOX antiretaliation claim requires a showing that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent.[7] As in *Tompkins*, the whistleblower-employee need not show that retaliatory intent "was the sole factor affecting the discipline or that the employer

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[7] We recognize that our conclusion departs from the approach of the Fifth and Ninth Circuits as to the elements of a section 1514A claim. *See Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (holding that retaliatory intent is not an element of a section 1514A claim); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same). In our view, those courts overlooked the plain meaning of the text. Moreover, we note that the Second, Seventh, and Eighth Circuits have interpreted the same language in the FRSA to require a showing of retaliatory intent. *See Tompkins*, 983 F.3d at 82; *Armstrong*, 880 F.3d at 382; *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). *But see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1196 (9th Cir. 2019) (holding that an FRSA antiretaliation claim does not require proof of retaliatory intent); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (same). We also note that three circuits have declined to decide the issue of whether retaliatory intent is an element of a section 1514A claim. *See Wiest v. Tyco Electronics Corp.*, 812 F.3d 319, 330 (3d Cir. 2016); *Feldman v. Law Enforcement Assoc's Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013).

acted only with retaliatory motive." 983 F.3d at 82. There must, however, be "more than a temporal connection between the protected conduct and the adverse employment action." *Id.* (internal quotation marks omitted); *see also Armstrong*, 880 F.3d at 382 ("[W]hile a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was *a* motivating factor.") (emphasis in original)).[8]

C. The Jury Instruction Error Was Not Harmless

We must next determine the appropriate remedy for the district court's jury-instruction error. "We review a claim of error in jury instructions *de novo*, reversing only where appellant can show that, viewing the charge as a whole, there was a prejudicial error." *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016) (cleaned up). "An erroneous instruction requires a new trial unless the error is harmless and an error is harmless only if the court is convinced that the error did not influence the jury's verdict." *Id.* (cleaned up).

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[8] This framework is consistent with the goal of section 1514A to "combat what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior . . . [by] protect[ing] employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent." *Bechtel*, 710 F.3d at 446 (cleaned up); *see also Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008) (Section 1514A "protects 'employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent.'") (quoting S. Rep. No. 107–146, at 19)).

Because we need to be convinced that the error did not influence the jury's verdict, the district court's failure to instruct the jury on Murray's burden to prove UBS's retaliatory intent in terminating him was not harmless. Indeed, the district court itself remarked that this was "one of the closest [cases] [it] has ever observed." Sp. App'x at 55. UBS offered evidence at trial of non-retaliatory reasons for its decision to terminate Murray. For example, UBS witnesses testified that the company was experiencing significant financial difficulties, resulting in company-wide layoffs when Murray reported the alleged misconduct and was ultimately terminated. In response to a question about why UBS imposed layoffs, a UBS witness testified: "[In] 2011 our financial performance or the performance of the firm was not good. We lost billions of dollars that year and, therefore, we had to layoff people." App'x at 573; *see id.* at 575 (citing "a two billion dollar trading loss" as a cause of "more financial hardship to [UBS]"). Cohen, the head of the CMBS trading desk, also testified that Murray's position as a CMBS strategist was "not necessary" to generate revenue, but instead was "nice to have." *Id.* at 867. This evidence supports UBS's position that it terminated Murray without retaliatory intent—specifically, that it did so for the non-retaliatory reason of saving money during a time of financial difficulty. To be sure, there was circumstantial evidence at trial that UBS terminated Murray in retaliation for whistleblowing. *See, e.g.*, App'x at 649 (testimony explaining close temporal proximity between Murray's whistleblowing and termination); *id.* at 447

(testimony of Schumacher stating that he gave Murray a "good" performance evaluation in December 2011, prior to Murray's purported whistleblowing). But we do not know whose reasons—UBS's or Murray's—the jury credited, as the jury instructions did not require the jury to find retaliatory intent. And although the jury did not find that UBS "prove[d] by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [Murray's] protected behavior," *Bechtel*, 710 F.3d at 447 (citation omitted), this does not mean that Murray proved by a preponderance of the evidence that UBS acted with retaliatory intent in terminating Murray. In other words, even though the jury found that Murray's whistleblowing was a contributing factor to his termination, we cannot know whether it would have found that UBS acted with retaliatory intent. We are thus unconvinced that the erroneous jury instruction did not influence the verdict, and we accordingly remand to the district court for a new trial.

III. CONCLUSION

Retaliatory intent is an element of a section 1514A claim. This conclusion flows from the plain meaning of the statutory language and is supported by our interpretation of nearly identical language in the FRSA. The district court erred by failing to instruct the jury on Murray's burden to prove UBS's retaliatory intent in terminating him. The jury instructions were incorrect as a matter of law, and the error was not harmless. We thus vacate the jury's verdict and remand to the district court for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of September, two thousand twenty-two.

Trevor Murray, Plaintiff-Appellee-Cross-Appellant, v. UBS Securities, LLC, UBS AG, Defendants-Appellants-Cross-Appellees.	**ORDER** Docket Nos: 20-4202 (L) 21-56 (XAP)

Appellee-Cross-Appellant, Trevor Murray, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL] /s/ *Catherine O'Hagan Wolf*

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREVOR MURRAY, Plaintiff, v. UBS SECURITIES, LLC, et al., Defendants.	14 Civ. 927 (KPF) **ORDER**	USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC#: _____ DATE FILED: September 25, 2018

HON. KATHERINE POLK FAILLA, District Judge:

For the reasons set forth on the record during the telephonic conference held on today's date, the parties' post-trial motions are resolved as follows:

1. Defendants' motion for judgment as a matter of law, and Defendants' renewed motion for judgment as a matter of law or a new trial, are DENIED;

2. Defendants' motion to limit Plaintiff's back pay award is DENIED;

3. Plaintiff's motion for reinstatement or front pay is DENIED, and Plaintiff's motion for the award of prejudgment interest is GRANTED insofar as the Court will award prejudgment interest from February 20, 2012, through the date of entry of judgment using a weighted average prime rate of 3.57%, compounded annually.

The Clerk of Court is directed to terminate the motions at docket entries 243, 280, 282, and 285. In addition, the Clerk of Court is directed to terminate entries for certain previously decided motions, including the motions at docket entries 184, 185, 329, 331, and 334.

Finally, the parties are directed to file a joint letter, on or before October 2, 2018, proposing a schedule for a motion for attorney's fees.

SO ORDERED.

Dated: September 25, 2018
New York, New York

Katherine Polk Failla
KATHERINE POLK FAILLA
United States District Judge

APPENDIX D

18 U.S.C. § 1514A

§ 1514A. Civil action to protect against retaliation in fraud cases

Effective: July 22, 2010

(a) Whistleblower Protection for Employees of Publicly Traded Companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), 1 or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

> **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the

information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.--

(1) In general.--A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo

review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.--

(A) In general.--An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.--Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.--An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial.--A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) Remedies.--

(1) In general.--An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.--Relief for any action under paragraph (1) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights Retained by Employee.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.--

(1) Waiver of rights and remedies.--The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) Predispute arbitration agreements.--No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

APPENDIX E

49 U.S.C. § 42121

§ 42121. Protection of employees providing air safety information

Effective: December 27, 2020

(a) **Prohibited discrimination.**--A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder, may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.--

(1) Filing and notification.--A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.--

(A) In general.--Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the

complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.--

(i) Required showing by complainant.--The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.--Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary.--The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.--Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final order.—

(A) Deadline for issuance; settlement agreements.--Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection

may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy.--If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints.--If the Secretary of Labor finds that a complaint under paragraph

(1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) Review.--

(A) Appeal to Court of Appeals.--Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack.--An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by Secretary of Labor. --Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce

such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.--

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

(B) Attorney fees.--The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus.--Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Nonapplicability to deliberate violations.--Subsection (a) shall not apply with respect to an employee of a holder of a certificate issued under section 44704 or 44705, or a contractor or subcontractor thereof, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately

causes a violation of any requirement relating to aviation safety under this subtitle or any other law of the United States.

(e) Contractor defined.--In this section, the term "contractor" means--

(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or

(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component thereof by contract for a holder of a certificate issued under section 44704.